UNITED
NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORG: ENGLISH

REFERRAL CHAMBER DESIGNATED UNDER RULE 11 BIS

Before Judges: Florence Rita Arrey, Presiding
Emile Francis Short
Robert Fremr

Registrar: Adama Dieng

Date: 28 June 2011

PROSECUTOR

v.

JEAN UWINKINDI

Case No. ICTR-2001-75-R11bis

DECISION ON PROSECUTOR'S REQUEST FOR REFERRAL TO THE REPUBLIC OF RWANDA

Rule 11 bis of the Rules of Procedure and Evidence

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as a Chamber designated under Rule 11 *bis*, composed of Judges Florence Rita Arrey, Presiding, Emile Francis Short, and Robert Fremr ("Referral Chamber");

BEING SEISED OF the Prosecutor's "Request for the Referral of the case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence" and the subsequent filings of parties;

FURTHER NOTING the *amici curiae* submissions filed by the Republic of Rwanda ("GoR" or "Rwanda") on 18 February 2011, Human Rights Watch ("HRW") on 17 February 2011, the International Criminal Defence Attorneys Association ("ICDAA") on 11 March 2011, the International Association of Democratic Lawyers ("IADL") on 17 March 2011 and the Kigali Bar Association ("KBA") on 26 April 2011, as well as responses to the submissions;

HEREBY DECIDES the Request.

1. INTRODUCTION

1. Rule 11 *bis* of the Rules of Procedure and Evidence ("Rules") of the International Criminal Tribunal for Rwanda ("Tribunal" or "ICTR") governs the referral of cases to national jurisdictions. In its current amended form, Rule 11 *bis* provides as follows:

> Rule 11 *bis*: Referral of the Indictment to another court
>
> (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:
>
> (i) in whose territory the crime was committed; or
>
> (ii) in which the accused was arrested; or
>
> (iii) having jurisdiction and being willing and adequately prepared to accept such a case,
>
> so that those authorities should forthwith refer the case to the appropriate court for trial within that State.
>
> (B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.
>
> (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.
>
> (D) When an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.

(E) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may *proprio motu* or at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

2. **PROCEDURAL HISTORY**

2. On 5 September 2001, the Prosecution filed the original Indictment charging Jean Uwinkindi ("Accused") with Genocide, Complicity in Genocide, and Extermination as a Crime against Humanity pursuant to Article 6 (1) of the Statute of the Tribunal ("Statute").[1]

3. On 30 June 2010, the Accused was arrested in Uganda. On 2 July 2010, the Accused was transferred to the United Nations Detention Facility in Arusha.[2]

4. On 4 November 2010, the Prosecution filed a Motion requesting that the case of the Accused be referred to the authorities of Rwanda for trial in the High Court of Rwanda ("Motion").[3]

5. On 23 November 2010, the Prosecutor filed an amended indictment charging the Accused with Genocide and Extermination as a Crime against Humanity pursuant to Article 6 (1) of the Statute.[4]

6. On 26 November 2010, the President designated Trial Chamber II, composed of Judges Florence Rita Arrey, Presiding, Emile Francis Short and Robert Fremr to determine the Motion.[5]

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[1] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I*,* Indictment charging Jean-Bosco Uwinkindi with Genocide, Complicity in Genocide, and Extermination as a Crime against Humanity, pursuant to Article 6 (1) of the Statute, 5 September 2001.

[2] *Prosecutor v. Jean Uwinkind*i, Case No. ICTR-2001-75-I, T. 1 December 2010 p. 1. Uwinkindi made a further appearance following the filing of an Amended Indictment on 23 November 2010.

[3] *Prosecutor v. Jean Uwinkindi,* Case No. ICTR-2001-75-R11bis, Prosecutor's request for the referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence ("Motion"), 4 November 2010.

[4] *Prosecutor v. Jean Uwinkindi,* Case No. ICTR-2001-75-I, Amended Indictment, 23 November 2011. In the Amended Indictment, the charge of Complicity in Genocide is withdrawn.

7. On 17 February 2011, Human Rights Watch filed an *amicus* brief.[6]

8. On 18 February 2011, following a *proprio motu* invitation by the Chamber to Rwanda[7] to appear as *amicus curiae* in this case, Rwanda filed its *amicus* brief.[8]

9. ICDAA and IADL filed their respective *amici* briefs on 11 March[9] and 17 March 2011.[10]

10. On 14 March 2011, the Defence filed a Response to the Motion opposing the request for transfer of the case to Rwanda ("Response").[11]

11. On 20 April 2011, the Prosecution filed a Consolidated Reply to the Response and *amici* briefs ("Reply"). [12]

12. On 26 April 2011, KBA filed its *amicus* brief.[13]

13. On 17 June 2011, the Defence filed a Consolidated Rejoinder ("Rejoinder") to the Prosecution's Reply and to the *amicus* brief of KBA.[14]

14. On 28 June 2011, the Defence filed a submission responding to the GoR's provision of information regarding genocide cases at the Rwandan High Court.[15]

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[5] Notice of Designation - *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, 26 November 2010.
[6] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, *Amicus Curiae* Brief of Human Rights Watch in opposition to Rule 11 *bis* Transfer, 17 February 2011.
[7] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Invitation to the Government of Rwanda to make Submissions as Amicus Curiae pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, 18 January 2011.
[8] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, *Amicus Curiae* Brief for the Republic of Rwanda in support of the Prosecutor's Application for Referral pursuant to Rule 11 *bis*, 18 February 2011.
[9] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, International Criminal Defence Attorneys Association (ICDAA) *Amicus Curiae* Brief, 11 March 2011.
[10] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, *Amicus Curiae* Brief of the International Association of Democratic Lawyers (IADL) Pursuant to Rule 74 (Rules of Procedure and Evidence), 17 March 2011.
[11] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Defence Response to the Prosecutor's Request for the Referral of the Case of Jean Uwinkindi to Rwanda Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence ("Response"), 14 March 2011.
[12] *Prosecutor v. Uwinkindi,* Case No. ICTR-2001-75-I, Prosecutor's Consolidated Response to: (1) Defence Response to the Prosecutor's Request for the Referral of the Case of Jean Uwinkindi to Rwanda Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence; (2) *Amicus Curiae* Brief of Human Rights Watch in Opposition to Rule 11 *bis* Transfer; (3) *Amicus Curiae* Brief of the International Association of Democratic Lawyers (IADL) Pursuant to Rule 74 (Rules of Procedure and Evidence); and (4) International Criminal Defence Attorneys Association (ICDAA) *Amicus Curiae* Brief ("Reply"), 20 April 2011.
[13] *Prosecutor v. Jean Uwinkindi,* Case No. ICTR-2001-75-R11bis, *Amicus Brief* of the Kigali Bar Association in the Matter of the Prosecutor's Request for the Referral of the case of Uwinkindi Jean, 26 April 2011 ("KBA").
[14] *Prosecutor v. Jean Uwinkindi,* Case No. ICTR-2001-75-R11bis, Defence Consolidated rejoinder to the Prosecutor's consolidated response and to the *amicus curiae* brief of the Kigali Bar Association ("Rejoinder"), 17 June 2011.
[15] *Prosecutor v. Jean Uwinkindi,* Case No. ICTR-2001-75-R11bis, Defence Submissions Relating to the Republic of Rwanda's Response to 6 June 2011 Order to Provide Further Information Regarding 36 Genocide Cases at the High Court, 28 June 2011.

3. **APPLICABLE LAW**

15. Pursuant to Rule 11 *bis* and the jurisprudence of this Tribunal, a designated Trial Chamber may order referral to a State that has jurisdiction over the charged crimes and is willing and adequately prepared to accept the case.[16] In assessing whether a State is competent within the meaning of Rule 11 *bis* to accept a case from the Tribunal, the designated Trial Chamber must consider whether the State has a legal framework that criminalises the alleged conduct of the accused and provides an adequate penalty structure.[17] The penalty structure must provide an appropriate punishment for the offences for which the accused is charged,[18] and conditions of detention must accord with internationally recognised standards.[19] Prior to ordering referral, a Chamber must be satisfied that the accused will receive a fair trial in the courts of the State and that the death penalty will not be imposed or carried out.[20]

16. The final decision on whether to refer is within the discretion of the Chamber.[21] The Chamber may consider whatever information it reasonably deems it needs so long as the information assists it in determining whether the proceedings following the transfer will be fair.[22]

17. In considering whether the accused will receive a fair trial, the accused must be accorded by the State the rights set out in Article 20 of the Statute.[23] Article 20 provides that:

> 1. All persons shall be equal before the International Tribunal for Rwanda.
> 2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
> 3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
> 4. In determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

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[16] Rule 11 *bis* (A) of the Rules of Procedure and Evidence; *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-AR11*bis*, Decision on Rule 11 *bis* Appeal (AC), 30 August 2006 ("*Bagaragaza* Appeal Decision"), para. 8. The Appeals Chamber of the ICTY has ruled that contrary to a strict textual reading of Rule 11 *bis* (A) those States in whose territory the crimes were committed and/or in which the accused was arrested must also be willing and adequately prepared to accept the case. *Prosecutor v. Stanković* Case No. IT-96-23/2-*AR11bis*.2, Decision on Rule 11*bis* Referral (AC), 15 November 2005 ("*Stanković* Appeal Decision") para. 40. The Chamber notes that ICTR Rule 11 bis (A) is, in relevant part, identical to Rule 11 *bis* (A) of the ICTY Rules of Procedure and Evidence.

[17] *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008 ("*Kanyarukiga* Appeal Decision"), para. 4, fn. 17, citing *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11*bis,* Decision on the Prosecutor's Appeal Against Decision on Referral under Rule 11*bis*, 8 October 2008 ("*Munyakazi* Appeal Decision"), para. 4, fn. 15, and sources cited therein.

[18] *Kanyarukiga* Appeal Decision*,* para. 4, fn. 18, citing *Munyakazi* Appeal Decision, para. 4, fn. 16, and sources cited therein.

[19] *Kanyarukiga* Appeal Decision*,* para. 4, fn. 19, citing *Munyakazi* Appeal Decision, para. 4, fn. 17, and sources cited therein.

[20] Rule 11 *bis* (C); In contrast to its ICTY counterpart, the ICTR Rule 11 *bis* does not require the Referral Chamber to consider the "gravity of the crimes charged and the level of responsibility of the accused." ICTY Rule 11 *bis* (C).

[21] *Bagaragaza* Appeal Decision, para. 9.

[22] *Stanković* Appeal Decision, para. 50.

[23] *Munyakazi* Appeal Decision, para. 4 (footnotes omitted).

a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

c) To be tried without undue delay;

d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so requires, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

g) Not to be compelled to testify against himself or herself or to confess guilt.

4. **JURISDICTION**

18. The Prosecution submits that Rwanda possesses the territorial, personal, material and temporal jurisdiction to prosecute the Accused as required under Rule 11 *bis*.[24] It appends to its Motion a letter from GoR expressing its willingness and readiness to prosecute the Accused in accordance with requisite fair trial guarantees and established international standards.[25] The Defence does not object that Rwanda has personal and temporal jurisdiction to try this case, but argues that the Rwandan High Court does not have material jurisdiction to try the Accused by operation of the absolute right enjoyed by him to protection against double jeopardy.[26]

19. In the Amended Indictment, the Accused is charged pursuant to Article 6 (1) of the Statute with planning, instigating, ordering, committing or otherwise aiding and abetting the crimes alleged. Both the principal perpetrator of crimes and the accomplice are covered by Article 6 (1) of the Statute. Article 89 of Rwanda's Penal Code, identifies both principal perpetrators and accomplices to crimes. Article 90 of the same Code defines the author of a crime as someone who has executed the crime or has directly cooperated in the commission of the crime. Article 91 of the Code defines the material elements of accomplice liability.[27] The Chamber considers that the modes of criminal responsibility covered in the Rwandan Penal Code are adequate to cover the crimes of the Accused as alleged in the Amended Indictment pursuant to Article 6 (1) of the Statute.

[24] Motion, paras. 9 (i), 12-20.
[25] Motion, paras. 4, 9 (ii), 21, Annex B.
[26] Response, para. 32.
[27] Motion, para. 19, Annex F (Articles 89-91 of the Rwandan Penal Code).

20. As stated in the *Kanyarukiga* Rule 11 *bis* Decision, "[i]t follows from Articles 1 and 7 of the Statute that the ICTR only has jurisdiction to prosecute acts committed between 1 January and 31 December 1994. The formulation in the Transfer Law indicates that [the Accused], if transferred, will not be prosecuted for acts committed before or after this period."[28]

21. The Chamber notes that the law adopted by Rwanda to accept cases on referral from this Tribunal ("Transfer Law") specifically mandates the High Court and the Supreme Court to deal with cases transferred to Rwanda, and to exercise jurisdiction over crimes identical to those in the Tribunal's Statute.[29] It further notes that the Gacaca convictions against the Accused have been vacated and that the Gacaca Court would not exercise any jurisdiction over the Accused in the case. In conclusion, the Chamber is satisfied that following the Transfer Law, Rwandan courts, specifically the High Court and the Supreme Court have material jurisdiction over this case.

5. **FAIR TRIAL**

5.1. **Presumption of Innocence**

22. Article 19 of the Constitution of Rwanda provides that every accused person "shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing in which all the necessary guarantees for defence have been made available".[30] This provision is in conformity with several human rights treaties to which Rwanda is party, for instance Article 14 (2) of the International Covenant on Civil and Political Rights ("ICCPR"). Article 44 (2) of the Rwandan Code of Criminal Procedure ("RCCP") also provides that "an accused is presumed innocent until proven guilty".[31] The principle is reiterated in Article 13 (2) of the Transfer Law. Consequently, the presumption of innocence clearly forms part of Rwandan statutory law.

23. The Defence states that "the reality does not reflect the formal texts,"[32] and recalls that the Accused was found guilty of genocide by a Rwandan Gacaca Court, his sentence was pronounced in public, and that Articles 84 and 89 of the Gacaca Law require that a Gacaca judgement be displayed for a period of one month at several places around the relevant *cellule*.[33] Accordingly, the Defence argues that it is highly likely that potential defence witnesses will be extremely reluctant to appear before a Rwandan court to present a version of events that contradicts a Gacaca Court finding, particularly one which conforms to the policies of the current Rwandan government.[34]

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[28] *Prosecution v. Kanyarukiga*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, (TC), 6 June 2008 ("*Kanyarukiga* Trial Decision"), para. 20.
[29] Transfer Law, Article 2 (stating that the High Court is conferred with the competence to conduct in the first instance, trials of accused persons referred to Rwanda from the ICTR and of persons extradited from other states); Transfer Law, Article 16 (stating that the Supreme Court of Rwanda has the jurisdiction to hear appeals from decisions taken by the High Court).
[30] Motion, Annex E (Rwandan Constitution of 2003).
[31] Motion, Annex G (Law No. 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure).
[32] Response, para. 264.
[33] Response, paras. 266-267.
[34] Response, paras. 268.

24. In 2007, the United Nations Human Rights Committee ("HRC") issued its General Comment No. 32 on Article 14 of ICCPR, the right to equality before courts and to a fair trial. On the issue of the presumption of innocence, the General Comment states: "[i]t is a duty for all public authorities to refrain from prejudging a trial, e.g by abstaining from making public statements affirming the guilt of the accused. […] The media should avoid news coverage undermining the presumption of innocence."[35]

25. The Defence draws the Chamber's attention to an interview broadcast on Radio Rwanda and then published in a Rwandan newspaper following the arrest of the Accused, in which a Rwandan pastor expressed his desire to testify that the Accused committed genocidal acts as far back as 1990.[36] IADL points to an interview at the time of the arrest of the Accused in which the Rwandan Minister of Justice stated:

> All the people that feature on the International Criminal Tribunal for Rwanda arrest warrant are important enough. They are high up in the hierarchy and were involved in the planning and executing genocide. So yes, the arrest of Jean-Bosco Uwinkindi would be a big catch.[37]

26. Regarding the comments made by the Minister of Justice, the Referral Chamber is of the view that judges are trained and experienced professionals capable of separating comments made by public officials from evidence presented in the courtroom. The Chamber finds that the comments of public officials and the media, cited by the Defence and the IADL, do not, in and of themselves, violate the right of the Accused to the presumption of innocence.

5.2. ***Non Bis In Idem***

5.2.1. *Parties' and Amici Submissions*

27. In its Motion, the Prosecution points to previous findings of the *Kanyarukiga* and *Gatete* Referral Chambers that any accused, if transferred to Rwanda by this Tribunal, would not run the risk of double jeopardy.[38] The Defence does not contest the legal framework but observes that the Accused Uwinkindi was tried, convicted and sentenced, *in absentia*, on 20 August 2009 by the Ntarama *Secteur* Gacaca Court of substantially the same crimes for which he is charged in the ICTR Amended Indictment.[39]

28. In its Reply, the Prosecution explains that the Accused was tried and convicted in 2009 by two *Secteur* Gacaca Courts, namely Ntarama and Kayumba, but adds that in deference to the ICTR's superior jurisdiction, the Gacaca Court convictions of the Accused were vacated by the Gacaca Court of Appeal. It posits that the lay judges conducting the proceedings were not aware that the ICTR had issued an indictment and arrest warrant against the Accused.[40]

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[35] United Nations Human Rights Committee, General Comment No. 32: Article 14 Right to Equality Before Courts and Tribunals and to Fair Trial, CCPR/GC/32, 23 August 2007 ("General Comment No. 32"), para. 30.
[36] Response, para. 269.
[37] IADL Brief, para. 11.
[38] Motion, para. 105.
[39] Response, paras. 36, 39.
[40] Reply, paras. 6, 10; Rejoinder, paras. 12-23, 38-46.

5.2.2. *Discussion*

29. Article 14 (7) of ICCPR states that "[n]o one shall be tried or punished again for an offence for which he has been finally convicted or acquitted in accordance with the law and penal procedure of each country." This principle is reflected in Article 9 of the Statute.

30. General Comment No. 32 of HRC states that "[t]he prohibition [against double jeopardy] is not at issue if a higher court quashes a conviction and orders a retrial."[41]

31. The Chamber notes with concern that despite the fact that the Prosecution issued an arrest warrant for the Accused on 3 September 2001 and filed an Indictment against the Accused ten days later,[42] he was nevertheless tried and convicted by two separate Gacaca Courts nearly nine years later in violation of Article 8.2 of the Statute establishing the primacy of the ICTR over the national courts of all States. Although the Prosecution argues that the Gacaca Courts were possibly not aware of the ICTR Indictment against the Accused, this reflects adversely on the internal communication within the Rwandan judiciary in view of the potential prejudice that could result to the Accused were it not resolved. Although the Prosecution has not provided the Chamber with information on the procedure for vacating convictions in Rwanda, the Chamber has observed closely the chain of events relating to the vacation of the Gacaca convictions against this Accused.[43]

32. The Chamber recalls that pursuant to Articles 143 and 152 of the Constitution of Rwanda, Gacaca Courts are an integral part of the Rwandan judiciary benefiting from the same independence as other Rwandan courts. Yet, on its face, the chain of events suggests that the Gacaca Court of Appeal acted to vacate the convictions of the Accused solely in response to an instruction from the prosecutor to remove a perceived obstacle to referral of this case.

33. The prior convictions of the Accused suggest that despite a legal framework enshrined in Rwandan law that protects accused persons from double jeopardy, this right may sometimes be violated due to a lack of effective communication between the relevant judicial authorities. It would appear from Gacaca documents that the Accused was convicted of genocide as a Category

[41] General Comment No. 32, para. 56.
[42] Reply, fn. 13.
[43] On 22 October 2010, the ICTR Prosecutor, sent a letter to the Prosecutor General of Rwanda requiring that the latter confirm if Mr. Uwinkindi was indeed tried *in absentia* in Rwanda, on what charges if so and what steps would be taken to clear the way for his new trial in Rwanda." On 28 October 2008, Prosecutor General of Rwanda referred the matter to Domitilla Mukantaganzwa, the Executive Secretary of the National Service of Gacaca Courts and indicated that the Gacaca trials had violated Article 2 of the Transfer Law (Organic Law 11/2007 of 16 March 2007) and Circular 1285/DG/2008 of 10 December 2008 "prohibiting Gacaca Courts from judging genocide suspects living outside the country." He concluded by asking Mukantaganzwa to void the convictions so that Mr. Uwinkindi could be tried either by the ICTR or the High Court of Rwanda. On 3 November 2010, Mukantaganzwa sent a letter to the President of Kayumba Gacaca Appeals Chamber instructing him to review the Gacaca judgements in accordance with her instructions and the laws cited by the Prosecutor General. On 4 November 2010, the Kayumba Gacaca Appeals Chamber vacated the Kayumba *Secteur* Gacaca conviction dated 7 May 2009 of the Accused. The Appeals Judgement states that the conviction was not in accordance with the Transfer Law. On 5 November the Ntarama *Secteur* Gacaca Appeals Chambers vacated the Ntarama *Secteur* conviction dated 20 August 2009 of the Accused on the same basis.

I perpetrator and sentenced to life in prison by both the Kayumba and Ntarama *Secteur* Gacaca Courts on, *inter alia*, the same facts, in particular of killings of refugees at Kayenzi Parish.[44]

34. The Defence points to the case of Léonidas Nshogoza as another example in which an accused was subject to double jeopardy despite the fair trial protections in Rwanda's legal framework.[45] It appears that the Gasabo High Court in Rwanda is pursuing charges against Nshogoza on charges of corruption and genocide denial, although he was prosecuted for contempt of court by this Tribunal and acquitted of charges of bribing witnesses. In its Brief, Rwanda does not mention the proceedings in Rwanda against Nshogoza. The Prosecution argues only that "[n]o immunity from prosecution for [bribery of witnesses] exists under the Tribunal's Rules."[46] This submission does not address the allegation that Rwanda has violated its own laws prohibiting double jeopardy in pursuing the case against Nshogoza in spite of the proceedings against him at the ICTR.

5.2.3. *Conclusion*

35. The Chamber considers that the proceedings in a single case do not provide conclusive evidence for the lack of impartiality of the entire Rwandan Judiciary. The Tribunal shall rely on African Commission on Human and Peoples' Rights ("ACHPR") monitors to identify and report promptly on any violations which would be an impediment to the fair trial rights of the Accused if tried in Rwanda. The Chamber observes that following the trials *in absentia* of the Accused by the two Gacaca Courts in 2009, the convictions have been vacated. The Chamber is, therefore, satisfied that the principle of *non bis in idem* would not be violated if the Accused were to be tried again by the High Court of Rwanda upon referral of this case.

5.3. **Article 59 of the Rwandan Code of Criminal Procedure**

36. Article 59 of the RCCP reads as follows:

> Persons against whom the Prosecution has evidence to suspect that they were involved in the commission of an offence cannot be heard as witnesses.[47]

37. The Defence submits that this provision will prevent the Accused from exercising his fair trial rights pursuant to Article 20 of the Statute as "the fate of the Accused is left at the mercy of the Prosecutor who, at his discretion, will determine whether he has available evidence to merely

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[44] Reply, Annex A. The Ntarama *Secteur* Judgment solely states that the Accused is guilty of supervising and planning acts of genocide, and using his position of authority to and leading the genocide. However, attached to the judgement is a document which appears to be an Indictment charging that: "L'accusé a donné des instructions pour lancer les attaques à Kayenzi. Il était en compagnie de Mukumira. Les faits se sont déroulés à l'église de Kayenzi, le 10 avril 1994. C'est à cet endroit que les auteurs des tueries s'étaient établis. Tous les biens pillés y étaient entreposés, notamment les vaches que les meurtriers abattaient ainsi que celles qu'ils gardaient. L'accusé ordonnait de tuer les gens qui venaient chercher refuge à cet endroit." The Kayumba *Secteur* Judgement found the Accused guilty of "a) tenue des réunions au cours desquelles les tueries ont été organisées; b) avoir amené les personnes qui on tués des Tutsis a Kayenzi; c) meurtres de 135 personnes a Kayenzi; d) meutre de haguma; e) participation aux attaques lancées a Ntarama."

[45] Response, paras. 155-157. ICDAA Brief, paras. 52-56; HRW Brief, paras. 99-100; IADL Brief, para. G.2.

[46] Reply, para. 80 citing Article 29 (4) of the ICTR Statute (immunity for defence counsel extends only "as is necessary for the proper functioning of the Tribunal").

[47] Motion, Annex H.

suspect that a potential Defence witness might have been involved in the commission of an offence, this potentially giving him a significant influence on the Defence witnesses the Accused will be able to call."[48] The Prosecution does not respond to this submission.

38. KBA states that "in practice, a suspect can be heard as court informer" although his or her evidence must be corroborated by other evidence.[49]

39. The Chamber considers this provision of RCCP to be problematic for a number of reasons. First, it is not clear that this provision would permit the Accused to testify in his own Defence. Second, as this provision allows the exclusion of a witness' evidence on the suspicion of the prosecutor rather than a legal ground, it violates the principle of the presumption of innocence. Third, the law provides no indication that the judge may override the prosecutor's indications that a witness may have participated in an offence. Fourth, the law does not specify the type of "offence" that might warrant exclusion of a witness. Fifth, because this provision could be applied in an arbitrary manner by the prosecutor, it could have a chilling impact on the willingness of defence witnesses to testify. Finally, this article may be detrimental not only to the interests of the defence but to those of the prosecution, as many of the cases before this Tribunal rely to varying extents on the testimony of accomplice witnesses.

40. However, the Chamber notes that Article 13 (9) of the Transfer Law guarantees the right of the Accused to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him or her, and that Article 25 of the Transfer Law states that in the event of an inconsistency between the Transfer Law and any other law, the provisions of the Transfer Law will prevail. Therefore, the Chamber is confident that Article 59 of the RCCP will not be applied in any transferred case.

5.4. **Extradition Cases**

41. The Defence, supported by ICDAA, asserts that save for one case every country has denied extradition requests made by Rwanda because extradition would violate that country's obligation to guarantee the fair trial rights of the accused. The single occasion on which extradition was granted is currently on appeal before the European Court of Human Rights.[50] The Prosecution does not address this issue in its submissions.

42. The Chamber has reviewed the cited extradition decisions of national courts. In two cases, national courts based their decisions in large part on prior Rule 11 *bis* Decisions of this Tribunal. In four cases, the reasons adopted by the courts for denying extradition to Rwanda are not specified. Based on the evidence before it, therefore, the Chamber cannot conclude that the denial was motivated by fair trial issues.[51]

43. This Chamber is not bound by the decisions of national jurisdictions. It notes that the nature of extradition and referral proceedings is materially different. Extradition is a bilateral

[48] Response, para. 132.
[49] KBA Brief, para. 51.
[50] Response, paras. 398-417; ICDAA Brief, paras. 64-71 ; Rejoinder, para. 83.
[51] Response, para. 399 (Marcel Bivugabagabo-France), para. 401 (Pascal Simbikangwa-France), para. 414 (Sosthène Munyemana-France), paras. 415-416 (Callixte Mbarushimana-Germany-France-ICC).

arrangement between two States wherein upon extradition the extraditing State transfers the custody of the accused to the receiving State and the former exercises no control over the trial of the extradited person. Referral, however, is a *sui generis* mechanism wherein the referring Tribunal retains the power to revoke its decision if fair trial rights are not ensured. Referral is also ordered pursuant to a stringent monitoring mechanism that keeps the Tribunal informed of the receiving State's adherence to the conditions of referral.

6. PENALTY STRUCTURE

6.1. Parties' Submissions

44. The Prosecution submits that Rwanda has addressed the fair trial concerns regarding its legal framework raised in the previous Rule 11 *bis* applications[52] and now provides for an adequate penalty structure in which neither the death penalty nor life imprisonment with special provisions will be imposed.[53]

45. The Defence challenges these submissions and notes that in August 2009, although Rwanda was aware that Uwinkindi had been indicted by the ICTR, he was indicted, tried and sentenced to "life imprisonment with special conditions" (isolation).[54] This sentence was imposed despite Rwanda's assurances in 2007 in its *amicus* brief in the *Kayishema* referral case that it would not exercise concurrent jurisdiction to prosecute an accused person without a referral from the Tribunal.[55] The Defence submits that in trying, convicting and sentencing the Accused before his transfer from the ICTR, Rwanda acted in bad faith. Moreover, the Defence submits that the Accused would start serving the sentence of life in prison with special conditions imposed by the Gacaca Courts once he is transferred to Rwandan custody.[56]

46. The Prosecution notes that the Gacaca convictions of the Accused have been vacated.[57]

6.2. Applicable Law

47. The parties do not dispute that the death penalty was abolished in Rwanda pursuant to Organic Law No. 31/2007 of 25 July 2007, or that the penalty of life imprisonment with special conditions is no longer a potential penalty in transfer cases.[58]

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[52] *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (TC), 28 May 2008 ("*Munyakazi* Trial Decision"), paras. 25-39; *Prosecution v. Gatete*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 17 November 2008 ("*Gatete* Trial Decision"), paras. 85-87; *Munyakazi* Appeal Decision, paras. 8-21; *Kanyarukiga* Appeal Decision, paras. 6-17; *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis* (AC), 4 December 2008 ("*Hategekimana* Appeal Decision"), paras. 31-38.
[53] Motion, paras. 29-30.
[54] Response, para. 57.
[55] Response, para. 56. *Amicus Curiae* Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the Above Case to Rwanda Pursuant to Rule 11 bis, 1 October 2007, *Prosecutor v. Kayishema*, Case No. ICTR-95-1.
[56] Response, para. 51.
[57] Reply, paras. 7-13.
[58] Motion, Annex G.

6.3. **Discussion**

48. Although not expressly provided in Rule 11 *bis*, pursuant to the jurisprudence of this Tribunal and the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the State to which a case is referred must provide an appropriate punishment for the offences with which an accused is charged.[59]

49. The Chamber notes that Article 21 of the Transfer Law on penalties is consistent with Rule 101 of this Tribunal, which allows for a maximum penalty of life imprisonment. The Chamber also notes that Article 82 of the Rwandan Penal Code provides for consideration of the individual circumstances of a convicted person in determining the sentence, and Article 22 of the Transfer Law states that convicted persons will be given credit for time spent in custody. These provisions are consistent with the Tribunal's Rules on sentencing.[60]

50. The Chamber has reviewed the Gacaca convictions of the Accused and concludes that while the Accused was sentenced in both cases to life imprisonment, in neither case was he sentenced to life imprisonment "in isolation."[61] The Defence has misinterpreted the Gacaca judgements on this point. Moreover, these convictions have now been vacated. Thus, the Chamber concludes that the prior convictions of the Accused will not result in an inappropriate sentence if the Accused is transferred to Rwanda.

6.4. **Conclusion**

51. The Chamber finds that the current penalty structure of Rwanda is adequate as required by the jurisprudence of the Tribunal as it no longer allows for imposition of the death penalty or life imprisonment with solitary confinement. The Chamber is satisfied that the ambiguities which existed in previous Rule 11 *bis* applications regarding the nature and scope of the sentence for accused persons in cases referred to Rwanda have been adequately addressed by Rwanda.

7. **CONDITIONS OF DETENTION**

7.1. **Parties' Submissions**

52. The Prosecution submits that the Transfer Law institutes a special regime for detainees transferred from this Tribunal.[62] It adds that Rwanda's detention facilities located at Kigali and Mpanga[63] meet international standards and that Rwanda's legal framework ensures that mechanisms are in place to address concerns about detention conditions and ill-treatment of detainees.[64]

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[59] *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis* (TC), 17 May 2005 ("*Stanković* Trial Decision"), para. 32; *Bagaragaza* Appeal Decision, para. 9.
[60] ICTR Rule 101 (B) & (C).
[61] Reply, Annex A.
[62] *Kanyarukiga* Trial Decision, paras. 85-86.
[63] Mpanga prison facilities are currently housing convicts from the Special Court for Sierra Leone. Amended Agreement Between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court of Sierra Leone, 18 March 2009.
[64] Motion, para. 109.

53. Rwanda supports the Prosecution Motion asserting that the rights afforded to prisoners under Rwandan law are, in all material respects, identical to those recognised under prevailing international standards.[65]

54. The Defence submits that if convicted in Rwanda, the Accused would, in practice, be detained under conditions that fall far below internationally recognised minimum standards.[66] Although the Accused might initially serve his sentence in a prison meeting international standards, there is nothing to prevent the Rwandan authorities from later transferring him arbitrarily to another prison where contact with his relatives would be limited or non-existent.[67] The Transfer Law does not guarantee that Rwanda will keep the Accused in a specific prison.[68] The Accused could also be subject to the existing "inhuman living conditions" reported by the Rwandan National Commission for Human Rights.[69]

55. The Defence further points out that although both the Prosecutor and Rwanda refer to facilities at Kigali Central Prison, the Rwandan Minister of Internal Affairs announced on 13 January 2011 that this prison is to be demolished before the end of 2011 and its prisoners relocated to Butamwa Prison. As Butamwa Prison will also house prisoners from Remera, it is forseeable that there will be overcrowding and that the conditions afforded to prisoners in the existing Kigali Central Prison, such as individual cells, will no longer be available.[70] The Defence is ultimately concerned that Rwanda will be unable to house prisoners in adequate conditions at the Butamwa Prison.[71]

56. The Defence asserts that there are neither adequate safeguards nor permanent mechanisms to monitor the detention conditions of the Accused.[72] It points to an April 2009 report by HRC in which the Committee urged GoR to adopt effective measures to ensure

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[65] GoR Brief, para. 70; First United Nations Congress on the Prevention of Crime and the Treatment Offenders, Standard Minimum Rules for the Treatment of Prisoners, 3 September 1955.
[66] Response, paras. 386, 387.
[67] Response, paras. 371-374.
[68] Response, para. 369.
[69] National Human Rights Commission, Activity Report for 2009-2010 (January 2009 – June 2010) Kigali, October 2010 (Unofficial translation), Annex 29, wherein the Commission reported after visiting several prisons in Rwanda (including Mpanga) to monitor *inter alia* "the life conditions of detainees" as follows:

1. Canteens intended to help detainees supplement their regular food supply are not yet operative although they are stipulated in Instruction No. 09/08 of the Minister of Internal Security, 16 June 2008.
2. Cutlery available is old and insufficient.
3. Detainees have no prison uniform and borrow uniforms from other detainees when appearing before a court or to meet visitors.
4. Minors and HIV infected persons are detained far away from their families for the latter to assist the detainees with food to supplement their prison diets.
5. In some prisons, detainees who have mental illness and contagious diseases are detained together with persons not infected.

[70] Response, paras. 367-368.
[71] Response, paras. 376-380.
[72] Response, paras. 383-385. The ICTR is an *ad hoc* institution with a time-limited mandate. International Standard Minimum Rules for the Treatment of Prisoners have to be met by potential States of enforcement of ICTR sentences. Reliance and expectation is placed by GoR on the UN to supply sustenance to prisoners @ $802 per month, same as is being paid by the SCSL for its prisoners at Mpanga prison. However, there is no agreement in place ensuring that the UN will supply these funds, neither has Rwanda allocated a budget. (Response, para. 379).

conditions of detention which respect the dignity of prisoners. The Defence submits that neither the Prosecution nor Rwanda have provided information about whether the situation has improved since 2009, or if any steps have been taken to put in place safeguards addressing the concerns of HRC. [73]

7.2. **Human Rights Watch Submissions**

57. HRW submits that it has tried repeatedly but unsuccessfully to secure a meeting with authorities to approve a visit to the new temporary detention facilities at Kigali Central Prison. According to Rwandan authorities, funds are available to complete construction of the prison but the work has not yet taken place.[74] IADL, ICDAA and KBA make no comment on detention conditions in Rwanda in their briefs.

7.3. **Applicable Law**

58. The conditions of detention speak to the fairness of a country's criminal justice system and must accord with internationally recognised standards.[75] The Transfer Law provides that any person transferred from this Tribunal shall be detained in accordance with the minimum standards of detention adopted by United Nations General Assembly Resolution 43/173.[76] The Transfer Law also enshrines the right of the International Committee of the Red Cross ("ICRC") or a monitor appointed by the Tribunal to inspect the conditions of detention of persons transferred to Rwanda by this Tribunal and to submit a confidential report based on the findings of these inspections to the Rwandan Minister of Justice and the Tribunal's President.[77]

7.4. **Discussion**

59. The Chamber recalls that the *Kanyarukiga* Referral Chamber found that "during trial, the accused would be detained in a custom-built remand facility at the Kigali Central Prison".[78]

60. The Chamber notes that adequate detention conditions are guaranteed by the Transfer Law and considers that the Defence submissions that the conditions will be inadequate in practice are speculative at this juncture. The Chamber expects that the monitoring mechanism

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[73] Response, para. 370.
[74] HRW Brief, para. 110.
[75] Conditions of detention in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction's criminal justice system and is an inquiry squarely within the Referral Chamber's mandate. *Stanković* Appeal Decision, para. 34. These internationally recognised standards include: (i) Freedom from torture, or cruel, inhuman or degrading treatment or punishment as contained in Article 5, Universal Declaration of Human Rights; Article 7, ICCPR; Article 5, African Charter on Human and People's Rights ("AChHPR"); Article 16 (1), Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment; Principle 6 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988) ("Body of Principles"); and (ii) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person as contained in Article 10 (1), ICCPR; Article 5, AChHPR; and Principle 1 of the Body of Principles.
[76] Transfer Law, Article 23 of Organic Law No. 11/2003 of 16/03/2007, concerning transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States, citing the Body of Principles which guarantees the same standards both upon transfer and after conviction.
[77] Article 23 of the Transfer Law.
[78] GoR Brief, para. 106.

will conduct regular prison visits to ensure that both the detention conditions and treatment of the Accused in detention are satisfactory, and that it will immediately report any concerns to both the Prosecutor and the President of the Tribunal. Thus, the Chamber is convinced that the Accused will be detained in appropriate conditions if his case is referred to Rwanda.

8. AVAILABILITY AND PROTECTION OF WITNESSES

8.1. Witness Availability

8.1.1. *Prosecution, Rwanda and the Kigali Bar Association Submissions*

61. The Prosecution submits that fair trial concerns relating to the availability and protection of witnesses that were identified by Trial and Appeal Chambers in response to previous Rule 11 *bis* applications have now been addressed by Rwanda, and therefore no longer constitute an impediment to the transfer of cases to Rwanda. Article 13 of the Transfer Law has been amended to include immunity for anything said or done in the course of a trial.[79] In addition, all witnesses who travel from abroad to Rwanda to testify in the trial of transferred cases shall have immunity from search, seizure, arrest or detention during their testimony and their travel to and from the trials.[80]

62. Article 14 of the Transfer Law has also been amended to provide that the testimony of witnesses residing abroad can be taken by deposition in Rwanda or in a foreign jurisdiction, or by video-link hearing taken by the judge at trial or by judges sitting in a foreign jurisdiction. Moreover, in addition to the witness protection programme run by the Office of the Prosecutor General, Rwanda has established a witness protection unit within the Supreme Court and High Court. It further argues that if witnesses are harassed or intimidated the Rwandan legal system is competent to respond fairly to such problems.[81]

63. The Prosecution notes that 357 witnesses from Rwanda have testified for the defence between 2005 and 2010 and that during the same period, 424 witnesses from Rwanda testified for the Prosecution. The ICTR's Witnesses and Victims Support Section (WVSS) records indicate that many witnesses returned to Rwanda and did not raise subsequent security concerns.[82] These statistics indicate that witnesses could testify for the defence in cases transferred to Rwanda without suffering any consequences.[83] The Prosecution submits that the Rwandan judiciary is equipped to handle any witness complaints. The High Court and Supreme Court have the mandate to initiate investigations into any incidents and ensure witness protection, and if they fail the Rule 11 *bis* monitoring and revocation procedures are available to the parties.[84]

64. The Prosecution further states that the Rwandan judiciary, the High Court and the Supreme Court, have adjudicated a large number of genocide cases. In those cases, many

[79] Motion, para. 38.
[80] Motion, paras. 57. GoR Brief, para. 24-57.
[81] Motion, para. 38.
[82] Motion, para. 51. Annex M **(**ICTR WVSS Data 2005–2010. These statistics do not refer to the number of witnesses who travelled from third countries to testify at the ICTR).
[83] Motion, para. 55.
[84] Motion, para. 52.

witnesses have testified before Rwandan courts for both low and high-ranking civilian leaders and military officials without facing threats or consequences for their testimony.[85] Among those cases, the High Court heard 21 genocide cases between 2006 and 2008 and the Supreme Court handled 61 such cases.[86]

65. The Prosecution and Rwanda argue that at the time of the previous Rule 11 *bis* applications, the Transfer Law already provided significant protections to witnesses living abroad, and notes that Article 14 of the Transfer Law requires that the Prosecutor General facilitate witness testimony, including that of those living abroad through the provision of appropriate immigration documents, personal security, and medical and psychological assistance.[87]

66. Rwanda has concluded several mutual assistance agreements with States in the region and elsewhere as part of its cooperation with the Tribunal and the conduct of its domestic trials. Additionally, United Nations Security Council Resolution No. 1503 called on all States to assist national jurisdictions where cases have been referred. This provides a basis for requesting and obtaining cooperation to secure the attendance or evidence of witnesses from abroad.[88]

67. Rwanda submits that it is "not deaf to the criticisms that have been levelled against Article 13 [of the Constitution] by human rights activists and other groups […] based on what are perceived as ambiguous operative terms and the potential for overbroad application that might chill freedom of expression."[89] In response, it notes that the Minister of Justice has commissioned a study to deal with potential problems with the law.[90] Rwanda adds that there is no reason to believe that Rwanda's judiciary will abdicate its responsibility to fairly and impartially interpret Article 13 and do so in a manner that will redress any potential errors in the law's application.[91]

68. Rwanda further submits that "there is not a single case where a defence team member or witness has been charged with a crime under Article 13 for acts or words relating to the investigation or trial of a criminal case."[92] It submits that in light of the multiple sources of immunity, any argument that defence team members and witnesses fear arrest and prosecution for words or acts related to a trial of a referred case would be unfounded. The Transfer Law expressly shields them from such incidents. Moreover there is no reason to suspect that government officials would deliberately violate these protections.[93] Finally, Rwanda argues that because no case has yet been referred to Rwanda, the Transfer Law's immunity provisions

[85] Motion, para. 53; GoR Brief, paras. 116-119; GoR Response, paras. 8-43.
[86] Motion, para. 88; GoR Brief, para. 123 states that from 2006 to 2010 the High Court of Rwanda presided over 36 genocide cases and, during 2006 to 2008, the Supreme Court heard 61 appeals or other post-conviction proceedings in gernocide cases. The 36 genocide cases have been detailed in "Republic of Rwanda's Response to 6 June 2011 Order to Provide Further Information Regarding 36 Genocide Cases at the High Court".
[87] Motion, para. 57; GoR Brief, para. 24-57.
[88] GoR Brief, paras. 40-45.
[89] Article 13 of the Rwandan Constitution criminalises "revisionism, negationism and trivialisation of genocide."
[90] GoR Brief, para. 61.
[91] GoR Brief, para. 62.
[92] GoR Brief, para. 55.
[93] GoR Brief, paras. 52-53.

remain untested, and that Rwanda should be accorded a presumption of good faith and diligence.[94]

69. KBA contends that its members have dealt with numerous genocide and other criminal cases. Witnesses and victims have come to testify for both the prosecution and the defence, and members of KBA have had no difficulty in convincing witnesses to testify for the defence, including in genocide cases. The President of KBA is not aware of a case where a witness has refused to testify out of fear of reprisal, or a counsel who was prosecuted pursuant to Article 13 of the Constitution regarding genocide ideology during the course of his or her official duties. KBA therefore concludes that allegations that witnesses refuse to testify for fear of harassment "are against the reality experienced by Rwandan lawyers on a daily basis."[95]

8.1.2. *Defence Submissions*

70. The Defence submits that it has identified, located and met with 49 potential Defence witnesses in this case. Eight of these live in Rwanda and the remaining 41 are resident in nine other African countries. Each of the 49 witnesses has agreed to testify for the Accused on the condition that their identities are kept confidential and not disclosed to Rwandan authorities. Each of these witnesses has been asked by the Defence whether he or she would testify for the Accused in the event the case were transferred to Rwanda, and each has responded that if the case were transferred they would not be willing to appear at all. The Defence has appended to its Response redacted affidavits of all its potential witnesses.[96] The Defence notes that some of the witnesses are currently serving prison sentences and were therefore not able to travel to a notary's office in order to authenticate the affidavits provided. [97]

71. The Defence asserts that although the witnesses put forward different reasons for their unwillingness to testify in Rwanda, they are all afraid of being threatened, harassed, jailed or even killed. They are of the opinion that the Rwandan authorities will inevitably victimise them. They have no "faith in the Rwandan law" and "do not trust the judiciary system" in the country. Most of them believe that if they testify for the Defence their relatives in Rwanda will face repercussions which could ultimately result in death. They are further "terrified" of Rwandan laws on genocide denial, revisionism, genocide ideology and minimisation of the genocide. [98]

72. In response to the Prosecution claim that many witnesses from Rwanda have testified for the defence at the Tribunal without any adverse consequences upon their return to Rwanda, the Defence notes that affidavit provided by WVSS (Annex M of the Motion) does not give details of the nature of threats reported by Defence witnesses. It also fails to indicate whether WVSS conducted regular follow-up monitoring of defence witnesses during that period, especially of those residing in Rwanda to inquire about security concerns or whether it relied instead on witnesses to come and report incidents themselves. [99]

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[94] GoR Brief, para. 50-63.
[95] KBA Brief, para. 49-63.
[96] Response, paras. 81-82, 110 (The redacted version of the affidavits are in Annex VIII. Unredacted versions of the affidavits have been filed as *ex parte* Annex I for the sole benefit of the Referral Chamber); Rejoinder, paras. 90-91.
[97] Response, paras. 82.
[98] Response, paras. 84-86 ; Rejoinder, para. 92.
[99] Response, para. 89, HRW Brief, para. 29

73. The Defence argues that "[u]nlike attacks on Prosecution witnesses, attacks on defence witnesses have not been systematically monitored or tracked by Rwandan authorities or local organisations." It submits that during the period covered by the WVSS affidavit there were numerous incidents involving threats and harassment of defence witnesses but that most remained off the record because WVSS lacks a follow-up mechanism. Defence witnesses prefer to keep quiet when harassed for fear that a report would aggravate their already volatile security situation. [100]

74. In response to Rwanda's claim that it has facilitated the work of foreign defence teams while on mission in Rwanda, the Defence argues that such cooperation is not indicative of whether similar facilities and cooperation will be afforded to local counsel assigned to represent the Accused. Furthermore, the Defence notes that in some cases involving genocide trials held abroad defence witnesses were nevertheless harassed and victimised. [101]

75. The Defence argues that the witnesses are aware of the significant gap between the law as it is written and the reality on the ground. Moreover, most of the witnesses residing outside Rwanda are refugees or asylum seekers, none of whom are ready to return to a country they fled because the issues that initially made them leave are unresolved. They also fear losing their refugee status.[102] The 41 potential Defence witnesses living abroad expressed their unwillingness to return to Rwanda to give evidence, or to appear before any Rwandan judge wherever a potential trial might take place. [103]

76. The Defence further takes note of Annex D of the GoR Brief, an affidavit signed by John Bosco Siboyintore, Acting Head of the National Public Prosecution Authority's ("NPPA") Genocide Fugitive Tracking Unit, which indicates that travel documentation and entry visas to Rwanda for all witnesses will be handled by the NPPA Genocide Fugitive Tracking Unit and thus ultimately by the Office of the Prosecutor General. The Defence submits that this situation in itself sends a negative signal to potential Defence witnesses from abroad who will undoubtedly be reluctant to avail themselves of the services of this Office.[104]

8.1.3. *Human Rights Watch Submissions*

77. HRW states that it has conducted interviews with many Rwandans living in exile and that many were distrustful of GoR and wary of guarantees stipulated in law. Their unwillingness to testify appears to have increased as a result of political events within Rwanda in 2010. Rwandans living abroad have relatives who still reside in Rwanda and are therefore fearful of speaking out publicly on sensitive issues for fear that these relatives would suffer repercussions.[105] HRW submits that the willingness of witnesses to testify in the genocide trials depends largely on whether they believe they will suffer repercussions for their testimony and

[100] Response, para. 90.
[101] Response, paras. 98-96.
[102] Response, paras. 86, 96, 105, 122. Annex 18.
[103] Response, para. 110.
[104] Response, para. 120 citing GoR Brief, Annex D.
[105] HRW Brief, paras. 14, 38-40.

whether they believe the State has the ability and willingness to guarantee their safety. HRW argues that these fears have not changed since 2008.[106]

8.1.4. *International Criminal Defence Attorneys Association Submissions*

78. ICDAA submits that for an accused to receive a fair trial in Rwanda, GoR must be open to criticism, and establish a positive record of freedom of press, speech, thought and association. It further submits that if GoR does not satisfy these conditions, witnesses will be unwilling to travel to Rwanda to testify, or if in Rwanda they will not testify.[107]

79. ICDAA refers to the Rwandan laws on "genocide ideology" as "the most powerful weapon in Rwanda's legal arsenal against political dissidents."[108] HRW states that GoR's campaign against genocide denial and related crimes has proved to be the "most significant obstacle to securing defence testimony in genocide cases."[109] IADL also submits that the legislation may have a chilling effect on the defence for any case transferred from the Tribunal to Rwanda.[110] In an Amnesty International report annexed to the HRW Brief, Amnesty International concludes that the genocide denial laws have had a chilling effect and that "people who have yet to have any action taken against them nonetheless fear being targeted and refrain from expressing opinions which may be legal. In some cases, this has discouraged some people from testifying for the defence in criminal cases."[111] Filip Reyntjens refers to GoR's "use […] of the Genocide as the *raison d'être* for the present Government and an excuse for its excesses."[112]

8.1.5. *Prosecution Reply*

80. In its Reply, the Prosecution objects to the fact that the affidavits of the potential Defence witnesses have been redacted to provide anonymity. The Prosecution asserts that the Defence acted unilaterally to protect the identities of the affiants without the prior authorisation of the Chamber and that by failing to reveal the identities of these affiants to the Prosecution, the Defence has hampered the Prosecution's ability to respond to the "secret affidavits."[113] The Prosecution therefore cannot assess whether any subjective fears could be ameliorated by carefully-crafted witness protection services or court orders. The Prosecution reiterates its argument that the Tribunal's own experience reveals that witnesses from Rwanda have testified both in support of and against accused persons without incident.[114] More generally, the Prosecution is of the view that the Defence allegations of subjective witness fears are not credible and, in all events, can be redressed under Rwanda's Transfer Law.[115]

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[106] HRW Brief, paras. 24-35.
[107] ICDAA Brief, para. 29.
[108] ICDAA Brief, para. 57.
[109] HRW Brief, para. 41.
[110] IADL Brief, paras. 31-33.
[111] Amnesty International, Safer to Stay Silent: the Chilling Effect of Rwanda's Laws on "Genocide Ideology" and Sectarianism, 31 August 2010, p. 8.
[112] Response, Annex 1, para. 68 (Statement of Filip Reytnjens on behalf of Jean Uwinkindi, 11 March 2011).
[113] Reply, para. 66.
[114] Reply, paras. 83-87.
[115] Reply, para. 66.

81. With respect to the incidents of intimidation of the Tribunal's defence counsel cited by the Defence, the Prosecution argues that the Defence selected a few ambiguous incidents that it characterises as Rwandan interference with the Tribunal and other defence teams, and that, building on this weak foundation, the Defence draws broad conclusions about perceived impediments to the conduct of defence in Rwanda.[116]

82. While the Prosecution submits that the fears articulated by the potential witnesses in the affidavits provided by the Defence "should not be credited,"[117] it argues that even if the subjective fears of potential Defence witnesses are honestly held, there is no reason that these witnesses could not present evidence in one or more of the alternative ways provided by Rwandan law on *viva voce* testimony.[118]

83. The Prosecution provides statistics which it believes indicate that the number of prosecutions for genocide ideology is lower than what the Defence and some *amici* suggest, and that 40% of the prosecutions brought between 2008 and 2010 resulted in acquittals.[119] Finally, Rwanda has introduced new legislation that would allow the panel for any case referred for trial in Rwanda to include judges from foreign or international courts.[120] This prospect adequately addresses any remaining fears that Defence witnesses may have about appearing before a Rwandan judge.[121]

8.1.6. *Discussion*

8.1.6.1. Potential Witnesses and Protective Measures

84. The Chamber notes the Prosecution argument that the Defence has withheld the identities of its 49 potential witnesses although no protective measures are yet in place.[122] Given the circumstances, however, the Chamber considers that the Defence approach to the disclosure of the identities of its witnesses is appropriate. Defence counsel are officers of the court, and therefore the Chamber presumes that they have not interfered with the information provided in Annex 8 of the Response. Indeed, the Prosecution does not allege that the Defence has fabricated the information or that it coerced the potential witnesses.[123]

85. Moreover, it is not the role of the Referral Chamber to determine whether the fears expressed by the individual affiants are legitimate, reasonable or well-founded. This Chamber is simply concerned with assessing the likelihood that the Accused will be able to "obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her" if this case were to be transferred to Rwanda.

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[116] Reply, para. 65.
[117] Reply, para. 86.
[118] Reply, para. 93.
[119] Reply, paras. 90-91.
[120] Draft Organic Law Establishing the Organization, Functioning and Jurisdiction of the Supreme Court, Article 13.
[121] Reply, para. 84.
[122] Response, paras. 81-82, 110.
[123] Prosecutor v. Jean Uwinkindi, Case No. ICTR-2001-75-R11bis, Decision on prosecution's Motion to Order the Disclosure of Unredacted Affidavits to the Prosecution, 17 June 2011, disposition. (The Chamber denied the motion).

8.1.6.2. Minister of Justice and the Fugitive Unit

86. The Chamber notes with concern that when discussing the addition of immunity provisions for defence witnesses to the Transfer Law in the Rwandan Senate in February 2007, the incumbent Minister of Justice stated as follows:

> We have nothing to lose [by granting immunity] if anything, we have everything to gain, by these people turning up, it will be a step toward their being captured. They will sign affidavits on which their current address will be shown and that would at any other time lead to their arrest.[124]

87. During the referral hearing in *Munyakazi*, the Rwandan representative did not deny that this statement was made but said it was taken out of context. The representative did not elaborate about the relevant context.[125] While this Chamber is aware that this statement was made approximately four years ago, it considers that the issue remains pertinent in light of the affidavit provided by the Acting Head of NPPA's Genocide Fugitive Tracking Unit in which he states that his office is responsible for facilitating the travel of witnesses and attorneys to and from Rwanda.[126]

88. Although this Chamber notes that Rwandans residing abroad may be responsible for genocide related crimes, the Chamber nevertheless considers that the Minister's statement, taken together with the fact that the Genocide Fugitive Tracking Unit is responsible for coordinating the travel arrangements of witnesses, may give rise to the concerns of those witnesses who fear being accused of genocide in connection with their testimony for the defence. The Referral Chamber considers that the witnesses' fears of being falsely accused of genocide in connection with their testimony for the Defence is premature taking into consideration the amendments made to Article 13 of the Transfer Law, granting witnesses immunity in regard to their testimony.[127]

8.1.6.3. Forty-Nine Affidavits from Defence Witnesses

89. This Chamber has reviewed the affidavits of the 49 potential Defence witnesses provided in Annex 8 of the Response. The Chamber notes that the majority of the potential witnesses fear that they may be prosecuted under the genocide ideology laws. The Chamber observes that there is little indication that they have been advised of the immunity provisions under Articles 13 and 14 of the Transfer Law.[128] The Chamber also observes that most of the witnesses express concerns that if they testify for the Defence in Rwanda, their family members still living in Rwanda will face repercussions.[129] Others fear that they will be abducted or killed.[130] Potential

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[124] *Munyakazi* Trial Decision, para. 61.
[125] *Munyakazi* Trial Decision, para. 61, fn. 126. HRW Brief, para. 38. fn. 16 of the Response, citing the example of *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63, where 91% of the defence witnesses came from abroad, *Prosecutor v. Ntagerura*, Case No. ICTR-96-10**,** where 100% of the defence witnesses came from abroad, and *Prosecutor v. Imanishimwe*, Case No. ICTR-97-36, where 100% of the defence witnesses were from abroad.
[126] GoR Brief, Annex D; Response, para. 120.
[127] Article 13 of Organic Law No. 3/2009/OL of 26/5/2009 (amending the Transfer Law).
[128] The affidavits of witnesses: JUO39, JUO40, JUO41, JUO42, JUO43, JUO49, JUO68, JUO69, JUO82.
[129]JU057, JU77, JU056, JU061, JU062, JU063, JU060, JU050, JU059, JU064, JU013, JU065, JU066, JU067, JU058, JU82, JU069, JU070, JU072, JU073, JU75, JU074, JU038, JU039, JU040, JU041, JU042, JU043, JU045, JU046, JU075, JU076, JU98, JU080, JU036, JU46, JU36, JU020, JU62, JU079, JU080.

Defence witnesses who are detainees expressed concern that they would be transferred to prisons away from their families, or persecuted in prison in retaliation for their testimony.[131] Many witnesses additionally worry about the impact of testifying in Rwanda on their refugee status.[132]

90. While noting that the witnesses may have fears regarding their decision to testify for the Defence, the Chamber recalls that its role is not to assess whether the fears of the individual potential witnesses are legitimate or not. Rather, its mandate is to ascertain that the Accused will be able to secure the appearance of witnesses on his behalf and thus ensure a fair trial. The Chamber is therefore of the opinion that the immunities and protections provided to the witnesses under the Transfer Law are adequate to ensure a fair trial of the Accused before the High Court of Rwanda.

8.1.6.4. Witness Immunities and Transfer Law

91. Article 14 of the Transfer Law provides that:

> All witnesses who travel from abroad to Rwanda to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials.

92. On 26 May 2009, Article 13 of the Transfer Law was amended to include a second immunity provision stipulating that:

> Without prejudice to the relevant laws on contempt of court and perjury, no persons shall be criminally liable for anything said or done in the course of a trial.

93. This Chamber views this amendment as a positive development. It provides counsel and witnesses living in Rwanda with additional protection. Witnesses living abroad were already protected to a significant extent by the immunities existing in the 2007 Transfer Law. The most recent amendment further shields them from prosecution relating to their testimony after they leave the country.

8.1.6.5. Genocidal Ideology

94. The Prosecutor submits that the general principle stipulated in Article 13 of the 2007 Transfer Law as modified by Article 2 of the 2009 Transfer Law will provide immunity to the Accused, his Defence as well as his witnesses.[133] The Defence notes that this "theoretical" immunity is not extended to witnesses' family members and relatives. Rwanda acknowledges that criticism has been levelled against Article 13 by human rights activists and other groups, "on what are perceived as ambiguous operative terms and the potential for overbroad application that

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[130]JU057, JU77, JU056, JU061, JU062, JU063, JU060, JU050, JU059, JU013, JU066, JU067, JU058, JU82, JU068, JU069, JU070, JU071, JU072, JU073, JU75, JU074, JU038, JU039, JU040, JU041, JU042, JU043, JU049, JU045, JU046, JU048, JU61, JU075, JU076, JU077, JU078, JU080, JU036, JU46, JU36, JU020, JU62, JU080.
[131]JU98, JU46, JU020.
[132]JU057, JU056, JU062, JU063, JU060, JU050, JU059, JU013, JU065, JU067, JU058, JU070, JU071, JU072, JU61, JU078, JU079.
[133] Motion, para. 48.

might chill freedom of expression."[134] Rwanda further states that the Minister of Justice has commissioned a study to examine the potential problems with this law, and that "if the study finds ambiguities in the language or the potential for overbroad application, amendments or modifications to the law will be implemented"[135] The Defence submits that this assertion cannot in itself be sufficient to convince Defence witnesses and human rights groups of the misuse of the law on genocide ideology. The terms of reference of this study are unknown, as is its potential date of rendering, while the outcome is, to say the least, unforeseeable. [136]

95. Article 13 of the Rwandan Constitution criminalises "revisionism, negationism and trivialization of genocide." In addition to this constitutional prohibition, a number of related laws limiting free speech are in force in Rwanda.[137] As stated by previous Referral Chambers, the Transfer Law in itself is legitimate and understandable in the Rwandan context. Many countries have criminalised the denial of the Holocaust, while others prohibit hate speech in general.[138] In the present case, it is argued that an expansive interpretation and application of the prohibition of "genocidal ideology" will lead to the Defence witnesses not being willing to testify out of fear of being accused of harbouring this ideology. The Chamber notes that Rwanda acknowledges that there may be ambiguity in the law on genocidal ideology and that the law is being evaluated. However, Rwanda is unclear on how long this evaluation would take. This is unsatisfactory. The Chamber, while noting the initiative that Rwanda has taken to address the criticism against the law, requests that Rwanda inform the ICTR President about the studies carried out on the law and any measures taken to amend it before the Accused's trial begins in Rwanda. The Chamber considers that Article 13 of the Transfer Law, as amended, provides immunity to defence witnesses and defence counsel for anything said or done in the course of a trial.

96. The Tribunal has taken judicial notice that genocide occurred in Rwanda in 1994. In the course of trials before this Tribunal some accused and witnesses have made statements amounting to a denial of that genocide. The Chambers emphasizes and expects that if in the course of the trial in Rwanda the Accused, his counsel or any witnesses on his behalf makes a statement amounting to a denial of the genocide, he or she shall not be prosecuted for contempt or perjury.

8.1.6.6. Witnesses Within Rwanda

97. The Chamber notes Rwanda's argument and the KBA submission that numerous genocide trials have been held in Rwanda and that defence witnesses have participated in these cases without issue. The Chamber observes that, based on the information provided by Rwanda on the 36 genocide trials in Rwanda, the number of defence witnesses was fewer than the

[134] GoR Brief, para. 61.
[135] GoR Brief, para. 61.
[136] Response, paras. 124-125
[137] Law No. 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology; Law No. 33 bis/2003 of 06/09/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes; Law No. 47/2001 of 18/12/2001 On Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism.
[138] Article 10, European Convention on Human Rights ("ECHR"); Article 19, ICCPR. As pointed out by the Prosecution (Response to HRW, para. 29), it follows from human rights case law emanating from the ECHR and ICCPR that prohibiting negation or revision of the Holocaust does not constitute a violation of freedom of expression.

number of prosecution witnesses.[139] It is the opinion of the Chamber that this alone does not indicate the lack of fair trial for the Accused.

98. The GoR report on the 36 genocide cases also indicates that in a few of these cases, the accused opted to represent themselves.[140] This could be an explanation for the low number of defence witnesses secured to testify since such self-representing accused may have lacked the skills and resources required to secure, prepare and present witnesses in their defence.

99. The Defence cites instances during the past two years in which the Tribunal's defence counsel have complained that their witnesses were unwilling to testify because of fears of intimidation or harassment.[141] HRW also refers to incidents in which defence witnesses in Rwanda have been jailed or victimised before or after testifying.[142] Furthermore, many witnesses fear their appearance will lead to an indictment against them.[143] Defence witnesses may fear being accused of "genocidal ideology", a crime referred to in the Rwandan Constitution but undefined under Rwandan law. It is the Chamber's view that the concerns of witnesses within Rwanda regarding their safety have been addressed by changes to the law over the past two years.[144] The Chamber expects that Rwanda will ensure the safety of both prosecution and defence witnesses in a transfer case as has been stipulated in the new and amended laws.

100. This Chamber notes the previous findings by the Appeals Chamber in Rule 11 *bis* decisions that witnesses in Rwanda may be unwilling to testify for the defence due to their fear that they may face serious consequences, including prosecution, threats, harassment, torture, arrest or even murder.[145] The Chamber notes that in the 36 genocide cases tried in the High Court of Rwanda, the defence in most cases was able to secure the attendance of witnesses even without the safeguards available to cases transferred from the Tribunal. It is logical to assume that with the amendments made to the laws regarding witness immunity, the creation of a new witness protection programme, and the safeguards imposed by the Chamber on Rwanda, the Appeals Chamber's finding that witnesses may be unwilling to testify is no longer a compelling reason for denying referral.

101. Although the concerns expressed by the Defence are materially the same as those expressed by defence teams in past referral cases, Rwanda has shown the willingness and the capacity to change by amending its relevant laws over the past two years. The amendment to Article 13 of the Transfer Law to include immunity for statements by witnesses at trial is a step towards allaying the fears of witnesses. This is complemented by the improvements made to the Rwandan Victims and Witnesses Support Unit ("VWSU" which is sometimes also referred to as "WVSU") and the creation of the Witness Protection Unit ("WPU") under the Judiciary as discussed below.

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[139] GoR Response, paras. 8-30.
[140] GoR Response, paras. 8, 14, 31, (cases of Jean Baptiste Bogera, Anastase Ntakirende, Faustin Munyurabatware).
[141] Response, paras. 91-96.
[142] HWR Brief, paras. 33-34.
[143] HRW Brief, paras. 30-40.
[144] Article 13 of the Amended Transfer Law.
[145] *Kanyarukiga* Appeals Decision, para. 33.

102. The Chamber notes that in cases before the Tribunal some witnesses are still afraid of testifying despite the provision of multiple safeguards. The Chamber is therefore satisfied that Rwanda has taken adequate steps to amend its laws in this regard. The full implementation of these additional measures mandated by this Chamber would likely guarantee a fair trial for the Accused.

103. The Chamber further notes that the subjective fear of witnesses to testify cannot be addressed without implementing adequate legal safeguards to allay such fears. Where laws can neutralise the reasonable fears of individuals, the Chamber is of the opinion that they must be implemented and revised as needed. It is the considered opinion of this Chamber that it is impossible to evaluate the effectiveness of a reasonable law in the abstract. Accordingly, the relevant Rwandan laws must be given a chance to operate before being held to be defective.

104. Moreover, the Chamber notes that witnesses who reside in Rwanda are obligated to appear to give evidence when summoned. Efforts to secure the testimony of witnesses by either party may be enforced by an order for compulsory apprehension of a witness pursuant to Article 50 of the RCCP.[146] This national direct enforcement mechanism exists without regard to whether the witness is at risk of arrest for personal criminal activity. To the extent that defence witnesses residing in Rwanda may fail to appear because of a perceived risk of arrest, the issue may be entirely hypothetical. The Defence merely contends that potential witnesses may be reluctant to give evidence if called. In any event, any disadvantage to the Accused by virtue of this national procedure, which reflects a generally accepted direct enforcement mechanism for ensuring the presence at trial of any witness, cannot be properly regarded as prejudicial to the right to a fair trial.

8.1.6.7. Witnesses Outside Rwanda

105. In addition to the affidavits of the potential Defence witnesses, HRW states that it conducted research into the willingness of Rwandans living abroad to testify in light of the new legislative framework and found that many were distrustful of GoR and did not place faith in the protection offered by the law, making it unlikely that they would return to Rwanda to testify. HRW further submits that the situation has not changed since 2008.[147]

106. The Chamber observes that based on the information provided by Rwanda on the 36 genocide trials in the High Court of Rwanda, GoR was unable to say with certainty if any defence witnesses travelled from abroad to testify.[148] In *Hategekimana*, the Appeals Chamber concluded that "the Trial Chamber did not err in accepting Hategekimana's assertion that most of his witnesses reside outside Rwanda, as this is usual for cases before the Tribunal."[149] This Chamber finds no reason to doubt the Defence contention that the vast majority of its proposed witnesses in this case live outside Rwanda. This fact, however, does not undermine the Accused's right to a fair trial. The efforts made by Rwanda to secure witness testimony include

[146] Article 50 of the RCCP.
[147] HRW Brief, paras. 28, 40.
[148] GoR Response, para. 44.
[149] *Hategekimana* Appeal Decision, para. 34 citing *Munyakazi* Appeal Decision, para. 40; *Kanyarukiga* Appeal Decision, para. 31.

video-link facilities which have been set up and used at the Supreme Court, as well as several alternative methods.

107. The Chamber also recalls the finding of the *Hategekimana* Referral Chamber that "the Defence claims and ICTR experience confirms that many Defence witnesses residing outside Rwanda have claimed refugee status, and thus there may be legal obstacles preventing them from returning to Rwanda."[150]

108. The Chamber notes that Rwanda has taken specific and concrete steps to amend the law to secure the attendance or evidence of witnesses from abroad. Specifically, the Chamber recalls the Appeals Chamber finding that Rwanda has several mutual assistance agreements with States in the region and elsewhere in Africa, and that these agreements have been arranged with other States as part of Rwanda's cooperation with the Tribunal and for the conduct of its domestic trials.

8.1.6.8. Alternative Means of Testifying

109. The Defence states that all of its 41 witnesses living abroad have indicated that they were not prepared to travel to Rwanda to testify or to appear before any Rwandan judge who might travel to their countries of residence.[151] The Chamber notes that following the 2009 amendments to Article 14 of the Transfer Law, witnesses may now testify in three more ways in addition to providing *viva voce* testimony before the relevant High Court in Rwanda: via deposition in Rwanda; via video-link taken before a judge at trial, or in a foreign jurisdiction; or via a judge sitting in a foreign jurisdiction.[152]

110. At the outset, the Chamber observes the use of any of these methods is not a right guaranteed to the Accused (or to any other party). These procedures are intended as an exception to the general rule of *viva voce* testimony before the court, and whether to provide for any of these measures remains within the sole discretion of the trial court.[153] The law is silent as to whether or not the adverse party can make submissions on such a request and does not establish any criteria that may guide a judge in his or her decision when facing such a request. The law also does not stipulate whether the decision on such a request is subject to appeal, and if so, under which conditions.

111. The Defence submits that in the present case the reasons put forward by Defence witnesses in their affidavits may well be rejected by a Rwandan judge. For instance, it doubts that a judge would consider valid a witness' fear for his or her security if brought to Rwanda for testimony, the fact that his or testimony would incriminate the Rwandan Patriotic Front ("RPF"), or that he or she does not trust the Rwandan judiciary. Although the doubts expressed by the Defence are relevant the Chamber concludes that they are speculative at this juncture.

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[150] *Prosecution v. Hategekimana,* Case No. ICTR-00-55B-R11*bis,* Decision on Prosecutor's Request for the Referral of the Case of Idelphone Hategekimana to Rwanda (TC), 19 June 2008 ("*Hategekimana* Trial Decision"), para. 68.
[151] Response, paras. 115.
[152] Article 14 *bis* of the Amended Transfer Law.
[153] Article 14 *bis* of the Amended Transfer Law (stating that alternatives are available "where a witness is unable or for good reason unwilling to physically appear before the High Court to give testimony").

112. With respect to the prospect that witnesses living abroad could testify by video-link, the Appeals Chamber has previously held that "the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of equality of arms if the majority of defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person."[154] However, with regards to the witnesses who live outside Rwanda, this Chamber notes that, in addition to the possibility of hearing testimony via video-link, Article 14 of the amended Transfer Law allows testimony to be provided a) via deposition in Rwanda or in a foreign jurisdiction, taken by a Presiding Officer, Magistrate, or other judicial officer appointed for that purpose; or b) before a judge sitting in a foreign jurisdiction for the purpose of recording such testimony.

113. The Defence argues that for its 41 witnesses residing abroad, a judge sitting on the case would have to travel to nine different African countries to receive their testimonies meaning that the Accused would be absent for almost the entirety of his Defence case. The Defence recalls the right of the Accused to be "tried in his presence," as stipulated in Article 14 (3) (d) of ICCPR.[155] The Chamber notes the amendments to Article 14 of the Transfer Law which provide the option of hearing evidence from witnesses located outside Rwanda in order to ensure their protection. Even in an instance where the Accused wishes to exercise his right to examine or cross-examine a witness who is testifying in another location, he could avail himself of the video-link facilities already in place. Thus, there is no apparent impediment to the presence of the Accused during the sections of the trial that would take place outside Rwanda. The Chamber finds that the Defence argument that the Accused would be absent for the majority of his Defence case untenable and that the possibility that witnesses will testify outside Rwanda cannot be regarded as prejudicial to the right to a fair trial.

114. Finally, Rwanda has expressed its intention to introduce new legislation that would allow the panel for any case referred for trial in Rwanda to include judges from foreign or international courts. The Chamber expects this to happen upon referral of this case and finds that this measure would further enhance the Accused's fair trial rights.[156]

8.2. **Rwanda's Witness Protection Programme**

8.2.1. *Prosecution Submissions*

115. The Prosecution submits that VWSU was created in 2006 to serve both prosecution and defence witnesses, and operates under the Office of the Prosecutor General. Its main objective is to assist and protect witnesses in order to ensure their physical and mental well-being before, during and after the trial. VWSU is staffed by sociologists, psychologists and lawyers. VWSU works alongside the courts, local authorities, national Police, Rwandan defence forces, and the national security services to enforce the protective measures for the witnesses as well as to address any threats against them. VWSU has access to all the relevant authorities to facilitate its

[154] *Munyakazi* Appeal Decision, para. 42; *Kanyarukiga* Appeal Decision, para. 33. *Hategekimana* Appeal Decision, para. 26.
[155] Response, para. 116.
[156] Reply, para. 85; Article 13, Draft Organic Law establishing the Organization, Functioning and Jurisdiction of the Supreme Court.

work, thereby enabling it to function competently and effectively in the protection of all witnesses.[157]

116. According to the statistics of the Office of the Prosecutor General of Rwanda, between 2006 and 2009, VWSU assisted 265 defence witnesses and 738 prosecution witnesses.[158] These figures further illustrate that VWSU has the capacity to deal with problems of witness protection.[159]

117. The Prosecution states that in addition to VWSU, which the ICTR Appeals Chamber has previously found inadequate, Rwanda has established a separate witness protection unit under the judiciary, the aforementioned WPU. In doing so, Rwanda has addressed the remaining concern expressed previously in Rule 11 *bis* Decisions that witnesses, especially defence witnesses, may be afraid to avail themselves of the services of VWSU, as it is administered by the Office of the Prosecutor General. Such witnesses will now be able to access the protection service managed by the Rwandan judiciary.[160]

118. According to the Prosecution, WPU was created on 15 December 2008. The President of the Rwandan Supreme Court issued an ordinance requiring that a witness protection unit be created in the Registries of the Supreme and High Courts in order to protect the life and security of witnesses pursuant to Article 14 of the Transfer Law. Each WPU is administered by one or more Registrars under the direction of the Chief Registrar. Its mission is to receive, listen to and guide witnesses, as well as to record their requests. WPU informs witnesses about their rights and the ways to exercise them, and it also ensures that all protective measures issued by the courts are implemented. Defence witnesses will have a choice of which witness protection service to utilise, and will have adequate and effective protection regardless of the unit they choose.[161]

119. The Prosecution submits that the witness protection programme is being continually strengthened to address the security needs of witnesses. The capacity of the staff running both units, namely VWSU and WPU, has been enhanced through training programmes, including ongoing trainings conducted by the Tribunal's Registry.[162] More generally, the creation and enhancement of the two witness protection services have addressed the concerns expressed by previous Referral Chambers, especially regarding the possible fear of the defence witnesses to avail themselves of the services of a witness protection programme.[163]

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[157] Motion, para. 42.
[158] Document on VWSU, p. 6. Nikuze Donatien, Acting Coordinator, VWSU, Document on Victim and Witness Support Unit.
[159] Motion, paras. 43. Annex I.
[160] Motion, paras. 39-41.
[161] Motion, paras. 44-45, Annex J (*Ordonnance No. 001/2008 du 15 décembre 2008 Président de la Cour Suprême portant instruction relative à la protection des témoins dans le cadre du renvoi d'affaires à la République du Rwanda par Le Tribunal Pénal International Pour Le Rwanda (TPIR) et par d'autres Etats*).
[162] Motion, para. 46, Annexes K and L.
[163] Motion, paras. 46-47.

8.2.2. *Rwanda Submissions*

120. Rwanda states that it has two state-of-the-art programmes for the protection of witnesses and victims. VWSU, which was created in 2006, has over four years of practical experience. Its staff members are continuously participating in further training sessions.[164] WPU is a new unit, created in response to concerns expressed by prior Referral Chambers that defence witnesses might be reluctant to avail themselves of VWSU. WPU is not yet operational because no case has yet been referred to Rwanda by this Tribunal.[165]

8.2.3. *Defence Submissions*

121. The Defence highlights Rwanda's acknowledgement that WPU is not yet fully operational because no cases have been transferred so far. Moreover, the Defence argues that *Ordonnance No. 001/2008* issued by the President of the Supreme Court does not create WPU within the High Court and the Supreme Court. Rather, it instructs these two institutions to create such a service themselves:

> *La Haute Cour, et la Cour Suprême au niveau d'appel, doivent créer au sein de leurs greffes respectifs un service de protection des témoins, assuré par un ou plusieurs greffiers spécialement y affectés, sous la direction du Greffier en chef.*[166]

122. The Defence contends that the modalities and functions of WPU are not clear.[167]

123. The Defence recalls that in previous decisions, while the Appeals Chamber agreed "with the Trial Chamber's conclusion that the fact that the Rwandan witness protection service is administered by the Office of the Prosecutor General and the fact that threats of harassment are reported to the police does not necessarily render it inadequate", it nevertheless found that "based on the information before it, the Trial Chamber did not err in finding that witnesses would be afraid to avail themselves of its services for these reasons."[168] The situation prevailing at the time these decisions were handed down in 2008 and 2009 has not changed.[169]

124. Referring to its potential witnesses, the Defence recalls that all have been categorical that they do not want to have their identities disclosed to any Rwandan authority.[170] The Defence contends that the Prosecution's report by Nikuze Donatien, Acting Director of VWSU, provides figures of the number of witnesses who have travelled to and from Rwanda to testify in trials abroad and confirms the Defence position that it is difficult to secure the testimony of defence witnesses in the environment prevailing in Rwanda.[171]

125. The Defence argues that neither the Prosecution nor Rwanda has clearly indicated the distinctions, if any, between VWSU and WPU. The Defence is of the view that in practice both

[164] GoR Brief, para.65-77.
[165] GoR Brief, para.82-85.
[166] Motion, Annex J.
[167] Response, para. 138-141.
[168] *Kanyarukiga* Appeal Decision, para. 27; *Munyakazi* Appeal Decision, para. 38.
[169] Response, paras. 143-145.
[170] Response, para. 145.
[171] Response, paras. 97-100; Motion, Annex I; GoR Brief, Annex C.

services are in fact a single unit that bears the name VWSU or WPU depending on the circumstances.[172] WPU entered into force on 10 January 2010 and Section 4, Article 73 of its provisions stipulates the requirements that must be fulfilled by a witness or a victim who requests protection from WPU.[173] The Defence submits that Defence witnesses may be unable to fulfil these requirements, in particular the requirement that the applicant must make his or her request for assistance to the Prosecutor General or to the Chief Prosecutor. Furthermore, the procedure is lengthy and bureaucratic, and assistance can be denied.[174]

8.2.4. *Human Rights Watch Submissions*

126. HRW submits that VWSU has been active, has made good use of its financial and material capacity, and has taken important steps to raise awareness of witness intimidation in Rwanda. However, as it remains part of the Office of the Prosecutor General, Defence witnesses may be wary of seeking assistance from this office. The statistics provided by the Office of the Prosecutor General show that between 2006 and 2009, VWSU assisted 265 Defence witnesses and 738 Prosecution witnesses. The discrepancy in the number of defence and prosecution witnesses seeking assistance may reflect the unwillingness of the defence witnesses to come forward to testify or seek protection from the Office of the Prosecutor General.[175]

127. With respect to WPU, HRW observes that it is not yet operational, and that both VWSU and WPU may be limited to administrative liaison functions with witnesses rather than provision of security.[176]

8.2.5. *Discussion*

128. As a preliminary matter, the Chamber notes that the parties do not dispute the fact that no judicial system can guarantee absolute witness protection.[177]

129. The Chamber notes that over the past two years the Rwandan VWSU has improved. It has seen an increase in staff size, funding and awareness raising programmes.[178] Prior Referral Chambers have held that while the funding and personnel issues faced by the witness protection service may suggest that it faces challenges, they do not show that it is ineffective.[179] This Chamber notes that while VWSU provides statistics on the number of witnesses it has assisted, it is not explicit with respect to the manner in which it addresses the security concerns of witnesses.

130. Both HRW and the Defence express concern that VWSU is administered by the Office of the Prosecutor General. However, the Appeals Chamber has previously held that "the fact that

[172] Response, para. 146-147.
[173] Response, paras. 148-150; GoR Brief, Annex F.
[174] Response, para. 151.
[175] Motion, paras. 46-47; GoR Brief, paras. 23-26; HRW Brief, paras. 63.
[176] HRW Brief, paras. 55-62.
[177] *Prosecutor v. Janković*, Case No. IT-96-23-2-AR11bis.2, Decision on Rule 11 *bis* Referral (AC), 15 November 2005, para. 49. *Kanyarukiga* Trial Decision, para. 69; *Gatete* Trial Decision, para. 60; *Hategekimana* Trial Decision, para. 64*; Munyakazi* Appeal Decision, para. 38.
[178] HRW Brief, paras. 51-53
[179] *Hategekimana* Trial Decision, para. 64.

the Rwandan witness protection service is administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render it inadequate. […] witnesses would be afraid to avail themselves of its services for these reasons."[180]

131. This Chamber observes that Rwanda has taken steps towards the creation of an additional witness protection unit under the auspices of the judiciary, WPU. The Chamber observes that this step may go some distance in guaranteeing that witness safety will be monitored directly by the Rwandan judiciary. The Chamber is mindful that the Defence witnesses would have to apply to the Office of the Prosecutor general for assistance of WPU but notes that the protection service under WPU would be ultimately administered by the Judiciary.[181] Nevertheless, the Chamber is of the view that as WPU has only been established to assist witnesses in transferred cases, of which there have been none, the Chamber cannot evaluate its terms of reference or its effectiveness. The Prosecution submits that "the mission of the WPU is to receive, listen to and guide witnesses, as well as to record their requests. The WPU informs witnesses about their rights and the ways to exercise them, and it also ensures that all protective measures issued by the courts are implemented."[182] WPU, in the Chamber's opinion and expectation, should remain under the judiciary as this would provide a guarantee that the witness's safety would be monitored directly by the judges.

132. Moreover, Rule 11 *bis* (D) (ii) provides that the Referral Chamber may order existing protective measures for certain witnesses or victims to remain in force. In addition, in the event of referral, external monitors would oversee these witness protection programmes. The Referral Chamber would expect that the ICTR appointed monitors meet with Defence counsel and WPU on a regular basis and address the concerns raised in their regular reports to this Tribunal. The Chamber concludes that the potential reluctance of witnesses to avail the services of WPU is speculative at this time. The Chamber is of the opinion that the issue of protective measures for Defence witnesses is *prima facie* guaranteed ensuring a likely fair trial of the Accused.

9. RIGHT TO AN EFFECTIVE DEFENCE

9.1. Competence, Capacity, Availability

133. The Prosecution asserts that the legal framework of Rwanda guarantees the right of an accused to an effective defence. The KBA submits that the Accused will be able to secure legal representation by competent and experienced lawyers even if he is indigent and applies for legal aid. Moreover, all members of the KBA are able to work "freely and under good conditions".[183]

134. The Defence enumerates a number of hurdles to the realisation of the right to an effective defence, and in particular: (1) adequate defence staff and resources may be unavailable to the Accused; (2) the legal aid programme will not provide sufficient funding; and (3) defence

[180] *Munyakazi* Trial Decision, para. 38, *Kanyarukiga* Appeal Decision, para. 27.
[181] GoR, Annex F (Directive No 01/2011 of the Secretary General of 10 January 2011. Regarding the functioning of the Office of the Prosecutor General (Unofficial Defence Translation), at Registry Pages 2546-2545; Article 73 of Services to Witnesses and Victims (Unofficial Defence Translation)).
[182] Motion, para. 45.
[183] KBA Brief, para. 3.

counsel and staff continue to face precarious working conditions in Rwanda. HRW, ICDAA and IADL support the Defence position.

9.1.1. *Applicable Law*

135. Article 14 (3) of ICCPR recognises and protects the right to a fair trial, including the right of accused persons to defend themselves through the counsel of their choice and the right to have adequate time and facilities for the preparation of their defence.[184] This principle is enshrined in the Rwandan Constitution and under various provisions of the Transfer Law. Article 18 (3) of the Constitution states that "the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision-making organs".[185] Article 13 of the Transfer Law mirrors the fair trial guarantees under ICCPR and extends the right to a counsel of choice to an accused person in a case transferred by the Tribunal. The right to legal representation is still observed where an accused has no means to pay.[186] The Transfer Law also extends protection to counsel working on transferred cases. Article 15 of the Transfer Law provides that defence counsel will have the right to enter Rwanda, move freely, and not be subject to search, seizure, arrest or detention in the performance of their legal duties. The security and protection of defence counsel and their support staff is also guaranteed under Article 15. Moreover, the 2009 amendment to Article 13 of the Transfer Law provides immunity "for anything said or done in the course of a trial" with the exception of contempt of court and perjury.[187] This offers broad protections to counsel working on transferred cases.

9.1.2. *Availability of Counsel*

136. The Prosecution refers to Articles 13 (6) and 15 of the Transfer Law which entitle the Accused to counsel of his choice and guarantee that the Defence team will not be prevented from carrying out its work effectively. Article 64 of the RCCP further entitles the defence counsel to access the Prosecution's file and to communicate with the accused.

137. Both the KBA and the Prosecution highlight the competence and adequacy of the Rwandan Bar. The KBA has 686 members. Competent national lawyers are both willing and able to represent effectively any accused transferred to Rwanda. In addition, Rwanda has extended bar membership to foreign lawyers over the past four years, meaning that an accused may also be represented by foreign lawyers admitted to practice before the Rwandan courts, including within the context of Rwanda's legal aid programme.[188] Rwanda further asserts that approximately 237 advocates admitted to the Rwandan Bar have "more than 5 years experience, including in the defence of genocide cases."[189]

138. The Defence notes that both the ICTY and this Tribunal require that defence attorneys have at least seven years of experience, but Rwanda has adopted a lower standard. The Defence

[184] Rwanda acceded to ICCPR on 16 April 1975. Status of Ratification, Reservations and Declarations, ICCPR.
[185] Constitution of Rwanda, Article 18. Article 19 also provides: "Every person accused of a crime shall be presumed innocent until his or her guilty has been conclusively proved in accordance with the law in a public and fair hearing in which all the necessary guarantees for defence have been made available."
[186] Article 13 (6) of the Transfer Law.
[187] Motion, Annex D (Article 2 of the Amended Transfer Law).
[188] KBA Brief, paras. 13-20.
[189] GoR Brief, paras. 8-16. GoR Brief, Annex A, para. 2.

and HRW submit that most lawyers might not be willing to represent the Accused unless they receive adequate compensation. Moreover, foreign lawyers may be reticent to represent persons transferred to Rwanda following the arrest in May 2010 of Peter Erlinder, a lawyer for opposition leader Victoire Ingabire. Finally, the Defence suggests that defence lawyers may be reluctant to represent an accused, such as Uwinkindi, who wishes to put forward a politically-charged line of defence.[190]

139. The Chamber notes that the admission of foreign attorneys to the Rwandan Bar does not in itself create a foolproof safeguard for the Accused, who is indigent and may not be able to afford foreign counsel.[191] In considering this issue, the Chamber is of the view that the most important factor is Article 13 (6) of the Transfer Law which entitles an accused to counsel of his choice or to legal representation, should he not have the means to pay for representation. The KBA has made the case that there are significant numbers of experienced and competent lawyers among its members and that its members may not refuse an assignment to provide legal aid. While the Chamber welcomes Rwanda's decision to permit foreign lawyers to practice in its jurisdiction, it is not for the Referral Chamber to determine whether Rwandan or foreign lawyers would most effectively represent the Accused. The Chamber accepts that the level of funding for the Defence may be lower than at this Tribunal. However, Rule 11 *bis* does not require an objective level of funding; it requires that the Accused be afforded equality of arms. The Chamber is satisfied that this requirement has been met. Furthermore, the Chamber does not require proof to support Rwanda's submission that sufficient funds are available to try the case properly. This Tribunal has a mechanism that provides for the revocation of the referral should Rwanda fail to ensure the fair trial rights of the Accused and guarantee the equality of arms between the parties.

140. It follows from the information provided to the Chamber that many members of the Rwandan Bar have more than five years experience. In addition, five lawyers are currently enrolled in the Tribunal's list of potential defence counsel. In line with decisions in previous Rule 11 *bis* cases,[192] Rwandan lawyers are obliged to provide *pro bono* services to indigent persons.[193] As such, the Chamber is confident that the Accused will have counsel made available to him in Rwanda.

9.1.3. *Legal Aid*

141. The Prosecution and Rwanda submit that Article 13 (6) of the Transfer Law provides a legal framework guaranteeing the right to legal aid for an indigent accused. Notwithstanding the guarantees in the current legal framework, Rwanda has created several legal aid programmes and has made a budgetary provision of 100 million Rwandan Francs to fund legal aid for transferred

[190] Response, paras. 320-340; HRW Brief, paras. 110-112.
[191] Motion, Annex T (Law on Rwandan Bar), Article 6.
[192] *Kanyarukiga* Trial Decision, para. 58; *Gatete* Trial Decision, para. 49; *Hategekimana* Trial Decision, para. 55.
[193] Motion, Annex T (Law on Rwandan Bar). Articles 56 and 60 do not promulgate a legal obligation for lawyers registered with the Rwandan Bar to provide *pro bono* legal aid, but merely a prohibition to refuse or neglect the defence of an accused where they have been appointed to do so (Article 56) as well as an affirmation that the Law Society Council provide for the assistance of persons who have insufficient financial resources by establishing a consultation and defence bureau (Article 60).

cases.[194] The KBA further submits that legal aid is functioning in practice and that other initiatives supplement the provision of legal aid services funded by GoR.[195]

142. The Defence argues that it remains unclear from the Prosecution and Rwanda's submissions whether and under what conditions the Accused would be granted the status of indigence. Even if the Accused is declared indigent, the Chamber has not been provided with any information to assess whether Rwanda's legal aid system would be able, in practice, to provide appropriate support to the Accused.[196] HRW submits that the Rwandan legal system may still be limited in its ability to provide the Accused with counsel or financial support for representation.[197]

143. At the outset, the Chamber addresses the Defence submission that the Accused, who has already been found to be indigent by the Tribunal, will not necessarily receive the same treatment once transferred to Rwanda. The Chamber believes that the Accused will also be found indigent in Rwanda, absent the discovery of new evidence.

144. This Chamber observes that in the Rule 11 *bis* decisions in *Gatete* and *Kanyarukiga*, the Referral Chambers asserted that they were not in a position to inquire into the sufficiency of available funds.[198] Both cited the jurisprudence in *Stanković* and concluded that "there is no obligation to establish in detail the sufficiency of the funds available as a precondition for referral."[199] This Chamber does not share the Defence's position that it should verify availability of funds for legal aid at the domestic level. First, the Chamber assumes that the Prosecution and Rwanda have provided sufficient budgetary allocation for legal aid to the Accused in good faith. Second, the Chamber has already stated that it will not lightly intervene in the domestic jurisdiction of Rwanda and considers that it is not obliged to scrutinise the Rwandan budget or to verify its disbursal.

145. The Chamber is also satisfied that, as submitted by the KBA, other initiatives supplement the legal aid programme funded by GoR, including international non-governmental organisations such as *Avocats sans Frontières*.[200]

146. Accordingly, the Chamber is satisfied that legal aid will be available if the Accused is transferred. Should there be future financial constraints, the existence of monitors and the possibility of the revocation of the Accused's referral should address any failure by the Rwandan authorities to make counsel available or disburse funds for legal aid and ensure the Accused's fair trial rights.[201]

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[194] GoR Brief, para. 24; Rule 11 *bis* Motion, paras. 103-104.
[195] KBA Brief, paras. 21-36.
[196] Response, paras. 341-364.
[197] HRW Brief, paras. 110-112. The Chamber notes that Annex C of the Prosecution's Reply contains the 2010 Rwandan Joint Governance Assessment Report which highlights the lack of a sufficient number of lawyers and the challenges of accessing legal aid centres in Rwanda, pp. 36-37.
[198] *Kanyarukiga* Trial Decision, para. 57; *Gatete* Trial Decision, para. 48.
[199] *Stanković* Appeal Decision, para. 21.
[200] KBA Brief, paras. 33-36.
[201] *Hategekimana* Trial Decision, para. 55; *Stanković* Appeal Decision, paras. 50-52.

9.2. **Working Conditions**

147. The Prosecution recalls previous Rule 11 *bis* decisions by the Referral and Appeals Chambers that found that the difficulties by the defence in obtaining documents and visiting detainees, when taken together with other factors, could adversely impact an accused's fair trial rights.[202] Nonetheless, the Prosecution submits that these obstacles have been sufficiently addressed, and, should any problems occur, both the Transfer Law and the monitoring and revocation mechanisms create safeguards to ensure that the Accused is afforded a fair trial. Furthermore, the Prosecution mentions several cases—*Munyakazi*, *Ntawukulilyayo*, *Setako*, *Nchamihigo*, *Renzaho*, *Rukundo*, *Zigiranyirazo*, *Bikindi*, and *Muhimana*—in which the Defence did not alert the Tribunal's Chambers to the non-cooperation or other impediments in obtaining assistance from Rwanda. The Prosecution also points to the large number of Rwandese nationals who are assigned to defence teams at the Tribunal and presently reside in Rwanda. [203]

148. Rwanda emphasises that immunities provided to the Defence team members under the Transfer Law protect them from prosecution under Article 13 of the Rwandan Constitution, which prohibits revisionism.[204] Rwanda further submits that in genocide cases, members of the KBA have been able to present the fullest defence possible without interference.[205]

149. However, the Defence submits that defence teams for individuals accused of committing genocide are mostly unwelcome in Rwanda. It argues that members of the Tribunal's defence teams have been harassed or imprisoned in Rwanda, most notably defence counsel Erlinder and defence investigator Nshogoza. The Defence adds that should the Accused be transferred to Rwanda, his counsel will not be permitted to conduct the line of Defence instructed by the Accused.[206]

150. In 2008, HRW pointed out that the Rwandan legal system may be limited in its ability to facilitate travel and investigations for defence teams. In its *amicus* Brief, HRW submitted that Rwandan and ICTR defence lawyers have faced difficulties while trying to obtain documents or see witnesses in Rwanda.[207] Both ICDAA and IADL emphasise the poor working conditions of defence teams in Rwanda. IADL is of the view that "there is a history of interference with, and danger to, defence teams working in Rwanda". ICDAA points to a "series of highly disturbing cases of intimidation and interference". The *amici* reminds the Chamber of the proceedings against the defence investigator Nshogoza and the fact that criminal proceedings remain pending in Rwanda for charges on which he has been acquitted by the Tribunal. The *amici* further recall other cases, notably the arrest and detention of Théogène Muhayeyezu and Erlinder. Noting these arrests, ICDAA and IADL argue that notwithstanding the immunity granted under Article 13 of the Transfer Law, Rwandan courts will still be able to curtail certain lines of defence

[202] *Kanyarukiga* Trial Decision, para. 62; *Gatete* Trial Decision, para. 53; *Kanyarukiga* Appeal Decision, paras. 21-22.
[203] Motion, paras. 63-70.
[204] GoR Brief, paras. 46-63.
[205] KBA Brief, paras. 37-48.
[206] Response, paras. 152-164.
[207] HRW Brief, para. 113.

through contempt proceedings. ICDAA also points to an "unnecessary intrusive government procedure" imposed on defence teams seeking to obtain Gacaca documents.[208]

151. The Prosecution replies that Rwanda has demonstrated its cooperation with defence teams from the Tribunal and other jurisdictions, and that the Transfer Law provides defence teams and witnesses with broad immunity from arrest and prosecution. It submits that the Defence's allegations of interference with defence teams lack merit.[209]

152. The Referral Chamber recognises the continued cooperation of the Rwandan government with the Tribunal.[210] The cooperation of the Rwandan judicial authorities does not, however, prevent the Chamber from addressing the submissions on the working conditions of the defence.

9.2.1. *Legal Framework*

153. According to Article 15 of the Transfer Law, the Defence will be entitled to security and the right to move into and within Rwanda, and to carry out their functions without search, seizure or deprivation of liberty. According to Article 2 of the Transfer Law, apart from contempt and perjury "no person shall be criminally liable for anything said or done in the course of a trial."

9.2.2. *Immunities and Work of Tribunal Defence Teams in Rwanda*

154. Having considered the legal framework, the Chamber will focus on cases of particular relevance. The arrest and detention of defence counsel Erlinder has already been addressed in this Decision. The Chamber, however, finds it appropriate to address the following observation of Rwanda: "there is not a single case where a defence team member or witness has been charged with a crime under Article 13 for acts or words relating to the investigation or trial of a criminal case". GoR adds that the arrest of Erlinder on charges of genocide denial is not an exception because Rwanda has terminated its legal proceedings against Erlinder.[211] This Chamber is of the view that immunity granted to defence counsel should prevent them from being prosecuted for statements linked to their activities as defence counsel.

155. The Chamber will now address the case of Léonidas Nshogoza, a defence investigator at the Tribunal. It is alleged that Nshogoza was subject to double jeopardy despite the protections in Rwanda's legal framework.[212] In 2007, Nshogoza was the subject of an ICTR investigation after allegations were made that he tried to bribe a prosecution witness to change his testimony. Despite the ongoing investigation and proceedings against Nshogoza at the Tribunal, the Tribunal's primacy pursuant to Article 8 (2) of the Statute and Nshogoza's functional immunity as a defence investigator, Nshogoza was arrested in Rwanda and detained for the remainder of the Defence case in *Rukundo* on which he was working at the time.[213] The Rwandan Prosecutor General informed the Tribunal that Nshogoza had been detained on "charges of having attempted

[208] ICDAA Brief, paras. 40-56; IADL Brief, Section G (stating "Defence counsel and teams cannot freely function and carry out their work in Rwanda, free from intimidation or threat in Rwanda").
[209] Reply, paras. 64-82.
[210] Motion, paras. 73-92; GoR Brief, paras. 117-128; Reply, paras. 67-68.
[211] GoR Brief, para. 55.
[212] Response, paras. 155-157. ICDAA Brief, paras. 52-56; HRW Brief, paras. 99-100; IADL Brief, para. G.2.
[213] Response, paras. 155-157; HRW Brief, paras. 99-100; ICDAA Brief, para. 53.

to convince a witness to change his statements in favour of the defendant, as well as spreading genocide ideology."[214]

156. On 30 November 2007, the Gasabo High Court heard evidence on the charges that Nshogoza had participated in active and passive corruption, bribed a witness, "grossly minimized the genocide" and destroyed evidence. That same day the Court stayed the proceedings in order to "obtain the rules governing investigators of the Tribunal in Arusha."[215] He was released on bail by the Gasabo High Court in January 2008.[216] In the meantime, the regional Gacaca District Coordinator instructed Gacaca judges to open a file against Nshogoza. That same month, the Gacaca judges charged him with the involvement in the deaths of four of his sisters' children and set a trial date for late January 2008. Three Gacaca Judges later told HRW that they were surprised by Nshogoza's case as all Gacaca trials in the *secteur* had officially been completed. Nshogoza was acquitted of these charges by the Gacaca courts later that month.[217] On 7 July 2009, Nshogoza was convicted by the ICTR for violating protective measures but acquitted of attempting to bribe witnesses. Despite this ruling by the Tribunal, he was summoned to appear before the Gasabo High Court on 12 November 2009 to answer the charges relating to the bribery and genocide minimization, on the same facts as heard by the Tribunal. According to information provided by the Defence, Nshogoza was summoned again to answer these charges on 4 August 2010, 4 January 2011, and 28 March 2011.[218]

157. The Prosecution, in its Reply, confirms the broad outlines of the proceedings against Nshogoza as described by the Defence and *amici*.[219] However, it argues that two years later Rwanda charged Nshogoza with bribing the witness to provide false testimony and the witness with accepting the bribe. Both offences are punishable under Articles 11 and 15 of Rwanda's Anti-Corruption Law.[220] In addition, as a result of his alleged fabrication of evidence, he was charged with minimization of genocide and destruction or concealment of the evidence of a crime.[221]

158. The Prosecution argues that "[i]t is absurd for the Defence and its *amici* to suggest that Rwanda's charges against these conspirators amount to harassment or retaliation of defence team members." It notes that the Tribunal itself implicated Nshogoza and the witness in an illicit scheme to pervert justice, resulting in Nshogoza's conviction for contempt and concludes that "[b]ribery to solicit false testimony is not and cannot be within the legitimate role of defence team members or witnesses appearing before the Tribunal." No immunity from prosecution for such an act exists under the Tribunal's rules.[222] Rwanda, for its part, need not stand idle and allow these corrupt acts—committed within its borders—to escape prosecution under its laws.[223]

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[214] HRW Brief, para. 99; ICDAA Brief, para. 54.
[215] Reply, Annex U.
[216] HRW Brief, para. 99.
[217] HRW Brief, para. 100.
[218] Response, para. 157.
[219] Reply, paras. 77-80.
[220] Reply, Annex O (filed *ex parte* because of order of protective measures for Witness GEX/A7).
[221] Reply, paras. 79-80.
[222] Article 29 (4) of the ICTR Statute (immunity for defence counsel extends only "as is necessary for the proper functioning of the Tribunal"). *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-A, Decision on Aloys

159. The Chamber concludes that while the evidence shows that defence teams at the Tribunal have been able to work in Rwanda, there is also evidence showing that they have encountered problems. Without going further into the factual circumstances of the various alleged incidents, the Chamber accepts that there have been instances of harassment, threats or even arrest of lawyers for accused charged with genocide. As stated by previous Referral Chambers and the Appeals Chamber, should such situations occur after transfer under Rule 11 *bis*, the Defence will have a legal basis for bringing the matter to the attention of the High Court or the Supreme Court. These Courts will be under a duty to investigate the matter and provide a remedy in order to ensure an efficient defence. If the Defence team is prevented from carrying out its work effectively, this will become a matter for the monitoring mechanism to address and may lead to the revocation of the referral.[224]

160. The Chamber does not consider that other alleged impediments faced by the Defence prevent transfer. The guarantees offered by the Transfer Law have not been tested yet. However, examples provided by the Defence and *amici* illustrate that the working conditions for the Defence may be difficult. The Chamber finds that those factors can have a chilling effect on potential Defence team members.[225]

161. The Chamber notes that ICDAA points to an "unnecessary intrusive government procedure" imposed on defence teams seeking to obtain Gacaca documents.[226] The Appeals Chamber has held that it is unclear how the mechanisms of monitoring and revocation under the Rules would constitute sufficient safeguards for the defence with regard to obtaining documents in a timely manner.[227] However, this Chamber finds that such incidents considered alone or in conjunction with factors that illustrate that the working conditions of the Defence may be difficult are not in themselves sufficient to prevent transfer under Rule 11 *bis*.

9.3. **Accused's Line of Defence**

9.3.1. *Parties' Submissions*

162. The Defence submits that the Accused wishes to argue in his defence that the mass graves found in July and August 1994 at Kayenzi Church were not filled with Tutsi bodies as a result of his actions, but that those graves were filled with Hutu victims of the RPF.[228] The Defence contends that running this particular line of defence is "simply untenable" in Rwanda's

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Ntabakuze's Motion for Injunctions against the Government of Rwanda regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, para. 46 (immunity applies only to the performance of their duties as defence counsel).
[223] Reply, paras. 79-80.
[224] *Gatete* Trial Decision, para. 52; *Hategekimana* Trial Decision, para. 60; *Kanyarukiga* Trial Decision, para. 61.
[225] IADL refers to the U.S Supreme Court case, *Dombrowski v. Pfister*, 38 U.S. 479 (1965) that gives a definition of the legal concept of the "chilling effect" as being the threat of possible prosecutions based on legal provisions using unduly vague, uncertain and broad. IADL argues that this definition applies to Article 13 of the Constitution criminalising "revisionism, negationism and trivialisation of genocide". It concludes that this provision present the possibility of prosecution for an indefinite period of time, chilling the Defence for any case transferred from the ICTR to Rwanda. IADL Brief section G "Defence counsel and teams cannot freely function and carry out their work in Rwanda, free from intimidation or threat in Rwanda", paras. 27-33.
[226] ICDAA Brief, paras. 40-56.
[227] *Kanyarukiga* Appeal Decision, para. 21.
[228] Response, para. 311, Response, Annex 26.

current political-legal climate.[229] It concludes that despite the immunity added to the Transfer Law in 2009 it is unlikely that a potential witness would be willing to present evidence on the role of the RPF in killings in Rwanda and that it is equally unlikely that any defence counsel in Rwanda would agree to represent a client putting forward such a politically sensitive defence.[230] Citing the arrest of Peter Erlinder, ICDAA argues that notwithstanding the immunity granted under Article 13 of the Transfer Law, Rwandan courts will still be able to curtail certain lines of defence by initiating contempt proceedings against lawyers or witnesses voicing politically sensitive views.[231]

163. In response, the Prosecution submits that the Rwandan judiciary should benefit from the same presumption of independence that attaches to the Tribunal's own judges. Referring to the Tribunal's jurisprudence, it contends that there is a presumption of impartiality that attaches to any judge of the Tribunal and that it cannot be rebutted easily.[232] The KBA submits that in genocide cases, its members have been able to present the "fullest defence possible" without interference from GoR, and that "there is nothing that prevents a defendant from mounting a defence that the crime he was charged with was committed by others including Tutsi, RPF soldiers [etc.]."[233]

164. The Defence points to the arrest of opposition leader Victoire Ingabire after she gave a speech claiming that Hutus were also killed in large numbers during the genocide. It also notes that Alison Des Forges was declared *persona non grata* in Rwanda in 2008 and refused access to the country for having accused the RPF of being responsible for the killings of tens of thousands of Hutus in 1994.[234]

165. The Kigali Bar Association asserts that its members have been able to offer clients in genocide cases the fullest defence possible. This Chamber observes that in its brief, the KBA has, at instances, made sweeping statements without referring to specific cases and persons. Its approach is no different on this particular matter.

9.3.2. *Discussion*

166. This Tribunal's jurisprudence has established that there exists a presumption of impartiality that attaches to a judge or a tribunal.[235] This presumption derives from the judges' oath of office and the qualifications for their appointment. In the absence of evidence to the contrary it must be assumed that the judges can "disabuse their minds of any irrelevant personal

[229] Response, paras. 301-312.
[230] Response, para. 312.
[231] ICDAA Brief, para. 51.
[232] Reply, para. 89 quoting: *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 48.
[233] KBA Brief, para. 41. Reference is also made to Article 44 of the Rwandan Code of Criminal Procedure.
[234] Response, paras. 309-310.
[235] *Nahimana* Appeal Judgement, para. 48; *Prosecutor v. Akayesu*, No. ICTR-96-4-A, Judgement, 1 June 2001, para. 91; *Prosecutor v. Seromba*, No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, 25 April 2006, para. 9; *Prosecutor v. Karemera*, No. ICTR-98-44-T, Decision by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para. 11; *Prosecutor v. Karemera et al*, No, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings (TC), 20 February 2009, para. 6.

beliefs or predispositions". However, absolute neutrality can hardly, if ever, be achieved.[236] In *Furundžija*, the ICTY Appeals Chamber held that partiality must be established on the basis of adequate and reliable evidence. In addition, there is a high threshold to reach in order to rebut the presumption of impartiality.[237] This Chamber is therefore of the view that Rwandan judges, as professional judges, benefit from a presumption of independence and impartiality. This presumption cannot be lightly rebutted.

167. The Chamber recalls that the transfer, if granted, will be governed by the provisions of the Transfer Law. Article 13 of that Transfer Law was amended in 2009 and now explicitly states that "no person shall be criminally liable for anything said or done in the course of a trial." As this safeguard applies only to transferred cases, the examples cited by the Defence are inapposite. They took place within a different legal framework and are of a little assistance in assessing the likelihood that the Accused will be able to pursue his particular line of defence if the transfer motion were to be granted. As for the ICDAA contention that a Rwandan judge or chamber may circumvent the immunity provisions by resorting to the contempt exception, this Chamber is of the view that this argument is merely speculative at this juncture.

168. The Chamber reiterates and expects that if in the course of the trial in Rwanda the Accused, his counsel or any witnesses on his behalf make a statement amounting to a denial of the genocide, he or she shall not be prosecuted for contempt or perjury. The Chamber considers that this will allay the fears posed to potential witnesses by Article 13 of the Transfer Law.

169. In any event, the Chamber recalls the existence of the monitoring and revocation mechanisms. The Accused has made the line of defence he wishes to pursue at trial clear in a letter written by him to his current attorneys.[238] The monitor will be vested with the duty to evaluate the ability of the Accused to present this line of defence and report back to this Tribunal.

10. **JUDICIAL COMPETENCE, INDEPENDENCE AND IMPARTIALITY**

10.1. **Applicable International Law**

170. The Chamber's understanding of the parties' and *amici* submissions in general is as follows: the Prosecution, Rwanda and the KBA contend that Rwanda's judiciary is independent and impartial. The Defence argues that while judicial independence is guaranteed by law, the Rwandan courts are neither independent nor impartial in practice. HRW, ICDAA and IADL are of the view that judicial authorities operate in a deleterious political context and that Rwanda cannot guarantee that the Accused will be tried by an independent and impartial court.[239]

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[236] *Prosecutor v. Furundžija,* Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 203.
[237] *Furundžija* Appeal Judgement, para. 197.
[238] Response, paras. 306-307, Annex 26.
[239] Motion, paras. 9 (ii), (iv), 23-25, 72-91, 93, Annex N (Law on Statutes for Judges and other Judicial Personnel), Annex O (Law on Superior Council of the Judiciary), Annex P (Law on the Supreme Court), Annex Q (Law on Organisation, Functioning and Jurisdiction of Courts), Annex R (Law Establishing the Institute of Legal Practice and Development), Annex S (Code of Ethics); GoR Brief, paras. 2, 4, 110-132; Response, paras. 165-262; HRW

171. Article 20 of the Statute and Article 2 (1) of the 2009 Transfer Law guarantee the right to a fair and public hearing.[240] This right encompasses the right to be tried before an independent and impartial tribunal as reflected in major human rights instruments[241] and international criminal jurisprudence.[242] The criteria of independence and impartiality are distinct yet interrelated.

172. With respect to the independence of the judiciary, Article 14 (1) of ICCPR states: "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

173. With regard to the independence of judges, General Comment No. 32 of the HRC states that:

> The requirement of independence refers, in particular, to the procedure and qualification for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term in office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. […] States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political interference in their decision making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension, and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[243]

174. An independent tribunal must be independent of the country's executive, the legislature and the parties to a case.[244] The criteria encompassing judicial independence include: the manner

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Brief, paras. 13, 69, 75-96, 116 (b); ICDAA Brief, paras. 4, 8, 10-20; IADL Brief, part. B "Preliminary Points", para. 13, Part. H "Independence of the Judiciary"); Reply, paras. 19-66.

[240] Article 20 (2) of the Statute; Article 13 (1) of the Amended Transfer Law (stating that the accused shall be entitled to a fair and public hearing).

[241] Article 14 (1) of ICCPR (providing that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); Article 6 (1) of the ECHR (protecting the right to a fair trial and providing *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."); Article 7 (1) (d) of the ACHPR (providing that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal." The ACHRP "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" recognises "General Principles Applicable to All Legal Proceedings", among them a fair and public hearing, independent and impartial tribunal).

[242] *Furundžija* Appeal Judgement, para. 177, fn. 239 (holding that under Article 21 (2) of the Statute of the ICTY, which is identical to Article 20 (2) of the Statute of the ICTR, the accused is entitled to "a fair and public hearing" in the determination of the charges against him).

[243] General Comment No. 32, para. 19.

[244] *Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v. Italy*, App. No. 8603/79, European Court of Human Rights, 18 December 1980, p. 212.

in which members of the judiciary are appointed and their terms of office, as well as the existence of guarantees against outside pressures and the appearance of independence.[245]

175. The ICTY Appeals Chamber has defined impartiality of the judiciary as follows:

> A. A Judge is not impartial if it is shown that actual bias exists.
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> B. There is an unacceptable appearance of bias if:
>
> i. A Judge is a party to the case or has a financial or proprietary interest in the outcome of a case, or if the judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances a Judge's disqualification from the case is automatic; or
>
> ii. The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

176. In expanding on the second branch of the appearance of bias, the Appeals Chamber noted that the reasonable person must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that judges swear to uphold.[246]

10.2. **Rwandan Legal Framework**

10.2.1. *Competence and Qualification of Judges*

177. The Prosecution submits that the judges of the High Court and Supreme Court of Rwanda are qualified and experienced lawyers. It further indicates that Rwanda has engaged in programmes reinforcing the competencies and skills of the judges.[247] The Defence does not challenge the competence and qualification of the judges as such and acknowledges their experience in trying genocide cases.[248] In addition, HRW notes that "[t]here have been changes for the better in the Rwandan judicial system, now more efficient and staffed with more highly trained jurists than ten years ago."[249]

178. The Chamber is satisfied that the judges of the Supreme Court and the High Court of Rwanda are qualified and experienced and that they have the necessary skills to handle the case at issue if transferred.

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[245] The European Court of Human Rights has held that "in order to establish whether a tribunal can be considered as 'independent', regard must be had, *inter alia*, to the manner of the appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence." *Findlay v. United Kingdom*, No. 22107/93, European Court of Human Rights, para. 73; *Bryan v. United Kingdom*, 19178/91, European Court of Human Rights, para. 37.
[246] *Furundžija* Appeal Judgement, paras. 181-215.
[247] Motion, paras. 82-84.
[248] Motion, para. 8; GoR Brief, para. 117; Response, para. 201. The Defence however states that this expertise cannot to be confused with any indicia of independence or impartiality. Response, paras. 320-333. The Defence expresses concerns regarding the number of sufficiently experienced criminal defence lawyers in the area of genocide trials that would be willing to represent the Accused, should he be transferred. Reply, para. 19.
[249] HRW Brief, p. 107.

10.3. **Security of Tenure for Judges**

10.3.1. *Parties' and Amici Submissions*

179. Citing Articles 8 and 14 of the Law on the Supreme Court and Articles 24 and 79 of the Law on the Statutes for Judges and other Judicial Personnel, both the Prosecution and Rwanda submit that the Presidents and the Vice Presidents of those Courts are appointed for determinate periods and that other judges are afforded security of tenure for life or until the age of retirement.[250]

180. Referring to a 2010 amendment to Article 142 of the Rwandan Constitution, the Defence argues that apart from Court Presidents and Vice Presidents who continue to be appointed for determinate periods, the Constitution is now silent on the period of tenure for other judges of the High Court and Supreme Court. The Defence acknowledges that the judges of the Supreme Court hold a tenure of office "not of fixed duration" according to Article 8 of the Law on Supreme Court. "The situation is entirely opaque" regarding the tenure of all other judges, including those of the High Court.[251] ICDAA is also concerned with the independence of the Judges.[252]

10.3.2. *Discussion*

181. With respect to the tenure of Judges, this Chamber notes the following evolution of Rwandan Law on this issue. Article 142 of the 2003 Rwandan Constitution provided that all judges hold office for life.[253] In 2008, this Article was amended. The President and the Vice President of the Supreme Court are still appointed for an eight year non-renewable term, and the President and the Vice President of the High Court are still appointed for a five year term renewable once. However, all other judges are now appointed for a "determinate term of office that may be renewable by the High Council of the Judiciary in accordance with the provision of the law relating to their status, following their evaluation." Thus, following the 2008 amendment, the Rwandan Constitution no longer guarantees judicial tenure for life for Judges of the High and Supreme Courts.[254] The Constitution was again amended in 2010, but no further changes were made to Article 142.[255]

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[250] Motion, paras. 74, 79, Annex N (Law on Statutes for Judges and other Judicial Personnel), Annex P (Law on the Supreme Court); GoR Brief, para. 111.

[251] Response, paras. 182-188; Motion, Annex E (2008 amendment to the Constitution of the Republic of Rwanda), Chapter V.

[252] ICDAA Brief, 11 paras. 10-16.

[253] *Kanyarukiga* Trial Decision, para. 35; *Gatete* Trial Decision, para. 34; *Hategekimana* Trial Decision, para. 38. The Chamber recalls the wording of the 2003 Constitution, Article 142 "les juges nommés à titre définitifs sont inamovibles; ils ne peuvent être suspendus, muté, même en avancement, mis à la retraite ou démis de leurs fonctions sauf dans les cas prévus par la loi. Les juges ne sont soumis, dans l'exercice de leurs fonctions, qu'a l'autorité de la loi. La loi portant statut des juges et des agents de l'ordre judciaire détermine le salaire et autres avantages qui leurs sont aloués": ICDAA Brief, para. 10.

[254] Motion, Annex E (2008 amendment to the Constitution of the Republic of Rwanda). Article 142 provided that: "The tenure of office for heads of Courts and judges shall be determined as follows: The President and the Vice President of the Supreme Court shall be appointed for an eight (8) year term that is not renewable. The President of the High Court […] shall be appointed for a five (5) year term renewable only once. […] Other judges shall be appointed for a determinate term of office that may be renewalbe by the High Council of the Judiciary in accordance

182. Article 24 of the Law on the Statutes for Judges and other Judicial Personnel states that "Judges who have been confirmed in their posts are irremovable."[256] Article 8 of the of the Law Establishing the Organisation, Functioning and Jurisdiction of the Supreme Court states more explicitly that "[t]he tenure of office of Supreme Court judges is not of fixed duration".[257] However, both laws pre-date the 2008 amendment to Article 142 of the Constitution, and a State's Constitution always supersedes subordinate legislation. Finally, the Defence argues that Article 72 (1) of the Law on the Statute for Judges provides for the automatic dismissal of a judge in case of "professional incapability", and that it is unaware of any legislation defining "professional incapability.[258] The Chamber observes that neither the Prosecution nor Rwanda have referred to any legislation providing a definition of this term.

183. Given the 2008 amendment to Article 142 of the Constitution, this Chamber is of the view that Rwanda no longer ensures life tenure for judges.[259] However, it is too early to conclude whether this change in the Constitution will have any impact on the independence of the judiciary.

10.4. **Allegations of Corruption**

184. The Defence and HRW allege that there is widespread corruption in the Rwandan regular court system and refer to a recent public address by Aloysia Cyanzayire, the President of the Supreme Court, in which he described the justice sector as "very prone to corruption."[260] The Prosecution states that he made these comments as part of an effort to clamp down on corruption. The Prosecution further states that the allegations of corruption are "wildly exaggerated" and insists that Rwanda is the least corrupt country in East Africa.[261] The Ombudsman's report also suggests that Rwanda is taking significant steps to address corruption.[262]

185. The Chamber finds that the information before it does not permit it to conclude that the Rwandan judiciary is unduly corrupt. Allegations of corruption *per se*, without further details, do not amount to a denial of the Accused's fair trial rights upon transfer.

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with the provisions of the law relating to their status, following their evaluation. In exercise of their judicial functions, judges shall, at all times, follow the law and shall be independent from any power or authority. […] The status of judges and other judicial personnel shall be determined by law."

[255] Motion, Annex E (2010 amendment to the Constitution of the Republic of Rwanda). Article 32, reads as follows: The President and the Vice President of the Supreme Court shall be appointed for an eight (8) year term that is not renewable. The President of the High Court, the Vice President of the High Court […] shall be appointed for a five (5) year term renewable only once. In the exercice of their judicial functions, judges shall remain suject to the authority of the law and remain independent from any other power or authority. The code of ethics of judges shall be determined by specific laws. The law on the status of judges and the judicial personnel shall also regulate the term of office of heads of other courts."

[256] Motion, Annex N (Law on Statutes for Judges and other Judicial Personnel).

[257] Motion, Annex P (Law on the Supreme Court).

[258] The Chamber considers that Article 72 (1) that provide automatic dismissal in case of "professional incapability" is not to be confused with Article 72 (5) especially dealing with cases of "infirmity or sickness". Motion, Annex N (Law on Statutes for Judges and other Judicial Personnel).

[259] HRW Brief, para. 69.

[260] Response, paras. 213-215, HRW Brief, paras. 73-74.

[261] Reply, paras. 19-31.

[262] Reply, Annex B (Report of Activities Office of Ombudsman 2008), Annex C (2010 Joint Governance Assessment, Data Analysis Report). Press Conference, 8 February 2011 (http://www.orinfor.gov.rw/printmedia/topstory.php?id=2187).

10.5. **Rwandan Judiciary in Practice**

186. The Chamber notes that the Transfer Law mandates the Rwandan High Court and the Supreme Court to deal with any cases transferred from this Tribunal to Rwanda.[263] The Chamber is of the view that the Rwandan legal framework guarantees the independence and impartiality of the judiciary. Article 140 of the Rwandan Constitution affirms that the judiciary is independent and separate from the legislative and executive arms of government, and that it enjoys financial and administrative autonomy. According to the Rwandan Constitution, the Superior Council of the Judiciary is responsible for the appointment, promotion or removal of judges.[264] The appointment and removal of the President and the Vice President of the Supreme Court are regulated by specific provisions.[265]

187. Pursuant to the 2004 Law on the Statutes for Judges and other Judicial Personnel, judges are fully independent in discharging their activities, and in the exercise of their duties they shall only be subject to the law. They shall be fully independent of the legislative and executive powers.[266] The Chamber notes that the judiciary includes an oversight mechanism in the form of an ombudsman and a code of ethics.[267]

188. The Transfer Law guarantees the same rights to an accused as those provided by Article 20 of the Tribunal's Statute with the exception of the right of an accused "to defend himself or herself in person".[268] The Transfer Law has also been amended to offer the President of the Court the option of having complex or important cases ruled by a quorum of three or more judges rather than one judge.[269]

189. In addition, although the Rwandan Constitution establishes that Gacaca courts are an integral part of the Rwandan judiciary, the Chamber is mindful that Gacaca courts were established to address unique circumstances and that they therefore function in a distinctive manner. It further recalls that in the event that the transfer is granted, the Accused will be tried by a High Court.

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[263] Motion, para. 23, Annex C (Transfer Law), Annex D (Organic Law modifying Transfer Law).
[264] 2008 amendment to the Rwandan Constitution: Articles 157-158; 2010 amendment to the Rwandan Constitution: Article 40.
[265] (2008 Constitution: Articles 147; 2010 Constitution: Article 34).
[266] Motion, Annex N (Law on Statutes for Judges and other Judicial Personnel), Article 22.
[267] Motion, paras. 72-76, 81, 85-87, Annex E (2008 amendment to the Constitution of the Republic of Rwanda), Annex N (Law on Statutes for Judges and other Judicial Personnel), Annex O (Law on Superior Council of the Judiciary), Annex P (Law on the Supreme Court), Annex Q (Law on Organisation, Functioning and Jurisdiction of Courts), Annex S (Code of Ethics).
[268] Motion, Annex C (2007 Transfer Law), Annex D (2009 Transfer Law), Article 2 of the 2009 Transfer Law provides that "[…] the accused person in the case transferred by ICTR to Rwanda shall be guaranteed the following rights: 1) a fair and public hearing; 2) presumption of innocent until proven guilty; 3) to be informed promptly and in detail […] of the nature and the cause of the charge against him; 4) adequate time and facilities to prepare his/her defense; 5) a speedy trial without undue delay; 6) entitlement to counsel of his/her choice in any examination. In case he/she has no means to pay, he/she shall be entitled to legal representation: 7) the right to remain silent and not to be compelled to incriminate him/herself; 8) the right to be tried in his/her presence; 9) to examine, or have a person to examine on his/her behalf the witnesses against him/her; 10) to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her […]".
[269] Motion, para. 93, Annex D (Organic Law dated 2009 modifying Transfer Law), Article 1 provides that "[…] the President of the Court may at his/her absolute discretion designate a quorum of three (3) or more judges assisted by a Court Registrar depending on his/her assessment of the complexity and importance of the case".

10.5.1. *Parties' Submissions*

190. As evidence that the system is independent and impartial in practice, the Prosecution highlights Rwanda's legal framework and argues that it provides guarantees against outside pressure. The Prosecution also points to the acquittal rate before the High Court in Rwanda, the rate of High Court judgements reversed on appeal and the continuous cooperation of GoR with this Tribunal. It further draws the attention of the Chamber to the qualifications and expertise of the Rwandan judges.[270]

191. The Prosecution submits that the acquittal rate in Rwanda shows that no bias exists on the part of Rwandan judges.[271] Rwanda notes that in 2008 there were 283 criminal trials before the High Court, with slightly over 200 of these cases resulting in conviction and the remainder in acquittal. It submits that the acquittal rate is "tangible proof that persons tried before the High Court are ensured a fair trial before an impartial and independent judge." It also submits that the rate of High Court judgements affirmed or reversed by the Supreme Court is another reliable indicator of judicial independence.[272]

192. Rwanda notes that between 2006 and 2010, the High Court presided over 36 genocide cases, and in the period between 2006 and 2008 the Supreme Court heard 61 appeals or other post-conviction proceedings in genocide cases.[273]

193. Citing a number of individual cases, the Defence, HRW, ICDAA and IADL all argue that although judicial independence and impartiality is for the most part guaranteed by law, it is lacking in practice. They cite a number of cases which they contend demonstrate that the judicial system is flawed and functions neither independently nor impartially.[274] HRW submits that "the right to a fair trial must be capable of being realized in practice and not just in theory."[275] IADL makes a submission with respect to selective prosecution in Rwanda, and concludes that political considerations which control Rwanda's failure to effectively prosecute RPF crimes in its domestic courts bodes ill for the implementation of fairness within Rwanda.[276]

194. The Defence argues that the information provided by the Prosecution is outdated and does not reflect recent trends, in particular that not all of the 283 cases cited by Prosecution are genocide cases, and that an acquittal rate in itself is not evidence that a trial has been fairly conducted.[277]

195. The Prosecution replies that it is "difficult to discern any meaningful links between the so-called political cases and the present case"[278] but nevertheless provides a series of Rwandan

[270] Motion, paras. 73-92; GoR Brief, paras. 117-128.
[271] Motion, paras. 73, 90.
[272] GoR Brief, paras. 118-120, according to Rwanda, from 2006 to 2009, the Supreme Court has reversed between 17 and 8% of convictions.
[273] GoR Brief, para. 123.
[274] Response, paras. 200-253; HRW Brief, paras. 11, 66-96; ICDAA Brief, paras. 3-9, 17-20; IADL Brief, Sections E-H. Response, Annex A.
[275] HRW Brief, para. 6
[276] IADL Brief, paras. 1-16.
[277] Response, paras. 204-209.
[278] Reply, paras. 32-56.

court judgements to demonstrate that "the prosecutions were not politically motivated but grounded […] on serious violations of Rwandan law."[279]

10.5.2. *Discussion*

196. The Chamber notes that the Defence, HRW, IADL and ICDAA provide examples of individual cases in support of their submissions on the lack of independence and impartiality of the Rwandan judiciary in practice.[280] The Chamber understands that this approach may be, at least partly motivated by the Appeal Chamber findings in *Munyakazi* that the Referral Chamber did not have sufficient evidence on the record to conclude that the Rwandan judiciary lacked safeguards against outside pressure.[281] Having reviewed these cases, the Chamber finds that most are of a political nature and do not necessarily reflect the conditions of the trial or the charges that the Accused faces. Moreover, the Chamber notes that any transferred case will be closely monitored by the ACHPR, which will give periodic reports to the President of the Tribunal. If there is a report that the fair trial rights of the Accused have not been respected the Tribunal or, if applicable, the Residual Mechanism, may invoke the revocation clause under Rule 11 *bis* and recall the case from Rwanda.

11. **MONITORING AND REVOCATION**

11.1. **Monitoring**

11.1.1. *Parties' Submissions*

197. The Prosecution argues that the monitoring and revocation mechanisms "provide additional oversight for ensuring a fair trial of the Accused in Rwanda."[282]

198. The Defence asserts that Rule 11 *bis* (D) (iv) hitherto allowed the Prosecutor to monitor trial proceedings, but not detention conditions.[283] It argues that Rule 11 *bis* (F) is not clear about whether the revocation mechanism can be initiated in the event that a monitor concludes that the Accused is being held under conditions that do not respect human dignity, adding that this mechanism ceases to apply at the point of conviction or acquittal of the Accused.[284] Furthermore, the Defence submits that despite Rwanda's assertion[285] observers will conduct monitoring and present a report on the prison conditions to the Minister of Justice and the Tribunal's President, the Organic Law fails to indicate what the Minister would do with this report, given that the Prisons Service falls under the Ministry of Internal Security.[286]

[279] Reply, para. 39 and Annexes A, E-J, and L.
[280] Response, paras. 219-226, 231-232, 247-248, 252, 278-280; Human Rights Watch, Law and Reality, pp. 53-57, 63-64, 77, 80, 83, 96; Human Rights Watch, Press Release, 11 February 2011; Reply, paras. 21-25, 41-42, 62, 106-108 and Annex H (Kigali High Court Judgement 4 February 2011), and Annex Q and Annex G. Military High Court Judgement dated 14 January 2011.
[281] *Munyakazi* Appeal Decision, para. 29.
[282] Motion, para. 112.
[283] Response, para. 384.
[284] Response, para. 384.
[285] GoR Brief, para. 109 (referring to Article 23 (2) of the Organic Law on Transfer of Cases to Rwanda).
[286] Response, para. 385.

199. The Prosecution replies that the ACHPR has agreed to monitor proceedings of referred cases[287] and annexes to its Rule 11 *bis* Motion a letter of acceptance from the ACHPR agreeing to monitor such proceedings. The Defence challenges the age and practicability of this document stating that there is no evidence that the ACHPR is still ready in terms of funds and staff to carry out such monitoring.[288] It submits that it is difficult to assess the likely efficacy of a monitoring system as the Prosecution provided no information regarding the modalities of its monitoring programme.[289]

200. The Prosecution responds that the Defence's suggestion that "the Prosecutor must work out all the modalities of a potential monitoring and revocation system before a case can be referred" is "misguided." It contends that Rule 11 *bis* grants the Prosecution wide discretion in how to monitor the proceedings and, in fact, on whether it must monitor them at all.[290] Consequently, the Prosecution contends that amended Rule 11 *bis* allows the Chambers to monitor proceedings as well.[291] The Prosecution further states that the Residual Mechanism Statute requires that the Mechanism would monitor any cases referred by the Tribunal to national courts, and that these powers extend to any cases transferred to national courts before the Residual Mechanism takes effect.[292]

201. In its consolidated Rejoinder, the Defence expresses a concern about the lack of indication by the Prosecutor that there will be training for ACHPR monitors[293] and about the lack of precision in terms of the budgetary allocation for the monitoring of the proceedings of cases referred to Rwanda.[294] It also point out the lack of modalities of the monitoring and argues that on the basis of the Prosecutor's submissions there can be no conclusion that arrangements are in place for a monitoring programme.[295]

11.1.2. *Amici Submissions*

202. Rwanda, the KBA and ICDAA make no submissions regarding the monitoring of proceedings in cases referred to Rwanda.

203. HRW has no objection to monitoring being undertaken by the ACHPR but expresses its concern that the Prosecutor may be reticent to recall the case even if problems arise during proceedings in Rwanda.[296]

204. IADL similarly does not question the qualifications of ACHPR to monitor trials but says there are serious questions as to whether, given the "political climate and the hostile environment to fair trial in Rwanda […] monitoring by any entity would safeguard the rights of the Accused"

[287] Motion, para. 113.
[288] Response, paras. 391-392.
[289] Response, para. 392.
[290] Reply, para. 104.
[291] Reply, paras. 99-101.
[292] Reply, para. 102.
[293] *Prosecutor v. Uwinkindi*, Defence Consolidated Rejoinder to the Prosecutor's Consolidated Response and to the *Amicus Curiae* Brief of the Kigali Bar Association (TC), 17 June 2011 ("Rejoinder"), paras. 107-108, 111.
[294] Rejoinder, paras. 104-106.
[295] Rejoinder, para. 103.
[296] HRW Brief, paras. 106-107.

in view of the restricted freedom of speech and the press.[297] It also argues that Rwanda's legal framework cannot provide a satisfactory implementation of fair trial guarantees because no system can impartially and independently monitor itself.[298] IADL concludes that monitoring and revocation procedures do not prevent violations of fair trial rights nor deter their possible occurance in the future.[299]

11.1.3. *Applicable Law*

205. Rule 11 *bis* (D) (iv), which hitherto stipulated that the Prosecutor could appoint observers to monitor the proceedings of any case referred to Rwanda, has been amended to enable the Referral Chamber to request that the Registrar appoint a monitor for the proceedings.

206. Rule 11 *bis* (G) provides for the revocation of a transfer order. The Rule provides that where the Tribunal makes such a revocation, the State shall accede thereto without delay in keeping with Article 28 of the Statute.

207. The Chamber notes that the ACHPR has reaffirmed its willingness to assign one of their members to monitor the trial in Rwanda and report to the Office of the Prosecutor. In view of the recent amendment of the Rule, the Referral Chamber shall order that these periodic monitoring reports be submitted by the ACHPR to the President of the Tribunal through the Registrar as well as to the Prosecutor.

11.1.4. *Discussion*

208. The Referral Chamber considers that it would be in the interest of justice to ensure that there is an adequate system of monitoring in place if this case is to be transferred to Rwanda. Furthermore, it is important that any system of monitoring the fairness of the trial should be cognizant of and responsive to genuine concerns raised by the Defence, as well as by the Prosecution. Rule 11 *bis* now provides for the Referral Chamber as well as the Tribunal's Prosecutor to have the ongoing capacity to monitor a case which has been referred to a national jurisdiction and, where the circumstances so warrant, to have such a case recalled to this Tribunal.[300]

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[297] IADL Brief, Part I, paras. 5-9.
[298] IADL Brief, paras. 12-14.
[299] IADL Brief, para. 16.
[300] On 1 April 2011, the ICTR Rules Committee presented the revised Rule 11 *bis* and it was adopted by the Chambers Plenary session. The Rule was amended to read as follows:

> Rule 11 *bis* :
>
> (D) […]
>
> (iv) the Prosecutor and, if the Trial Chamber so orders, the Registrar shall send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.
>
> […]
>
> (F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may *proprio motu* **or** at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

209. The Chamber notes that Article 19 of the Transfer Law provides that "[o]bservers appointed by the ICTR Prosecutor shall have access to court proceedings, documents and records relating to the case as well as access to places of detention." The former Rule 11 *bis* gave only the Prosecutor powers to appoint monitors for the proceedings in referral cases. However, in consideration of the amended Rule 11 *bis* D (iv) which now also enables the Chambers to request the Registrar to send observers to monitor the proceedings of the trials in referred cases, the Referral Chamber requests Rwanda to provide ACHPR monitors with access to the court proceedings, documents, records and locations including detention facility where the Accused would be detained.

210. The Chamber notes that the ACHPR's expression of interest in monitoring proceedings is still valid.[301] In addition, the current Commissioner of the ACHPR has pledged to assign a monitor for this task, the financial arrangements of which have been agreed between the ACHPR and the Tribunal.[302] The Chamber requests the Registrar to secure a written arrangement which would clearly stipulate the logistical, financial and other modalities by which the monitoring shall be carried out.

211. The Appeals Chamber in *Munyakazi* noted that the ACHPR is an independent organ established under the African Charter on Human and Peoples' Rights.[303] Trial Chambers have consistently held that the ACHPR has the necessary qualifications to monitor trials.[304] This Chamber further notes that the parties do not dispute the qualifications of the ACHPR to monitor a transferred case. This Chamber is therefore satisfied that this case will be appropriately monitored by the ACHPR as an independent body if the case is referred to Rwanda. However, given the concerns expressed in other areas by the Chamber in this Decision, it will issue guidelines to the ACHPR monitors on matters it considers to be of specific relevance to the fair trial rights of the Accused.

212. The Referral Chamber recognises and reiterates the importance of the continued cooperation of the Rwandan government with this Tribunal.[305] It expects Rwanda to facilitate and assist the ACHPR in its monitoring activities.

11.1.4.1. Monitoring by the African Commission of Human and Peoples' Rights

213. The ACHPR has agreed to monitor cases referred by this Tribunal to Rwanda. The Chamber expects that all monitors appointed by the Tribunal will be granted equal and unfettered access to persons, proceedings and documents. Having regard to matters considered in this Decision and the vital importance of a fair trial, the Chamber will require the ACHPR to appoint at least two or more experienced professionals who will conduct full-time monitoring of the

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[301] *Prosecutor v. Uwinkindi*, Case No. ICTR-2001-75-R11bis, Request to Prosecution to Provide Further Information Regarding its Monitoring Programme Pursuant to Rule 11 *bis*, 23 May 2011 ("*Uwinkindi* Request to Prosecution to Provide Further Information"). The Chamber, *proprio motu*, requested that the Prosecution provide additional information with respect to its monitoring programme. On 31 May 2011, the Prosecution filed its response. Prosecution's Motion, Annex U.
[302] *Uwinkindi* Request to Prosecution to Provide Further Information, para. 3.
[303] *Munyakazi* Appeal Decision, para. 30.
[304] *Munyakazi* Appeal Decision, para. 30; *Kanyarukiga* Appeal Decision, para. 38; *Hategekimana* Appeal Decision, para. 29.
[305] Motion, paras. 73-92; GoR Brief, paras. 117-128.

proceedings and submit reports on the same to the President through the Registrar. The monitors will be required to file an initial report on the progress made by the Rwandan Prosecutor General in the Accused's case six weeks after the transfer of the evidentiary material to the appropriate court in Rwanda. Thereafter, ACHPR shall submit a regular report every three months on the status of proceedings to the President through the Registrar upon commencement of the trial and until the completion of the trial and the appellate process for the Accused and through to the enforcement of sentence, if any.

11.1.4.2. Tribunal's Monitoring

214. The Chamber is aware that there is no provision in the Transfer Law that would allow for monitoring of cases by an individual or body appointed by the Registrar. However, it bears in mind that Rule 11 *bis* was amended on 1 April 2011 and it now enables the Chamber to request the Registrar to send observers to monitor proceedings. Therefore, Rwanda has had little time to amend the Transfer Law accordingly. The Chamber is further of the view that the appointed monitor shall report to the President through the Registrar if there are impediments to fair trial or if there arises any difficulty accessing relevant persons, proceedings or documents during the proceedings.

11.1.4.3. Residual Mechanism's Monitoring

215. Article 6 (4) of the Statute of the Residual Mechanism reads as follows: "The Mechanism shall monitor the cases referred to national courts by the ICTY, ICTR, and those referred in accordance with this Article, with the assistance of international and regional organizations and bodies." The ICTR branch of the Residual Mechanism is scheduled to commence functioning on 1 July 2012.[306]

216. The Chamber considers that effective monitoring would require the monitoring to begin from the date the case is transferred to the relevant national authority as stipulated herein. Thus, the Chamber notes that monitoring of this case if referred to Rwanda would pre-date the point at which the Residual Mechanism comes into operation and continues uninterrupted thereafter.

11.2. **Revocation**

217. The Chamber is mindful of the revocation mechanism established under Rule 11 *bis.* However, bearing in mind the delays occasioned by the transfer proceedings, it must consider that proceedings requesting revocation could be equally time-consuming. In addition, if a case were revoked, further time would be spent by the parties at the Tribunal preparing for trial. Even if the revocation is sought by the Accused due to concerns regarding his fair trial rights, the delay in proceedings would inevitably adversely impact his right to an expeditious trial. With these constraints in mind, the Referral Chamber will only consider the revocation mechanism as a remedy of last resort. Thus, while it does constitute a safeguard, it is not a panacea.

218. Having said that, the Chamber is cognizant that the nature and importance of this case would require a great degree of diligence on the part of any person or agency charged with monitoring. Such a monitor would be in a position, not only to provide accurate and up-to-date

[306] United Nations Security Council Resolution 1966 (2010), 22 December 2010.

data on the conduct of the proceedings in Rwanda, but to support or investigate any application for the revocation of a transferred case.

219. The Chamber notes that the ACHPR has expressed willingness to monitor this trial at the cost of the Tribunal or the Residual Mechanism.[307] Due to the unique position and experience of the ACHPR as an external monitor in identifying and combating abuses of human rights on the continent, the ACHPR would be a trustworthy agency were it to make an application through the Registrar to the President for the revocation of the case.

220. In *Stanković*, the ICTY Appeals Chamber determined that the judges have inherent authority to issue orders which are reasonably related to the task before them and that this power emanates from the exercise of their judicial function.[308] The Appeals Chamber reasoned that the Prosecution's discretion to send monitors cannot derogate from the Referral Chamber's inherent authority to do so pursuant to Rule 11 *bis* of the Rules.

221. The Chamber finds that it is appropriate to request the Registrar to prepare and finalise a suitable agreement with regard to the arrangements concerning monitoring. The Chamber requests the Registrar to work closely with the ACHPR for monitoring this case and to seek further directions from the President if arrangements for monitoring should prove ineffective.

12. **CONCLUSION**

222. Upon assessment of the submissions of the parties and the *amici curiae*, the Chamber has concluded that the case of this Accused should be referred to the authorities of the Republic of Rwanda for his prosecution before the competent national court for charges brought against him by the Prosecutor in the Indictment. In so deciding, the Chamber is cognizant that it is taking a view contrary to the views taken about two years ago by Referral Chambers of this Tribunal where upon assessment of the facts before them, they concluded that those cases should not be referred to Rwanda.

223. This Chamber notes that, in the intervening period, Rwanda has made material changes in its laws and has indicated its capacity and willingness to prosecute cases referred by this Tribunal. This gives the Referral Chamber confidence that the case of the Accused, if referred, will be prosecuted consistent with internationally recognised fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments. The Referral Chamber is persuaded to refer this case after receiving assurances that a robust monitoring mechanism provided by the ACHPR will ensure that any material violation of the fair trial rights of this Accused will be brought to the attention of the President of the Tribunal forthwith so that remedial action, including revocation, can be considered by this Tribunal, or if applicable, by the Residual Mechanism.

224. The Referral Chamber is cognizant of the strong opposition mounted by the Defence and certain *amici curiae* to the proposed referral. The Chamber, however, considers that the issues

[307] Annex 2 of Prosecutor's Response to Chambers Request to Provide Further Information Regarding its Monitoring Programme Pursuant to Rule 11 *bis*; Letter of the Chairperson African Commission on Human and People's Rights, Commissioner Reine Alapini-Gansou, 26 May 2011.
[308] *Stanković* Appeal Decision, para. 51.

that concerned the previous Referral Chambers, in particular, the availability of witnesses and their protection, have been addressed to some satisfaction by Rwanda in the intervening period and that any referral with robust monitoring would be able to address concerns that the Defence and the *amici* have expressed.

225. Before parting with this Decision, the Chamber expresses its solemn hope that the Republic of Rwanda, in accepting its first referral from this Tribunal, will actualise in practice the commitments it has made in its filings about its good faith, capacity and willingness to enforce the highest standards of international justice in the referred cases.

13. **DISPOSITION**

FOR THE FOREGOING REASONS, THE REFERRAL CHAMBER

PURSUANT to Rule 11 *bis* of the Rules;

GRANTS the Motion;

ORDERS the case of *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75-PT) to be referred to the authorities of the Republic of Rwanda, so that those authorities should forthwith refer the case to the High Court of Rwanda for an expeditious trial;

DECLARES that the referral of this case shall not have the effect of revoking the previous Orders and Decisions of this Tribunal in this case;

REQUESTS the Registrar to arrange the transport of the Accused and his personal belongings, within 30 days of this Decision becoming final, to Rwanda in accordance *mutatis mutandis* with the procedures applicable to the transfer of convicted persons to States for enforcement of sentence;

ORDERS the Prosecution to hand over to the Prosecutor General of Rwanda, as soon as possible and no later than 30 days after this Decision has become final, the material supporting the Indictment against the Accused and all other appropriate evidentiary material in the possession of the Prosecution;

REQUESTS the Registrar to, within 30 days of this Decision becoming final, appoint the African Commission on Human and People's Rights as monitor for the trial of the Accused in Rwanda under Rule 11 *bis* (D) (iv) and to make arrangements to this effect;

REQUESTS the African Commission on Human and People's Rights to:

1. monitor on a full-time basis and report to the President through the Registrar on the progress of the referred case in general, and on the observance of international fair trial standards with special emphasis to the availability and protection of witnesses before, during and after the proceedings;

2. ensure that Article 13 of the Transfer Law is strictly respected and applied by Rwanda in respect of anything said by the Accused, his counsel or witnesses in his trial to advance his line of defence;
3. monitor detention conditions ensuring that that they are in accordance with international standards both during and after the trial and appeal of the Accused, if convicted by a competent court;
4. ensure that the provisions of Article 59 of the RCCP which precludes witnesses suspected by the Prosecution of having committed serious crimes (genocide) from testifying are not applied to witnesses in the trial of the Accused;
5. liaise with the representatives of VWSU and WPU in Rwanda on a regular basis and include their findings in the regular quarterly reports to the President through the Registrar on the number of witnesses seeking the assistance of each service;
6. identify and report to the President through the Registrar any incidents of violations of Rule 11 *bis* D (iv) and in particular those relating to the protective measures for witnesses ordered by this Tribunal; and
7. indicate, in general, any violations of the fair trial rights of the Accused;
8. seek assistance, as it deems appropriate, from the relevant United Nations agencies or other international, regional inter-governmental, governmental or non-governmental organizations to advance the objectives of an effective and efficient monitoring of this case.

FURTHER REQUESTS the African Commission on Human and People's Rights to file an initial report to the President through the Registrar on the progress made by Rwanda in the prosecution of the Accused after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the High Court of Rwanda after commencement of trial;

ORDERS the Prosecutor and the Defence to cooperate with the African Commission on Human and People's Rights to ensure the monitoring and reporting on the proceedings of this case. If arrangements for monitoring and reporting should prove ineffective, the parties and/or the Registrar may seek further directions from the President;

REQUESTS Rwanda to provide the ACHPR monitors with access to court proceedings, documents, records, persons and locations, including the detention facility where the Accused will be housed, throughout the territory of Rwanda as may be needed for the effective conduct of their monitoring;

FURTHER REQUESTS Rwanda to provide the Defence team with access to persons, locations and documents throughout the territory of Rwanda as may be needed for the effective conduct of the Defence case;

FURTHER REQUESTS Rwanda to report to the President of the Tribunal within 60 days of this Decision about the progress of the study commissioned by the Rwandan Minister of Justice regarding Article 13 of the Rwandan Constitution and any consequential action, including amendment thereto, contemplated by Rwanda;

DECLARES that it would be open to the Accused to draw the attention of the President of any perceived violation of the conditions of referral by the Republic of Rwanda and to seek consequential orders including revocation of referral;

FURTHER DECLARES that any such application by the Accused before this Tribunal will not act as an automatic stay of proceedings before Rwandan courts unless expressly directed by this Tribunal;

DECLARES that in the event, after referral, the Tribunal is satisfied that the Accused cannot have a fair trial in Rwanda, the Tribunal may consider revocation of the referral as permitted by Rule 11 *bis*;

ORDERS that referral will be suspended until the expiry of the statutory period of appeal and thereafter will be subject to the final appellate decision of the ICTR Appeals Chamber should any appeal(s) be filed;

REQUESTS the Registrar to inform the President to any hurdles in the implementation and operation of the monitoring mechanism for any consequential orders; and

NOTES that upon the conclusion of the mandate of the Tribunal, all obligations of the parties, the monitors and Rwanda will be subject to the directions of the International Residual Mechanism for Criminal Tribunals.

Done in English, 28 June 2011.

Florence Rita Arrey	Emile Francis Short	Robert Fremr
Presiding Judge	Judge	Judge

[Seal of the Tribunal]