UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER DESIGNATED UNDER RULE 11 *BIS*

Before Judges: Erik Møse, presiding
Sergei Alekseevich Egorov
Florence Rita Arrey

Registrar: Adama Dieng

Date: 6 June 2008

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

***Case No. ICTR-2002-78-R11*bis**

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

The Prosecution
Hassan Bubacar Jallow
Bongani Majola
Alex Obote-Odora
Richard Karegyesa
George Mugwanya
Inneke Onsea
François Nsanzuwera
Florida Kabasinga

The Defence
Ernest Midagu Bahati
Camille Yuma

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as a Chamber designated under Rule 11 *bis*, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Prosecutor's "Request for the Referral of the case of Gaspard Kanyarukiga to Rwanda pursuant to Rule 11 *bis*" etc., filed on 7 September 2007;

NOTING the Defence Response, filed on 16 November 2007, and the Prosecution Reply, filed on 5 December 2007;

FURTHER NOTING the *amicus curiae* submissions filed by the Republic of Rwanda on 22 November 2007, Human Rights Watch on 27 February 2008, the International Criminal Defence Attorneys Association (ICDAA) on 29 February 2008 and the Kigali Bar Association on 17 March 2008, as well as responses to the submissions;

HEREBY DECIDES the Request.

INTRODUCTION

1. On 4 March 2002, the Indictment was confirmed against Gaspard Kanyarukiga, who was a businessman in the Kigali and Kibuye prefectures in Rwanda. It contained four counts: genocide, or in the alternative complicity in genocide, conspiracy to commit genocide, and extermination as a crime against humanity.[1] Kanyarukiga pleaded not guilty to all counts during his initial appearance on 22 July 2004.[2]

2. On 7 September 2007, the Prosecutor submitted a request for referral of this case to the Republic of Rwanda for trial.[3] The Defence responded on 16 November 2007, opposing such referral.[4] On 2 October 2007, the President of the Tribunal designated a Chamber under

[1] Decision on Confirmation of an Indictment against Gaspard Kanyarukiga, 4 March 2002, p. 2.
[2] T. 22 July 2004 p. 7.
[3] The Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007 (below referred to as the "Prosecution Request"). Four similar transfer requests have been filed and assigned to Chambers of the Tribunal: *The Prosecutor v. Fulgence Kayishema*, The Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 11 June 2007; *The Prosecutor v. Yussuf Munyakazi*, The Prosecutor's Request for the Referral of the Case of Yussef Munyakazi to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Idelphonse Hategekimana*, The Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Jean-Baptiste Gatete*, The Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 28 November 2007. Fulgence Kayishema is at large, whereas the other three accused are at the ICTR detention facilities in Arusha. A decision has been rendered in one of these cases, *see The Prosecutor v. Yussuf Munyakazi*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (Referral Bench), 28 May 2008, in which transfer was denied.
[4] *Réponse de la Défense à la requête du Procureur portant transfert de l'Accusé Gaspard Kanyarukiga au Rwanda*, 16 November 2007 ("Defence Response"). *See also* Prosecutor's Reply to this Response, 5 December 2007 ("Prosecution Reply"), after having sought an extension on 22 November 2008. The Chamber has according to case law discretion to consider late submissions. It has considered the Reply without making a formal decision on the request for extension, which is hence moot.

Rule 11 *bis* of the Rules of Procedure and Evidence, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey.[5]

3. On 14 November 2007, Trial Chamber I granted the Prosecution leave to amend the Indictment.[6] The Amended Indictment is the basis of the present transfer request.[7] On the basis of acts in Kivumu commune, Kibuye prefecture, it charges Kanyarukiga with genocide, or in the alternative complicity in genocide, and extermination as a crime against humanity. The focus of the Indictment is an attack against Nyange church on 15 April 1994, where about 2,000 Tutsi refugees were allegedly killed. Kanyarukiga is accused of having participated in a joint criminal enterprise comprising Athanase Seromba, Fulgence Kayishema and others.[8]

4. Following applications pursuant to Rule 74 of the Rules, the Chamber granted *amicus curiae* status to the Republic of Rwanda, Human Rights Watch, the International Criminal Defence Attorneys Association (ICDAA) and the Kigali Bar Association.[9] They have provided written submissions on Rwanda's ability to satisfy the requirements of Rule 11 *bis* (C).[10] The Prosecution and the Defence have responded to the briefs of some of the *amici*.[11]

5. Rwanda supports the Prosecutor's Request. It submits that it is willing and able to accept Kanyarukiga's case before a competent court in Rwanda and that he will receive a fair

---

[5] Designation of Trial Chamber for the Referral of the Case of Gaspard Kanyarukiga to Rwanda (President), 2 October 2007.

[6] Decision on Prosecution Request to Amend the Indictment (TC), 14 November 2007. The Amended Indictment withdrew the count of conspiracy to commit genocide, clarified the modes of participation and provided better particulars of the charges against Kanyarukiga. The Defence did not oppose the amendments.

[7] *The Prosecutor v. Savo Todović*, Decision on Rule 11*bis* Referral (AC), 23 February 2006, para. 14 (a Referral Bench must base its considerations concerning the referral of a case on the operative indictment); *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Milan Lukić Appeal Regarding Referral (AC), 11 July 2007, para. 12.

[8] *See The Prosecutor v. Athanase Seromba*, Judgement (TC), 13 December 2006, and Judgement (AC), 12 March 2008. An indictment against Fulgence Kayishema was issued on 10 July 2001. As mentioned above (footnote 3), the Prosecutor has also requested that his case be transferred to Rwanda.

[9] Decision on the Request of the Republic of Rwanda for Leave to Appear as *Amicus Curiae* (TC), 9 November 2007; Decision on *Amicus Curiae* Request by the International Criminal Defence Attorneys Association (ICDAA) (TC), 22 February 2008; Decision on *Amicus Curiae* Request by the Kigali Bar Association (TC), 22 February 2008. In its Decision on Defence Request to Grant *Amicus Curiae* Status to Four Non-Governmental Organisations (TC), 22 February 2008, the Chamber denied such status to three non-governmental organisations but accepted the Defence request with regard to Human Rights Watch, which had demonstrated an intention to provide submissions by doing so in Rule 11 *bis* proceedings before another Chamber. *See also* Decision on *Amicus Curiae* Request by Human Rights Watch (TC), 29 February 2008 (considering its request moot, as such status had already been granted). Requests from three other organisations were denied, *see* Decision on *Amicus Curiae* Request by the Organisation of Defence Counsel (ADAD) (TC), 22 February 2008, and Decision on *Amicus Curiae* Request by Ibuka and Avega (TC), 22 February 2008.

[10] Amicus Curiae briefs were filed by the Republic of Rwanda on 22 November 2007 ("Rwanda's Brief"), by Human Rights Watch on 27 February 2008 ("HRW Brief"), and by ICDAA on 29 February 2008 ("ICDAA Brief"). On 21 April 2008, Rwanda requested the Chamber to consider its response of 6 March 2008 to Human Rights Watch in the Kayishema case as also being part of the submissions in the Kanyarukiga case ("Rwanda's Response to HRW"), and the Chamber has done so. The Kigali Bar Association filed its brief on 17 March 2008 ("Kigali Bar Brief"), after the deadline. On the same date, it sought an extension of time. The Chamber has considered the Kigali Bar Brief without issuing a formal decision to that effect. The request for extension is therefore moot (see similarly footnote 4).

[11] The Prosecution filed its Response to ICDAA on 7 March 2008 ("Prosecution Response to ICDAA"). In a request of 11 April 2008, it asked the Chamber to consider its Response of 21 January 2008 to Human Rights Watch in the Kayishema case as part of the submissions in the Kanyarukiga case ("Prosecution Response to HRW"). The Chamber has done so. The Defence filed its submissions on the ICDAA Brief on 13 March 2008.

trial there. The Kigali Bar Association is also in favour of transfer. The Defence, Human Rights Watch and ICDAA oppose transfer. The submissions of the parties and the *amici* are summarised below. They are comprehensive and the Chamber has not found any need for an oral hearing.[12]

DELIBERATIONS

6. Rule 11 *bis* (C) allows a designated Trial Chamber to refer a case to a competent national jurisdiction if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. According to Rule 11 *bis* (A), referral may be ordered to a State (i) in whose territory the crime was committed, or (ii) in which the accused was arrested, or (iii) which has jurisdiction and is willing and adequately prepared to accept the referral.[13]

7. The Prosecution Request is based on Rule 11 *bis* (A)(i), which does not contain any explicit requirement concerning a State's willingness and preparedness to accept a referral. However, it follows from case law that this is implicit in a Rule 11 *bis* (C) analysis.[14] The Chamber notes that the Republic of Rwanda has stated that it is willing and is prepared to accept Kanyarukiga's case for prosecution.[15]

A. Legal Framework

8. The Appeals Chamber has established that a Trial Chamber designated under Rule 11 *bis* must consider whether the State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[16]

---

[12] The Chamber notes that an oral hearing took place in *The Prosecutor v. Yussuf Munyakazi* (footnote 3 above), *see* T. 24 April 2008 pp. 1-83.

[13] It is recalled than unlike its ICTY counterpart, Rule 11 *bis* of the ICTR Rules does not require that the Chamber "shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused", *see* ICTY Rule 11 *bis* (C).

[14] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), 1 September 2005, para. 40 relating to the equivalent provisions in the ICTY Rules of Procedure and Evidence ("as a strictly textual matter, Rule 11*bis* (A) does not require that a jurisdiction be "willing and adequately prepared to accept" a transferred case if it was the territory in which the crime was committed … But that is beside the point, because unquestionably a jurisdiction's willingness and capacity to accept a prepared case is an explicit prerequisite for any referral to a domestic jurisdiction … Thus, the "willing and adequately prepared" prong of Rule 11*bis* (A)(iii) of the Rules is implicit also in the Rule 11*bis*(B) analysis"). *See also The Prosecutor v. Mitar Rašević and Savo Todović*, Decision on Savo Todović's Appeal Against Decisions on Referral under Rule 11*bis* (AC), 4 September 2006, para. 88.

[15] Letter of 5 September 2007 from the Rwandan Prosecutor General to the ICTR Prosecutor (Annex A to the Prosecution Request). The letter also contains assurances that Kanyarukiga will be afforded a fair trial and that, if convicted, he will not be subject to the death penalty.

[16] *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11*bis* Appeal (AC), 30 August 2006, para. 9, referring to *The Prosecutor v. Zeljko Mejakić et al*., Decision on Joint Defence Appeal Against Decision on Referral under Rule 11*bis* (AC), 7 April 2006, para. 60. *See* also *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* etc. (Referral Bench), 5 April 2007**,** paras. 44–45; *The Prosecutor v. Rahim Ademi and Mirko Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis* (Referral Bench), 14 September 2005, paras. 32 and 46); *The Prosecutor v. Gojko Janković*, Decision on Referral of Case under Rule 11*bis* (Referral Bench), 22 July 2005, para. 27; *The Prosecutor v. Zeljko Mejakić et al*., Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* (Referral Bench), 20 July 2005, para. 43; *The Prosecutor v. Mitar Rašević and Savo Todović*, Decision on Referral of Case under Rule 11*bis* etc. (Referral Bench), 8 July 2005, para. 34.

(i) Personal Jurisdiction

9. According to the Indictment, Kanyarukiga's alleged crimes were committed in Rwanda. Consequently, Rwandan courts have personal jurisdiction over him pursuant to Article 6 of the Rwandan Penal Code.[17]

(ii) Material Jurisdiction

10. The Prosecution and the Republic of Rwanda submit that Rwanda's legal framework criminalises Kanyarukiga's conduct in terms identical to the provisions of the ICTR Statute. According to Human Rights Watch, transfer may not be possible due to a potential lack of subject matter jurisdiction.[18]

11. The Chamber is not the competent authority to decide in any binding way which law is to be applied if the case is transferred. This is a matter which would be within the competence of the High Court and the Supreme Court of Rwanda. But the Chamber must be satisfied that there is an adequate legal framework which criminalises Kanyarukiga's conduct so that the allegations can be duly tried and determined.[19]

12. Article 1 of Organic Law of 16 March 2007 on the Transfer of Cases ("Transfer Law") states that the law "shall regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda". Article 3 provides that a person whose case is transferred by the ICTR to Rwanda "shall be prosecuted only for crimes falling within the jurisdiction of the Tribunal". The Transfer Law does not contain any explicit legal definitions of genocide and crimes against humanity.[20]

13. The Prosecution and the Republic of Rwanda have referred to a law of 1996 concerning the prosecution of genocide and a law of 2004 pertaining to the Gacaca courts.[21] Human Rights Watch argues that the 1996 Genocide Law was abrogated by the 2004 Gacaca Law, and that the latter does not define the crimes of genocide and other violations of international humanitarian law. Therefore, the Chamber "should inquire into this apparent discrepancy and whether there is a complete definitional basis for the relevant crimes in Rwandan law" to support transfer.[22]

---

[17] Rwanda's Brief, para. 9, citing Article 6 of the Rwandan Penal Code of 18 August 1977 as subsequently amended (Annex D to the Prosecution Request): "*Toute infraction commise sur le territoire Rwandais par les Rwandais ou des étrangers est punie conformement à la loi Rwandaise, sous réserve de l'immunité diplomatique consacrée par les conventions ou les usages internationaux.*"

[18] Prosecution Request, paras. 18-33; Rwanda's Brief, paras. 11-16; HRW Brief, paras. 18-24; Prosecution Response to HRW, paras. 9-20; Rwanda's Response to HRW, paras. 21-25.

[19] *See* footnote 16.

[20] Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States, Annex B to the Prosecution Request.

[21] Organic Law No. 08/96 of 30 August 1996 on the Organisation of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 ("1996 Genocide Law") (Annex C to the Prosecution Request); Organic Law No. 16/ 2004 of 19 June 2004 Establishing the Organisation, Competence, and Functioning of Gacaca Courts ("2004 Gacaca Law").

[22] HRW Brief, paras. 22-23 (noting that Rwandan courts convicted 204 persons for crimes of genocide between January 2005 and September 2007 under the 2004 Gacaca Law and the Penal Code). Human Rights Watch also argues that Law 33/bis/2003 Punishing the Crime of Genocide, Crimes against Humanity and War Crimes

14. The Chamber recalls that Article 1 of the 1996 Genocide Law, which was replaced by the 2004 Gacaca Law, provided for criminal proceedings against persons who since 1 October 1990 committed acts constituting

> a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional protocols, as well as in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, the three of which were ratified by Rwanda; or
>
> b) offences set out in the Penal Code which the Public Prosecution Department alleges or the defendant admits were committed in connection with the events surrounding the genocide and crimes against humanity.

This text referred to the definitions of the crimes in the relevant international conventions. However, the 1996 Genocide Law will not be applicable to any cases that may be transferred from the Tribunal to Rwanda.[23]

15. The 2004 Law reorganised the Gacaca courts charged with trying the perpetrators of "the crime of genocide and crimes against humanity" committed between 1 October 1990 and 31 December 1994 (Article 1) and maintained that cases concerning offenders belonging to the so-called "first category" should be heard by the ordinary courts (Article 2). According to Article 51, that category comprises, amongst others, persons who planned, organised and supervised "the genocide or crimes against humanity", together with his or her accomplices. Consequently, both Articles 1 and 51 specifically mention genocide and crimes against humanity but without any explicit definitions.

16. The Genocide Convention of 1948 as well as the four Geneva Conventions of 1949 and their two Additional Protocols of 1997 were all binding on the Republic of Rwanda in 1994. It has also ratified the Convention of 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[24] According to Article 190 of the Rwandan Constitution of 2003, treaties which Rwanda has ratified are "more binding than organic and ordinary laws".[25] This formulation indicates that the conventions have been incorporated into national law and carry considerable weight.[26]

("2003 Law"), which contains very specific definitions in Articles 2 (genocide), 5 (crimes against humanity) and 6 (war crimes) does not seem to have retroactive effect. The Republic of Rwanda has confirmed that the 2003 Law is irrelevant in relation to transferred cases as it is applicable only for crimes that are committed after its entry into force (Rwanda's Brief, para. 26 c).

[23] Article 105 of the 2004 Gacaca Law states that the 1996 Genocide Law, as well as another law establishing Gacaca courts and all previous legal provisions "contrary to this organic law, are hereby abrogated".

[24] The Republic of Rwanda ratified or acceded to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide on 16 April 1975; the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War on 5 May 1964; the Additional Protocols to the Geneva Conventions on 19 November 1984; and the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on 16 April 1975 ("1968 Convention").

[25] The Rwandan Constitution, adopted in Referendum of 26 May 2003 (Annex F to the Prosecution Request contains excerpts). Article 190 continues "except in case of non compliance of one of the parties". This proviso appears inapplicable in the present context.

[26] The formulation "more binding than … laws" is not clear but suggests that the conventions carry more weight than ordinary legislation and may prevail in case of a conflict with domestic law. The submissions do not specifically address this issue, which is not decisive to the Chamber's findings.

17. A closer examination confirms the impact of these conventions in Rwandan law. In conformity with the 1968 Convention, Article 13 of the Constitution provides that "the crime of genocide, crimes against humanity and war crimes do not have a period of limitation". As mentioned above, the 1996 Genocide Law contained explicit references to the Genocide Convention, the Geneva Conventions and Protocols, and the 1968 Convention. Furthermore, the preamble of the 2004 Gacaca Law expressly refers to the Genocide Convention and to the 1968 Convention.[27] Rwandan jurisprudence confirms that the ordinary courts have applied the Genocide Convention, the applicable Geneva Convention or the 1968 Convention, depending on the charges, together with the material provisions of its Penal Code and the 1996 Law (which was subsequently replaced by the 2004 Gacaca Law, see para. 13 above).[28]

18. According to the Republic of Rwanda, the 2007 Transfer Law will unambiguously govern cases transferred from the ICTR. That law is not only *lex specialis* but will apply together with other applicable provisions, such as the ICTR Statute, the Penal Code and the 2004 Gacaca Law.[29] The Chamber considers that the formulation in Article 3 of the Transfer Law (providing for prosecution "only for crimes falling within the jurisdiction of the Tribunal") strongly suggests that they will be tried for the crimes as they are defined in Article 2 (genocide) and Article 3 (crimes against humanity) of the ICTR Statute.[30] Furthermore, Article 25 of the Transfer Law provides that in the event of an inconsistency between that law and any other law, the Transfer Law shall prevail.[31]

19. Having considered the relevant provisions in the Transfer Law, applicable conventions, Article 190 of the Constitution, legislation as well as domestic case law, the Chamber is satisfied that Rwanda has subject-matter jurisdiction over the crimes charged in the Indictment against Kanyarukiga.

(iii) Temporal Jurisdiction

20. Without referring to any specific provision, the Defence argues that the genocide legislation refers to acts committed from 1 October 1990 without any further limitation in time, and that this is not in conformity with the ICTR Statute.[32] The Chamber recalls that Article 3 of the Transfer Law provides that "notwithstanding the provisions of other laws in

[27] The preamble reads: "Considering that the crime of genocide and crimes against humanity are provided for by the International Convention of 9 December 1948 relating to repression and punishment of the crime of genocide"; "Considering the Convention of 26 November 1968 on imprescriptibility of war crimes and crimes against humanity". (Some stylistic changes have been made in the available English translation.)

[28] *See*, for instance, *Recueil de jurisprudence contentieux du genocide* (elaborated by *Avocats Sans Frontières* in co-operation with the Supreme Court of Rwanda et al.*)*, Volume V pp. 13 *et seq.* (*Higiro et al.*, judgment of 14 March 2003, Court of First Instance, Butare); Volume VII pp. 41 *et seq.* (*Mbarushimana et al.*, judgment of 7 January 2005, Court of First Instance, Gisenyi); pp. 163 *et seq.* (*Bayingana et al.*, judgment of 29 July 2005, High Court of Cyangugu); pp. 257 *et seq.* (*Ndinkabandi et al.*, judgment of 20 July 2005, Supreme Court, referring to the Genocide Convention, the applicable Geneva Convention and the Convention of 1968).

[29] Rwanda's Brief, para. 14; Rwanda's Response to HRW, para. 25.

[30] The Chamber recalls that neither the Genocide Convention nor the Geneva Conventions and Protocols define crimes against humanity (which prior to the *ad hoc* Tribunals' Statutes had its basis in customary international law). The definition of crimes against humanity in the 1968 Convention is only partial. Neither the parties nor the *amici* have addressed this issue. The Chamber is satisfied that the reference to the ICTR Statute in Article 3 of the Transfer Law (which includes a reference to Article 3 in the ICTR Statute), remedies any lacuna that may exist. Finally, there is no need for the Chamber to consider the legal basis of war crimes (Article 4 of the ICTR Statute) in Rwandan law, as they do not form part of the Indictment against Kanyarukiga.

[31] Article 25 of the Transfer Law reads: "In the event of any inconsistency between this Organic Law and any other Law, the provisions of this Organic Law shall prevail" (Annex B to the Prosecution Request).

[32] Defence Response, paras. 38-39, 43.

Rwanda", persons who are transferred from the Tribunal shall be prosecuted "only" for crimes falling with the jurisdiction of the ICTR. It 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 Kanyarukiga, if transferred, will not be prosecuted for acts committed before or after this period.[33]

(iv) Modes of Participation

21. Pursuant to Article 6 (1) of the Statute, Kanyarukiga is alleged to have planned, instigated, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes. This provision covers both principal perpetrators as well as accomplices. The Prosecution submits that the Republic of Rwanda possesses an adequate legal framework to try Kanyarukiga on similar forms of responsibility. Article 89 of the Rwandan Penal Code identifies both principal perpetrators and accomplices to crimes, Article 90 defines the author of crimes, and Article 91 mentions the various forms of complicity to crimes.[34] The Chamber finds the modes of participation in Rwandan law to be similar in substance to those found in Article 6 (1) of the Statute and Tribunal jurisprudence.

(v) Penalties

22. As mentioned above, a Chamber designated under Rule 11 *bis* must satisfy itself that the transfer State has an adequate penalty structure.[35] Article 21 of the Transfer Law states: "Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR." This corresponds to Article 23 of the ICTR Statute and Rule 101 of its Rules. Article 82 of the Rwandan Penal Code directs the court to assess the punishment in view of all circumstances in connection with the crime and to consider mitigating factors. Under Article 22 of the Transfer Law, the court shall give credit for the period spent in detention. The Chamber considers that the Rwandan penalty structure addresses the intrinsic gravity of international crimes and conforms to accepted sentencing practices.[36]

23. It follows from Article 4 of the Transfer Law that if the case is transferred, the Rwandan Prosecutor will adapt the Tribunal's Indictment to the Rwandan Code of Criminal Procedure.[37] According to the Republic of Rwanda, investigations will be carried out in order to establish whether the evidence relied on by the ICTR still is available for trial.[38] The Defence argues that there is a risk that the Indictment may be recast upon transfer. This may

[33] This also seems to follow from Rwanda's Brief, para. 14 ("The Republic of Rwanda deferred to the jurisdiction of the ICTR and will not exercise concurrent jurisdiction to prosecute the accused otherwise than in accordance with a referral by the ICTR pursuant to Rule 11 *bis*, and in conformity with the [Transfer Law]"). Under these circumstances, and in light of the Chamber's conclusion not to grant transfer in the present case, it is not necessary to go further into this issue.

[34] Prosecution Request, paras. 23-25, referring to the Rwandan Penal Code (Annex D to the Prosecution Request). In particular, Article 91 encompasses, amongst other forms, complicity by instigation, complicity by aiding and abetting, and complicity by preparing the means to commit the crime.

[35] Footnote 16 above; Prosecution Request, paras. 26-33.

[36] Submissions concerning solitary confinement will be addressed below, paras. 94-96.

[37] Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request).

[38] Rwanda's Brief, paras. 46-48.

result in different penalties than under the ICTR regime, and exclude Kanyarukiga from pardon or commutation of sentence.[39]

24. The Chamber considers that national investigations may be required to prepare a transferred case for trial. Furthermore, case law has accepted that an international indictment be adapted to national provisions.[40] The remainder of the Defence submissions are based on a distinction between two forms of life imprisonment under Rwandan law, "life imprisonment" and "life imprisonment with special provisions". According to the Defence, the latter will exclude pardon and commutation of sentence. The Chamber observes that Article 21 of the Transfer Law refers to "life imprisonment" only and not "special provisions". To the extent that Kanyarukiga may risk "life imprisonment with special provision" if transferred (below, para. 96), the Defence submission does not prevent transfer. It follows from Article 27 of the ICTR Statute and Rule 124 and 125 of the Rules that convicted persons only may obtain pardon or commutation (including early release) if they are eligible for such measures according to the legislation of the country in which they are serving their sentences and if the President of the Tribunal finds that pardon or commutation is appropriate.

B. Death Penalty

25. According to Rule 11 *bis* (C), the Chamber must satisfy itself that "the death penalty will not be imposed or carried out". This condition for transfer is met. In relation to transferred cases, capital punishment is excluded by Article 21 of the Transfer Law, quoted above (para. 22). The Republic of Rwanda has also abolished the death penalty from its entire legal system.[41] By abolishing capital punishment, it removed one of the impediments to transfer of cases from the ICTR.[42] Submissions concerning conditions during life imprisonment will be addressed below (paras. 89-96).

---

[39] Defence Response, paras. 40-42 (*remaniement de l'acte de l'accusation*), *see also* paras. 35-37.

[40] *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11*bis* Appeal (AC), 30 August 2006, para. 17 ("The Appeals Chamber agrees with the Prosecution that the concept of a 'case' is broader than any given charge in an indictment", holding that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before the Tribunal); *The Prosecutor v. Radivan Stankovic*, Decision on Referral of Case under Rule 11 *bis* (Referral Bench), 17 May 2005, para. 74, referring to the adaptation of indictments under the Transfer Law of Bosnia and Herzegovina (*see* also paras. 24, 45-46).

[41] Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (Annex E to the Prosecution Request). Article 2 reads: "The death penalty is hereby abolished", whereas Article 3 provides: "In all the legislative texts in force before the [entry into force] of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions". The Defence is therefore not correct when it argues (Response, paras. 28, 40) that legislation concerning death penalty still applies in Rwanda. The concerns that capital punishment may be reintroduced (Defence Response, paras. 43-44) are speculative. A re-introduction of the death penalty would be a basis for revocation of the transfer order under Rule 11 *bis* (F).

[42] This was the point made by the ICTR Prosecutor in his address to the Security Council on 15 December 2006 ("Rwanda … is not yet ready in the sense of fulfilling the conditions of transfer, to receive from the ICTR cases of indictees for trial"). ICDAA's submission that the statement referred to the issue of fairness before Rwandan courts (Brief, para. 18) is inaccurate. This follows clearly from the context of the Prosecutor's statement ("The indications are that the death penalty, a major obstacle to the transfer of any case to Rwanda, will be abolished not just in relation to the cases of the ICTR, but across the board. A soon as that is accomplished I shall be requesting the transfer of cases … I hope this can be done in the first half of 2007").

C. Fair Trial

(i) General Considerations

26. Rule 11 *bis* (C) requires the Chamber to satisfy itself that "the accused will receive a fair trial in the courts of the State concerned". The Prosecution, the Republic of Rwanda and the Kigali Bar Association submit that Rwanda's legal framework includes the fair trial guarantees recognized by the ICTR Statute and human rights conventions. The Defence, Human Rights Watch and ICDAA dispute this. [43]

27. The Chamber recalls that the right to a fair trial follows from several international instruments, including Articles 19 and 20 of the ICTR Statute, Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), and Article 7 of the African Charter on Human and Peoples' Rights (ACHR). The Republic of Rwanda is a party to the ICCPR and the ACHR.[44] It has provided reports to the supervisory bodies under these conventions.[45]

28. At the domestic level, Rwanda has adopted many provisions of relevance to the right to a fair trial. The Constitution contains a separate chapter on human rights which includes fair trial guarantees, such as Articles 11 and 16 (non-discrimination and equality before the law), 15 (right to physical and mental integrity), 18 (deprivation of liberty; information about charges), 19 (presumption of innocence; fair and public hearing; access to court), 20 (non-retroactivity of criminal laws) and 44 (the judiciary as the guardian of rights and freedoms).[46] The legislation also provides protection, such as the Code of Criminal Procedure.[47]

29. With regard to transfer of cases the Chamber observes that Article 13 of the Transfer Law lists the following rights:

> (1) the accused shall be entitled to a fair and public hearing;
>
> (2) the accused shall be presumed innocent until proved guilty;

---

[43] Prosecution Request, paras. 36-74; Defence Response paras. 48-55; Rwanda's Brief, paras. 31-40; HRW Brief, paras. 12-15; Kigali Bar Brief, paras. 7-8; ICDAA Brief, paras. 18-27.

[44] The Republic of Rwanda ratified the ICCPR on 16 April 1975 and the ACHR on 15 July 1983. The Prosecution points out that Rwanda also has accepted scrutiny under the optional program established under the African Union, the New Partnership for Africa's Development review (NEPAD). Among the objectives of this program is the promotion of sustainable development, good governance and human rights (Prosecution Request, para. 73).

[45] The Prosecution argues that the Republic of Rwanda's "compliance action under treaties and programmes mentioned above enables Rwanda to draw from the expertise of the members of those bodies in an effort to progressively enhance her compliance with human rights obligations, including those in relation to fair trials and due process" (Prosecution Request, para. 73). This is not entirely convincing. Rwanda's third periodic report under Article 40 of the Covenant, which was expected on 10 April 1992, was submitted on 23 July 2007 and has not been examined by the Human Rights Committee. Rwanda has not accepted the Optional Protocol to the ICCPR concerning individual communications. The Chamber does not have available any information about the reports submitted under the ACHR.

[46] Rwandan Constitution of 2003, Title II: "Fundamental Human Rights and the Rights and Duties of the Citizen" (Annex F to the Prosecution Request).

[47] The Republic of Rwanda refers to Article 1 (3) of Law No. 20/2006 of 22 April 2006 Modifying and Complementing the Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure, and provides the following quote (Rwanda's Response to HRW, para. 30): "Criminal judgments must be held in public audience, be fair, impartial, comply with the principle of self-defence, cross-examination, treat litigants equal in the eyes of the law, based on evidence legally produced and be rendered without any undue delay."

> (3) the accused shall 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;
>
> (4) the accused shall be given adequate time and facilities to prepare his and her defence;
>
> (5) the accused shall be entitled to a speedy trial without undue delay;
>
> (6) the accused shall be entitled to counsel of his or her choice in any examination. In case he or she has no means to pay, he or she shall be entitled to legal representation;
>
> (7) the accused shall have the right to be tried in his or her presence;
>
> (8) the accused shall have the right to examine, or have a person to examine for him or her the witnesses against him or her;
>
> (9) the accused shall have the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
>
> (10) the accused shall have the right to remain silent and not to be compelled to incriminate himself or herself.[48]

30. This list of rights is supplemented by other provisions in the Transfer Law, such as Articles 5 (lawful arrest and detention), 7 para. 2 (no conviction based solely on written witness statements), 9 para. 2 (right to cross-examination), 14 (protection of witnesses), 15 (status of the Defence), and 23 (conditions of detention). Furthermore, it is recalled that Article 190 of the Constitution states that international conventions are "more binding" than other laws (above, para. 16).

31. The above overview illustrates that the Republic of Rwanda has made notable progress in improving its judicial system.[49] The Chamber accepts that the Rwandan legal framework generally mirrors the right to a fair trial as embodied in Article 20 of the ICTR Statute. However, the issue in the present transfer proceedings is not only whether Rwandan law contains the required guarantees. The Defence, Human Rights Watch and ICDAA argue that there is a gap between judicial theory and practice, especially for prosecutions of persons accused of genocide and other crimes of political importance.[50] They have provided illustrations relating to the general situation in the country, experiences from the ordinary courts, and from the Gacaca jurisdictions.

32. The Prosecution disputes these concerns, considering them speculative, generalized and unsubstantiated. The Republic of Rwanda characterises them as fears based on isolated and sporadic incidents, which have occurred in the course of fighting impunity in a post-genocide environment. The "Rwandan judicial system does not have to be qualified as near to perfection" to qualify for transfer. It also submits that "the task of the Trial Chamber is only

---

[48] Annex B to the Prosecution Request, which contains the text of Article 13 in Kinyarwanda, English and French. Some minor inconsistencies in the English version have been corrected above.

[49] This is, for instance, the view of Human Rights Watch. In addition to long-standing knowledge of the situation in Rwanda, this non-governmental organisation has been monitoring the judicial system there since 2005 (HRW Brief, paras. 3-4, 17). Referring to Rule 94 (B) of the Rules of Procedure and Evidence, the Republic of Rwanda requests the Chamber to take judicial notice of the progress made in its legal system (Rwanda's Response to HRW, para. 8, 9 and 42 c). However, Rule 94 (B) is not applicable as it refers to adjudicated facts "from other proceedings of the Tribunal".

[50] *See*, in particular, Defence Response, paras. 43-47 (about "*insecurité juridique*"); HRW Brief, paras. 12 and 13 ("On their face Rwanda's laws comply with the fair trial provisions of Article 20 of the Statute … Nevertheless, these laws are inconsistently applied"); ICDAA Brief, para. 22 ("Basic principles of fairness are very often ignored within the Rwandan national judicial system, either in theory or practice, or both").

to determine whether the laws applicable to proceedings against the accused in Rwanda provide an adequate basis for fair trial".[51]

33. The Chamber recalls that its task under Rule 11 *bis* is to satisfy itself that the accused will receive a fair trial if transferred. Information which the Chamber reasonably feels it needs to determine this issue is therefore relevant.[52] This includes experience from proceedings before Rwandan courts. But it is also important to bear in mind that the Prosecution request is based on a specific legal regime, established by Rwanda to facilitate transfer under Rule 11 *bis*. This regime only involves the High Court and the Supreme Court which will conduct proceedings within the framework of the Transfer Law. As no accused at the ICTR has been transferred to Rwanda, there is no practice under this specific regime. Furthermore, the Prosecution has taken steps to ensure international monitoring of transferred trials under Rule 11 *bis* (D)(iv).[53] The task of the Chamber is to determine whether Kanyuarukiga will receive a fair trial if transferred under these particular circumstances. Below it will examine the specific issues that have been raised.

(ii) Judicial Independence, Impartiality and Capacity

34. According to the Prosecution and Rwanda, the courts and judges are independent and impartial. The Defence disputes this. Human Rights Watch submits that even though judicial independence is guaranteed by law, there is executive interference in practice. ICDAA also questions the independence of the judiciary.[54]

35. The Chamber notes that Rwanda has adopted a legal framework concerning independence and impartiality. The Constitution states that the judiciary is independent and separate from the legislative and executive arms of government, and that it enjoys financial and administrative autonomy (Article 140). Judges hold office for life and shall not be suspended, transferred, or otherwise removed from office (Article 142).[55] The Superior Council of the Judiciary is responsible for the appointment, discipline and removal of judges (Articles 157 and 158).[56] Article 1 of the Code of Criminal Procedure provides for trials by a

---

[51] Rwanda's Response to HRW, in particular paras. 7, 11-12 (with quotes), 15, 31.

[52] *See* similarly (in relation to monitoring) *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), para. 50 ("The question, then, is how much authority the Referral Bench has in satisfying itself that the accused will receive a fair trial. In the view of the Appeals Chamber, the answer is straightforward: whatever information the Referral Bench reasonably feels it needs, and whatever orders is reasonably finds necessary, are within the Referral Bench's authority, so long as they assist the Bench in determining whether the proceedings following the transfer will be fair. The Referral Bench must bear in mind the considerable discretion that the Rule affords the Prosecutor, but always the ultimate inquiry remains the fairness of the trial that the accused will receive"). Rwanda's Response to HRW, para. 12 quotes Decision on Referral of Case under Rule 11*bis* in *Stankovic* (Referral Bench), 17 May 2005, para. 68 However, that passage is simply the conclusion after a discussion which is not confined to applicable laws (*see*, for instance, para. 67 of the Referral Bench's decision).

[53] Below, Section D (paras. 98-103).

[54] Prosecution Request, paras. 46-57; Defence Response, paras. 48-55; Rwanda's Brief, paras. 34-40; HRW Brief, paras. 49-54; Prosecution Response to HRW, paras. 39-44; Rwanda's Response to HRW, para. 33; ICDAA Brief, paras. 7-10; Prosecution Response to ICDAA, para. 6.

[55] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[56] Detailed provisions about the Superior Council are found in Organic Law No. 02/2004 of 20 March 2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary (Annex K to the Prosecution Request). Furthermore, Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts contains rules about the appointment and removal of judges as well as disciplinary powers.

competent, independent and impartial tribunal established by law.[57] An Ombudsman oversees the judiciary, and a Code of Ethics has been adopted.[58] These guarantees also apply to the High Court and the Supreme Court, which will hear cases under the Transfer Law.

36. The Defence points out that the President of the Republic of Rwanda has a role in the appointment of the President and Vice-President of the Supreme Court and of the High Court. He is also involved in the process leading to the appointment of the members of the Supreme Court and of the Superior Council overseeing the activities of the courts.[59] The Chamber notes that executive involvement in connection with judicial appointments exists in many countries. This does not in itself mean that the courts lack independence.

37. The Defence and ICDAA argue that there has been a tendency to fill higher positions, also in the judiciary, with Tutsis and exclude Hutus. The implication is that the courts may be biased, or that judicial proceedings cannot take place in a sufficiently calm and dispassionate climate.[60] The Chamber has not been provided with any statistical information, neither generally nor in relation to the ethnicity of judges appointed to the High Court and the Supreme Court.[61] But irrespective of the exact composition of those two judicial bodies, the Chamber does not find that these submissions prevent transfer. The acquittal rate in Rwanda in genocide cases is considerable. Many accused of Hutus origin have been acquitted by the ordinary courts, including cases where convictions are overturned on appeal.[62]

38. Human Rights Watch and ICDAA have provided examples to illustrate that there is a gap between law and practice with respect to judicial independence.[63] The Chamber does not underestimate the challenges facing the judiciary, which had to be reconstructed after the genocide in 1994. It also accepts the general observation by an independent expert group, referred to by Human Rights Watch, to the effect that the "concept of judicial independence is relatively new in Rwanda". But although some of the illustrations provided by the *amici*

[57] Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request). *See* similarly Article 64 (1) of Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts: "Courts shall be independent and separate from other state institutions."

[58] Prosecution Request, paras. 55-56. The Code was promulgated pursuant to Law No. 09/2004 of 29 April 2004 Relating to the Code of Ethics for the Judiciary.

[59] Defence Reply, paras. 50-51. According to Article 147 of the Constitution, the President and Vice-President of the Supreme Court are elected by the Senate and proposed by the President of the Republic after consultation with the Cabinet and the Supreme Council of the Judiciary. They are removed by the Chamber of Deputies or the Senate. Under Article 148, the President of the Republic, after consultation with the Cabinet and the Superior Council, submits a list of candidates for the Supreme Court to the Senate, which by an absolute majority elects the candidates.

[60] Defence Reply, para. 49; ICDAA Brief, paras. 24-26.

[61] The Chamber notes that the official policy of Rwanda seems to avoid public references to ethnicity. *See*, for instance, oral hearing in *The Prosecutor v. Yussuf Munyakazi* (T. 24 April 2007 pp. 55-56) where Counsel for the Republic of Rwanda, in relation to a question from the Bench about the composition of the High Court, answered: "… But, with due respect, I will not be going into the discussion of ethnic balance. It is against the policy of my country, it is against the constitution of my country, and I will not be doing that." *See also id*. p. 37.

[62] The Chamber does not take a position on the exact percentage of acquittals, which may differ according to whether not only the ordinary courts but also Gacaca proceedings are included in the calculation. It simply observes that the acquittal rate is considerable. Of ten cases reported in Volume VII (2004-2005) of *Recueil de jurisprudence contentieux du genocide* (footnote 28 above), five involved an acquittal of some type. In *The Prosecutor v. Yussuf Munyakazi*, Counsel for the Republic of Rwanda referred to an acquittal rate in his country of "close to 40 per cent" (T. 24 April 2007 p. 31, *see also* pp. 37, 38).

[63] HRW Brief, paras. 49-54 and ICDAA Brief, paras. 7-10. The Briefs also refer to "genocidal ideology" which is considered below (paras. 45, 54-55, 71-72) but has been taken into account also in the present context.

appear well-founded, they are mostly of a general nature and do not focus specifically on the High Court or Supreme Court which will adjudicate cases within the framework of the Transfer Law. For instance, in relation to interviews with 25 high-ranking Rwandan judicial officials stating that the courts were not independent in 2005, 2006 and 2007, there is no information about the basis for their view, which is generally formulated. Other illustrations show that there may have been specific attempts to influence judges but not that the alleged interference was successful.[64]

39. The Defence submits that the High Court will be composed of a single judge (Article 2 of the Transfer Law) and that three judges will constitute the Bench in the Supreme Court. This is different from the situation in the international tribunals, where there are three judges at the first instance level and five on appeal. The Defence argument is partly that the justice offered by Rwanda will be of a lower standard than at the ICTR, partly that a single judge may be more vulnerable to attempted interference.[65] The Republic of Rwanda has explained that all judgments in the first instance are pronounced by a single judge. This system was introduced through a judicial reform in 2004, based on a comparative survey of common and civil law systems in East, Central and Southern Africa.[66]

40. The Chamber observes that international legal instruments, including human rights conventions, do not require that a trial or an appeal has to be heard by a specific number of judges in order to be fair and independent. The fact that the Bench at the first instance level and on appeal is composed of fewer judges in Rwanda than at the international tribunals clearly does not prevent transfer. Single judge trials take place in many countries on several continents and may include serious cases which can lead to severe punishment. Rwanda has had single judge trials in genocide cases since 2004, and there is no information available that the acquittal rate has been lower in such trials. The Chamber has no basis for a finding that the situation may be different in a case transferred from the Tribunal.

41. Doubts have also been raised as to whether Rwandan judges have the required competence.[67] The Chamber is not convinced by these arguments. Even though some judges there may be young, they clearly have experience in adjudicating genocide cases. Furthermore, it appears that many judges in the High Court and the Supreme Court have more experience than the minimum requirements (six and eight years professional experience, respectively) prescribed by the law.[68]

42. It follows that the Chamber considers some of the concerns mentioned above well-founded. However, having considered them separately and together, it does not find that they constitute a sufficient basis to deny transfer to the judicial bodies under the Transfer Law.

---

[64] One example is an incident of alleged executive interference with the High Court, mentioned in HRW Brief, para. 53.

[65] Defence Response, para. 53; Prosecution Reply, paras. 31-33.

[66] Rwanda's Brief, paras. 36 and 40, referring to Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts. It provides for single judges in Articles 7 (Lower Instance Court), 16 (Higher Instance Court) and 26 ("The High Court of the Republic shall hear cases in the first instance while being constituted of a single judge assisted by a registrar. However, in the course of hearing appeals from decisions of lower courts, it shall be constituted of three judges assisted by a court registrar").

[67] Prosecution Request, paras. 15, 43-45; Defence Reply, para. 53. Rwanda's Brief, paras. 17-19; HRW Brief, paras. 73, 83-85.

[68] Rwanda's Brief, para. 19. A similar argument was unsuccessfully put forward in *Prosecutor v. Mitar Rasević and Savo Todović*, Decision on Savo Todović's Appeals Against Decisions on Referral under Rule *11bis* (AC), 4 September 2006, paras. 86, 88-91.

(iii) Presumption of Innocence

43. Article 19 of the Constitution 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".[69] This provision is in conformity with several human rights treaties to which Rwanda is a party, for instance Article 14 (2) of the ICCPR. Article 44 (2) of the Code of Criminal Procedure also provides that "an accused is presumed innocent until proven guilty".[70] The principle is reiterated in Article 13 (2) of the Transfer Law (above, para. 29). Consequently, the presumption of innocence clearly forms part of Rwandan law. The question is whether it is applied in practice.

44. Human Rights Watch mentions several illustrations to show that there is a preconceived attitude against genocide suspects. The Prosecution, the Republic of Rwanda and the Kigali Bar Association dispute these submissions.[71] The Chamber notes that the examples referred to by Human Rights Watch do not include activities before Rwandan courts. One of them is the denial of voting rights to persons in pre-trial detention. This indicates a possible problem with electoral legislation, but does not demonstrate that judges in a trial will disregard the presumption of innocence. Another submission concern "collective punishment", according to which persons living in the vicinity of places where survivors have been harassed have been forced to pay fines without any process of law. The Republic of Rwanda strongly disputes this and denies any official involvement. The Chamber observes that also this example does not involve the judiciary.

45. Reference has been made to statements by officials which purportedly suggest predetermination of guilt. The Chamber recalls that it follows from human rights case law that statements by representatives of authorities may raise issues in relation to the presumption of innocence.[72] One set of utterances refer to the killing by police officers of 20 detainees in May 2007. The Commissioner General is alleged to have made a statement characterising all the suspects that were killed as criminals and terrorist. The Chamber notes that the facts are disputed and that the statement was made by a person outside the judicial hierarchy. Another statement was made by the President of the High Court in connection with a conference in 2006.[73] This statement is not clear and does not express any view on the guilt or innocence of specific persons. The Chamber does not consider that these incidents prevent transfer of Kanyarukiga's case to the High Court and makes a similar finding in relation to other statements quoted by Human Rights Watch as well as cases relating to "genocidal ideology" in 2006.[74] It is recalled that many cases tried by Rwandan courts have resulted in acquittals (above, para. 37).

---

[69] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).
[70] Law No. 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure (Annex G to the Prosecution Request). Article 44 further clarifies that it is the Prosecution which bears the burden of proof, and that an accused must put forward a defence only once the Prosecution has established a *prima facie* case.
[71] Prosecution Request, paras. 37(ii), 67-68; Rwanda's Brief, para. 32 (b); HRW Brief, paras. 16 (a)(ii), 41-48, 111 (b); Prosecution Response to HRW, paras. 4, 37; Rwanda's Response to HRW, paras. 28 (b), 32.
[72] For instance, *Allenet de Ribemont v. France*, Judgment of 10 February 1995, European Court of Human Rights, paras. 32-47.
[73] The statement ("the architects of the genocide literally made everyone a direct or indirect participants") formed part of a paper delivered at a conference in The Hague in December 2006. HRW Brief, para. 46.
[74] HRW Brief, paras. 47-48.

(iv) Right to an Effective Defence

52. Article 14 (3) of the ICCPR, which is incorporated into Rwandan law (above, para. 16) contains the various elements of the right to defend oneself or through legal assistance. The principle is set forth in Article 18 (3) of the Rwandan Constitution.[75] Article 13 of the Transfer Law covers some aspects of this right (above, para. 29). Moreover, Article 15 provides that Defence Counsel shall have the right to enter Rwanda, move freely there, 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.

53. The contested issues are primarily whether these rights will be observed in practice. The Prosecution, the Republic of Rwanda and the Kigali Bar Association submit that Rwandan law affords the necessary guarantees. The Defence, HRW and ICDAA argues first, that Kanyarukiga, if transferred, may not have counsel available; second, that he may not receive legal aid; third, that the Defence may have problems in respect of travel, investigations and security or face other impediments in discharging its functions; and fourth, that witnesses may not be available or may receive insufficient protection.[76] The Chamber will address these issues separately.

(a) Availability of Counsel

54. The Prosecution and the Republic of Rwanda refer to Article 13 (6) of the Transfer Law, according to which the accused is entitled to counsel of his choice. The Defence, Human Rights Watch and the ICDAA submit that it may be difficult to ensure that Kanyarukiga has legal representation, as lawyers representing persons accused of genocide have faced threats or harassment. There are few lawyers, and many are inexperienced.[77]

55. It follows from the information provided to the Chamber that there are around 280 Rwandan lawyers in private practice, mostly in Kigali. Even though this is a limited number compared to all genocide accused in the country, the Chamber has no doubt that there will be lawyers available to represent Kanyarukiga. The Kigali Bar has expressed its willingness to defend persons transferred from the ICTR.[78] It is also possible that lawyers from abroad may be willing to represent such persons.[79] The examples of threats and harassment against Rwandan defence lawyers in connections with cases before ordinary courts do not show that lawyers, from Rwanda or elsewhere, will refuse assignments as Defence Counsel in proceedings under the Transfer Law. Whether a risk of harassment will make it difficult to carry out an efficient defence will be considered separately below under (c). Finally, the Chamber has no basis for accepting the Defence submission that Kanyarukiga will only be represented by a young or inexperienced counsel.

---

[75] Article 18 (3) of the Rwandan Constitution reads: "The right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs" (Annex F to the Prosecution Request).

[76] Prosecution Request, paras. 65-66; Defence Response, paras. 67-69; Prosecution Reply, paras. 44-48; Prosecution Response to HRW, paras. 53-62; Rwanda's Response to HRW, paras. 31; Kigali Bar Brief, paras. 6-18; ICDAA Brief, paras. 37-40, 55-76.

[77] Prosecution Request, 59, 63; Defence Response, paras. 66-72; Prosecution Reply, paras. 60-64; Rwanda's Brief, para. 22; HRW Brief 69-74, 84, 111 (c); Prosecution Response to HRW, paras. 53-57; Rwanda's Response to HRW, paras. 7.1, 28; ICDAA Brief, paras. 42-46; Prosecution Response to ICDAA, paras. 17-18.

[78] Rwanda's Brief, para. 22 and, more generally, Kigali Bar Brief.

[79] HRW Brief, paras. 73-74.

(b) Legal Aid

56. Article 13 (6) of the Transfer Law provides a legal framework guaranteeing the right to legal aid for indigent accused. The contentious issue is whether this right will be ensured in practice. The Prosecution and the Republic of Rwanda refer to funds having been set aside. Human Rights Watch and the ICDAA doubt that they will be made available or be sufficient.[80]

57. The Chamber notes the submissions of the two *amici* that Rwandan authorities have not disbursed funds to provide payment for legal representation of indigent accused in the past, and that the legal aid budget administered by the Rwandan Bar Association is always depleted. However, what matters in the present context, is the situation under the Transfer Law. The Ministry of Justice has made budgetary provisions of approximately $500,000 for 2008 to fund the legal aid scheme in respect of transferred cases.[81] This is a significant amount. It is not for the Chamber to venture into the question whether this amount will be sufficient. It follows from case law that there is no obligation to establish in detail the sufficiency of the funds available as a precondition for referral.[82]

58. Accordingly, the Chamber is satisfied that legal aid will be available if Kanyarukiga is transferred. Should there be future financial constraints, it would be a matter for evaluation by the monitoring mechanism (below, D).

(c) Working Conditions

59. The Defence, Human Rights Watch and ICDAA argue that Rwanda has never facilitated the travel of Defence teams, and has delayed or failed to assist them in their investigations in Rwanda. In particular, on several occasions the Defence have been unable to obtain documents or only after great effort. This is disputed by the Prosecution, the Republic of Rwanda and the Kigali Bar Association.[83]

60. Article 15 (Defence Counsel) of the Transfer Law reads as follows:

> Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties. They shall not be subject to search, seizure, arrest or detention in the performance of their legal duties.
>
> The Defence Counsel and their support staff shall, at their request, be provided with appropriate security and protection.

---

[80] Prosecution Request, paras. 62-63; Rwanda's Brief, paras. 22-26; HRW Brief, paras. 75-78, 111 (f); Prosecution Response to HRW, paras. 58-60; ICDAA Brief, paras. 33-36, 47-54; Prosecution Response to ICDAA, paras. 13-15.

[81] *See* Rwanda's Brief, para. 25 (RwF 250 million); HRW Brief, para. 76 ($500,000); ICDAA Brief, para. 35 ($468,000).

[82] *Prosecutor v. Radovan Stanković*, Decision on Rule 11 *bis* Referral (AC), 1 September 2005, para. 21 ("Having satisfied itself that the State would supply defence counsel to accused who cannot afford their own representation, and having learned that there is financial support for that representation, the Referral Bench was not obligated in its opinion to itemize the provisions of the BiH budget").

[83] Prosecution Request, paras. 65-66; Defence Response, paras. 67-69; Prosecution Reply, paras. 44-48; HRW Brief, paras. 16 (a)(iii), 79-84, 111 (g) and (h); Prosecution Response to HRW, paras. 53-62; Rwanda's Response to HRW, paras. 7.2, 31.7; ICDAA Brief, paras. 37-40, 55-76; Kigali Bar Brief, paras. 6-18.

61. According to this provision, the Defence will be entitled to move into and within Rwanda and carry out their functions without search, seizure or deprivation of liberty, as well as being entitled to security. Without going 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. On the other hand, the examples relate to proceedings before the ordinary courts. Defence teams at the ICTR have been able to work in Rwanda, even though they have encountered some problems.[84] Should such situations occur after transfer under Rule 11 *bis*, the Defence will have an explicit legal basis for bringing the matter to the attention to 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 be a matter for the monitoring mechanism and may lead to revocation of the transfer order. Finally, for the reasons given above (para. 57), the Chamber is not persuaded by the submission that the travel and investigation budget will be insufficient.[85]

62. Other alleged impediments faced by the Defence in connection with its investigations are generally formulated, and the Chamber is not convinced that they prevent transfer. Some of them may be explained by communication problems, lack of precision in the requests, or more generally administrative delays or lack of resources.[86] However, the Chamber accepts the submission that many ICTR Defence teams have been unable to obtain documents from Rwandan authorities, or have received them only after considerable time.[87] Similarly, there are examples of Defence counsel having difficulties in meeting detainees.[88] Such incidents are not in themselves sufficient to prevent transfer under Rule 11 *bis*. However, together with other factors they illustrate that the working conditions for the Defence may be difficult. Together with other factors discussed below under (d), this may have a bearing on the fairness of the trial.

(d) Availability and Protection of Witnesses

63. The Prosecution, the Republic of Rwanda and the Kigali Bar Association submit that witnesses will be available and protected under the specific regime established under the Transfer Law. Allegations to the contrary are generalized and unfounded. The Defence, Human Rights Watch and ICDAA argue that witnesses for persons accused of genocide are reticent to testify because they are afraid of being accused of harbouring "genocidal ideology". Inadequate procedures exist to protect witnesses. Defence witnesses in particular

[84] The factual circumstances of some of the purported problems are disputed, and the Chamber does not fully accept the description of all events. For instance, Léonidas Nshogoza (ICDAA Brief, para. 57), a lawyer who was then serving as investigator for an ICTR Defence team, was on 11 February 2008 indicted by the ICTR and charged with contempt of court. The descriptions of the incidents involving Defence Counsel Callixte Gakwaya (ICDAA Brief, para. 66) and Defence Minister Marcel Gatsinzi (HRW Brief, para. 82) are also not complete.

[85] ICDAA Brief, paras. 55-56. Neither is the Chamber convinced by the purported lack of specific funding of security for Defence teams (ICDAA, paras. 59-60).

[86] Some of these factors are mentioned as possible explanations for delays in Rwanda's Response to HRW, paras. 31.7.

[87] HRW Brief, paras. 79, 81; ICDAA Brief, para. 72. One example is judicial antecedents, for instance guilty pleas or judgments involving Prosecution witnesses.

[88] HRW Brief, paras. 79, 81; ICDAA Brief, para. 71. The illustrations in ICDAA Brief, paras. 69 (Defence Counsel followed by government officials during investigations) and 70 (Defence Counsel photographed while interviewing a witness) are worrying. However, such incidents do not appear sufficiently widespread to prevent transfer.

face threats and harassment, and witnesses residing outside Rwanda will be unwilling to testify.[89]

64. The Chamber recalls that providing physical protection to witnesses and their family members who may be in danger as a result of their testimony may positively influence their availability. This may affect an accused's right to obtain the attendance of witnesses on his behalf and examine them under the same conditions as witnesses against him. Protection of witnesses before, during and after their testimony is therefore important to the fairness of the trial.[90]

65. Article 14 of the Transfer Law states that in cases transferred from the ICTR, the High Court "shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence". The travelling to Rwanda of witnesses residing abroad shall be facilitated, and they shall have immunity from search, seizure, arrest or detention. According to Article 145 of the Code of Criminal Procedure, courts may order closed sessions where a public hearing could be detrimental to public order and good morals, and they may take other measures that may reasonably limit the right to a public trial when necessary for the protection of witnesses.[91] Consequently, the Republic of Rwanda has a legal framework for the protection of witnesses and has adopted provisions similar to those in the Tribunal's Rules.

Witnesses in Rwanda

66. Based on interviews, Human Rights Watch points out that the Rwandan provisions concerning witness protection do not appear to be widely known by legal practitioners and judges and hence not applied.[92] The Chamber notes that the interviews were carried out in 2005, 2006 and 2007 and related to a law which was recently adopted - in 2004 – and is applicable in the ordinary courts. Kanyarukiga's case, if transferred, will be conducted under the Transfer Law of 2007, which in Article 14 contains explicit and elaborate rules about protection. Lawyers, prosecutors and judges who will be engaged in such proceedings must be expected to know that provision. It will be for the parties to raise concerns, if any, and exhaust the witness protective mechanisms available in those proceedings, which would be monitored in case of transfer (below, D). In the Chamber's view, limited knowledge of witness protection under a previous general system is not a reason to exclude transfer under the specific regime established by the Transfer Law. Finally, the submissions do not show that Rwandan judicial officials will disregard witness protection orders.[93]

---

[89] Prosecution Request, paras. 41-42, 69; Defence Brief, paras. 56-66; Prosecution Reply, para. 65; Rwanda's Brief, paras. 27; HRW Brief, paras. 15 (i), 16 (c), (d), (e), 25-40, 83-105, 111 (b), (i), (j) and (k); Prosecution Response to HRW, paras. 4, 21-36, 63-66; Rwanda's Response to HRW, paras. 31.2-31.6; ICDAA Brief, paras. 80-102; Prosecution Response to ICDAA, paras. 21-24; Kigali Bar Brief, paras. 19-23.

[90] *Prosecutor v. Rahim Ademi and Mirko Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis* (TC), 14 September 2005, paras. 49-50.

[91] Law No. 13/2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request).

[92] HRW Brief, para. 26 refers to Article 128 of *Loi No. 15/2004 portant modes et administration de la preuve*, which enables Rwandan courts to take measures to protect witnesses who provide information or cooperate with the prosecuting authorities.

[93] A statement by the Rwandan Minister of Justice in 2006 to the effect that witness protection is not appropriate in the Rwandan context (HRW Brief, para. 26) predates the adoption of the Transfer Law. The Chamber's attention has also been drawn to a decision by the Higher Instance Court of Gasabo, which included names of protected witnesses (HRW Brief, para. 28). However, one such decision does not form a basis to conclude that officials will not respect orders to be given under the Transfer Law. (The decision ordered the detention of Leonard Nshogoza, a Defence investigator charged at the ICTR with contempt of court, see footnote 84 above).

67. Human Rights Watch and ICDAA argue that the Rwandan witness protection service will be unable to provide adequate protection, as it lacks resources. The funding has been left to foreign donors, and only 16 staff members serve the entire country.[94] The Chamber observes that about 900 witnesses have been subject to protection since the service was established.[95] This shows that the witness protection service has experience. There are presently four staff members in Kigali, where the transfer proceedings will take place. Capacity does not only depend on the number of employees but also on the priority given to particular cases, based on a concrete evaluation. Finally, a mere risk that future funding may not be available is not a sufficient reason to deny transfer.[96]

68. The Defence, Human Rights Watch and ICDAA refer to instances of threats, harassment and violence against witnesses living in Rwanda. It is argued that following testimony for the defence teams in ordinary courts, witnesses have been accused in Gacaca proceedings. Furthermore, in about ten cases, persons who testified for the Defence before the Tribunal were purportedly arrested, re-arrested, subjected to worse conditions of incarceration or otherwise harassed after returning to Rwanda. The Prosecution and Rwanda disputes the factual description of some of the event, whereas others are sporadic incidents which do not prevent transfer.[97]

69. In the Chamber's view, the submissions show that there have been instances of harassment of witnesses. However, it appears that the large majority of witnesses have testified without such consequences. Similarly, although some persons who have given evidence before the Tribunal have reported problems, hundreds of Prosecution and Defence witnesses have come from Rwanda and returned without difficulties. Under these circumstances, the Chamber does not find that witnesses will, in general, face risks if they testify in transfer proceedings. This said, no judicial system, be it national or international, can guarantee absolute witness protection.[98] Should incidents occur, it will be for the High Court or the Supreme Court to initiate investigation, clarify the facts and ensure the necessary protection. If this is not done, or if the measures taken are insufficient, it would be a matter for evaluation by the monitoring mechanism (below, D).[99]

70. In this connection, the Chamber has also taken into account that the Rwandan witness protection service is unable to provide protection alone. According to Human Rights Watch and ICDAA, the service has to refer all cases of threats to the local police. The witness protection service forms part of the national prosecutor's office. According to the two *amici*, this makes it unlikely that Defence witnesses will seek the assistance of that service.[100] The Chamber considers that referral of cases by the witness protection service to other institutions, such as the police, does not necessarily mean that the service is inadequate. This

[94] HRW Brief, paras. 27 and 85; ICDAA Brief, para. 83.
[95] HRW Brief, para. 85; Prosecution Response to HRW, para. 64.
[96] According to Human Rights Watch, the funding for the first three quarters of 2007 amounted to $132,000 (HRW Brief, para. 85).
[97] Defence Response, paras. 63-66; HRW Brief, paras. 89-109; Prosecution Response to HRW, paras. 67-78; Rwanda's Response to HRW, paras. 11-12, 15-16, 31; ICDAA Brief, paras. 80-93.
[98] *The Prosecutor v. Gojko Janković*, Decision on Rule 11*bis* Referral (AC), 15 November 2005, para. 49.
[99] Human Rights Watch has referred to specific incidents where allegation of ill-treatment did not lead to investigations (HRW Brief, paras. 90-94). This is certainly a matter of concern. However, the incidents do not reveal a general pattern and does not in the Chamber's view prevent transfer under the specific regime established by the Transfer Law.
[100] HRW Brief, paras. 27, 86, 87; ICDAA, paras. 83-86; Prosecution Response to HRW, para. 65. The two *amici* refer not only to the police but also to "political authorities". It is unclear what is meant by that.

said, the link between the witness protection service and the police may, in the Rwandan context, reduce the willingness of some potential Defence witnesses to testify. The fact that the national prosecutor's office is responsible for the protection of all witnesses may also be noted by fearful witnesses.

71. Witness protection concerns are also related to the issue of "genocidal ideology", which has been extensively referred to in some of the submissions. The Constitution refers to the fight against "the ideology of genocide".[101] Article 13 does not use this concept but states that revisionism, negationism and trivialization of genocide is punishable by law, and the 2003 Genocide Law prohibits the negation of genocide.[102] This is in itself legitimate and understandable in the Rwandan context. The Chamber recalls that many countries criminalise the denial of the Holocaust, while others prohibit hate speech in general.[103] In the present case, it is argued that an expansive interpretation and application of the prohibition of "genocidal ideology" will lead to Defence witnesses not being willing to testify, as they are afraid of being accused of harbouring this ideology.

72. The material indicates that in several instances, the concept has been given a wide interpretation.[104] There are examples of persons being too afraid to appear as witnesses for persons who allegedly were innocent. On the other hand, many persons living in Rwanda have testified for the Defence in proceedings there. In addition, the Transfer Law provides specific rules and remedies in the field of witness protection (above, para. 65). However, the Chamber cannot exclude that some potential Defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring "genocidal ideology".

73. Taking into account the totality of the factors mentioned above, the Chamber accepts that the Defence may face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. This may affect the fairness of the trial.

Witnesses Outside Rwanda

74. Defence, Human Rights Watch and ICDAA dispute that the Defence will be able to obtain witnesses residing outside Rwanda. According to the Prosecution and the Republic of Rwanda, this fear is unfounded.[105] The Chamber notes Article 14 (2) and (3) of the Transfer Law:

---

[101] Second preambular paragraph and Article 9 (1) of the Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[102] Law No. 33 *bis*/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes. According to Article 4, imprisonment between 10 and 20 years may be imposed on "any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimized it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence".

[103] As pointed out by the Prosecution (Response to HRW, para. 29), it follows from human rights case law that prohibiting negation or revision of the Holocaust does not constitute a violation of freedom of expression under Article 10 of the European Convention of Human Rights and Article 19 of the ICCPR.

[104] HRW Brief, paras. 30-40 and 99 (arguing that the concept has been considered to cover "a broad spectrum of ideas, expression, and conduct, often including those perceived as being in opposition to the policies of the current government" and "questioning the legitimacy of detention of a Hutu"; and mentioning lists of hundreds of persons and organizations considered guilty of holding or disseminating "genocidal ideology", including Care International, BBC and Voice of America).

[105] Defence Brief, para. 61; HRW Brief, paras. 38-40, Prosecution Response to HRW, paras. 76-78; 103-105; Rwanda's Response to HRW, paras. 31.18 and 31.19; ICDAA Brief, paras. 94-102.

> In the trial of cases transferred from the ICTR, the Prosecutor General of the Republic shall facilitate the witnesses in giving testimony including those living abroad, by the provision of appropriate immigration documents, personal security as well as providing them with medical and psychological assistance.
>
> All witnesses who travel from abroad to Rwanda to testify in the trial of cases referred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials. The High Court of the Republic may establish reasonable conditions towards a witness's right of safety in the country. As such there shall be determination of limitations of movements in the country, duration of stay and travel.

75. This provision provides a legal framework for witnesses residing abroad, including their travel, security, immunity and assistance. The Chamber notes in particular that the witnesses shall have immunity from arrest and detention in connection with testimony in Rwanda. The Republic of Rwanda has submitted the provisions on safe conduct of witnesses will be strictly observed in all proceedings involving transferred cases.[106] The Chamber accepts this statement but is also persuaded by the submissions by the Defence, Human Rights Watch and ICDAA that many Rwandans in the diaspora will be afraid to testify in Rwanda.[107] Experience at the ICTR confirms such fear.

76. Leaving aside how well-founded such fear is, it has to be taken into account when evaluating the availability of Defence witnesses. The Kanyarukiga Defence states that most of its witnesses are residing abroad. This is not unusual at the ICTR.[108] Even assuming that some of them will testify in Kigali, it will undermine the fairness of a trial there if Kanyarukiga is unable to call a sufficient number of witnesses to present an efficient defence.

77. In facing the problem of unwilling witnesses, the ICTR has issued subpoenas based on Article 28 of its Statute, which requires states to cooperate with the Tribunal in securing

---

[106] Rwanda's Response to HRW (para. 31.19, quoted below in footnote 107). *See* on the other hand ICDAA Brief, para. 100 about "safe conduct" ("*sauf-conduit*").

[107] ICDAA Brief, para. 101 ("ICDAA's conclusion, based on its members' experience, is that almost no witness from abroad will be willing to go back to Rwanda in order to testify at the request of a defence team."); HRW Brief, para. 38 ("The right to present witnesses is seriously undermined by the fact that many Rwandan witnesses living abroad are unwilling to testify in Rwandan courts"). Quoting a statement by the Minister of Justice in February 2007 about how immunity for witnesses "will be a step towards their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest", Human Right Watch continues (para. 39): "This comment, widely circulated among Rwandans in the diaspora, served only to confirm the fears of many Rwandans that the immunity guaranteed by the transfer law was in fact a falsehood to facilitate their later arrest and forced return to Rwanda". In its Response to HRW (para. 31.19), Rwanda does not dispute the accuracy of the Minister's statement but submits that "the information as to the whereabouts of fugitives has always been available, yet not each of the fugitives has been tracked down and captured yet. More importantly, some of the fugitives have been removed from *Interpol red notice* simply because the ICTR needed them as witnesses in various cases. This has always been done even without any legally binding provision. We submit that the provisions on safe conduct of witnesses shall be strictly observed in all proceedings involving transferred cases. Thus there should be no room for speculation or worries as expressed under paragraph 39 and 40 of the HRW Brief."

[108] Defence Response, para. 61 ("Or, la plupart des témoins de la défense de Kanyarukiga sont localisés à l'étranger et ceux de l'interieur par peur des représailles risquent de se retracter"). *See also* HRW Brief, para. 38 ("One experienced defence lawyer estimated that as many as 90 percent of the witnesses called by his clients and other accused persons reside outside Rwanda."). In its Response to HRW, Rwanda challenges the reliability of this estimate (para. 31.18). Leaving aside the exact percentage of Defence witnesse residing abroad in the various trials, the Chamber accepts that it is generally high and has no basis for disputing the Kanyarukiga Defence statement about its witnesses.

the attendance of witnesses. The Republic of Rwanda will not have this remedy available. Furthermore, the Chamber is not aware that Rwanda has taken any steps to conclude conventions about mutual assistance in criminal matters.[109] This will make it difficult to ensure the attendance of witnesses in Kigali.

78. The Prosecution and the Republic of Rwanda submit that witnesses residing abroad may be heard by video-link conference, and that the necessary facilities exist in Rwanda.[110] The Chamber accepts that there is such equipment in Rwanda, and that it is available in relation to unwilling, including fearful, witnesses. It is also recalled that there is extensive case-law accepting this procedure, under certain conditions, both in domestic jurisdictions and at the ICTR. In Tribunal case law, genuinely-held fear has been considered as a sufficient reason to hear the testimony of witnesses residing outside Rwanda by video-link instead of requiring their presence in the courtroom.[111]

79. This said, it would be an unprecedented situation if most or all witnesses for one side were to be heard by video-link. It is preferable that witnesses be heard in court.[112] The testimony of witnesses heard through electronic media runs the risk of being less weighty if the quality of the transmission impairs the court's assessment of the witness. The physical presence of witnesses makes it easier for the bench to assess their credibility, and also for the parties, including the accused, to follow the evidence and the proceedings. Video-link transmission cannot be equated with presence, as there is not the same visual interaction. In relation to key witnesses, the use of video-link may, according to the circumstances, raise concerns.[113]

---

[109] In *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), the Appeals Chamber accepted (para. 26) that the Referral Bench had taken into account that Bosnia and Herzegovina had ratified the European Convention on Mutual Assistance in Criminal Matters when considering the steps taken by that country to promote the obtaining of witnesses and evidence. Reference was also made to Security Council resolution 1503 (2003), which obliges the international community to assist national jurisdictions in improving their capacity to prosecute cases transferred from the ICTY and the ICTR (operative paragraph 1). According to the Appeals Chamber, "this instruction implicitly includes cooperation with respect to witnesses" (*id.*). In the present case, the Chamber is not convinced that this in itself will be sufficient to ensure the availability of Defence witnesses. (About availability of witnesses, *see also The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B (Referral Bench), 5 April 2007, para. 85.)

[110] Rwanda's Brief, para. 20 (courtroom equipped with "Audiovisual recording"); Prosecution Response to HRW, paras. 66 and 78, quoting *Amicus Curiae* Brief of Rwanda, submitted on 10 January 2008 in the Rule 11 *bis* proceedings in *Prosecutor v. Hategekimana* (p. 7: "Audiovisual recording: There are video-link facilities which will be used to receive testimony of any witness residing abroad who may be unable or unwilling to physically appear in court"). *See also Prosecutor v. Yussuf Munuyakazi*, T. 24 April 2008 p. 70, where Counsel for Rwanda confirmed that there were no practical or procedural obstacles limiting courts to hear witnesses by video-link.

[111] About fear, *see The Prosecutor v. Bagosora et al.*, Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed Session (TC), 1 November 2006, paras. 2-3; Decision on Video-Conference Testimony of Kabiligi Witnesses YUL-39 and LAX-23 and to Hear Testimony in Closed Session (TC), 19 October 2006, paras. 2-5; Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46 (TC), 5 October 2006, paras. 2-6.

[112] This has been a relevant factor in ICTR case law. *See Prosecutor v. Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 15 (reiterating "the general principle, and the Chamber's strong preference, that most witnesses should be heard in court"); Decision on Testimony by Video-Conference (TC), 20 December 2004, para. 4 (emphasizing "the general principle, articulated in Rule 90 (A), that 'witnesses, shall, in principle, be heard directly by the Chamber'"); Decision on Testimony of Witness Amadou Deme by Video-Link (TC), 29 August 2006, para. 3.

[113] *The Prosecutor v. Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 19 ("the Appeals Chamber accepts that the Trial Chamber's general concern over its ability to assess the credibility of a key witness is an important interest"). *See also The Prosecutor v. Zejnil Delalic et al.*, Decision on the Motion to

80. Furthermore, human rights case law has established the principle of equality of arms, which is one aspect of the right to a fair trial. It implies that each party must be afforded a reasonable opportunity to present his or her case – including evidence – under conditions that do not place him or her at a substantial disadvantage vis-à-vis the other party.[114] The hearing of most Prosecution witnesses in the courtroom while most of the Defence witnesses either refuse to give evidence or testify by video-link would not be in conformity with this principle. In the Chamber's view, there is a real risk that this will be the situation, even if the trial is subject to monitoring.

81. The Chamber concludes that it is not satisfied that Kanyarukiga will be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial if his case is transferred.

(v) Double jeopardy

82. According to the Defence and Human Rights Watch, the Rwandan legal system provides no protection against double jeopardy as guaranteed by the ICCPR and the Statute (*non bis in idem*). Persons tried before conventional courts may subsequently be brought before the Gacaca jurisdictions. This follows both from legislation and practice. The Prosecution submits that the risk of double jeopardy is unsupported and refers to the Transfer Law.[115]

83. The Chamber recalls that ICCPR Article 14 (7) states that no-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Similarly, it follows from Article 9 (1) of the ICTR Statute that no person "shall be tried before a national court for acts constituting serious violations of international humanitarian law under the Statute for which he or she has already been tried by the Tribunal". Under Rwandan law, however, it follows from the 2004 Gacaca Law that a person may be tried first by an ordinary court and subsequently by a Gacaca jurisdiction. According to Article 93, the Gacaca Courts of Appeal are the only courts competent to review judgments in such cases.[116] Human Rights Watch has provided examples of accused who were first acquitted by an ordinary court and subsequently brought before a Gacaca jurisdiction.

Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference (TC), 28 May 1997, para. 18.

[114] *See*, for instance, the following judgments of the European Court of Human Rights: *Delcourt v. Belgium*, Judgment, 17 January 1970, Series A, No. 11, paras. 27-38, in particular para. 28; *Bönisch v. Austria*, Judgment, 6 May 1995, Series A, No. 92, paras. 28-35, particularly para. 32 (referring to the need for equal treatment as between the hearing of a Prosecution witness and a Defence witness); *Dombo Beheer B.V. v. The Netherlands*, Judgment, 27 October 1993, Series A, No. 274, paras. 30-35, in particular para. 33 ("each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent").

[115] Defence Response, para. 46; HRW Brief paras. 15 (b), 55-60, 111 (c); Prosecution Response to HRW, paras. 45-48.

[116] Article 93 of the 2004 Gacaca Law provides: "(1) The judgement can be subject to review only when: (1) the person was acquitted in a judgement passed in the last resort by an ordinary court, but is later found guilty by the Gacaca Court; (2) the person was convicted in a judgement passed by an ordinary court, but is later found innocent by the Gacaca court … The Gacaca Court of Appeal is the only competent Court to review judgements passed under such conditions."

84. It is not the task of the Chamber to assess the general implementation in Rwandan law of the protection against double jeopardy but to determine whether Kanyarukiga, if transferred, will be protected against a violation of this principle. The Transfer Law, which according to Article 1 regulates the transfer of cases, establishes the High Court and the Supreme Court as the only courts to hear such cases. Article 2 specifies that the High Court "shall be the competent court to conduct [in] the first instance" cases that are transferred [n]otwithstanding any other law to the contrary". Article 25 states that in the event of any inconsistency between the Transfer Law and another law, the former shall prevail. Finally, Article 13 of the Transfer Law provides that it shall apply without prejudice to other rights ("*sous reserve d'autres droits*") guaranteed in the ICCPR, which includes the prohibition of double jeopardy (above, para. 83). According to Article 190 of the Constitution, international conventions ratified by Rwanda is more binding than other laws (para. 16). In view of these provisions, the Chamber is satisfied that Kanyarukiga, if transferred, will not run the risk of double jeopardy.[117]

(vi) Arrest and Conditions of Detention

85. Case law has established that conditions of detention in a national jurisdiction, whether pre- or post-conviction, are a matter that touches upon the fairness of that jurisdiction's criminal justice system.[118] By way of introduction, the Chamber notes that Rwanda has ratified and incorporated several human rights instruments, including the ICCPR, which prohibits unlawful and arbitrary deprivation of liberty (Article 9), requires that all persons deprived of their liberty shall be treated with humanity and respect (Article 10), and outlaws torture and cruel, inhuman or degrading treatment or punishment (Article 7). The Constitution establishes the right to physical and mental integrity and provides that no-one shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment (Article 15). The liberty of persons is guaranteed by the State (Article 18).[119]

86. The Defence, Human Rights Watch and ICDAA raise concerns in relation to unlawful detention and inhuman conditions of detention, as well as torture. The Prosecution, the Republic of Rwanda and the Kigali Bar Association dispute this. Before considering these issues separately, the Chamber recalls that the ICTY has used the following yardstick to evaluate potential risks confronting an accused if transferred:

> First, the Bench must examine whether any suspicions of threats to the accused's safety are substantiated and based on fact. If so, the Bench must then determine whether the authorities of the state of referral would be able to effectively safeguard the accused against any attacks on his life and limb.[120]

---

[117] This conclusion means that the Chamber accepts the Prosecution submissions. In the present case, Rwanda has not explicitly addressed the issue of double jeopardy but it follows from its Response to HRW (para. 14) that it "re-iterates the Prosecutor's position, in its entirety, on all issues pertaining to legal framework as well as jurisdiction of Rwandan Courts". Furthermore, during the oral hearing in *The Prosecutor v. Munyakazi*, Counsel for Rwanda confirmed that a case dealt with under the Transfer Law cannot be heard by the Gacaca jurisdictions, *see* T. 24 April 2008 p. 66.

[118] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), 1 September 2005, para. 34, as well as Referral Bench practice (*see*, for instance, footnote 120 below).

[119] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[120] *The Prosecutor v. Milorad Trbić*, Decision on Referral of Case under Rule 11*bis* with Confidential Annex (Referral Bench), 27 April 2007, para. 40, relying on *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B (Referral Bench), 5 April 2007, para. 64.

(a) Unlawful and Arbitrary Arrest

87. The Prosecution and the Republic of Rwanda argue that Kanyarukiga will be lawfully detained if transferred. Human Rights Watch and ICDAA express doubts in this regard, referring to examples of lengthy pre-trial detention in Rwanda, even without an arrest warrant, before the ordinary courts and Gacaca jurisdictions.[121] The Chamber recalls that Kanyarukiga was arrested on the basis of an international arrest warrant and has been lawfully detained by the ICTR. If transferred, it will be on the basis of the most recent Indictment, issued by the ICTR on 14 November 2007 (above, paras. 2 and 3). According to Article 5 of the Transfer Law, his arrest and detention in Rwanda shall be regulated in accordance with the Code of Criminal Procedure, which has provisions about appearance before a judge.[122] Consequently, there is an adequate legal framework in place to prevent unlawful and arbitrary detention.

88. The Chamber is well aware of the criticism concerning unlawful and lengthy detention both in respect of Gacaca courts and the ordinary courts. However, Kanyarukiga will be detained under the legal regime established by the Transfer Law. Any irregularities or lengthy pre-trial detention may be brought to the attention of the High Court, the Supreme Court and the monitoring mechanism (below, D). Consequently, the Chamber does not find that the risk of unlawful or arbitrary detention prevents his transfer.

(b) Conditions of Detention

89. The Defence, Human Rights Watch and ICDAA submit that it is unclear whether the detention conditions before, during and, in case of a conviction, after trial will comply with the ICCPR and other internationally recognised standards. According to the Prosecution, the Republic of Rwanda and Kigali Bar Association, these fears are unfounded. The conditions of detention will be subject to inspection.[123]

90. Some of the submissions refer to material showing that the general detention conditions in Rwanda are below international standards, for instance due to overcrowding, lack of health care and shortage of food. The issue for the Chamber is whether Kanyarukiga will be subjected to such conditions. Article 23 (1) and (2) of the Transfer Law states:

> Any person who is transferred to Rwanda by the ICTR for trial shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43 /173 of 9 December 1998.
>
> The International Committee of the Red Cross or an observer appointed by the President of the ICTR shall have the right to inspect the conditions of detention of persons transferred to Rwanda by the ICTR and held in detention. The International Committee of the Red Cross or

[121] Prosecution Request, para. 78; Defence Reply, para. 88; Rwanda's Brief, para. 49-52; HRW Brief, paras. 16 (f), 106-109, 111 (l); Prosecution Response to HRW, paras. 79-80; ICDAA Brief, paras. 104-117; Prosecution Response to ICDAA, para. 25.

[122] *See* Articles 93-100 of the Code on Criminal Procedure concerning "preventive detention" (Annex G to the Prosecution Request) and Rwanda's Brief, paras. 50-51.

[123] Prosecution Request, paras. 78-79; Defence Brief, paras. 30-32, 87-90; Rwanda's Brief, paras. 28-30, 52; HRW Brief, paras. 15 (c), 16 (g), 61-67, 110, 111 (d) and (m); Prosecution Response to HRW, paras. 49-52; Rwanda's Response to HRW, para. 35; ICDAA Brief, paras. 118-126; Prosecution Response to ICDAA, paras. 25-31; Kigali Bar Brief, paras. 24-27.

> the observer appointed by the ICTR shall submit a confidential report based on the findings of these inspections to the Minister of Justice of Rwanda and to the President of the ICTR.[124]

91. This provision institutes a special regime for detainees transferred from the ICTR. The question is how it will be implemented in practice. It follows from the submissions of the Republic of Rwanda that a new prison has been built in Mpanga. It has a special wing with 73 cells built to international standards. Budgetary appropriations have been earmarked and are available to complete the partitioning of the cells to meet requirements set by the ICTR. The Mpanga prison is situated in Nyanza, about two hours drive from Kigali. During trial, the accused will be detained at a custom-built remand facility at the Kigali Central Prison, in close proximity to the High Court and the Supreme Court. It contains twelve cells and six toilets. Each room is equipped with a bed, beddings, closet, reading table and a chair.[125]

92. Based on this information, the Chamber is not persuaded by the concerns regarding the physical conditions of the detention facilities in which Kanyarukiga will be placed, should he be transferred. Even though further construction work is required in Mpanga, some time would elapse before transfer could take place.[126] Any remaining problems at the time of transfer can be drawn to the attention of the monitoring mechanism under Rule 11 *bis* (D) (iv) or to inspectors to be appointed under Articles 23 (2) of the Transfer Law.

93. The remaining issue is whether Kanyarukiga, if transferred, runs any risk of torture, and cruel, inhuman or degrading treatment or punishment.[127] The Chamber does not consider it likely that such acts will be committed under the special regime established by the Transfer Law. Furthermore, Article 23 (2) provides for inspection by the International Red Cross Committee (ICRC) or an observer appointed by the ICTR President. Should ill-treatment occur, it would also be a matter for the monitoring mechanism under Rule 11 *bis* (D)(iv). This may lead to revocation of any transfer decision under Rule 11 *bis* (F) and (G).

(c) Life Imprisonment with Solitary Confinement

94. The Defence and Human Rights Watch refer to the law which in 2007 abolished capital punishment (the Death Penalty Law) and replaced it with life imprisonment or "life imprisonment with special provision".[128] They argue that Kanyarukiga may, if convicted to life imprisonment, risk prolonged solitary confinement in breach of Article 7 of the ICCPR. The Prosecution and the Republic of Rwanda dispute that the "special provision" clause is applicable under the Transfer Law. Prolonged isolation will therefore not occur.[129]

95. It is common ground that prolonged solitary confinement may constitute a violation of Article 7 of the ICCPR and other instruments prohibiting torture and inhuman and degrading

---

[124] Some minor stylistic changes have been made in the English translation of the text. Furthermore, Article 23 (3) and (4) provide for notification and investigation if an accused dies or escapes from prison.
[125] Rwanda's Brief, paras. 28-29.
[126] Work remained in Mpanga prison when visited by a researcher from Human Rights Watch in November 2006 (HRW Brief, para. 110). It is the Prosecution's position that both institutions are commensurate with internationally accepted standards (Prosecution Response to ICDAA, para. 27). According to Rwanda, the ICTR Prosecutor found the Kigali Prison facilities acceptable in October 2007 (Rwanda's Brief, para. 29).
[127] Defence Brief, paras. 87-88; ICDAA Brief, paras. 127-133.
[128] Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (Annex E to the Prosecution Request). *See* above, para. 25.
[129] Defence Response, paras. 33-35; HRW Brief, paras. 61-67 (referring to ICCPR Article 7); Prosecution Response to HRW, in particular paras. 49-50; Rwanda's Response to HRW, para. 35.2.

treatment or punishment.[130] The question is whether Kanyarukiga, if transferred, may be subjected to such isolation. Article 3 of the law which in 2007 abolished capital punishment, states that the death penalty is substituted "by life imprisonment or life imprisonment with special provision". According to Article 4, the latter means that "a convicted person is kept in isolation". On the other hand, Article 21 of the Transfer Law provides that "life imprisonment" shall be the heaviest penalty, without any reference to imprisonment "with special provision".

96. The Chamber is not aware of any case law in Rwanda concerning the relationship between these two laws. It notes that the Transfer Law, which could arguably be seen as *lex specialis* in the field of transfer, states in Article 25 that its provisions shall prevail in the event of any inconsistency with other legislation. On the other hand, the Death Penalty Law, which was adopted a few months after the Transfer Law, is *lex posterior* and provides categorically in Article 9 that "[a]ll legal provisions contrary to this Organic Law are hereby repealed". Although these two laws may be interpreted to the effect that "life imprisonment with special provision" does not apply within the field of application of the Transfer Law, the legal situation is nevertheless unclear.[131] The Chamber finds that there is a risk that Kanyarukiga, if transferred and convicted, may be subject to isolation and is therefore not satisfied that he will be protected against isolation.

(vii) Individual Circumstances

97. The Defence invokes Kanyarukiga's personal circumstances, pointing out that he voluntarily gave himself up to the ICTR on condition that he would not be transferred to Rwanda, that transfer will delay his trial, that his property has been taken or destroyed, that there is a conspiracy against him, and that close relatives have disappeared.[132] The Chamber has considered these submissions but does not find that they prevent transfer of his case.

D. Monitoring

98. If the request for transfer is granted, the Prosecutor may, according to Rule 11 *bis* (D)(iv), send observers to monitor the proceedings in Rwandan courts. As mentioned above (in particular paras. 73, 81 and 96), the Chamber has some concerns that prevent transfer. The Chamber will nevertheless address the issue of monitoring, as it has rejected some of the objections against transfer based on the existence of a satisfactory monitoring system.

---

[130] Rwanda's Response to HRW, para. 35.2 ("We agree with HRW that prolonged solitary confinement may be in breach of certain provisions of the Convention against torture. We submit, however, that there is no prolonged solitary confinement in Rwandan prisons"). The ICCPR Human Rights Committee has adopted General Comment 20, para. 6 ("The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7"). Similar statements have been made in connection with the Committee's consideration of reports from states under Article 40 and individual communications under the Optional Protocol. Under the European Convention on Human Rights, the Court have established similar principles in several cases, for instance *Ramirez Sanchez v. France*, Judgment, 4 July 2006, paras. 120-150, in particular para. 136 ("substantive reasons must be given when a protracted period of solitary confinement is extended") and 145 ("The Court nevertheless wishes to emphasise that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely. Moreover, it is essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement"). In the present case, the parties have not addressed these issues.

[131] The lack of clarity was illustrated during the oral hearing in *The Prosecutor v. Yussuf Munyakazi*, T. 24 April 2008 pp. 63, 66-67, 76-77.

[132] Defence Response, paras. 83-86, 95-101.

99. The Prosecutor's request was based on monitoring of national proceedings. The Republic of Rwanda submits that it accepts this. ICDAA argues that monitors should not be selected by the Prosecution but by an independent organisation in order to ensure that they represent the interests of all interested parties. It is also of the view that the proposed monitoring process will be insufficient.[133]

100. The Chamber recalls that Rule 11 *bis* (D)(iv) confers a substantial amount of discretion on the Prosecutor in determining whether to send monitors on his behalf and how such monitoring should be conducted.[134] He has approached the African Commission on Human and People's Rights, which has accepted to monitor proceedings in transferred cases.[135] Such an arrangement falls squarely within the Prosecutor's discretion. The Chamber notes that the Commission is an independent organ established under the African Charter on Human and Peoples' Rights and has no reason to doubt that the Commission has the necessary qualifications to monitor trials.

101. Rwandan legislation includes provisions about monitoring. Article 19 of the Transfer Law states that the ICTR Prosecutor shall have the right to designate individuals to observe the progress of transferred cases. The observers shall have access to court proceedings, documents and records relating to the case, as well as access to all places of detention.[136] The Republic of Rwanda has expressed its commitment to facilitating the work of the monitors.[137]

102. According to Rule 11 *bis* (F) and (G), the Prosecutor may, before a transferred person has been found guilty or acquitted by a national court, request the Chamber to revoke the transfer order and make a formal request that the State concerned defer to the competence of the ICTR. In conformity with the duty to co-operate with the Tribunal (Article 28 of the ICTR Statute), the State shall accede to such a request without delay. The counterpart in Rwandan law is Article 20 of the Transfer Law, which provides that an accused shall be promptly surrendered to the ICTR if a transfer order is revoked. The Republic of Rwanda has committed itself to complying with any revocation order.[138]

103. The Chamber considers the suggested monitoring system satisfactory and has taken this into account in its deliberations. This has led to the rejection of some of the objections against transfer. However, monitoring will not, in the Chamber's view, solve the problems relating to availability and protection of witnesses and not eliminate the risk of solitary confinement in case of life imprisonment.

---

[133] Prosecution Request, paras. 75-79; Rwanda's Brief, paras. 41-45; ICDAA Brief, paras. 134-148; Prosecution Response to ICDAA, paras. 39-47.
[134] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11 *Bis* Referral (AC), 1 September 2005, paras. 50, 53, 57.
[135] Letter of 2 June 2006 from the President of the African Commission on Human and People's Rights to the ICTR Prosecutor (Annex M to the Prosecution Request).
[136] Places of detention are not only subject to monitoring under Article 19, but also inspection in pursuance of Article 23 (*see* above para. 90 concerning The International Committee of Red Cross or an observer appointed by the ICTR President.
[137] Rwanda's Brief, para. 42.
[138] Rwanda's Brief, para. 44.

E. Concluding Remarks

104. The Chamber concludes that the Republic of Rwanda has made notable progress in improving its judicial system. Its legal framework contains satisfactory provisions concerning jurisdiction and criminalises Gaspard Kanyarukiga's alleged conduct. The death penalty has been abolished. However, the Chamber is not satisfied that Kanyarukiga will receive a fair trial if transferred to Rwanda. First, it is concerned that he will not be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial. Second, it accepts that the Defence will face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. Third, there is a risk that Kanyarukia, if convicted to life imprisonment there, may risk solitary confinement due to unclear legal provisions in Rwanda.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Request.

Arusha, 6 June 2008.

Erik Møse	Sergei Alekseevich Egorov	Florence Rita Arrey
Presiding Judge	Judge	Judge