



UNITED NATIONS
NATIONS UNIES

ICTR-01-67-R11bis
03-02-2011
(1959 - 1955)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Vagn Joensen, Presiding
Gberdao Gustave Kam
Mparany Rajohnson

Registrar: Adama Dieng

Date: 3 February 2011

THE PROSECUTOR

v.

FULGENCE KAYISHEMA

Case No. ICTR-01-67-R11bis

JUDICIAL RECORDS ARCHIVE
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**DECISION ON PROSECUTOR'S REQUEST FOR RECONSIDERATION AND, IN
THE ALTERNATIVE, FOR CERTIFICATION OF INTERLOCUTORY APPEAL**

Rules 11 bis and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:

Hassan Bubacar Jallow
James J. Arguin
Deborah Wilkinson

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1958

INTRODUCTION

1. On 17 January 2011, the Chamber deferred proceedings between the Parties in this case until a final decision is made in the *Uwinkindi* referral application or until Fulgence Kayishema is apprehended, whichever comes first.¹ A previous referral request under Rule 11 *bis* of the Rules of Procedure and Evidence to the Republic of Rwanda was denied on 16 December 2008.² The Prosecutor now requests the Trial Chamber to reconsider its decision to defer proceedings or in the alternative seeks an interlocutory appeal.³ There has been no reply to the filings because the Accused is still at large.

2. The Prosecution alleges that reconsideration is necessary because of a clear error in reasoning in the Scheduling Order by referring to Fulgence Kayishema's at-large status and because of the injustice caused by an unwarranted delay of proceedings.⁴ The Prosecution also argues that injustice would result if the issues in Kayishema's referral proceeding are not considered on their individual merits.⁵ The Prosecution also contends that these circumstances warrant the granting of an interlocutory appeal if the motion for reconsideration is denied.⁶

DELIBERATIONS

Reconsideration

3. Well established jurisprudence grants an inherent power to a Trial Chamber to reconsider its own decisions if (i) a new fact is discovered that was not known to the Trial Chamber at the time, (ii) if there is a material change in the circumstances, or (iii) where there is reason to believe that a previous decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.⁷ It is for the party seeking reconsideration to demonstrate special

¹ *Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11bis ("*Kayishema*"), Scheduling Order (TC), 17 January 2011.

² *Kayishema*, Decision on the Prosecutor's Request for Referral of the Case to Rwanda (TC), 16 December 2008.

³ Prosecutor's Request for Reconsideration and, in the Alternative, for Certification of Interlocutory Appeal ("*Prosecutor's Request*"), filed on 24 January 2011, para 1.

⁴ Prosecutor's Request, para. 2.

⁵ Prosecutor's Request, para. 2.

⁶ Prosecutor's Request, para. 12.

⁷ *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44 ("*Karemera et al.*"), Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure (TC), 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness (TC), 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

VJ.

1957

circumstances warranting such reconsideration.⁸

4. The Chamber would like to first clarify that it is the proceedings between the Prosecution and Fulgence Kayishema that have been deferred until a final decision in the *Uwinkindi*. The Chamber will continue to decide issues concerning Amicus Curiae and set timelines for any such submissions. Further, the Chamber will request the Registrar to appoint Counsel for the Accused well in advance of the *Uwinkindi* decision to allow time for counsel to familiarize himself with the case. As such, it is erroneous for the Prosecution to state that this decision amounts to “an indefinite stay of these proceedings.”⁹

5. The Chamber notes that the Prosecutor's referral requests against Fulgence Kayishema, Charles Sikubwabo, and Jean Uwinkindi constitutes his second round of requests for the referral of cases to the authorities of Rwanda.¹⁰ The first round of referral requests were filed in 2007 and consisted of referral requests against Kayishema, who was at large, and referral requests against Yussuf Munyakazi, Gaspard Kanyarukiga, and Ildephonse Hategekimana, who were all in the custody of the Tribunal.¹¹ The Referral Chamber's decision on the referral request against Kayishema,¹² which had been filed about two months before the other referral requests, was not delivered until after the Appeals Decisions in the *Munyakazi*, *Kanyarukiga* and *Hategekimana* cases had been rendered.¹³ Therefore, this Referral Chamber's decision to defer the proceedings between the Parties until the delivery of the anticipated Appeals Decision in *Uwinkindi* is in accordance with the dispositions in the first round of referral requests. The only difference between the first round of referrals and the present one is that the response from the Defence and the reply from the Prosecution have been

⁸ See *Karemera et al.*, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago (TC), 10 October 2003, para. 6.

⁹ Prosecutor's Request, para. 8.

¹⁰ Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed on 4 November 2010; Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed on 4 November 2010; Prosecutor's Request for the Referral of the Case of Jean-Bosco (*sic*) Uwinkindi to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed on 4 November 2010.

¹¹ Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed on 11 June 2007; Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed on 7 September 2007; The Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed on 7 September 2007; Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed on 7 September 2007.

¹² *Kayishema*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (TC), 16 December 2008.

¹³ *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 *bis* (AC), 8 October 2008, *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 *bis* (AC), 30 October 2008, *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (AC), 4 December 2008.

VJ.

1956

deferred until after the *Uwinkindi* Appeals Decision or until Kayishema is arrested, whichever comes first.

6. The Prosecution claims that the Referral Chamber has made a clear error of reasoning by taking into consideration the fact that Fulgence Kayishema is still at large. The Chamber, however, notes that the fact that Kayishema is at-large is not in itself the reason for deferring the proceedings between the Parties. The reason for the deferral is that the anticipated *Uwinkindi* Appeals Decision is likely to impact on the issues that will be raised by the Defence. Furthermore, there is no contraindication with respect to the Accused's right, pursuant to Article 20 of the Statute of the Tribunal to be tried without delay, because there can be no trial, either before the Tribunal or in Rwanda, before the Accused has been arrested.¹⁴

7. Some of the same or similar issues will be addressed in all of the current referral cases, and the Prosecution admits that this will occur, but submits that Fulgence Kayishema's right to have his case considered on its individual merits will be violated if the adjudication of his case is deferred until after the anticipated appeals decision in *Uwinkindi*. This submission is unfounded. When the anticipated Appeals Decision in *Uwinkindi* has been delivered, Kayishema's defence and the Prosecution will have every opportunity to present arguments that may not have been presented in the *Uwinkindi* case and to argue that Kayishema's case is distinguishable from *Uwinkindi*'s case. Moreover, in cases with the same or similar issues, one case will necessarily be decided before the other, and relying on jurisprudence from the first case when deciding later cases is not a violation of the Parties' right to have the case decided on its merits. The Chamber recalls that the Appeals Chamber in *Kanyarukiga* relied on *Munyakazi*, which was delivered first and that *Hategekimana* relied on *Kanyarukiga* citing *Munyakazi*. Likewise, the *Kayishema* Referral Chamber relied on all three Appeals Decisions in its decision.

8. The Prosecutor further submits that the decision to defer the proceedings between the Parties would prejudice not only the Prosecutor, but also the referral State and Fulgence Kayishema himself, because absent a judicial decision about where the case will be tried they cannot focus scarce investigative and prosecutorial resources appropriately. The Prosecutor argues that it could take a year or more before there is a final decision in *Uwinkindi*. The Chamber notes that there is no presumption that Kayishema referral case could be processed faster than the *Uwinkindi* case. On the contrary, *Uwinkindi*, as opposed to Kayishema, already had a defence team in place when the referral request was made and could instruct his counsel. The decision in this case can be expected

¹⁴ See Loi organique n° 11/2007 du 16/03/2007 relative au renvoi d'affaires a la république du Rwanda par le Tribunal Pénal International pour le Rwanda et par d'autres États, 19 March 2007, Article 13, 3° and 7°.

UJ.

about three months after the anticipated appeal decision in *Uwinkindi* and the appeal, if any (the Chamber is mindful that the first Kayishema decision was not appealed) can be expected four and half months after that. This timeline should be compared to the fact that the Indictment against Kayishema was filed on 10 June 2001 and confirmed 4 July 2001.¹⁵ It should also be balanced against the fact that there are currently no trial preparations being delayed while waiting for the outcome of these decisions because Kayishema is at large. For the foregoing reasons, the Chamber finds that the Prosecution has not demonstrated the special circumstances which warrant the reconsideration of the Chamber's decision of 17 January 2011.

Certification to Appeal

9. Rule 73(B) of the Rules provides that certification to appeal may only be granted if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.¹⁶ The Prosecution, as detailed above, has failed to raise any issue which warrants certification to appeal this decision to the Appeals Chamber. As such, this motion is denied.

FOR THESE REASONS, THE CHAMBER:

DENIES the Prosecution's Motion in its entirety.

Arusha, 3 February 2011, done in English.


Vagn Joensen
Presiding Judge


Gberdao Gustave Kam
Judge


Mparany Rajohnson
Judge



¹⁵ *Kayishema*, Decision on the Prosecutor's Request for Search, Seizure, Arrest and Transfer (TC), 4 July 2001.

¹⁶ *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses (TC), 28 September 2005, para. 3.