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**UNITED
NATIONS**

Mechanism for International Criminal Tribunals

MICT-12-25-R14.1
5 October 2015
Original: FRENCH

THE TRIAL CHAMBER

Before: Judge Vagn Joensen, Presiding
Judge William Hussein Sekule
Judge Florence Rita Arrey

Registrar: Mr John Hocking

PROSECUTOR

- v. -

JEAN UWINKINDI

PUBLIC

**REQUEST FOR CERTIFICATION OF APPEAL PURSUANT TO RULES
79 (C) AND 80 (B) OF THE RULES OF PROCEDURE AND EVIDENCE
ON THE TRIAL CHAMBER'S DECISION OF OCTOBER 2015 IN THE
JEAN UWINKINDI CASE**

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I. INTRODUCTION

1. On 1 October 2015, the Trial Chamber rendered a decision on the motion for a stay of proceedings before the High Court of Rwanda (“Motion for Stay of Proceedings”), on an oral hearing and other related matters mentioned in the Decision (“Decision”) in Case No. MICT-12-25-R14.1, *The Prosecutor v. Jean Uwinkindi*.¹
2. In its disposition, the Chamber dismissed all points of the request of which it was seised with the exception of the point relating to the acknowledgement of the public nature of the Brief in Support of the Request seeking revocation of the referral Order.²
3. Upon examining this Decision it seems that the Trial Chamber committed clear errors of law and fact that are likely to lead to its annulment.
4. Pursuant to Rules 79 (B)(ii) and (C), 80 (B) and (C), 132 (A) and (B) of the Rules of Procedure and Evidence, the Defence first seeks the certification of its Appeal.
5. In support of its request, it presents the following arguments:

II. LEGAL DISCUSSION

6. Rule 79 (B) and (C) of the Rules of Procedure and Evidence stipulates that:
 - Decisions on preliminary motions are without interlocutory appeal save:
 - in other cases where certification has been granted by the Trial Chamber, which may grant such certification 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

¹ “Decision on Uwinkindi’s Motion for a Stay of Proceedings before the High Court of Rwanda, an Oral Hearing and Other Related Matters”.

² “Decision on Uwinkindi’s Motion for a Stay of Proceedings before the High Court of Rwanda, an Oral Hearing and Other Related Matters”, page 9, filing number 1920.

immediate resolution by the Appeals Chamber may materially advance the proceedings.

- Requests for certification under paragraph (B)(ii) shall be filed within seven days of filing of the impugned decision.
7. This procedure is also set out in Rule 80 (B) and (C) which states that decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
 8. In this instance, the substantial question remains whether the court decision adopted on the various points concerns a prejudicial matter that is likely to compromise significantly the expeditious and fair conduct of the trial.
 9. The Chamber is now called to decide with regard to the presented material whether the points relating to the request for a stay of proceedings before the High Court concerns matters linked to the expeditious and fair conduct of the trial.
 10. The Chamber should also examine the points linked to the denial of the motion seeking to obtain an oral hearing in order to check whether this position is likely to infringe considerably on the fairness of the trial. The same applies to the question relating to the request for translation.

II.1 On the refusal of the Chamber to grant Jean UWINKINDI the possibility of seeking an oral hearing

11. On pages 8 and 9, paragraphs 25 and 26, filing numbers 1919-1920 of the court decision, the Trial Chamber relies on Rule 80 (A) of the Rules of Procedure and Evidence which gives it discretionary power to decide a motion with or without an oral hearing.³
12. In support of its arguments, it maintains that the Accused had sufficient time to present his written submission and that, in any case, the Trial Chamber was generous in granting him an extension of time to present his written submissions and even to exceed the word limit set by the Mechanism practice direction.⁴
13. In its reply, the Chamber opposes Rule 55 of the Rules of Procedure and Evidence which allows a Judge *proprio motu* or at the request of either party to issue orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.
14. In this case, the Trial Chamber was seised by one of the parties to the trial seeking an oral hearing.
15. Under the terms of the aforementioned provisions of the Rules, it could even have exercised its discretionary powers *proprio motu*.
16. Having been seised by one of the parties to the trial, it should have had an appropriate response in order to offer to the latter the opportunity to present arguments.
17. Thus, as it stands, a simple request is sufficient to prompt a judge to use the power entrusted to him by the aforementioned Rules in order to grant the Applicant the possibility of presenting his legal grounds.⁵ There is no need to hide behind discretionary powers.

³ “Decision on Uwinkindi’S Motion for Stay of Proceedings before the High Court of Rwanda, an Oral Hearing and Other Related Matters”, page 9, file number 1920.

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⁵ Mechanism for International Criminal Tribunals (MICT), Basic Documents, September 2013, page 33.

18. When examining the Motion, it could have taken inspiration from several previous legal rulings made in the transferred case-files of Youssuf Munyakazi and Bernard Munyagishari to ensure a fair trial.⁶ It could have also recalled similar submissions that were filed by Counsel for the Accused before the transfer which had also been rejected.
19. In addition, the Chamber should not have lost sight of the fact that Jean UWINKINDI was the first to be transferred to Rwanda.
20. If we examine the monitoring reports and even the previous requests to the President of the Mechanism, they represent first-hand sources that could enlighten the Chamber on the origin and progression of the violations of the fundamental rights from the time of the transfer up to now.
21. The Chamber did not pay heed in the name of discretionary powers, losing sight that this was nevertheless a matter likely to compromise significantly the fair and expeditious conduct of the trial.
22. Consequently, the request seeking the certification of appeal offered the possibility to Jean UWINKINDI to present his arguments in support of his motion for an oral hearing.
23. There are no reasons of law or fairness that could justify the Chamber's refusal to grant him this possibility.
24. Thus, the Accused is the only one in a position to describe convincingly and in detail the ordeal he has endured for almost four years before the High Court, with him being deprived to this day of all representation and without having the possibility of benefiting from the right to present Defence witnesses, and even less so to cross-examine Prosecution witnesses.

⁶ Yussuf Munyakazi case-file, MICT 12-18, *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-1, Oral Hearing, 12 April 2012.

25. An in-depth examination of the Monitoring Report for the month of March 2015 and of our briefs is sufficient to confirm this.⁷
26. Moreover, the documents forwarded to Uwinkindi have so far been in languages of the Mechanism that he does not understand.
27. Despite the measures taken by the Chamber from the start of the proceedings to grant his many requests, the Accused has not benefited from this right which is guaranteed under Rules 40 (A) and 41 (A) of the Rules of Procedure and Evidence, namely, to be informed in a language he understands.
28. This means that Jean UWINKINDI now has an impressive number of documents that relate to him and of whose contents he is not aware.
29. Such infringement constitutes a violation of his basic rights, including that of benefiting from the necessary facilities to present his Defence strategy, which considerably compromises the fair and expeditious conduct of the trial.
30. In regard of the aforementioned, this concerns again relevant and reliable evidence that is likely to lead the Chamber to certify the appeal.

II.2 On the stay of proceedings before the High Court

31. In its Decision, the Chamber reiterated the lack of prejudice to the rights of the Accused to justify the dismissal of the request seeking a stay of proceedings currently before the High Court.

⁷ Monitoring Report for the Uwinkindi Case (March 2015), 12 May 2015 (March 2015, Monitoring Report), para. 60, March 2015 Monitoring Report, para 123, *see also* March 2015 Monitoring Report, paras 76, 78, 118, 120, as mentioned in the Decision on Request for Revocation of an Order Referring a Case to the Republic Rwanda, Case MICT 12-25-R.14.1.

32. On page 7, paragraph 22, filing number 1922, the Trial Chamber holds that there are no exceptional circumstances likely to lead to an immediate intervention in order to stay proceedings before the High Court.
33. Before the Trial Chamber, Jean Uwinkindi could not have been more explicit about the fact that he did not have Counsel, did not have access to his witnesses abroad, had lost access to his witnesses in the country.
34. He also elaborated on the fact that the ordeal that he is suffering started when he was transferred and his intervention with the various institutions was met with no response.
35. At the public hearing on 23 September 2015 before the High Court, the Accused discovered additional evidence on the discussions surrounding the appointment of Attorneys Isaacar Hishamunda and Joseph Ngabonziza, who were assigned to him in the well-known circumstances that were exposed in our earlier briefs.⁸
36. The two attorneys explicitly acknowledged that they were completely unable to take on the task that was assigned to them by the President of the Bar Association, to represent Jean Uwinkindi, in the following terms:

An attorney advises his client in matters of law. The lack of contact with the client is a real problem. We are not in the position to immerse ourselves in the facts ... without collaborating with the client, it is impossible for us to contribute to the proper administration of justice. For as long as we are not able to contact Defence witnesses, we will not be of use to the Court.

37. For its part, the Prosecution stated the following at the hearing:

⁸ Transcript of hearing of 23 September 2015.

We know that important legal decisions have been taken in the interest of justice ... the Uwinkindi case requires an in-depth consideration, and anything that could facilitate the conduct of fair proceedings is welcome... We recognise that the attorneys (i.e., Hishamunda and Ngabonziza) could not cross-examine the witnesses because they are not apprised of the facts (Dusanga abavocat batazashobora gukora cross examination kubatangabuhamya batazi les faits ...).

38. Thus, for the first time, the Prosecution and the Defence imposed on Jean UWINKINDI were in agreement on the principle of free choice of counsel by the latter. The Court simply had to take note of the compromise reached through a mutual agreement.
39. Oddly, at the hearing of 29 September 2015, the High Court ruled *ultra petita* denying the request filed jointly by the National Prosecuting Authority and the Defence.
40. The Court adjourned the case until 15 October 2015 to hear witnesses, with a Defence that would not be able to cross-examine them.
41. In its Decision of 1 October 2015, the Chamber maintained that there were serious and exceptional circumstances likely to lead to immediate intervention.
42. We hereby wish to present the exceptional and serious circumstances by way of which the Chamber has replicated the same errors by imposing attorneys for his Defence even though the latter acknowledged that it was unable to continue to represent Jean UWINKINDI. These facts are cited as an example, they affect matters that are likely to prejudice the fair and expeditious conduct of the trial, or even its outcome.
43. Therefore, the certification of appeal by the present Chamber is necessary in order for the proceedings to continue.
44. At this stage, can we still claim a lack of exceptional circumstances or an absence of a prejudice likely to prompt immediate intervention by the Chamber?

45. Is the fact that the Accused has been abandoned to his sorry fate not proof of a prejudice of immeasurable legal consequences?

46. Thus, to claim that there have been no significant violations that require remedy (The Trial Chamber that there is no imminent threat of egregious violation of Uwinkindi's that could be remedied) is beyond belief.

CONCLUSION

47. In the interest of the proper administration of justice, the Chamber is respectfully requested to rule that the Certification of Appeal pursuant to Rules 79 (C) and 80 (B) of the Rules of Procedure and Evidence on the Decision rendered by the Chamber on 1 October 2015 entitled "DECISION ON UWINKINDI'S MOTION FOR A STAY OF PROCEEDINGS BEFORE THE HIGH COURT OF RWANDA, AN ORAL HEARING AND OTHER RELATED MATTERS" is founded in law and to grant certification.

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EVIDENCE IN SUPPORT OF THE REQUEST FOR CERTIFICATION OF APPEAL TO
BE DISCLOSED TO THE TRIAL CHAMBER

Annex no.	Description
Annex 1	DECISION RENDERED BY THE HIGH COURT AT THE PUBLIC HEARING OF 29 SEPTEMBER 2015 IN THE CASE OF <i>THE PROSECUTOR V. JEAN UWINKINDI</i> , RP 0002/12/HCCI
Annex 2	TRANSCRIPT OF HEARING OF 23 SEPTEMBER 2015

Kigali, 6 October 2015

Gatera Gashabana, Attorney-at-Law

Lead Counsel

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/stamp of Rwandan Bar Association/