



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

698/H

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ICTR-05-89-AR11bis
IN THE APPEALS CHAMBER {8th July 2013}
{698/H - 691/H}

Before: Judge Theodor Meron, Presiding
Judge William H. Sekule
Judge Mehmet Güney
Judge Arlette Ramaroson
Judge Khalida Rachid Khan

Registrar: Mr. Bongani Majola

Decision of: 8 July 2013

BERNARD MUNYAGISHARI

v.

THE PROSECUTOR

Case No. ICTR-05-89-AR11bis

**DECISION ON BERNARD MUNYAGISHARI'S MOTION FOR RECONSIDERATION
OF THE DECISION ON APPEALS AGAINST REFERRAL DECISION**

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ICTR Appeals Chamber
08 JUL 2013
Date: *Jurya R.*
Action: *Chambers, Defense*
Copied To: *OTR KAD RPL*

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *ROSETTE MURIGO-MORRISON*
SIGNATURE: *[Signature]* DATE: *08/7/13*

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 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of a motion filed by Mr. Bernard Munyagishari on 3 June 2013,¹ in which he seeks reconsideration of the Decision on Appeals Against Referral Decision issued by the Appeals Chamber on 3 May 2013.²

A. Background

2. Mr. Munyagishari was charged before the Tribunal with conspiracy to commit genocide, genocide, complicity in genocide, and murder and rape as crimes against humanity.³ On 6 June 2012, the Referral Chamber Designated under Rule 11 *bis* (“Referral Chamber”) ordered the case of Mr. Munyagishari to be referred to the authorities of the Republic of Rwanda (“Rwanda”) for trial before the High Court of Rwanda, subject to certain conditions.⁴ Mr. Munyagishari and the Prosecution lodged appeals against the Referral Decision.⁵

3. On 3 May 2013, the Appeals Chamber set aside three of the conditions imposed by the Referral Chamber and affirmed the referral of Mr. Munyagishari’s case to Rwanda.⁶ The Appeals Chamber stayed Mr. Munyagishari’s transfer to Rwanda pending the filing of an amended indictment,⁷ which was filed on 8 May 2013.⁸

4. On 30 May 2013, the Appeals Chamber granted Mr. Munyagishari’s request for a further stay of his transfer until he receives the French translation of the Decision on Appeals Against Referral Decision, and ordered that Mr. Munyagishari’s transfer take place no sooner than three

¹ Urgent Motion by Bernard Munyagishari’s Defence for Reconsideration of the Decision Rendered on 3 May 2013, originally filed in French on 3 June 2013, English translation filed on 12 June 2013 (“Motion for Reconsideration”).

² Decision on Bernard Munyagishari’s Third and Fourth Motions for Admission of Additional Evidence and on the Appeals Against the Decision on Referral under Rule 11 *bis*, 3 May 2013 (“Decision on Appeals Against Referral Decision”).

³ *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Indictment, 8 September 2005.

⁴ *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-R11*bis*, Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, 6 June 2012 (“Referral Decision”), Disposition, pp. 54-56.

⁵ See Decision on Appeals Against Referral Decision, para. 1.

⁶ Decision on Appeals Against Referral Decision, para. 122.

⁷ Decision on Appeals Against Referral Decision, para. 122.

⁸ Amended Indictment Pursuant to Appeals Chamber’s Decision of 3 May 2013, 8 May 2013 (“Amended Indictment”). The Appeals Chamber notes that the Prosecution filed a corrected cover page of the Amended Indictment on 13 May 2013, which replaced the original cover page filed on 8 May 2013. The 8 May 2013 Amended Indictment is therefore considered as the operative amended indictment.

days after the service of the said translation.⁹ The French translation of the Decision on Appeals Against Referral Decision was served on Mr. Munyagishari on 10 June 2013.¹⁰

5. Mr. Munyagishari filed the present Motion for Reconsideration on 3 June 2013. On 7 June 2013, the Prosecution filed a response, in which it submits that the Motion for Reconsideration has no merit.¹¹ Mr. Munyagishari filed his reply on 10 June 2013.¹²

6. On 17 June 2013, the Appeals Chamber granted Mr. Munyagishari's request that his transfer to Rwanda be stayed pending resolution of the Motion for Reconsideration.¹³

B. Submissions

7. Mr. Munyagishari requests the Appeals Chamber to reconsider the Decision on Appeals Against Referral Decision and reverse the decision affirming the referral of his case to Rwanda on the basis of new facts that have allegedly emerged since the decision was rendered.¹⁴ Should the Appeals Chamber maintain referral of the case, Mr. Munyagishari requests the Appeals Chamber to stay his transfer to Rwanda until monitors are appointed.¹⁵

8. Mr. Munyagishari submits that the decision of the High Court of Kigali denying Mr. Jean Uwinkindi's request for the assignment of investigators to conduct investigations for the defence ("High Court Decision") demonstrates that he will similarly and undoubtedly not be assigned investigators.¹⁶ Mr. Munyagishari contends that the decision not to assign investigators to the defence has a "considerable and obvious impact on the ability of the Defence to conduct its own investigations",¹⁷ and that in fact, contrary to the submissions of the Prosecution and the Kigali Bar

⁹ Decision on Bernard Munyagishari's Motion for a Stay of his Transfer to Rwanda, 30 May 2013, p. 3.

¹⁰ See Proof of Service to Detainees, dated 7 June 2013, signed by Mr. Munyagishari on 10 June 2013.

¹¹ Prosecutor's Consolidated Response to "*Requête extrêmement urgente de Bernard Munyagishari aux fins de sursis du transfert au Rwanda*" and "*Requête urgente de la Défense de Bernard Munyagishari aux fins de reconsidération de la Décision rendue le 3 mai 2013*", 7 June 2013 ("Response"), paras. 4, 19.

¹² Reply of Bernard Munyagishari's Defence to the Prosecutor's Response Filed on 7 June 2013, originally filed in French on 10 June 2013, English version filed on 21 June 2013 ("Reply"). On 5 July 2013, Mr. Munyagishari filed a resolution of the European Parliament dated 23 May 2013 concerning the case of Victoire Ingabire as an addendum to his Motion for Reconsideration and asked the Appeals Chamber to take this resolution into account in the context of his Motion for Reconsideration. See *Addendum de la Défense de Bernard Munyagishari à la Requête aux fins de reconsidération*, 5 July 2013 ("Addendum"). The Appeals Chamber considers that the filing of an addendum nearly a month after the filing of the motion which the additional filing is aimed at supporting is inappropriate and threatens the efficient administration of justice. By filing the Addendum after the completion of the briefing, Mr. Munyagishari also deprived the Prosecution of the possibility of making any submissions in response. In these circumstances, the Appeals Chamber finds that the Addendum is not validly filed and declines to consider it.

¹³ Interim Order Relating to Bernard Munyagishari's Motion to Reconsider the Decision on Appeals Against Referral Decision, 17 June 2013 ("Interim Order"), p. 3.

¹⁴ Motion for Reconsideration, paras. 4, 5, 24.

¹⁵ Motion for Reconsideration, paras. 23, 24.

¹⁶ Motion for Reconsideration, paras. 8-10, 20, referring to a communiqué from *Hirondelle News Agency* of 17 May 2013 annexed to the Motion for Reconsideration ("*Hirondelle Communiqué*").

¹⁷ Motion for Reconsideration, para. 21. See also Reply, para. 13.

Association (“KBA”) before the Referral Chamber, the right of the defence to conduct its own investigations is not respected in Rwanda.¹⁸ Mr. Munyagishari argues that, without investigators at its disposal, the defence finds itself in an unfair and unfavorable position compared to the prosecution and cannot obtain the attendance of defence witnesses under the same conditions as prosecution witnesses, in violation of the Transfer Law.¹⁹

9. Mr. Munyagishari further submits that “it would appear that resources for Defence investigations have not yet been secured, whereas [Mr. Uwinkindi’s] trial is expected to commence in three months” and that “[t]his situation is extremely worrying for [him] who may find himself in Rwanda with a Defence team which has no investigators and no resources.”²⁰ He contends that the High Court Decision will therefore have a negative impact on his case²¹ and that “[t]he new facts are such that only a reconsideration of the Decision affirming referral of the case to Rwanda can prevent unavoidable injustice and safeguard [his] rights”.²²

10. In the alternative to his request for reconsideration of the decision to affirm the referral of his case to Rwanda, Mr. Munyagishari submits that, “[o]n account of the obvious problems that the Uwinkindi Defence is facing in Rwanda and which will certainly affect [his own] Defence”,²³ it would be in the interests of justice to stay his transfer to Rwanda until monitors are appointed.²⁴

11. The Prosecution responds that Mr. Munyagishari fails to demonstrate that reconsideration is necessary to prevent an injustice.²⁵ It submits that the *Hirondelle* Communiqué on which Mr. Munyagishari relies does not add anything to his submissions on defence investigations, which

¹⁸ See Motion for Reconsideration, paras. 17, 21, referring to *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Prosecutor’s Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11bis of the Tribunal’s Rules of Procedure and Evidence, 9 November 2011 (“Prosecution Request for Referral”), para. 52 and *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, *Amicus Curiae* Brief of the Kigali Bar Association in the Matter of the Prosecutor’s Request for the Referral of the Case of Munyagishari Bernard, 23 January 2012 (“KBA Brief”), para. 41.

¹⁹ Motion for Reconsideration, paras. 11, 12, 16, referring to Organic Law N° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States [Rwanda], as amended by Organic Law N° 03/2009/OL of 26/05/2009 Modifying and Complementing the Organic Law N° 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and Other States [Rwanda] (“Transfer Law”), Art. 13(1) and (9). Mr. Munyagishari submits that “the absence of investigators affects the very possibility of the Defence to obtain the attendance of Defence witnesses.” See Motion for Reconsideration, para. 12. According to Mr. Munyagishari, the High Court Decision also violates the provisions of the Transfer Law that provide for the precedence of the Transfer Law over any other law and for the assignment of support staff to defence counsel. See Motion for Reconsideration, para. 13, referring to Transfer Law, arts. 15, 25.

²⁰ Motion for Reconsideration, para. 19. See also Reply, para. 11.

²¹ Motion for Reconsideration, para. 7.

²² Motion for Reconsideration, para. 4. See also *ibid.*, para. 7; Reply, para. 9.

²³ Motion for Reconsideration, para. 23.

²⁴ Motion for Reconsideration, paras. 23, 24.

²⁵ Response, paras. 13, 14, 18, 19.

were already litigated and rejected by the Appeals Chamber.²⁶ The Prosecution argues that the High Court Decision did not suggest that funds for defence investigations would never be provided but merely confirmed that there is no need in the ordinary course for private investigators to be retained as criminal investigations in Rwanda are primarily conducted by the judicial police.²⁷ According to the Prosecution, the procedures set out in the High Court Decision are consistent with the submissions made by the Prosecution and the KBA, as well as with the Transfer Law.²⁸ Finally, the Prosecution contends that Mr. Munyagishari's assertion that the *Hirondelle* Communiqué "bolsters his initial argument about the need to stay his physical transfer until the monitoring mechanism is in place likewise provides no basis for reconsideration."²⁹

12. In reply, Mr. Munyagishari submits that, whereas the issue of defence investigators had already been raised before the Appeals Chamber, the High Court Decision indisputably demonstrates that the defence in Rwanda is in an unfair and unfavorable position as compared to the prosecution and that the Transfer Law is inadequate to guarantee the rights of the accused.³⁰ He argues that, while the High Court of Kigali seems to accept that the defence can conduct its own investigations, it denies the defence adequate resources to do so.³¹ Mr. Munyagishari further submits that his alternative request for a stay of his transfer until monitors are appointed is based upon the fact that the High Court Decision demonstrates that "the rights of the Defence [...] can easily be undermined in Rwanda."³² In his view, the appointment of monitors prior to his transfer would offer "a semblance of judicial security" and be beneficial to both him and the Tribunal.³³

²⁶ Response, paras. 15, 16, *referring to* Decision on Bernard Munyagishari's First and Second Motions for Admission of Additional Evidence, 25 February 2013 ("Decision on First and Second Motions for Additional Evidence"), para. 27.

²⁷ Response, paras. 16, 17, *referring to* High Court Decision, paras. 15, 16, 38. The Prosecution provided a copy of the High Court Decision in its original Kinyarwanda version as well as an informal English translation as annexes to the Response. *See* Response, Annexes B (*Ikiza ry'urubanza* RP 0002/12/HCCI, dated 16 May 2013) and C (Decision in the Case n° RP 0002/12/HCCI). The references to the High Court Decision provided in the present decision are to the informal English translation of the decision attached in Annex C.

²⁸ Response, para. 17.

²⁹ Response, para. 18.

³⁰ Reply, paras. 7, 8.

³¹ Reply, para. 10.

³² Reply, para. 14. *See also ibid.*, para. 15.

³³ Reply, para. 15.

C. Discussion

13. The Appeals Chamber recalls that an interlocutory appeal decision is not subject to review but that it may reconsider such a decision under its 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.³⁴

14. The Appeals Chamber finds no merit in Mr. Munyagishari's submission that reconsideration of the decision to affirm the referral of his case is necessary to prevent an injustice. Contrary to Mr. Munyagishari's claim, the High Court Decision does not undermine the conclusion on Rwanda's ability to guarantee a fair trial to transferred accused. As noted in the Decision on First and Second Motions for Additional Evidence, the Referral Chamber was aware of the legal framework within which criminal investigations in Rwanda are conducted and of the gathering of evidence *à charge et à décharge* by the judicial police in Rwanda.³⁵ The Referral Decision and the Decision on Appeals Against Referral Decision were not premised on the assumption that Mr. Munyagishari would be assigned investigators as neither the Transfer Law nor any other Rwandan law provides for such a right.³⁶ Further, by deciding that defence investigators shall not be appointed in the *Uwinkindi* case,³⁷ the High Court of Kigali did not contradict the submissions of the Prosecution and the KBA before the Referral Chamber that defence counsel are free to conduct their own investigations in Rwanda.³⁸ In this regard, it bears noting that, as reflected in the High Court Decision, Mr. Uwinkindi's counsel consider that they can conduct their own investigations, their only concern pertains to funding.³⁹ More importantly, Mr. Munyagishari's claim that he is likely not to be assigned any investigators is speculative at this stage, as is his claim that, if not assigned investigators, he will not obtain the attendance of his witnesses under the same conditions as prosecution witnesses.

15. Mr. Munyagishari also fails to demonstrate how the information reported in the High Court Decision concerning the funding of Mr. Uwinkindi's investigations calls for the reconsideration of

³⁴ *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, 23 February 2012, paras. 10, 11 and references cited therein. The Appeals Chamber recalls that "an appeal pursuant to Rule 11bis of the Rules [of Procedure and Evidence of the Tribunal] is more akin to an interlocutory appeal than to an appeal from a judgement". See Decision on Bernard Munyagishari's Motion for Extension of the Word Limit for his Appeal Brief, 30 October 2012, fn. 9 and references cited therein.

³⁵ Decision on First and Second Motions for Additional Evidence, para. 27 and references contained therein.

³⁶ See Transfer Law, art. 13; Law N° 13/2004 Relating to the Code of Criminal Procedure, 17 May 2007 [Rwanda], arts. 18, 19, 22. See also High Court Decision, para. 15. The Appeals Chamber also finds that Mr. Munyagishari's submissions regarding alleged violations of Articles 15 and 25 of the Transfer Law lack any merit insofar as the Transfer Law does not provide for funding of defence investigations or the assignment of defence investigators. See *supra*, fn. 19.

³⁷ High Court Decision, para. 38. See also *ibid.*, paras. 3-21.

³⁸ See Prosecution Request for Referral, para. 52; KBA Brief, paras. 41, 42.

³⁹ See High Court Decision, paras. 6, 19.

the Decision on Appeals Against Referral Decision. The High Court Decision evinces that the issue of the funding of Mr. Uwinkindi's investigations is the subject of on-going negotiations,⁴⁰ and also reflects that Mr. Uwinkindi has not suggested that the issue has jeopardized his right to a fair trial.⁴¹ In light of this, there is no reason for the Appeals Chamber to reconsider its decision to affirm the Referral Chamber's conclusions that an adequately funded legal aid system will afford Mr. Munyagishari legal assistance and that his right to an effective defence will be secured in Rwanda.⁴²

16. The Appeals Chamber also recalls, once again, that Mr. Munyagishari's case in Rwanda will be subject to independent monitoring and that, should his right to obtain the attendance of his witnesses under the same conditions as those testifying for the prosecution be impaired to the extent that it renders his trial in Rwanda unfair, the referral of his case may be revoked.⁴³

17. Turning to Mr. Munyagishari's request for a stay of his transfer to Rwanda until monitors are appointed, the Appeals Chamber recalls that, in its Decision on Appeals Against Referral Decision, it considered that Mr. Munyagishari's transfer to Rwanda before the actual appointment of monitors would not deprive him of the protection of the monitoring mechanism envisioned by the Referral Chamber given the Referral Chamber's express order that, if not appointed before his transfer, the monitoring organization should be appointed "as soon as practicable" after his transfer.⁴⁴ The Appeals Chamber considers that neither the *Hirondelle* Communiqué nor the High Court Decision provide any basis for reconsideration of this conclusion.

18. Accordingly, the Appeals Chamber denies Mr. Munyagishari's request for reconsideration of the Decision on Appeals Against Referral Decision and reaffirms the referral of Mr. Munyagishari's case to Rwanda. In accordance with the Referral Decision, Mr. Munyagishari shall be transferred to Rwanda as soon as practicable and in any event no later than 30 days from date of issuance of the present decision.⁴⁵

⁴⁰ See High Court Decision, paras. 23, 24.

⁴¹ See High Court Decision, paras. 4-8.

⁴² Decision on Appeals Against Referral Decision, paras. 84, 86, 122; Referral Decision, paras. 170, 171.

⁴³ Decision on Appeals Against Referral Decision, paras. 80, 87, 119; Decision on First and Second Motions for Additional Evidence, para. 29. See also Referral Decision, paras. 55, 91, 92, 97, 102, 107, 111, 117, 118, 128, 134, 137, 138, 153, 162, 197, 208, and Disposition, pp. 55, 56.

⁴⁴ Decision on Appeals Against Referral Decision, para. 91, referring to Referral Decision, Disposition, p. 55.

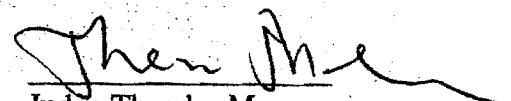
⁴⁵ See Referral Decision, Disposition, p. 56 ("ORDERS the Registrar to arrange the transport of [Mr. Munyagishari] and his personal belongings to Rwanda, within 30 days of this Decision becoming final and subject to the fulfilment of the above mentioned conditions, in accordance *mutatis mutandis* with the procedures applicable to the transfer of convicted persons to States for enforcement of sentence").

D. Disposition

19. For the foregoing reasons, the Appeals Chamber **DISMISSES** the remainder of the Motion for Reconsideration.⁴⁶

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

Done this 8th day of July 2013,
At The Hague,
The Netherlands.


Judge Theodor Meron
Presiding

[Seal of the Tribunal]



⁴⁶ See Interim Order, p. 3 (granting the Motion for Reconsideration in part).