UNITED NATIONS

MICT-12-25-R14.1

Mechanism for International Criminal Tribunals

9 October 2015
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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

DISCLOSURE TO THE CHAMBER AND THE PROSECUTION OF THE DECISION RENDERED BY THE HIGH COURT AT THE PUBLIC HEARING OF 29 SEPTEMBER 2015, PURSUANT TO RULE 72 (D) OF THE RULES OF PROCEDURE AND EVIDENCE

Office of the Prosecutor:

Hassan Bubacar Jallow

Counsel for Jean Uwinkindi:

Gatera Gashabana

I. INTRODUCTION

1. On 4 August 2015, the Defence sent the present Chamber its Brief in support of the request for revocation of the Referral Order to the Republic of Rwanda.[1]
2. In his Reply of 4 September 2015, received by the Defence on 8 September 2015, the Prosecution asked that this request be rejected.[2]
3. On 18 September 2015, the Defence sent its Response to the Prosecution's brief.
4. At the public hearing of 23 September 2015 before the High Court, the Accused discovered additional evidence and material likely to elucidate the Chamber regarding the controversy surrounding the appointment of Attorneys Isaacar Hishamunda and Joseph Ngabonziza.[3]
5. This information was disclosed to the Chamber on 28 September 2015.[4]
6. Therein, the two Counsel explicitly acknowledge the impossibility of carrying out the task assigned to them by the President of the Bar Association on 27 May 2015, pursuant to the decision of the Ministry of Justice and upheld by the Decisions of the Supreme Court and the High Court on 6 February, 24 April and 9 June 2015.[5]
7. Likewise, before the Court, the principle of an Accused being free to choose his own counsel, which had been accepted up to this point, was

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[1] "Brief in Support of Jean UWINKINDI's Request for Revocation of Referral Order".
[2] "Prosecution Brief Responding to Uwinkindi's Revocation Request".
[3] REPUBURIKA Y'U Rwanda, URUKIKO RUKURU, URUGEREKO RWIHARIYE RUSHINZWE KUBURANISHA IBYAHA MPUZAMAHANGA N'IBYABUNKA IMBIBI, TRANSCRIPT OF THE HEARING OF 23 SEPTEMBER 2015 at 0903 hours, RP 0002/HCCI: *Prosecutor v. Jean UWINKINDI*,
[4] Disclosure to the Chamber and the Prosecutor of additional evidence and material of 23 September 2015 pursuant to Rule 72 (D) of the Rules of Procedure and Evidence.
[5] Statement made at the hearing by Attorneys Isaacar Hishamunda and Joseph Ngabonziza on page 2 of the Transcript of the aforementioned Hearing.

called into question, representing a reversal of the jurisprudence so exalted by the Prosecutor in his Reply.[6]

8. Even the National Prosecution Authority, a staunch supporter of Attorneys Hishamunda and Ngabonziza, ultimately accepted the idea that the Accused should be able to choose his own Counsel.

9. All that remained was for the High Court to take note of this compromise mutually agreed on by the Prosecution and the Defence on the principle of free choice of Counsel by Jean UWINKINDI, as Attorneys Isaacar HISHAMUNDA and Joseph NGABONZIZA proved unable to take on the case.[7]

10. These new facts sanction the rejection by this Court of the principle of free choice of Counsel, which had been mutually agreed on by the Prosecution and the Defence at the public hearing of 23 September 2015.[8]

11. In accordance with Article 72(D) of the Rules of Procedure and Evidence, the issue relates to additional evidence and material which may be communicated to the Chamber and the Office of the Prosecutor in accordance with the Rules.

12. Consequently, the Defence is well-founded to present the following arguments:

II LEGAL DISCUSSION

13. Article 72(D) of the Rules of Procedure and Evidence sets out that:

> **"If either Party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that Party shall immediately disclose that evidence or material to the other Party and the Trial Chamber."**

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[6] Decision of the Supreme Court rendered at the public hearing of 24 April 2015 and upheld by the Specialised Chamber for international and cross-border crimes of the High Court on the designation of Isaacar Hishamunda and Joseph Ngabonziza as Counsel for Jean Uwinkindi.

[7] Monitoring Report (July 2015), Case of Bernard Munyagishari, MICT-12-20, para. 50.

[8] *See* Transcript of Hearing of 23 September 2015.

14. In this particular case, there is not a shadow of a doubt that the additional evidence and material contained in the Decision rendered by the Specialized Chamber for international and cross-border crimes of the High Court at its public hearing of 29 September 2015 emerged after we filed our submission, and after the Defence submitted the transcript of the hearing of 23 September 2015.

15. In accordance with Article 23 (B) of the Rules of Procedure and Evidence and the MICT Practice Direction on the Lengths of Briefs and Motions, the Defence must disclose these facts to the parties and to the Chamber by way of this document, which must not exceed 3,000 words.[9]

16. The Defence requests from the present Chamber to take note of the refusal of the High Court to uphold the compromise mutually agreed on by the Prosecution and the Defence on the principle of the free choice of Counsel, after Attorneys Isaacar Hishamunda and Joseph Ngabonziza proved unable to take on the case.

II.1. On the compromise agreed on between the Prosecution and the Defence on the principle of free choice of Counsel by Jean UWINKINDI.

17. On 23 September 2015, the attorneys stated the following before the High Court:[10]

"Joseph Ngabonziza, Attorney-at-Law:
(...) We were unable to meet with our client. Under such circumstances, we are not able to prepare any submissions."

"Isaacar Hishamunda, Attorney-at-Law
A counsel advises his client on matters of the law, but the facts come from the Accused. The lack of contact with our client is a real problem. We are not in a position to apprise ourselves of the facts."

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[9] Rules of Procedure and Evidence, Practice Direction on the Lengths of Briefs and Motions, item F, 6 August 2013.
[10] Statement by the Attorneys at the public hearing of 23 September 2014, *see* Transcript of the hearing, op. cit. page 2, paras 5 and 6.

18. Attorney Isaacar goes on to say: *"Without working with our client, it is impossible for us to contribute to the proper administration of justice."*

19. For his part, Attorney Joseph stated: *"For as long as we are unable to meet with our client, we will not be able to contact defence witnesses and we will not be of use to the Court".*[11]

20. In this way, the Attorneys made it all too clear that they were not in a position to represent an accused against his will.

21. Consequently, the free choice of Counsel, as well as the option for an indigent accused to accept or refuse counsel under Articles 38 and 39 of the Code of Criminal Procedure is reconfirmed by the Attorneys, thereby undermining the Prosecutor's argument.

22. The Chamber must take note of this turnaround and justifiably pronounce that the Accused's right to a fair trial is not guaranteed.

II.2. Free choice of Counsel is even recognized by the National Prosecution Authority

23. **At the public hearing of 23 September 2015, the Public Prosecutor stated the following:**[12]

> ***We know that important legal decisions have been taken in the interests of Justice. We deem that the Uwinkindi case requires in-depth consideration, and anything that could facilitate the conduct of fair proceedings is welcome.*** *(Tuziko hari ibyemezo byafashwe kandi munyungu z'ubutabera. Dutekereze ko muri uru rubanza rwa Uwinkindi hajemo ikibazo. Ko ikintu cyose cyatuma habaho urubanza rwa Fair cyakorwa kugirango ikibazo gicyemucye)*
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> ***We recognize that the attorneys (i.e. Hishamunda and Ngabonziza) could not cross-examine the witnesses because they are not apprised of the facts*** *(..Dusanga abavoka batazashobora gukora cross examination ku batangabuhamya batazi les faits …).*

24. For the first time, the Public Prosecutor acknowledges the necessity of ensuring a fair trial for the Accused and that it is impossible for the

[11] Statements by the Attorneys, op.cit. pp. 5 and 6

[12] Statement of the National Prosecution Authority at the public hearing of 23 September 2015, page 4 of Transcript of the hearing, page 4, paras 2 and 3.

assigned counsel to cross-examine witnesses, thereby calling into question its previous claims.

25. In the end, he endorses our arguments drawn from the Monitoring Report for March 2015 and from the Witteveen report,[13] as set out in our previous submission.

26. He ultimately acknowledges the free choice of a counsel even when one is assigned to an Accused.

27. Faced with this situation, one might hope that by way of a final decision, the High Court would uphold the argument of the parties. Unfortunately, it seems that this Court remains fixated on rejecting anything which could guarantee a fair trial for Jean UWINKINDI.

II.3. On the High Court's refusal of the compromise agreed on mutually by the Prosecution and the Defence

28. At its public hearing of 29 September 2015, the Specialised Chamber for international and cross-border crimes of the High Court rendered a legal decision rejecting the submission of the National Prosecution Authority together with the Defence.[14]

29. The Chamber adjourned the case until 15 October 2015 to hear witnesses, although the Defence admitted bona fide that it was unable to undertake the mission assigned to it by the President of the Bar Association to provide assistance and representation to the Accused Jean UWINKINDI before the Rwandan courts.

30. By doing so, the Chamber also lost sight of the Prosecutor's argument submitted before the Court at the public hearing on 23 September 2015, that in order to ensure a fair trial for the Accused Jean UWINKINDI it was necessary to start with a clean slate.

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[13] *See* our last submission as it takes up points 21 and 24 of the document entitled "Additional Expert Report, Martin Witteveen re Rwanda vs Bajinya *et al.*", page 7, items 21 and 24, June 2015.

[14] *See* the letter of 2 October wherein the Registrar transmits to the Accused Jean UWINKINDI the Decision rendered on 29 September 2015 by the Specialised Chamber for international and cross-border crimes of the High Court (*see* in particular the disposition of the Decision).

31. The Prosecutor in essence acknowledged at the hearing that Attorneys Isaacar Hishamunda and Joseph Ngabonziza would not be able to cross-examine witnesses because they are not apprised of the facts *(Dusanga abavocat batazashobora gukora cross examination ku batangabuhamya batazi les faits).*

32. This position of the Court violates Article 7 of Law no. 21/2012 of 14 June 2012 on the Code of Criminal, Commercial, Social and Administrative Procedure, which sets out that a judge must rule on all that was requested and only on what was requested, subject to an *ultra petita* ruling.

33. The principle *"NE EAT JUDEX ULTRA PETITA PATIUN"* means that the matter of dispute on which a judge issues a ruling and recognizes enforceable rights is limited.

34. Therefore, according to the *ultra petita* rule, no court can exceed the scope of the case referred to it and grant more than has been requested of it, or rule on matters that fall outside of the case referred to it or that are unrelated to the claims submitted, subject to the risk of exceeding its authority and rendering its decision ultra vires. Should the court act in this manner, it will be committing *ultra petita. "Ultra petita* committed by a repressive court constitutes an excess of power that could lead to the setting aside of a judgement". The Supreme Court of Canada, for example, would be derogating from the rule and committing *ultra petita* if called only to determine the meaning of an article in a law and instead digressing and ruling on the constitutionality of that law.[15]

35. Based on the foregoing, it seems obvious that an *ultra petita* ruling is not only prohibited before Rwandan courts but also before international courts.

36. Consequently, by ruling *ultra petita* in this case, the High Court has also deprived Jean UWINKINDI of his right to a fair trial.

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[15] "The Law and Procedure of the ICJ, 1951-1954: question of jurisdiction , competence and Procedure" (BYIL, Volume 34, 1958, Page 98 ss; M. KAZAZI, Burden of proof and related issues , The Hague, 1966 page 42 *et seq.*

37. Once again it has demonstrated a lack of objectivity, thereby showing that it was more fixated on ensuring an expeditious trial thus violating not only the right to free choice of Counsel but also the right to access witnesses and cross-examine them.

II.4. On the lack of objectivity by the High Court towards Jean UWINKINDI

38. As previously pointed out, the High Court adjourned the case until 15 October 2015 to hear witnesses and arguments from the parties.

39. However, the reasoning behind the decision of the Judge of the High Court reveals that he persists in the errors already described in the Monitoring Report for March 2015 and in the WITTEEVEN Report since he continues to uphold the assignment of Attorneys Isaacar HISHAMUNDA and Joseph NGABONZIZA despite their own admission at the public hearing that they are unable to ensure the defence of Jean UWINKINDI.

40. Consequently, at the public hearing of 15 October 2015, Jean UWINKINDI found himself once again alone with Counsel who were not only imposed on him but also still unable to provide him with an effective defence by examining and cross-examining witnesses, as was noted by the Public Prosecutor at the public hearing on 23 September 2015.

41. Faced with such an injustice, is there still any hope for a fair trial for Jean UWINKINDI? Is there not a basis to the argument that by adopting this position the High Court gives off the impression that it is fixated on its desire to settle the score with the Accused rather than on rendering him justice?

42. It seems more than clear that the High Court has reached a point of no return and that a remedy is no longer possible considering the obvious aversion by the Court towards Jean UWINKINDI.

43. Consequently, there are exceptional circumstances that urgently require the Chamber's immediate intervention to end this impasse.

44. The prejudice endured since January 2015 needs no further proof.

CONCLUSION

45. In accordance with Rule 72 (D) of the Rules of Procedure and Evidence, the Trial Chamber must take note of the disclosure of the Decision rendered by the High Court at its public hearing of 29 September 2015 in Case no. RP 0002/12/HCCI, Jean Uwinkindi v. the National Prosecution Authority, and must also note that not only do the violations of the Accused's fundamental rights persist, but worse than that they have reached a point of no return (LAST RESSORT).
46. The Chamber must also note that there are exceptional circumstances that require the immediate intervention by the Chamber to order an annulment of the Revocation Order.
47. Lastly, the claims boasting a lack of prejudice will not be able to withstand any scrutiny since the behaviour of the Chamber towards the Accused has one sole objective which is to deprive him of his fundamental rights by accelerating the process of his conviction.
48. Consequently, it is dangerous if this situation persists and only an urgent and exceptional intervention by the Chamber can remedy it and put an end to the Accused's ordeal.

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