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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER DESIGNATED PURSUANT TO RULE 11 *BIS*

Before Judges: Khalida Rachid Khan, presiding
Asoka de Silva
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 19 June 2008

THE PROSECUTOR
v.

ILDEPHONSE HATEGEKIMANA

Case No. ICTR-00-55B-R11*bis*

DECISION ON PROSECUTOR'S REQUEST FOR THE REFERRAL OF THE CASE OF ILDEPHONSE HATEGEKIMANA TO RWANDA

Rule 11 bis of the Rules of Procedure and Evidence

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INTRODUCTION

1. The original Indictment against Ildephonse Hategekimana, Tharcisse Muvunyi, and Idelphonse Nizeyimana was confirmed by Judge Yakov Ostrovsky on 2 February 2000.[1] Tharcisse Muvunyi was arrested on 7 February 2000, Ildephonse Hategekimana was arrested on 16 February 2003, while Idelphonse Nizeyimana remains at large.

2. On 11 December 2003, the Prosecutor was granted leave to sever Mr. Muvunyi from the original Indictment and ordered to file a separate indictment against him.[2] Mr. Muvunyi was subsequently tried and convicted, and his appeal is pending before the Appeals Chamber.[3]

3. A pre-trial Chamber subsequently granted the Prosecutor leave to sever Ildephonse Hategekimana from the original Indictment and amend the Indictment against him.[4] On 9 November 2007, Mr. Hategekimana made a further appearance following the filing of the Amended Indictment on 1 October 2007. He pleaded not guilty to all charges.

4. According to the Amended Indictment, Mr. Hategekimana was a Lieutenant in the *Forces Armées Rwandaises* ("FAR") and the Commander of Ngoma Military Camp in Butare *Préfecture*. The Amended Indictment charges Mr. Hategekimana with genocide, or alternatively, complicity in genocide, as well as murder and rape as crimes against humanity. He is charged with individual responsibility for the crimes pursuant to Article 6(1) of the ICTR Statute, as well as for having failed to prevent or punish his the crimes of his subordinates of which he knew or should have known, pursuant to Article 6(3) of the Statute.

5. Specifically, Mr. Hategekimana is alleged to have ordered, instigated, or otherwise aided and abetted his subordinate soldiers at Ngoma Camp to attack civilian Tutsi at various locations in Butare Town, and to have failed to prevent them from, or punish them for, committing such acts. He is also alleged to have planned such attacks, to have distributed weapons to facilitate them, and to have personally led a number of the attacks, which resulted in the killing of specified individuals. In addition, he is alleged to have raped, and to have ordered his subordinates to rape, Tutsi women.

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[1] *The Prosecutor v. Tharcisse Muvunyi et al.*, Case No. ICTR-00-55-I, Decision to Confirm the Indictment (TC), 2 February 2000.

[2] *Muvunyi et al.*, Case No. ICTR-00-55-I, Decision Regarding the Prosecutor's Motion for Leave to Sever an Indictment and for Directions on the Trial of Tharcisse Muvunyi (TC), 11 December 2003.

[3] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Judgement and Sentence (TC), dated 12 September 2006.

[4] Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment of Idelphonse Hategekimana, 25 September 2007 ("Severance and Amendment Decision"). In that Decision, the Chamber noted that the Prosecution now believed Ildephonse to be the proper spelling of Mr. Hategekimana's first name, and authorized the Indictment to be so amended.

Prosecutor's Request for Referral to Rwanda Pursuant to Rule 11 bis *of the Rules of Procedure and Evidence*[5]

6. The Prosecutor has requested that Mr. Hategekimana's case be referred to the authorities of Rwanda for adjudication before a Rwandan court pursuant to Rule 11 *bis*.[6] In accordance with Rule 11 *bis* (A), the President designated a Trial Chamber to decide the Referral Request, comprising Judges Khalida Rachid Khan, presiding, Asoka de Silva, and Emile Francis Short.[7]

7. The Chamber rendered several interim decisions authorizing the Republic of Rwanda, the International Criminal Defence Attorneys Association ("ICDAA"), the *Association des Avocats de la Defence* ("ADAD"), and Human Rights Watch ("HRW") to file submissions in relation to the Referral Request as *amicus curiae* pursuant to Rule 74, and authorizing the Parties to file additional submissions in response.[8] As a result, there are several submissions to consider in addition to the Referral Request itself.[9] Several of the submissions include lengthy annexes.

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[5] Unless specified otherwise, all Rules referred to in this Decision are from the Rules of Procedure and Evidence.

[6] 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, filed 7 September 2007 ("Referral Request").

[7] Designation of a Trial Chamber for the Referral of the Case of Idelphonse (sic) Hategekimana to Rwanda (President), 2 October 2007.

[8] Decision on Requests by the Republic of Rwanda, the Kigali Bar Association, the ICDAA, and ADAD for Leave to Appear and Make Submissions as Amici Curiae, 4 December 2007 ("First *Amicus Curiae* Decision"); Decision on Amicus Requests and Pending Defence Motions and Order for Further Submissions (TC), 20 March 2008 (the "20 March 2008 Decision"); Decision on Defence Request for Reconsideration and Prosecution Request for Extension of Time and Order Regarding the Amicus Curiae Submissions of the ICDAA and the Kigali Bar Association (TC), 30 April 2008.

[9] Réponse de La Défense a: 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, filed 19 December 2007 ("Defence Response"); Prosecutor's Reply to the Defence's Response to the Prosecutor's Request for the Referral of the Case of Hategekimana to Rwanda, filed 11 January 2008 ("Prosecution Reply"); Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11 *bis*, circulated 10 January 2008 ("Rwanda's Submissions"); Réponse de la Défense au Mémoire Amicus Curiae du Rwanda Produit le 10/01/2008 en Soutien a la Requête de Monsieur le Procureur en Date du 07/09/2007 Relative au Renvoi de l'acte d'accusation de l'Accuse Ildephonse Hategekimana au Rwanda, filed 2 April 2008 ("Defence Response to Rwanda's Submissions"); Request for Leave to Appear as *Amicus Curiae* Pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, filed 27 February 2008. HRW's proposed *amicus* brief was annexed to its request ("HRW's Original Submissions"); Further Submissions as *Amicus Curiae* in Response to Queries from the Chamber, filed 10 April 2008 ("HRW's Further Submissions"); Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA), Concerning the Request for Referral of Ildephonse Hategekimana to Rwanda Pursuant to Rule 11 bis of the Rules of Procedure and Evidence, filed 7 May 2008 ("ICDAA's Submissions"); ICTR-ADAD Submissions as *Amicus Curiae*, circulated 11 April 2008 ("ADAD's Submissions"); Prosecutor's Consolidated Response to "Brief of Human Rights Watch as *Amicus Curiae*" and "Further Submissions as *Amicus Curiae* in Response to Queries from the Chamber", "Brief of *Amicus Curiae*, International Criminal Defence Lawyers (sic) Association, Concerning the

DISCUSSION

Preliminary Matter: Referral of the Original or Amended Indictment?

8. The Prosecutor filed the Referral Request on 7 September 2007, shortly before the pre-trial Chamber delivered the Severance and Amendment Decision. The Defence submits that, as a result, the pending Referral Request cannot be granted because it seeks referral of an Indictment that no longer forms the basis of the Prosecutor's case against Mr. Hategekimana.

9. The Chamber is not convinced by the Defence's argument. A Trial Chamber considering referral should rely on the most recently confirmed, or operative, indictment.[10] Confirmation is part of the amendment process pursuant to Rule 50 (A)(ii). The Chamber therefore considers that the Amended Indictment is the most recently confirmed, or operative, indictment in this case and it is therefore relied upon as the basis of the Referral Request.

***Rule 11* bis**

10. Pursuant to Rule 11 *bis* and the jurisprudence of the Appeals Chamber, a Chamber may order referral to a State that has jurisdiction over the crimes of the accused, and is willing and adequately prepared to accept the case.[11] Prior to ordering referral, a Chamber must be satisfied that the accused will receive a fair trial in the courts of the referral State, and the death penalty will not be imposed or carried out.[12]

11. The ultimate decision on whether to refer is left to the discretion of the Chamber.[13] The Chamber may consider whatever information it reasonably feels it needs

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Request for Referral of Ildephonse Hategekimana to Rwanda" and "ICTR-ADAD Submissions as *Amicus Curiae*", filed 14 May 2008 ("Prosecutor's Consolidated Response to *Amici*").

[10] *See The Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32-1-AR11*bis*.1, Decision on Milan Lukic Appeal Regarding Referral (AC), 11 July 2007, para. 12 (citing *The Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1, Decision on Rule 11 bis Referral (AC), 23 February 2006, para. 14).

[11] Rule 11 *bis* (A); *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-AR11*bis*, Decision on Rule 11 *bis* Appeal (AC), 30 August 2006, para. 8 ("Bagaragaza Appeal Decision"). The Appeals Chamber of the ICTY has ruled that, despite the possibility of a strict textual reading of Rule 11 *bis* (A) to the contrary, those States in whose territory the crimes were committed and/or in which the accused was arrested must also be willing and adequately prepared to accept the case. *See The Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 bis Referral (AC), 1 September 2005, para. 40 ("Stanković Appeal Decision"). ICTR Rule 11 bis (A) is, in relevant part, identical to ICTY Rule 11 *bis* (A).

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

[13] *See e.g.*, Bagaragaza Appeal Decision, para. 9.

so long as the information assists it in determining whether the proceedings following the transfer will be fair.[14]

Jurisdiction, Willingness, and Adequacy of Preparation

12. To determine whether a State is adequately prepared to accept a case, a Trial Chamber designated pursuant to Rule 11 *bis* must consider whether the referral State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[15]

13. Rwanda expressed that it is willing to accept transfer of the case of Mr. Hategekimana by letter of the Prosecutor General of Rwanda addressed to the Prosecutor of the Tribunal.[16]

Jurisdiction

14. It is not contested that Rwandan courts have personal jurisdiction over Mr. Hategekimana, because, according to the Amended Indictment, he was a Rwandan national whose alleged crimes were committed in Rwanda.[17]

15. The Prosecutor and the Rwandan authorities submit that Rwanda has subject matter jurisdiction over the alleged crimes of Mr. Hategekimana. HRW submits that this is not certain, noting that Article 105 of Rwanda's Organic Law 16/2004 of 19 June 2004 *Establishing the Organization, Competence, and Functioning of Gacaca Courts* ("2004 Gacaca Law") expressly abrogated the Organic Law of 30 August 1996 on the *Organization of the Prosecution of Offences Constituting Genocide or Crimes Against Humanity Committed Since 1 October 1990* ("1996 Genocide Law"). HRW submits that, since the abrogation of the 1996 Genocide Law, there is no law in effect in Rwanda defining the crimes with which Mr. Hategekimana is charged.

16. Mr. Hategekimana is charged with genocide and crimes against humanity. The Prosecutor and the Rwandan authorities suggest several bases for subject matter jurisdiction over these crimes, of which the 1996 Genocide Law is only one. Primary amongst these are the Genocide Convention of 1948 and the four Geneva Conventions of 1949, as well as the additional protocols of 1977, all of which were binding on Rwanda prior to 1994.[18] The Rwandan Constitution of 2003 ("Constitution") states that ratified

[14] Stanković Appeal Decision, para. 50.
[15] *See e.g.*, Bagaragaza Appeal Decision, para. 9 (citations omitted).
[16] Referral Request, Annex A: Letter from Martin Ngoga, Prosecutor General of Rwanda, to Hassan B. Jallow, Prosecutor of the ICTR. In this letter, Mr. Ngoga expressed the willingness of the Rwandan Government to accept the case of Ildephonse Hategekimana, if referred.
[17] Rwandan Penal Code of 18 August 1977, as subsequently amended, Article 6 (Annex D to the Referral Request).
[18] 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. In addition, Rwanda ratified the Convention of 26

treaties are "more binding than organic and ordinary laws."[19] These treaties and conventions define genocide and crimes against humanity. The Chamber notes that the 1996 Genocide Law did not provide separate definitions of genocide and crimes against humanity, but referred to the definitions of these crimes in the conventions as the bases for their definitions in Rwandan law.[20]

17. Organic Law N° 11/2007 of 16/03/2007 *Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States* ("Transfer Law") will govern Mr. Hategekimana's case if it is referred to Rwanda by the Tribunal.[21] The Transfer Law states that persons transferred by the Tribunal to Rwanda shall be liable to prosecution only for crimes falling within the Tribunal's jurisdiction.[22] This provision suggests that accused persons referred by the Tribunal to Rwanda may be tried for crimes as they are defined in the relevant Articles of the Statute of the Tribunal. Moreover, the Chamber notes that the purpose of the 2004 Gacaca Law was to establish the *gacaca* system as the primary venue for prosecution of such crimes, other than for those persons who rank in the "first category", who were to continue to be tried before Rwandan ordinary courts.[23] The Chamber understands that there have been genocide trials in Rwandan ordinary courts since 2004.[24] Given the status of ratified treaties in Rwandan law, the purposes of the 2004 Gacaca Law, and the language of the Transfer Law, the Chamber is satisfied that Rwandan courts have subject matter jurisdiction over genocide and crimes against humanity.

Modes of Liability

18. As for relevant modes of criminal responsibility, the Chamber notes that the Amended Indictment seeks to hold Mr. Hategekimana responsible for individual participation pursuant to Article 6(1) of the ICTR Statute, as well as for command responsibility pursuant to Article 6(3) of the Statute. Rwanda's Penal Code provides for the prosecution of principal perpetrators and accomplices for instigation, preparation and planning, commission, direct and public incitement, provision of instruments or other assistance to principle perpetrators, and for harbouring or aiding perpetrators.[25] The Chamber considers that the modes of criminal responsibility covered in the Rwandan Penal Code are adequate to cover the crimes of the accused as alleged in the Amended Indictment pursuant Article 6(1) of the ICTR Statute.

November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on 16 April 1975.

[19] Constitution, Article 190.

[20] 1996 Genocide Law, Art. 1.

[21] Transfer Law, Art. 1.

[22] *Ibid.*, Art. 3.

[23] 2004 Gacaca Law, Articles 1-3.

[24] According to a report commissioned by the Prosecutor based on a mission conducted to Rwanda by the International Legal Assistance Consortium, the Rwandan ordinary courts have prosecuted 207 genocide cases between 2005 and September 2007. These numbers were culled from HGO reports. *See Justice in Rwanda: An Assessment*, (ILAC), November 2007, footnote 6.

[25] *See generally*, Articles 89, 90 and 91 of the Rwandan Penal Code.

19. The Prosecutor's and Rwanda's submissions are silent regarding command responsibility, and the Chamber is not aware of any provisions under Rwandan law that would authorize the High Court, or any Rwandan court, to hold Mr. Hategekimana criminally responsible for the failure to prevent or punish crimes he knew of or reasonably should have known of committed by his proven subordinates. The Chamber will therefore proceed on the assumption that Rwandan law does not recognise command responsibility or did not do so at the time relevant to the Amended Indictment. The Chamber notes that Amended Indictment seeks to hold Mr. Hategekimana responsible under Article 6(3) on all four counts, and cannot ignore the possibility of an acquittal on this basis should it decide to refer the case to Rwanda. The Amended Indictment is structured such that Mr. Hategekimana is to be held individually responsible under Article 6(1) and responsible as a commander under Article 6(3) for the same material facts. Under such circumstances, Mr. Hategekimana will go free in Rwanda if the evidence does not show that he planned, ordered, instigated, committed, or aided and abetted the alleged crimes, even if it does show such involvement on the part of his proven subordinates and that Mr. Hategekimana knew or had reason to know of their actions. Given the importance of command responsibility to the Amended Indictment, the Chamber is not satisfied that there is an adequate legal framework under Rwandan law which criminalizes Mr. Hategekimana's alleged conduct.[26]

Adaptation of the Amended Indictment

20. The Transfer Law also requires the Rwandan Prosecutor General's Office to adapt any transferred indictment to make it compliant with the formal requirements of the Code of Criminal Procedure of Rwanda ("Rwandan CCP").[27] The Defence suggests that this would result in a violation of Mr. Hategekimana's rights because the adapted indictment will comply with laws that are less favourable to accused persons. The Defence provides examples of penalty provisions allowed by the Rwandan CCP in support of this argument. The Chamber rejects the Defence argument. The Chamber recognizes that adaptation of the indictment to comply with the laws of a referral State may be necessary

[26] In the case of *The Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (TC), 14 September 2005, the ICTY Referral Bench reached a different conclusion. The Referral Bench noted that the 1997/2004 "Criminal Act of Croatia" ("CAC"), which provided for liability for command responsibility, may not be given retroactive effect, and thus the 1993 "Fundamental Crime Statute of Croatia" ("FCSC"), which did not explicitly provide for command responsibility, may be applied to the alleged crimes of the accused persons. In that case, the Referral Bench determined that this was not a bar to referral because (i) other provisions of the FCSC provided for liability for most of the conduct covered under Article 7(3) of the ICTY Statute, and (ii) that "if the acts that in the end can be proven would all fall outside the scope of the provisions of the law to be applied, the case against the Accused would have lost most of its significance and weight." *Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (TC), 14 September 2005, paras. 38-46. The Chamber does not consider either of these rationales persuasive in the instant case.

[27] Transfer Law, Art. 4.

to effectuate transfer, and notes that adaptation is acceptable pursuant to the jurisprudence and practice of the ICTR and ICTY regarding Rule 11 *bis* referrals.[28]

21. The Defence also submits that the adaptation process may result in an indictment that will include charges outside the Tribunal's jurisdiction. Article 3 of the Transfer Law states, "[n]otwithstanding the provisions of other laws applicable in Rwanda, a person whose case transferred by the ICTR to Rwanda shall be liable to be prosecuted only for crimes falling within the jurisdiction of the ICTR." On its face, the Chamber considers that there may be some ambiguity as to whether the reference in the Transfer Law to "crimes falling within the jurisdiction of the ICTR" refers to both temporal and subject matter jurisdiction. It is not, however, for the Chamber to determine how this provision will be interpreted by Rwandan courts. Regardless, the Chamber does not consider the possibility that Mr. Hategekimana might be charged with criminal acts falling outside the temporal jurisdiction of the ICTR to be fatal to the Referral Request. This possibility does not, of itself, interfere with any of Mr. Hategekimana's rights.[29]

Adequacy of the Penalty Structure under Rwandan Law

22. The Chamber must also consider whether there is an adequate penalty structure to punish the alleged crimes of Mr. Hategekimana under Rwandan law. The Prosecution and Rwanda suggest that the Transfer Law is controlling, and that life imprisonment is the maximum penalty available according to this law. The Chamber notes that this penalty structure is consistent with ICTR Rule 101, which allows for a maximum sentence of life imprisonment. In addition, the Chamber notes that Article 82 of the Rwandan Penal Code provides for consideration of the individual circumstances of a convicted person in determining sentence, and Article 22 of the Transfer Law states that convicted persons will be given credit for time spent in custody or pending appeal. These provisions are also consistent with ICTR Rules on sentencing.[30]

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[28] *See* Bagaragaza Appeal Decision, para. 17 (noting that the "concept of a 'case' is broader than any given charge in an indictment", and holding that the authorities in the referral State do not have to proceed under their laws with regard to each act or crime in an indictment in the same manner as the Prosecutor of the Tribunal). In addition, the Chamber notes that the ICTY has referred several cases to Bosnia and Herzegovina ("BiH"), which has a law requiring adaptation of referred indictments to render them compliant with BiH law. *See e.g.*, *The Prosecutor v. Radovan Stanković*, Case No. IT-96-23-2-PT, Decision on Referral of Case under Rule 11 *bis* (Referral Bench), 17 May 2005, para. 74.

[29] *Compare, The Prosecutor v. Milan Lukić & Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* (Referral Bench), 5 April 2007, para. 117 (noting that the referral scheme of Rule 11 *bis* implies that the State should exercise its national jurisdiction to try a referred case). In *Lukić & Lukić*, the ICTY Referral Bench engaged in a long discussion of whether referral States could prosecute a referred person for additional national crimes. While the Referral Bench did not consider there to be a simple answer to this question, it did note that, where the accused was a citizen of the referral State prosecution of the accused for national crimes by the referral State was generally not problematic unless such prosecution violated the international obligations of the referral State. The Chamber approves of this reasoning, and finds no problem with the possibility that, if transferred, Rwanda may prosecute Mr. Hategekimana for international crimes that fall within the subject matter jurisdiction of the Tribunal but outside the Tribunal's temporal jurisdiction.

[30] *See* ICTR Rule 101 (B) & (C).

23. The Defence submits, however, that pursuant to Article 3 of Organic Law N° 31/2007 of 25/07/2007 *Relating to the Abolition of the Death Penalty* ("Death Penalty Abolition Law"), Mr. Hategekimana may be subjected to either life imprisonment or life imprisonment with special provisions. The Chamber is not aware of any Rwandan jurisprudence interpreting the relationship between the Death Penalty Abolition Law and the Transfer Law. And it is not for the Chamber to determine how these laws will be interpreted or which law will be applied by Rwandan courts. The Chamber notes that both laws purport to repeal contrary provisions in other laws.[31] The Death Penalty Abolition Law post dates the Transfer Law, which may lead to application of the former over the latter under the principle that a later statute removes the effect of a prior one where they are irremediably inconsistent (*lex posterior derogat priori*). In addition, it is possible that the laws may be interpreted as being consistent, with the Death Penalty Abolition Law providing additional details on the possible legal meaning of "life imprisonment" as that phrase is used in the Transfer Law. In any case, the Chamber cannot rule out the possibility that a Rwandan court will rule that the Death Penalty Abolition Law, and particularly Articles 3 and 4 concerning life imprisonment with special provisions, to be the applicable law regarding penalties for persons transferred by the Tribunal to Rwanda.

24. Pursuant to Article 4 of the Death Penalty Abolition Law, life imprisonment with special provisions means (i) the "convicted person is not entitled to any kind of mercy, conditional release, or rehabilitation" until that person has served at least 20 years in prison, and (ii) the "convicted person is kept in isolation." The Defence argues that the provision removing the possibility of "mercy, conditional release, or rehabilitation" is in conflict with Article 27 of the ICTR Statute and ICTR Rule 124, which allow for the possibility of pardon or commutation of sentence. The Chamber rejects this argument. Article 27 and Rule 124, concerning pardon or commutation of sentence, are limited to circumstances where the legislation of the State in which a person convicted by the Tribunal is serving his sentence expressly allows for such measures. Even then, the President of the Tribunal must authorize such measures before they can take effect.[32] These provisions do not operate to vest convicted persons with additional rights or to impose obligations on States which agree to imprison persons convicted by the Tribunal. By their plain language, they do not apply to persons referred by the Tribunal to the authorities of another State pursuant to Rule 11 *bis*.

25. With regard to the possibility of life imprisonment served in isolation, the Chamber notes that various human rights bodies have adopted the position that imprisonment in isolation may amount to a violation of the rights of the prisoner and should only be used in exceptional circumstances and for limited periods. For example, paragraph 6 of General Comment 20 (Forty-fourth session, 1992) by the Human Rights Committee concerning Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") states that "prolonged solitary confinement of the detained or

[31] *See* Death Penalty Abolition Law, Article 9; Transfer Law, Article 25.
[32] ICTR Rule 125.

imprisoned person may amount to acts prohibited by article 7."[33] While imprisonment in isolation for limited periods does not amount to a *per se* violation of the rights of detained persons, safeguards are generally required to ensure that the use of solitary confinement is not abused.[34] The Death Penalty Abolition Law seems to allow for imprisonment in isolation for 20 years, or more, and does not provide or refer to any such safeguards. Moreover, the Chamber is not aware of any safeguards elsewhere in Rwandan law. The Chamber finds that if transferred and convicted, Mr. Hategekimana could be subjected to a deprivation of his rights through prolonged solitary confinement.

The Death Penalty

26. According to Rule 11 *bis* (C), the Chamber must satisfy itself that "the death penalty will not be imposed or carried out". The Death Penalty Abolition Law states, "The death penalty is hereby abolished." This law expressly abolished the death penalty in Rwanda for all crimes, including crimes of genocide and crimes against humanity, and replaced the death penalty with a maximum sentence of life imprisonment or life imprisonment with special provisions.[35]

27. The Defence argues that other relevant laws in Rwanda still contain the death penalty, and therefore the current legal status of the death penalty in Rwanda is uncertain. This argument is without merit. The Death Penalty Abolition Law expressly states, "[i]n all the legislative texts in force before the commencement of [this] Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided for by this Organic Law."[36]

28. The Defence submits that there have been extrajudicial killings of detainees in Rwanda, including extrajudicial killings of former FAR members.[37] The Defence suggests that reports of these killings show that Mr. Hategekimana may be killed if referred to Rwanda regardless of the legal status of the death penalty in Rwandan law. The Defence suggests that Mr. Hategekimana is at particular risk as a former member of the FAR. While there have been no independent investigations of the incidents involving

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[33] Rwanda ratified the ICCPR on 16 April 1975. *See* Rwanda's Submissions, para. 34. Article 7 of the ICCPR concerns prohibits, *inter alia*, torture, or cruel, inhuman or degrading treatment or punishment. The Chamber notes that no derogation is allowed from the obligations of Article 7. *See* General Comment 20, para. 3.

[34] For example, the European Court of Human Rights applying Article 3 of the European Convention on Human Rights, which also prohibits torture or inhuman and degrading treatment or punishment, have held that reasons must be provided for placing persons in isolation, that isolation should not extend indefinitely, and prisoners should be able to seek individual judicial review of prolonged periods of isolation. *See Ramirez Sanchez v. France*, Judgment, European Court of Human Rights, Grand Chamber, App. No. 59450/00, 4 July 2006, paras 120-150.

[35] Death Penalty Abolition Law, Art. 3-5.

[36] Death Penalty Abolition Law, Art. 3.

[37] Defence Response to Referral Request, paras. 99-100 (referring to Annex K, a report by HRW entitled "There will be no Trial: Police Killings of Detainees and the Imposition of Collective Punishments", from July 2007, and Annex L, which includes a public statement from Amnesty International on the need to independently investigate reports of extrajudicial killings of former members of the FAR on 21 December 2005 at Mulindi military detention centre).

police killings of detainees referred to by the Defence, the Chamber notes the Rwandan police offered explanations for these incidents that differ from HRW accounts. The Chamber does not have sufficient information before it, and is not empowered to reach any conclusion on these competing claims. In addition, the Defence does not allege any individual threats against Mr. Hategekimana. Under these circumstances, and in light of the special detention regime designed for persons transferred to Rwanda by the Tribunal,[38] the Chamber does not consider that Mr. Hategekimana faces a serious risk of being killed in Rwandan custody.

29. The Defence also argues that detention conditions in Rwanda are so poor and dangerous as a result of, among other things, overcrowding, unsanitary conditions, and unavailability of food for detainees that to transfer him to Rwandan custody would be effectively a death sentence. The Chamber notes that detention conditions in the prisons of a referral state touch upon the fairness of that state's criminal justice system, and thus are within the mandate of a Trial Chamber sitting under Rule 11 *bis*.[39] The Chamber will further consider the detention conditions in Rwandan prisons below, in the section of this Decision dealing with fair trials in Rwanda.[40] With regard to their relevance to the death penalty, the Chamber recalls the existence of a special detention facility built to international standards for persons transferred from the ICTR to Rwanda.[41] In any event, the Chamber rejects the Defence contention that the detention conditions in Rwanda can be considered an effective death penalty.

Fair Trial

30. Rule 11 *bis* (C) also obligates the Chamber to satisfy itself that "the accused will receive a fair trial in the courts of the State concerned". For present purposes, the Chamber considers that the right to a fair trial includes the following[42]:

> The equality of all persons before the court.
>
> A fair and public hearing by a competent, independent, and impartial tribunal established by law.
>
> The presumption of innocence until guilt is proven according to the law.
>
> The right of an accused to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.
>
> The right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

[38] This detention scheme is discussed in full in the section dealing with fair trial. *See infra*, paragraphs 76-78.
[39] Stanković Appeal Decision, para. 34.
[40] *See infra*, paragraphs 76-78.
[41] This detention scheme is discussed in full in the section dealing with fair trial. *See infra*, paragraphs 76-78.
[42] *Cf.* Article 20 of the ICTR Statute; Article 14 of the ICCPR.

> The right of an accused to be tried without undue delay.
>
> The right of an accused to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.
>
> The right of an accused to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
>
> The right of an accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
>
> The right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings.
>
> The right of an accused not to be compelled to testify against himself or to confess guilt.

31. Another right not part of the trial phase itself but considered integral to the fairness of criminal justice systems is the right of an accused person not to be tried or punished again for an offence for which that person has already been acquitted or convicted.[43]

32. The Prosecution and the Republic of Rwanda submit that Rwandan laws guarantee the rights of accused persons before Rwandan courts. In support of this submissions, they refer to many provisions, including but not limited to Articles 13 through 15 of the Transfer Law, various provisions of the Rwandan Constitution and the Rwandan Code of Criminal Procedure, and international and regional human rights instruments to which Rwanda is signatory, such as the ICCPR, and the African Charter on Human and People's Rights ("AFCHPR").

33. Neither the Defence nor any of the *amici* who submitted briefs in opposition to the Referral Request suggests that the rights of accused persons are not protected under Rwandan law. Rather, they suggest that, in practice, Rwanda has failed to uphold the rights of accused persons in spite of its legal obligations. They submit that Rwanda's prior failures to guarantee the rights of accused persons provide reason to believe Mr. Hategekimana will not receive a fair trial in Rwanda. They therefore invite the Chamber to look beyond the relevant Rwandan laws and consider Rwanda's past practices.

34. The Prosecutor argues that the Chamber's "task is to determine whether the laws applicable to proceedings against the Accused in Rwanda provide an adequate basis for ensuring the right to a fair trial."[44] In support of this claim the Prosecution refers to decisions of the ICTY Appeals Chamber which state that the ICTY Referral Bench was

[43] Articles 9 (*Non bis in idem*) of the ICTR Statute; Article 14 of ICCPR, para. 7.
[44] Prosecutor's Reply, para. 36.

not required to look beyond the relevant legislation of a proposed referral State when determining whether an accused will receive a fair trial in that State.[45]

35. The Chamber disagrees with the Prosecutor's description of its task. The Chamber acknowledges that it is not *required* to look beyond the relevant legislation, but considers that it is *authorised* to do so. As the plain language of sub-Rule 11 *bis* (C) states, the Chamber's task is to "satisfy itself that the accused will receive a fair trial in the courts of the State concerned." Determining whether the laws of the referral State provide for a fair trial is part of that process, and may be sufficient where there is no reason to question the application of those laws in practice. The Appeals Chamber has, however, stated that a Referral Chamber may consider whatever information it reasonably feels it needs in order to satisfy itself that the accused will receive a fair trial in the courts of the referral State.[46] Under the particular circumstances of this case, where the Defence and several *amici curiae* submit that the Rwandan judicial system has failed to uphold the rights of the accused in the past, despite legislation requiring it to honour those rights, and where they offer examples of such prior failures, the Chamber considers that it may and should look beyond the relevant legislation to examples of the practices of Rwandan courts.

36. The Prosecutor also submits that referrals are governed by the Transfer Law, no cases have yet been referred to Rwanda under this law, and so there is no basis on which to judge the prior practice of the Rwandan judicial system in applying this law. The Chamber recognises that the Transfer Law was enacted as part of Rwanda's efforts to rebuild and reform its judicial system. But does not accept the Prosecutor's argument that the enactment of a law renders all past practice irrelevant. The Chamber recalls that it is obliged to satisfy itself that Mr. Hategekimana will receive a fair trial in Rwandan courts, not simply that the newly enacted Transfer Law provides for fair trials. The Rwandan Constitution, as well as international treaties such as the ICCPR and regional human rights treaties such as the AFCHPR all contain provisions concerning the rights of accused persons that pre-date the Transfer Law.[47] Rwandan courts have tried persons for genocide under these provisions. The Prosecutor cannot, therefore, reasonably suggest that only the Transfer Law is relevant to the issue of fair trials in Rwanda. The Chamber considers submissions suggesting that Rwanda has not followed its own laws or honoured its treaty obligations in the past to be relevant to the question of whether it will do so in the future.

37. The Chamber will now consider those fair trial rights that the Defence and *amici curiae* submit may not be guaranteed in practice by the Rwandan judicial system.

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[45] For example, *see The Prosecutor v. Željko Mejakić, et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Referral Decision under Rule 11 *bis* (AC), 7 April 2006, para. 69 (ruling that the Referral Bench did not err by focusing on the legal framework in BiH).

[46] Stanković Appeal Decision, para. 50.

[47] Constitution, Art. 18, 19, 20, 44, 60, & Ch. V; CCP and Law No. 20/2006 of 22/04/2006, *Modifying and Complementing the Law* N° 13/2004 of 17/5/2004 *Relating to the Code of Criminal Procedure* ("Amendment to CCP"); ICCPR, Art. 14; AFCHPR, Art. 7.

Trial by a Competent, Impartial and Independent Tribunal

38. The Prosecution and Rwanda submit, and the Defence and other *amici* do not dispute, that Rwandan law provides for an independent and impartial judiciary. Article 140 of the Constitution states that the "judiciary is independent and separate from the legislative and executive branches of government." Article 142 of the Constitution provides that judges hold tenure for life. These constitutional provisions are supported by other laws which reiterate the independence and impartiality of the Rwandan judiciary.[48] Pursuant to the Transfer Law, a judge of the High Court of the Republic of Rwanda will conduct first instance trials transferred to Rwanda from the Tribunal.[49] Appeals as of right are available for errors of law or fact and are heard by a three judge panel of the Supreme Court of Rwanda.[50]

39. The Defence, HRW, and the ICDAA contest the independence and impartiality of the Rwandan judiciary. The Defence suggests that the judiciary is dominated by the Rwandan Government, that the appointment process for judges of the High Court and the Supreme Court is controlled by the President of Rwanda. The Defence also expresses concern that a single judge will preside over the trial phase in the High Court, claiming this raises issues concerning independence as well as competence. HRW provides specific examples of cases it suggests involve the application of political pressure on the judiciary. The ICDAA suggests that the judiciary is dominated by Tutsis and victims who may have difficulty remaining impartial. The ICDAA also submits that Rwandan reactions to rulings by foreign judges calling for the investigation and prosecution of RPF crimes as well as to findings in favour of accused persons before the ICTR show the current Rwandan government's willingness to interfere with the judiciary.

40. The Chamber does not consider the involvement of the President of Rwanda in the appointment process for the President and Vice-President of the Rwandan Supreme Court, the High Court, and the regular members of the Supreme Court, in itself, to be problematic or exceptional. The Chamber notes that the President's role is not absolute in this regard. After consultation with the Cabinet and the Supreme Council of the Judiciary, the President proposes members of the Supreme Court, but the Senate ultimately elects them.[51] The Chamber does not have before it statistics regarding the ethnic make up of these appointing and consulting bodies, or of the judiciary itself, which has made it difficult to assess the suggestion that the judiciary is dominated by victims of the genocide or the Tutsi ethnic group.[52] The Chamber considers that even if it did have such

[48] *See e.g.*, Amendment to CCP, Art. 1; Organic Law No. 07/2004 of 25 April 2004, *Determining the Organization, Functioning and Jurisdiction of Courts*, Arts. 6 & 64; ICCPR, Art. 14.
[49] Transfer Law, Art. 2.
[50] *Ibid.*, Art. 16. The prosecution and the accused may appeal "an error on a question of law invalidating the decision, or; an error of fact which has occasioned a miscarriage of justice."
[51] Constitution, Articles 147-148.
[52] The ICDAA submits that 90% of judges and prosecutors in Rwanda in 2007 were Tutsi. The Chamber does not have sufficient information before it to verify this figure, but even if true does not consider that such a figure would, of itself, show a lack of independence or impartiality.

information, ethnic imbalance in the judiciary alone would not be sufficient to show impartiality or lack of independence.

41. Nor does the Chamber consider the fact that a single judge will preside over the trial phase before the High Court sufficient to show impartiality or lack of independence. The Chamber does not consider it necessary to engage in a comparative analysis of legal systems, and considers it uncontroversial that single judge trials are a common feature around the world, including for trials of serious crimes. Rule 11 *bis* does not require Rwanda to copy the three judge panel system practiced at this and other international and hybrid tribunals in order to qualify for transfer of cases. Furthermore, international and regional human rights treaties, such as the ICCPR and the AFCHPR, do not require that a trial or an appeal be heard by a specific number of judges to meet fair trial standards. Finally, none of the submissions has provided evidence that single judge trials in Rwanda, which commenced with the judicial reforms of 2004, have been more open to outside influence than previous trials involving panels of judges.

42. The Defence, HRW, and the ICDAA submit that the Rwandan judiciary is subject to government influence. HRW submits that interviews with present and former jurists have led it to believe that the Rwandan judiciary lacks independence, and refers to a select number of specific examples that it suggests show improper influence on the judiciary.[53] The Chamber notes that the examples cited in HRW's submissions involve a limited number of cases over a period of several years where the Rwandan ordinary courts have been dealing with large numbers of cases. The concerns expressed by former members of the Rwandan judiciary lack specificity and context. The Chamber does not consider that the examples and general concerns raised by HRW are sufficient to show such impartiality or lack of independence on the part of the judiciary as to prevent transfer.

43. The ICDAA suggests that the reactions of the Rwandan government to investigations by foreign judges into crimes committed by the RPF, as well as the reactions to decisions of this Tribunal provide reason to question the independence and impartiality of the Rwandan judiciary. The Chamber disagrees. Without commenting on their details, the Chamber notes that these were reactions to the rulings of foreign courts, and do not show how Rwanda would react to rulings by its own courts.[54]

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[53] HRW refers to interviews conducted from 2005 through 2007 with approximately 25 individuals it describes as "high-ranking judicial officials, judges, prosecutors, and lawyers now or formerly active in the Rwandan judicial system" who informed HRW that Rwandan Courts were not independent, even after 2004. HRW's Original Submissions, para. 51; HRW's Further Submissions, para. 27. HRW also referred to specific examples that it suggests illustrate a lack of judicial independence, such as cases of individuals being arrested on the seeming instruction of Rwandan Government authorities, and the arrest of persons who have criticized the current Rwandan Government, examples of interference in an ongoing trials, and examples of judicial figures being moved to different posts or leaving the country. HRW's Original Submissions, paras. 50, 53, 54; HRW's Further Submissions, paras. 30-35.

[54] The incidents involving Barayagwiza and Bagambiki cited by the ICDAA do not show that the Rwandan judiciary lacks independence or is biased. The Barayagwiza incident occurred several years ago. The ICTR has acquitted five persons since then, and the Rwandan government has not refused to cooperate with the

44. The Defence has also challenged the competence of the Rwandan judiciary to handle transferred cases, suggesting they lack adequate experience. The Chamber has not been presented with details regarding the education and experience levels of the members of Rwanda's High Court or its Supreme Court. Nonetheless, the Chamber notes that the Rwandan judiciary has been rebuilding since the 1994 genocide, Rwandan High and Supreme Court judges are experienced in adjudicating cases involving genocide and crimes against humanity, and must meet minimum educational and experience requirements. The Chamber therefore rejects the Defence submissions regarding competence.

45. The Chamber notes the availability of monitoring and revocation procedures under Rule 11 *bis* D(iv) and F. The Chamber considers that, if it were to transfer Mr. Hategekimana to Rwanda, monitors could inform the Prosecutor and the Chamber of any concerns regarding the independence, impartiality, or competence of the Rwandan judiciary.[55]

46. The Chamber concludes that, although the "concept of an independent judiciary is relatively new in Rwanda",[56] the submissions of the parties do not sufficiently call into question the independence, impartiality and competence of the Rwandan judiciary to prevent transfer.

The Presumption of Innocence

47. Article 13 (2) of the Transfer Law recognizes that an accused person transferred by the Tribunal to Rwanda "will be presumed innocent until proven guilty." This principle is also recognized in the Constitution, the Rwandan Code of Criminal Procedure and in the ICCPR.[57]

48. The Defence and HRW submit that, if transferred, Mr. Hategekimana may not benefit from the legally recognized presumption of innocence. The Defence suggests all former members of the FAR are presumed to have participated in the Rwandan genocide. HRW submits that statements by government officials concerning accused persons, the denial of voting rights to accused persons, and the practice of collective punishment all raise concerns that Mr. Hategekimana may not be presumed innocent until proven guilty if his case is transferred to Rwanda.

49. The Chamber recognizes that the present situation, which involves transfer of a former military adversary of some members of the current Rwandan government, calls for awareness of the risk of victor's justice, and thus careful scrutiny. Having said that,

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Tribunal as a result of these acquittals. The Bagambiki incident did not involve re-trial for crimes for which he was acquitted by the ICTR, but trial for crimes for which he was not charged.

[55] Stanković Appeal Decision, paras. 50-52 (ruling that it was reasonable for the Referral Bench to satisfy itself that the accused would receive a fair trial in part on the basis of the Rule 11 *bis* monitoring and revocation mechanism).

[56] *Justice in Rwanda: An Assessment*, (ILAC), November 2007, Section 6.3.7.

[57] Constitution, Art. 19; Amendment to CCP, Art. 44; ICCPR, Art. 14 (2).

the Defence's claim that Mr. Hategekimana will be presumed guilty is unsupported and speculative.

50. HRW's submissions do not support the claim that accused persons are not presumed innocent in practice. The denial of voting rights for accused persons does not show that they will not be presumed innocent in criminal proceedings. Similarly, allegations of collective punishment of persons living in areas where crimes have been committed, though they may raise issues to be addressed within Rwanda's criminal justice system, do not rise to the level to suggest that Rwanda fails to recognize the presumption of innocence at trial. Nor do they suggest that judges of the Rwandan High Court, to which Mr. Hategekimana would be transferred, will fail to uphold the presumption of innocence. Moreover, the Rwandan authorities dispute the factual details of HRW's claims and deny any official involvement in such incidents. The Chamber therefore has no reason to believe that Mr. Hategekimana will be subjected to such deprivations.

51. The Defence and HRW also submit that certain statements by Rwandan officials call into question the application of the presumption of innocence in practice. Without commenting on the substance of these statements, the Chamber notes that they are general in nature and do not concern the guilt or innocence of specific accused persons.

52. The Chamber finds that Rwandan law recognizes the presumption of innocence. The Chamber does not consider that the submissions and examples of the Defence and HRW show that Mr. Hategekimana will not be presumed innocent.

Legal Assistance

53. Article 13 (6) of the Transfer Law recognizes the right of accused persons to counsel of their choice, and the right to free legal assistance for indigent persons. The Defence, HRW, and the ICDAA claim that Rwanda cannot guarantee these rights in practice because of the lack of a sufficient number of willing and capable lawyers in Rwanda, and because of the unavailability of funds for indigent accused in Rwanda. Even where such funds have been available in the past, they have not been disbursed to defence counsel representing indigent accused persons.

54. According to HRW, the Rwandan Bar Association consisted of 274 members at the beginning of 2008. Though this is a small number relative to the case load faced by Rwandan courts, the Chamber notes that, according to the Rwandan Government, members of the Rwandan Bar are available and willing to defend persons transferred from the Tribunal to Rwanda. Members of the Rwandan Bar Association have experience defending genocide cases.[58]

[58] The Chamber has not been provided with any specific or statistical information on the number of members of the Rwandan Bar Association who have experience in defending genocide cases, but it is clear from the submissions that Rwandan lawyers have represented persons accused in such cases. For example, HRW's Original Submissions, paras. 69-74 (discussing the experiences of Rwandan lawyers defending

55. Regarding the availability of free legal assistance to indigent accused, the Chamber notes that, while this may have been a problem in the past, the Rwandan Government claims that 250 million Rwandan Francs (approximately $500,000 U.S. dollars) have been set aside to fund the legal aid scheme, with funds to be provided by *Avocats Sans Frontiers* ("ASF") in cooperation with the Belgian Technical School. HRW acknowledges that ASF and a Belgian government organization disbursed funds for legal assistance to indigent clients in Rwanda during 2007, some of whom were accused of genocide.[59] At this stage, the apparent availability of funds is sufficient to satisfy the Chamber that free legal assistance would be available to Mr. Hategekimana if transferred and found indigent by the Rwandan authorities.[60] If this were to become a problem upon transfer, the Chamber considers that the availability of monitors and the possibility of revocation of referral could rectify any subsequent failure by the Rwandan authorities to make counsel available or disburse funds for legal assistance.[61]

Ability of the Defence to Exercise its Function

56. Article 15 of the Transfer Law recognizes the right of defence teams to perform their duties free of government interference and, if requested, with security and protection.

57. The Defence, HRW, the ICDAA, and ADAD claim that, in practice, Rwanda cannot guarantee the ability of the Defence to exercise its function. More specifically, they claim that the Rwandan government may not be able to adequately protect defence teams or facilitate travel and investigation by the Defence throughout the country. Rather, they claim the Rwanda government has actively interfered with and impeded defence teams in the past.

58. The allegations regarding interference with the Defence can be divided into two categories: (i) the inability of defence teams to obtain documents in a timely manner or at all; and (ii) threats and intimidation to members of defence teams, including the arrest of defence team members in connection with their work. Without examining their details here, the Chamber acknowledges that the examples provided by the Defence and *amici* suggest that a defence team may face difficult working conditions in Rwanda. But the Chamber notes that, though troubling, the examples are discrete; they do not show widespread abuses. Nor do they show that the Defence will be unable to exercise its function. In this regard, the Chamber notes that ICTR defence teams have generally been able to work in Rwanda. In addition, the new legal scheme for transfers, including Article 15 of the Transfer Law, is untested in this regard and may provide additional protections.

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persons accused of genocide before Rwandan courts). The Chamber notes that the experiences of Rwandan lawyers described in HRW's submissions were problematic, but HRW acknowledges that lawyers have stated that Rwandan lawyers have stated that they would be willing to represent accused persons transferred to Rwanda by the ICTR if they were assured adequate compensation. HRW's Original Submissions, para. 73.

[59] HRW's Original Submissions, para. 78.

[60] Stanković Appeal Decision, para. 21.

[61] Stanković Appeal Decision, paras. 50-52.

59. HRW suggests that the current Rwandan campaign against "genocidal ideology" may impede a vigorous defence. HRW acknowledges that proposed legislation specifically criminalizing genocidal ideology has not yet been adopted, but submits that the Constitution commits Rwanda to fight "the ideology of genocide and all its manifestations", and Article 4 of a 2003 law punishing the crime of genocide, crimes against humanity, and war crimes prohibits "any gross minimalization of the genocide, any attempt to justify or approve of genocide, and any destruction of evidence of the genocide."[62] Another law criminalizing and punishing genocidal ideology has been passed by the Rwandan National Assembly and is currently under consideration by the Rwandan Senate.[63] Without questioning the legitimacy of legislation against hate speech and noting that Holocaust denial is criminalized in other states, the Chamber recognizes the possibility for abuse of such provisions. The Chamber also notes, however, that no such cases involving members of defence teams have been brought to its attention. Therefore, such concerns are speculative at this point.

60. The Chamber notes that, while the issues raised by the Defence and *amici* do suggest the possibility of some difficulties for the Defence in exercising its function, the Chamber does not consider that these difficulties show that Mr. Hategekimana would not receive a fair trial. In addition the Chamber notes that, were it to transfer Mr. Hategekimana to Rwanda, the monitoring and revocation scheme under Rule 11 *bis* could serve as a safeguard to ensure that the Defence was not prevented from effectively carrying out its function.[64]

Availability and Protection of Witnesses

61. The Chamber notes that the issue of witness protection is "instrumental to the issue of witness availability", and thus "relevant to the fairness of a trial as it may affect an accused's right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him."[65]

62. Article 14 of the *Transfer Law* provides a detailed witness protection regime expressly linked to ICTR Rules 53, 69 and 75. It also refers to the facilitation of witness testimony, including "immunity from search, seizure, arrest or detention during their testimony and during their travel to and from trials" for witnesses coming to testify from abroad. The Prosecution and the Rwandan Government submit that this regime is adequate to guarantee the safety of all witnesses who may testify in cases referred by the Tribunal to Rwanda. They suggest that this regime should also ensure witness attendance, and that arguments to the contrary by the Defence and *amici* are speculative.

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[62] Law 33/bis/2003, *Punishing the Crime of Genocide, Crimes Against Humanity and War Crimes*, Art. 4 ("2003 Law").
[63] HRW's Further Submissions, para. 18.
[64] Stanković Appeal Decision, paras. 50-52.
[65] *See Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (TC), 14 September 2005, para. 49.

63. The Defence, HRW, and the ICDAA argue that Rwanda cannot adequately protect witnesses, and refer to examples of threats, harassment, and violence committed against witnesses. They also allege that official action has been taken against defence witnesses in the past, suggesting Rwandan Government involvement or complicity. The Defence, HRW and the ICDAA suggest that Mr. Hategekimana may be unable to convince witnesses, whether residing in Rwanda or abroad, to testify on his behalf. HRW also submits that witnesses may be unwilling to testify on behalf of persons accused of genocide for fear of falling afoul of genocidal ideology laws prohibiting minimization, negation, justification or approval, or destruction of evidence of genocide. The Defence adds that most of its witnesses will come from outside Rwanda, and many are refugees for whom any return to Rwanda would be in violation of their refugee status.[66]

64. As a preliminary matter, the Chamber notes that no judicial system can guarantee absolute witness protection.[67] Regarding the claim that the Rwandan witness protection service cannot adequately protect witnesses due to a lack of adequate resources and too few personnel, the Chamber notes that, according to HRW, some 900 witnesses have been assisted through the program since its inception. The examples cited by HRW in particular show that there has been sporadic violence against prosecution witnesses in particular, but the Chamber has not been given any information to suggest that the examples referred to by HRW and the ICDAA concerned witnesses who had availed themselves of the witness protection service. While the funding and personnel issues faced by the witness protection service may suggest that it faces challenges, they do not show that it is ineffective.

65. The Defence, HRW, and the ICDAA have offered examples where defence witnesses have been threatened and harassed after testifying on behalf of persons accused in ordinary and *gacaca* courts in Rwanda and before the ICTR. Others have been arrested or accused in *gacaca* proceedings after providing such testimony.

66. HRW stresses the possible negative impact of Rwanda's laws concerning genocidal ideology on the willingness of witnesses to testify on behalf of accused persons. HRW refers to three parliamentary commissions which studied genocidal ideology. According to HRW, the first commission interpreted the term to include opposition to government policies, including land reform, support for opposition candidates, or discussion of war crimes allegedly committed by the Rwandan Patriotic Army ("RPA"), the military branch of the Rwandan Patriotic Front ("RPF"). HRW suggests that the second and third commissions also applied the term broadly. Government officials have denounced "hundreds of people and dozens of Rwandan and

[66] The Defence has not filed, or been ordered to file a witness list pursuant to ICTR Rule 73 *ter*, which is not unusual at this stage of the proceedings before the Tribunal. Nonetheless, this makes the Defence assertions about its prospective witnesses difficult for the Chamber to assess. Considering that large numbers of defence witnesses testifying before the Tribunal come from outside Rwanda, the Chamber considers it appropriate to assume the veracity of the Defence assertions for the purposes of consideration of the Referral Request.

[67] *The Prosecutor v. Gojko Janković*, Case No. IT-96-23-2-AR11*bis*.2, Decision on Rule 11 *bis* Referral (AC), 15 November 2005, para. 49.

international organizations" for holding "genocidal ideas". HRW also provides examples showing that Rwanda's campaign against genocidal ideology has also been carried out in the judicial system pursuant to the 2003 Law, and where the Rwandan judicial authorities have sought to extend application of this law beyond national boundaries.[68] Without questioning the legitimacy of such laws, the examples provided show that the language has been interpreted broadly on occasion. Moreover, HRW provides examples of some witnesses who have stated they would not be willing to testify for fear of prosecution under these laws.

67. The Chamber accepts that, regardless of whether their fears are well founded, witnesses in Rwanda may be unwilling to testify for the defence as a result of the fear that they may face threats, harassment, arrest or accusations of harbouring "genocidal ideology."

68. There may be additional difficulties obtaining witness testimony from outside Rwanda. Regardless of the protections promised under Rwandan law, the Chamber accepts that many defence witnesses residing outside Rwanda may be unwilling to travel to Rwanda to testify.[69] In addition, the Defence claims and ICTR experience confirms that many Defence witnesses residing outside Rwanda have claimed refugee status, and thus there may be legal obstacles preventing them from returning to Rwanda.[70]

69. Pursuant to Article 28 of the ICTR Statute and ICTR Rule 54, the Tribunal may issue subpoenas with the assistance of international parties to obtain the live testimony of unwilling witnesses. This is not the case in Rwanda. The Chamber is not aware of Rwanda's participation in conventions concerning mutual assistance in criminal matters.[71] Rwanda may therefore face difficulties securing the attendance of witnesses living abroad.

70. The Prosecution and Rwanda offer video-link as a solution. While this may be an adequate solution for some witnesses, the Chamber notes that the Defence claims that most of its witnesses are living outside Rwanda. The Chamber is not aware of any Rwandan legislation or case law addressing the weight to be given to video-link testimony, or under what circumstances it should or should not be authorized. At this

[68] HRW's Further Submissions, paras. 22-25.

[69] The Chamber notes a statement by the Rwandan Minister of Justice regarding the immunity for witnesses granted under the Transfer Law. The Minister stated that immunity "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." As HRW noted, "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." HRW's Original Submissions, paras. 38-40. The Chamber accepts that this statement may contribute to the unwillingness of witnesses outside Rwanda to enter the country to testify for the Defence.

[70] For example, *see* Convention Relating to the Status of Refugees (1951), Art. 1 (C)(1) (Noting that the convention will no longer apply to persons who voluntarily avail themselves of the protection of their country of nationality).

[71] *See* Stanković Appeals Decision, para. 26 (noting the relevance of Bosnia and Herzegovina's ratification of the European Convention on Mutual Assistance in Criminal Matters to the issue of obtaining witnesses).

Tribunal, the preference is that witnesses testify in court.[72] Video-link testimony is an exception to this norm, and may be given less weight as a result of the possible difficulties that accompany electronic transmission.[73] In addition, video-link testimony may not be appropriate for key witnesses.[74] The Chamber considers that hearing most defence witnesses in a case by video-link after hearing witnesses for the Prosecution in court may violate Mr. Hategekimana's right to a fair trial, in particular his right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[75]

71. The Chamber concludes that the Defence may face difficulties in obtaining the testimony of witnesses living in and outside Rwanda and is not satisfied that Mr. Hategekimana will receive a fair trial under such circumstances.[76]

Double Jeopardy

72. The protection against double jeopardy is guaranteed by Article 9 of the Tribunal's Statute (*non bis in idem*). HRW submits that Article 93 of the 2004 Gacaca Law authorizes, at least implicitly, the re-trial of persons for crimes for which they have already been tried in conventional courts. According to HRW, such re-trials at the *gacaca* level have occurred in dozens of cases.

73. The Prosecution does not dispute that such re-trials have occurred but submits that these cases did not involve re-trial of cases under the Transfer Law, Article 25 of which states that the provisions of the Transfer Law will apply in the case of conflict with any other laws. In addition, Article 13 of the Transfer Law states that the rights recognized therein are without prejudice to other rights recognised under Rwandan law, including, *inter alia*, the ICCPR, which prohibits double jeopardy in Article 14.

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[72] *See e.g., The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 15.

[73] *See The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996, para. 21 (noting that "the evidentiary value of testimony provided by video-link ... is not as weighty as testimony given in the courtroom. Hearing of witnesses by video-link should therefore be avoided as far as possible"); *Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 15.

[74] *See The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 19 (accepting as an important interest the Trial Chamber's concern over its ability to assess the credibility of a particularly important witness via video-link).

[75] In addition to the problems discussed above, the Chamber notes that such a scenario may raise equality of arms issues. *See The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, paras. 43-56. But the Chamber also notes that, generally, matters outside the control of the court are not considered to raise equality of arms issues. *Ibid.*, para. 49. The Chamber notes, however, that decisions to allow or disallow video-link testimony on the basis of the importance of a witness's testimony, and/or to give less weight to testimony heard by video-link are within the control of the court.

[76] *Cf., Tadić*, Judgement (AC), para. 55 (noting the possibility of a situation where a fair trial is not possible because important defence witnesses do not appear as a result of circumstances outside the control of the court).

74. The Chamber notes that pursuant to Article 190 of the Rwandan Constitution, international treaties such as the ICCPR are more binding than organic laws and other Rwandan domestic legislation, which may suggest that the provisions of the ICCPR should overrule contrary provisions of the 2004 Gacaca Law. Both the 2004 Gacaca Law and the Transfer Law are organic laws, but the Transfer Law is *lex posterior* and may be found to apply in cases of conflict. None of the examples of re-trial in gacaca courts cited by HRW occurred under the Transfer Law, which establishes the High Court and the Supreme Court as the only competent courts to hear cases transferred by the Tribunal to Rwanda.[77] Given the relevant provisions of the Transfer Law, the ICCPR, and the Constitution, the Chamber is satisfied that Mr. Hategekimana would not be subjected to re-trial in gacaca courts if his case were to be transferred to Rwanda.

Detention Conditions

75. As noted above, detention conditions touch upon the fairness of a state's criminal justice system, and are therefore within the mandate of a Trial Chamber sitting under Rule 11 *bis*.[78] The Chamber has already considered problems with Rwanda's law as it relates to post-conviction detention conditions in the section dealing with penalty structure.[79] The Chamber will now consider pre-trial detention conditions.

76. Article 23 of the Transfer Law states that persons transferred to Rwanda by the ICTR for trial shall be detained in accordance with international standards, and that the International Committee of the Red Cross ("ICRC") or an ICTR appointed observer shall have the right to inspect the detention conditions of transferred persons.

77. The Defence, HRW, and the ICDAA submit that detention conditions may not comply with internationally recognized standards, and point to past problems of chronic overcrowding, unsanitary conditions and insufficient food stores to feed detainees. The Prosecution and the Rwandan authorities submit that Mr. Hategekimana would be detained in new facilities built, or in the process of being built to international standards in Mpanga and in Kigali.[80] This facility has been visited by outside observers.[81] The only issue raised by the Defence, HRW, and the ICDAA regarding these new facilities is that they are not yet be completed. The Chamber notes that, if it were to order transfer of Mr. Hategekimana's case it could do so on the condition that transfer not be given effect until completion of the facilities in Mpanga.[82]

[77] Transfer Law, Art. 1.
[78] Stanković Appeal Decision, para. 34.
[79] *See supra*, paras. 22-25.
[80] Rwanda's Submissions, paras. 30-33.
[81] Rwanda's Submissions, para. 31.
[82] *See* Stanković Appeal Decision, para. 50 (noting that the Chamber can issue whatever orders it feels are necessary to assist it in satisfying itself that an accused will receive a fair trial in the referral State).

Conclusion

78. The Chamber notes that Rwanda has made significant progress in rebuilding to its criminal justice system, which was crippled as a result of the events of 1994. Nonetheless, some obstacles to referral of Mr. Hategekimana's case remain. The Chamber:

(i) is not satisfied that Rwanda's legal framework criminalizes command responsibility;

(ii) is not satisfied that Rwanda can ensure Mr. Hategekimana's right to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him; and

(iii) considers it possible that, pursuant to Rwandan law, Mr. Hategekimana may face life imprisonment in isolation without adequate safeguards in violation of his right not to be subjected to cruel, inhuman or degrading punishment.[83]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Referral Request.

Arusha, 19 June 2008

Khalida Rachid Khan
Presiding Judge

Asoka de Silva
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]

[83] Given this conclusion, the Chamber does not consider it necessary to further discuss the role of monitoring and revocation, as contemplated under Rule 11 bis (D)(iv) and (F).