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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before: Judge Inés M. Weinberg de Roca, Presiding
Judge Lee Gacuiya Muthoga
Judge Robert Fremr

Registrar: Adama Dieng

Date: 16 December 2008

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THE PROSECUTOR

v.

Fulgence KAYISHEMA

Case No. ICTR-01-67-R11bis

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

Rule 11bis of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hassan Bubacar Jallow
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Defence Counsel:
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1. INTRODUCTION

1. The Chamber is seized of the Prosecutor's request to refer the case of Fulgence Kayishema ("Accused") to the Republic of Rwanda ("Rwanda") pursuant to Rule 11bis of the Rules of Procedure and Evidence ("Rules") of the International Criminal Tribunal for Rwanda ("Tribunal").¹

2. The Accused is charged with genocide, or alternatively, with complicity in genocide, conspiracy to commit genocide and extermination as a crime against humanity.² The crimes are alleged to have been committed in Kivumu *commune*, Kibuye *préfecture*, within the territory of Rwanda.

3. In the Referral Request of 11 June 2007, the Prosecutor submits that Rwanda has jurisdiction over the Accused and is willing and adequately prepared to accept the Accused's case. The Prosecutor further submits that, as required by Rule 11bis, Rwanda possesses a legal framework that criminalises the alleged conduct of the Accused as international crimes, ensures that the death penalty will not be imposed, and guarantees the Accused's fair trial rights.

4. In the response dated 28 July 2008, Defence Counsel for the Accused objects to the Referral Request on the grounds that, amongst other things, Rwandan law does not provide an adequate legal framework and that the Accused cannot receive a fair trial in Rwanda.³

5. Pursuant to Rule 74,⁴ the Chamber has granted leave to the Republic of Rwanda ("Rwanda") the Kigali Bar Association ("KBA"), the International Criminal Defence Attorneys Association ("ICDAA"), and Human Rights Watch ("HRW") to file *amicus curiae*

¹ "Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence", 11 June 2007 ("Referral Request"). Following the Referral Request, the President of the Tribunal designated this Trial Chamber to determine the matter in accordance with Rule 11bis on 11 July 2007. See "Designation of a Trial Chamber for the Referral of the Case to a State", 11 July 2007.

² Indictment, 10 June 2001 ("Indictment"). The Accused is charged with individual criminal responsibility under Article 6 (1) of the Statute of the International Tribunal for Rwanda ("Statute") for genocide pursuant to Article 2 (3) (a) or alternatively, complicity in genocide pursuant to Article 2 (3) (c), for conspiracy to commit genocide under Article 2 (3) (b) and extermination as a crime against humanity pursuant to Article 3 (b) of the Statute.

³ "Response to the Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence", 28 July 2008 ("Defence Response"). On 1 August 2008, the Prosecutor replied to the Defence Response, "Prosecutor's Reply to 'Defence Response to the Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence'", 1 August 2008 ("Prosecutor's Reply").

⁴ Rule 74 states: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organisation or person to appear before it and make submissions on any issue specified by the Chamber."

briefs.⁵ Rwanda, ICDA and HRW filed written submissions in accordance with the Chamber's orders.⁶ Despite being granted leave to file an *amicus curiae* brief, KBA failed to do so.

6. The submissions of the Parties and the *amici* are comprehensive and the Chamber has not found the need for an oral hearing.

7. In deciding whether to refer this case to Rwanda, the Chamber will examine whether:

- (i) This case is appropriate for referral to the authorities of another State;⁷
- (ii) Rwanda has jurisdiction;⁸ and
- (iii) Rwanda is an appropriate referral State in that (a) the death penalty will not be imposed and the Accused will receive an appropriate punishment if convicted of the crimes with which he is charged;⁹ and (b) the Accused will receive a fair trial in case of referral.¹⁰

8. The Chamber recalls that the Accused is currently at large. However, it is clear that Rule 11*bis* also applies to the transfer of accused at large.¹¹ As a preliminary matter, the Chamber is satisfied that should his case be referred to Rwanda the Accused would not be tried in *absentia*. While the Criminal Procedure Code provides for trials in *absentia* in certain circumstances¹² it is not the applicable law in the case of transfer cases like that of the Accused. The Transfer Law as the *lex posterior* and the *lex specialis* in the field of transfer is the applicable law and it states in Article 25 that its provisions shall prevail in the event of any

⁵ "Decision on the Request of the Republic of Rwanda for Leave to Appear as *Amicus Curiae*", 14 September 2007; "Decision on the Request by Human Rights Watch for Leave to Appear as *Amicus Curiae* in the Proceedings for Referral of the Indictment against Fulgence Kayishema to Rwanda", 8 November 2007; "Decision on the Application by the Kigali Bar Association for Leave to Appear as *Amicus Curiae*", 6 December 2007; and "Decision on the Request for Permission to file an *Amicus Curiae* Brief, International Criminal Defence Attorneys Association (ICDAA) Concerning the Prosecutor's Request for Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 *Bis* of the Rules", 6 December 2007.

⁶ "*Amicus Curiae* Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11*bis*", 1 October 2007 ("Rwanda's *Amicus* Brief"); "Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11*bis* Transfer", 4 January 2008 ("HRW *Amicus* Brief"); and "Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence", 4 January 2008 ("ICDAA *Amicus* Brief").

⁷ See paras. 9 to 16 of this Decision.

⁸ Rule 11*bis* (A).

⁹ Rule 11*bis* (C) and the Tribunal's jurisprudence to be discussed further at paras. 19 to 29 of this Decision.

¹⁰ Rule 11*bis* (C) and the Tribunal's jurisprudence to be discussed further at paras. 30 to 46 of this Decision.

¹¹ Rule 11 *bis* (A) "If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a trial Chamber which shall determine whether the case should be referred to the authorities of a State". (Emphasis added)

¹² See Law No. 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure, ("Criminal Procedure Code") Articles 196-204.

inconsistency with other legislation.¹³ The Transfer Law guarantees the accused the right to be tried in his or her presence, mirroring Article 20 (4) (d) of the Statute.¹⁴ The Chamber is therefore satisfied that as the Accused's case would be governed by the Transfer Law he would not be subject to a trial *in absentia* should his case be transferred.¹⁵

II. APPROPRIATE CASE FOR CONSIDERATION

A. Submissions

9. The Prosecutor submits that selection of a case for referral to the authorities of a State is a matter falling within his discretion.¹⁶

10. The Defence submits that the Prosecutor has failed to state why he chose this particular case for referral to Rwanda.¹⁷

B. Law

11. The Chamber notes that while the Prosecutor has discretion to select cases for possible transfer to competent national jurisdictions,¹⁸ the Tribunal is mandated under Security Council Resolutions 1503 and 1534 to transfer cases involving *intermediate* and *low-rank* accused to competent national jurisdictions.¹⁹

¹³ The Chamber also notes the submission by Rwanda in its *Amicus* Brief that that "While the Criminal Procedure Code has provision, in certain circumstances for trials *in absentia*, this provision is inapplicable if inconsistent with the accused's right to [be tried in his or her] presence under Article 13 (7) of the *Organic Law on Transfer Cases*. According to Article 93 of the Constitution of the Republic, Organic Laws take precedence over ordinary laws, and the Criminal Procedure Code is an ordinary law.", Rwanda's *Amicus* Brief, para. 16, footnote 2.

¹⁴ Article 13(7) Organic Law No 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States ("Transfer Law") provides that "the accused shall have the right to be tried in his or her presence".

¹⁵ In reaching this conclusion, the Chamber also considered comments made by the Rwandan Prosecutor General in the *Amicus Curiae* hearing in the case of *Prosecutor v. Yussuf Munyakazi*, Case no. ICTR - 97-36-R11bis referred to in the Defence Reply, para. 3.2, confirming that Rwanda does try people *in absentia*. However, the Chamber observes that the Prosecutor was not asked specifically whether under the Transfer Law individuals can be tried *in absentia* which is clearly prohibited by Rwandan legislation as stated above, but whether Rwanda tries people *in absentia*, which as stated above is permitted in certain circumstances, *Prosecutor v. Yussuf Munyakazi*, Case no. ICTR - 97-36-R11bis, T. 24 April 2008, pp. 54-55.

¹⁶ Prosecutor's Reply, paras. 6-7, in which the Prosecutor submits that this is a matter falling within his discretion pursuant to Rule 11bis, which bestows upon him a "specific role" in initiating referral proceedings.

¹⁷ Defence Response, para. 3.2.

¹⁸ See *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT, "Decision on Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment under Rule 11bis", 30 June 2005, para. 14; and Security Council resolution 1534 (2004) which "Calls on the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions..." Resolution 1534 (2004), S/RES/1534 (2004), 26 March 2004, para. 4.

¹⁹ Eighth Preambular Paragraph of Security Council Resolution 1503: "Urging the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy)", Resolution 1503 (2003), S/RES/1504

12. According to prior jurisprudence on referrals, "intermediate" and "low-rank" accused include:²⁰ a sub-commander of the military police and one of the main paramilitary leaders in Foča;²¹ a prison administrator;²² a commander of a military police battalion including a formation known as "the jokers";²³ four Bosnian Serb authorities involved in a joint criminal enterprise in two detention camps;²⁴ a soldier;²⁵ and a *préfet* in Rwanda.²⁶ Positions considered too senior for referral have included: the most senior commander of the Army of Bosnia and Herzegovina;²⁷ a paramilitary leader;²⁸ a commander involved in peace negotiations who was one rank below the highest military command.²⁹

(2003), 23 August 2003. See also para. 6 of Security Council Resolution 1534 "Requests each Tribunal to provide the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments; ..."

²⁰ Rule 11bis (C) of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Statute states: In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council Resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.

²¹ See *Prosecutor v. Gajko Janković*, Case No. IT-96-23/2-AR11bis.2, "Decision on Rule 11bis Referral", 15 November 2005, paras. 4, 11, 19, 20. (Note that this was the basis of the first ground of his appeal: rejected).

²² See *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11bis.2, "Decision on Savo Todović's Appeals against Decisions on Referral under Rule 11bis", 4 September 2006, ("Todović Appeal") paras. 9, 17-22. (Note that this was the basis of the first ground of his appeal of the referral: rejected.)

²³ See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, "Decision on Appeal against Decision on Referral under Rule 11bis", 4 July 2006, ("Ljubičić Appeal") para. 3 (appealed, but not on this ground).

²⁴ See *Prosecutor v. Zeljko Mejakic et al.*, Case No. IT-02-65-AR11bis.1, "Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis", 7 April 2006, ("Mejakic Appeal"), paras. 3, 4, 18-26. (Note that this was the basis of the Appellants' second ground of appeal: rejected.)

²⁵ See *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, "Decision on Rule 11bis Referral", 1 September 2005, ("Stanković Appeal"), para. 3 (appealed, but not on this ground).

²⁶ See *Prosecutor v. Bucyibaruta*, Case No. ICTR-2005-85-I, "Décision Relative à la Requête du Procureur Aux Fins de Renvoi de L'Acte D'Accusation Contre Laurent Bucyibaruta Aux Autorités Françaises", 20 November 2007 ("Bucyibaruta Referral").

²⁷ See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, "Decision on Motion for Referral of Case Pursuant to Rule 11bis", 9 July 2007, paras. 11, 20-26 (This was the basis of the denial of the Referral, decision not appealed).

²⁸ See *Prosecutor v. Milan Lukić*, Case No. IT-98-32/1-AR11bis.1, "Decision on Milan Lukić's Appeal Regarding Referral", 11 July 2007, paras. 18-26. (Note that this was the basis of the third and fourth grounds of his appeal, which were accepted, his referral was revoked)

²⁹ See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, "Decision on Referral of a Case Pursuant to Rule 11bis", 8 July 2005, paras. 21-23 (Prosecution appeal on sentence pending).

C. Discussion

13. In determining whether the referral of the case is appropriate, the Chamber will therefore evaluate the level of responsibility of the Accused, considering only those facts alleged in the Indictment.³⁰

14. The Accused is alleged to have been the inspector of police of Kivumu *commune*, Kibuye *préfecture*.³¹ He is charged with genocide, or, alternatively, with complicity in genocide, conspiracy to commit genocide and extermination as a crime against humanity.³² Specifically, it is alleged that the Accused:

- a. prepared and executed a plan to exterminate the Tutsi population in Kivumu *commune* with others through regular meetings at Nyange Parish and the communal office between 6 April and 20 April 1994;
- b. attended several meetings on or about 10 April 1994 at the Parish of Nyange and the communal office where it was decided to gather all Tutsi civilians of Kivumu at Nyange church to exterminate them; and
- c. ordered or planned or aided and encouraged the destruction of Nyange Church killing the 2000 or more Tutsi trapped inside on or about 15 April 1994 and providing the fuel to do so.³³

15. The Chamber notes that the Accused had neither a rank of any military significance, nor had any official political role. He was the inspector of police at Kivumu *commune*, whose mandate was largely limited to Kivumu *commune*. The Accused's level of responsibility is comparable to many of those referred to national jurisdictions.

D. Conclusion

16. The Chamber is satisfied that the level of responsibility of the Accused makes his case an appropriate one for referral to the authorities of a State.

³⁰ See *Mejakić Appeal*, para. 22. "When assessing [...] the Appellants [...] level of responsibility, the Referral Bench properly considered only those facts alleged in the Indictment before reaching a determination concerning the appropriateness of referring the case to a national jurisdiction."

³¹ Indictment, II.

³² Indictment, Counts 1 to 4.

³³ Indictment, paras. 10-11, 16-18, 32-33, 35-37, 48.

III. REFERRAL TO RWANDA

A. Jurisdiction

17. Rule 11bis (A), which governs the transfer of accused persons from the Tribunal to a national jurisdiction, provides:

"If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

- a. in whose territory the crime was committed; or
- b. in which the accused was arrested; or
- c. having jurisdiction and being willing and adequately prepared to accept such a case'

so that those authorities should forthwith refer the case to the appropriate court for trial within that State."

18. It is not disputed that Rwanda has jurisdiction as the State in whose territory the crimes were committed pursuant to Rule 11bis (A) (i). Where a Chamber finds that any one of the three grounds in Rule 11bis (A) is established, it can proceed to determine, pursuant to Rule 11bis (C), whether the Accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.³⁴

B. Penalty Structure

A. Submissions

i. Non-Imposition of Death Penalty

19. It is not disputed that the death penalty was abolished in Rwanda pursuant to Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty ("Death Penalty Law").³⁵

ii. Applicable Punishment

20. The Prosecutor submits that the Transfer Law provides for a penalty structure identical to that enshrined in the Statute and Rules.³⁶ The Prosecutor refers to Article 21 of the Transfer Law which states that life imprisonment shall be the heaviest penalty for an Accused

³⁴ Rule 11bis (C) states that "In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out."

³⁵ Prosecutor's Reply, para. 11; Defence Response, para. 4.1. See Article 3 Death Penalty Law which states: "In all 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 Referral Request, para. 27.

transferred from the Tribunal to Rwanda.³⁷ It emphasizes that the applicable law with regard to sentencing is the Transfer Law as the *lex specialis* applying to all transfer cases, and not the Death Penalty Law. Accordingly, the maximum sentence that could be imposed would be life imprisonment and not life imprisonment with special conditions as provided for in the Death Penalty Law.³⁸ In this respect it refers to submissions and a written statement by Rwanda giving the specific assurance that no person transferred from the ICTR would be sentenced to life imprisonment with solitary confinement.³⁹

21. The Defence submits that there is significant ambiguity regarding the sentence that an accused person transferred to Rwanda could receive. It submits that there is no basis upon which to conclude that only the Transfer Law, rather than any provision under the Death Penalty Law will apply to the Accused. In this respect it refers to Article 4 of the Death Penalty Law which states that life imprisonment with special provisions is imprisonment in isolation.⁴⁰

B. Law

22. In order to refer the Accused's case, the Chamber must satisfy itself that the death penalty will not be imposed.⁴¹

23. Furthermore, although not expressly provided for in Rule 11bis, pursuant to the jurisprudence of the Tribunal and the ICTY, the penalty structure within a State to which an indictment may be referred must provide an appropriate punishment for the offences with which the Accused is currently charged.⁴² Moreover, conditions of detention, a matter which touches upon the fairness of a jurisdiction's criminal justice system, must accord with internationally recognised standards.⁴³

³⁷ Referral Request, para. 25, See also Article 1 of the Transfer Law which states that it 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 21 states that life imprisonment will be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from the ICTR.

³⁸ Prosecutor's Reply, paras. 12-15.

³⁹ Prosecutor's Reply, paras. 14-15 referring to *Amicus Curiae* Brief on Behalf of the Government of Rwanda, *Prosecutor v. Yussuf Munyakazi*, Case no. ICTR-97-36-R11bis (AC), 28 July 2008, ("Rwanda's *Amicus Curiae* Munyakazi AC") paras. 9-11 and its Annex 3 appended to the Prosecutor's Reply as Annex 1.

⁴⁰ Defence Response, paras. 4.4 – 4.8. NB, Article 4 of the Death Penalty Law states that "Life imprisonment with special provisions is imprisonment with the following modalities: - 1. a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment; 2. a convicted person is kept in isolation." See Defence Response, para. 4.5.

⁴¹ Rule 11bis (C).

⁴² *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, "Decision on Referral of Case under Rule 11bis", 17 May 2005 ("Stanković Referral"), para. 32; *Mejakić* Appeal, para. 48; *Ljubicić* Appeal, para. 48; and *Bagaragaza* Appeal, para. 9.

⁴³ The Chamber recalls that conditions of detention in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction's criminal justice system and is an inquiry squarely

24. Specifically with regard to solitary confinement, the Appeals Chamber recently held that "the punishment of solitary confinement may constitute a violation of international standards if not applied as an exceptional measure which is necessary, proportionate, restricted in time and includes minimum safeguards."⁴⁴ This is consistent with established jurisprudence of the European Court of Human Rights and the Human Rights Committee.⁴⁵

C. Discussion

i. Non-Imposition of the Death Penalty

25. The Death Penalty Law abolishes the death penalty, and replaces it in all previous legislative texts with life imprisonment or "life imprisonment with special provisions."⁴⁶ Thus, the Chamber is satisfied that, in line with Rule 11bis (C), the death penalty will not be imposed in Rwanda.

ii. Applicable Punishment

26. However, the Chamber is concerned that life imprisonment in the Accused's case would mean life imprisonment in isolation as it is unclear, as recently found by the Appeals Chamber, whether the punishment provisions in the Transfer Law or Death Penalty Law would prevail. It recalls the Appeals Chambers finding that:

"it would be possible for courts in Rwanda to interpret the relevant laws [Transfer and Death Penalty Laws] either to hold that life imprisonment with special provisions is applicable to transfer cases, or to hold that life imprisonment without special provisions is the maximum punishment.

within the Chamber's mandate. See *Stanković Appeal*, para. 34, and *Đodović Appeal*, para. 99. These internationally recognised standards include: (i) Freedom from torture, or cruel, inhuman or degrading treatment or punishment as contained in Article 5, Universal Declaration of Human Rights ("UDHR"); Article 7, International Covenant on Civil and Political Rights ("ICCPR"); Article 5, African Charter on Human and People's Rights ("ACHPR"); Article 16 (1), Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"); and Principle 6 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988) ("Body of Principles"); and (ii) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person as contained in Article 10 (1), ICCPR; Article 5, ACHPR; and Principle 1 of the Body of Principles.

⁴⁴ *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11 bis, "Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis", (*Kanyarukiga Appeals Chamber Decision*) para. 15.

⁴⁵ The Human Rights Committee ("HRC") has stated: "... solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant." See Concluding Observations of the HRC: Denmark, 31/10/2000, CCPR/CO/70/DNK, para. 12. See also, *Ramirez Sanchez v. France*, European Court of Human Rights (ECtHR), Grand Chamber (GC), App. No. 59450/00, 4 July 2006, para. 121.

⁴⁶ Article 3 of the Death Penalty Law provides that in all legislative texts, the death penalty is substituted with imprisonment or life imprisonment with special provisions. Further, Article 21 of the Transfer Law provides that life imprisonment is the highest penalty that can be imposed for cases referred to Rwanda by the Tribunal.

Since there is genuine ambiguity about which punishment provision would apply to transfer cases, and since, therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases, pursuant to the Abolition of Death Penalty Law, the Appeals Chamber finds no error in the Trial Chamber's conclusion that the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11bis of the Rules.⁴⁷

27. The Chamber notes that Rwanda indicated that it has now sought an authentic interpretation of the Transfer Law from Parliament. However, the Chamber is not aware that any such interpretation has yet been issued to clarify this ambiguity.⁴⁸ The Chamber also notes that Rwanda has recently passed a new law modifying the Death Penalty Law providing that life imprisonment with special provisions shall not apply to cases transferred from the Tribunal to Rwanda under the Transfer Law. However, there is no information before the Chamber to indicate that this law has entered into force.⁴⁹ The Chamber therefore considers, in line with the Appeals Chamber jurisprudence, that if transferred and convicted of the crimes charged the Accused may be subject to the sentence of life imprisonment in isolation.⁵⁰

28. In view of the established jurisprudence and observations of Human Rights bodies, the Chamber considers that, where provided for in domestic law, imprisonment in isolation should be an exceptional punishment, applicable only where necessary, proportionate, restricted in time and includes minimum safeguards. The Chamber is not aware of any such safeguards in Rwandan law as recognised by the Appeals Chamber.⁵¹

D. Conclusion

29. The Chamber finds that although the death penalty would not be imposed in Rwanda, thereby satisfying one of the requirements in Rule 11bis (C), the applicable sentence in the Accused's case, if convicted, may be life imprisonment in isolation. The Chamber considers in accordance with the Appeals Chamber jurisprudence that without the aforementioned

⁴⁷ *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11 bis, "Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis", the, 8 October 2008, ("*Munyakazi Appeals Chamber Decision*") paras. 19-20. See also *Kanyarukiga Appeals Chamber Decision*, para. 16.

⁴⁸ *Kanyarukiga Appeals Chamber Decision*, para. 14.

⁴⁹ *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, "Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis", 4 December 2008, ("*Hategekimana Appeals Chamber Decision*"), paras. 37-38.

⁵⁰ *Hategekimana Appeals Chamber Decision*, para. 38; *Kanyarukiga Appeals Chamber Decision*, para. 16; *Munyakazi Appeals Chamber Decision*, paras. 19-20.

⁵¹ *Kanyarukiga Appeals Chamber Decision*, para. 15.

safeguards, the current penalty structure is not adequate, as required by the jurisprudence of the Tribunal and the ICTY, thus precluding referral to Rwanda.⁵²

C. Fair Trial Guarantees: Witness Availability and Protection

A. Submissions

i. Parties

30. The Prosecutor submits that Rwanda has an effective witness protection mechanism that would guarantee the safety of witnesses.⁵³ It points out that Rwanda's Transfer Law includes measures to facilitate witnesses' testimony,⁵⁴ and to provide witness protection equivalent to that of the Tribunal.⁵⁵ It submits that allegations that witnesses who testified at the Tribunal were subsequently harassed by the Rwandan Government for so doing are unsubstantiated, and allegations that witnesses in transfer cases would potentially be subject to harassment and threats, are purely speculative.⁵⁶

31. The Prosecutor submits that it cannot simply be assumed that most Defence witnesses will come from outside Rwanda. Moreover, the Prosecutor submits that the Defence position ignores the specific provisions of Article 14 of the Transfer Law, under which the Prosecutor General is obliged to facilitate the testimony of such witnesses through the provision of appropriate immigration documents.⁵⁷

32. The Defence submits that, contrary to what is stipulated under Rwandan law, "the reality which prevails on the ground in Rwanda" is different.⁵⁸ Those who wish to testify for someone accused of genocide are subjected to harassment, and, if they persist, risk being subjected to violence and sometimes assassination.⁵⁹ The Defence points out that the Tribunal's Registrar recognised this danger, in *Karemura and others*.⁶⁰

⁵² *Hategukimana Appeals Chamber Decision*, para. 38; *Kanyarukiga Appeals Chamber Decision*, para. 16; *Munyakazi Appeals Chamber Decision*, paras. 19 to 20.

⁵³ Prosecutor's Reply, para. 74.

⁵⁴ See the Referral Request, para. 63, which cites Article 14 of the Transfer Law.

⁵⁵ *Ibid.*, para. 41, which cites Article 14 of the Transfer Law; Prosecutor's Reply, para. 71. See also Prosecutor's Reply, para. 53.

⁵⁶ Prosecutor's Reply, paras. 72-73; see also para. 51.

⁵⁷ Prosecutor's Reply, paras. 78-79.

⁵⁸ Defence Response, para. 11.6.

⁵⁹ *Ibid.*, paras. 11.6, 11.7. Para 11.6 refers to Annex D of the Defence Response, a letter from the ADAD President to the Tribunal's President. The Defence also provides two examples of alleged intimidations of defence witnesses within Rwanda in the cases of *Ntabakuze*, and *Renzaho* (Defence Response, para. 8.5).

⁶⁰ *Ibid.*, para. 11.8, *Prosecutor v. Karemura and others*, Case No. ICTR-98-44-T, Registrar's Submissions under Rule 33 (B) of the Rules on Joseph Nzirorera's Motion to hold Trial Sessions in Rwanda, 4 May 2005, ss 9-10. The Registrar strongly objected to a request that trial sessions in Rwanda, on the ground that it would be

33. The Defence submits that most of the Defence witnesses will be from outside Rwanda, as is the norm. As these witnesses are Rwandan nationals living outside their country as refugees, they cannot travel to Rwanda under the UNHCR Regulations governing their refugee status.⁶¹

ii. *Amici*

34. Rwanda submits that it has taken substantial steps to ensure the hearing of witnesses and the presentation of evidence, including measures to ensure witness protection and safety.⁶² It states that witnesses have a special security and protection arrangement in addition to the security measures afforded to other citizens. It adds that the fact that the witness protection mechanism is co-ordinated by the Prosecutor General's office does not impact on the inter-institutional mechanism in place.⁶³ It also highlights the availability of facilities for video-link testimony.⁶⁴

35. The ICDAAC submits that most Rwandan witnesses believe that the Rwandan authorities breach the protective measures.⁶⁵ The ICDAAC further submits that it is "extremely unlikely" that Defence witnesses will feel secure enough to testify in transferred cases, given that allegations of witness intimidation are referred to local political authorities and police.⁶⁶ It states that Defence witnesses in Rwanda risk being rejected by their community, mistreated, arrested, detained, beaten and even tortured,⁶⁷ and point to allegations of recent killings of witnesses in Rwanda.⁶⁸ Many witnesses also fear that their appearance will lead to an indictment being issued against them, as has occurred in numerous Gacaca proceedings.⁶⁹ The ICDAAC concludes that "almost no witness from abroad will be willing to return to Rwanda in

dangerous for the security of protected witnesses to testify within the community where they are accused of having committing crimes.

⁶¹ Defence Response, para. 11.9.

⁶² Rwanda's *Amicus Curiae Munyakazi AC*, paras. 17-21, contending that the referral bench in *Munyakazi* erred in failing to take these into account.

⁶³ Republic of Rwanda's Submissions in response to *Amicus Curiae Brief* filed by Human Rights Watch in Opposition to Rule 11 *bis* Transfer of Fulgence Kayishema, 6 March 2008, ("Rwanda's Response to HRW *Amicus Brief*") paras. 31.2-31.4.

⁶⁴ Rwanda's *Amicus Curiae Munyakazi AC*, para. 24.

⁶⁵ ICDAAC *Amicus Brief*, para. 82.

⁶⁶ *Ibid.*, paras. 80 and 87.

⁶⁷ *Ibid.*, para. 83.

⁶⁸ *Ibid.*, para. 85. The ICDAAC states that one of the witnesses in the *Sezibera* trial, Madame Espérance Uwantege, was killed in Rwanda. The ICDAAC also refers to a Report of the US State Department, dealt with further at para. 40 of this Decision.

⁶⁹ *Ibid.*, para. 84.

order to testify,"⁷⁰ and the Rwandan authorities would be unable to provide services even remotely comparable to those services provided by the Tribunal for witnesses from abroad.⁷¹

36. In recent interviews, HRW found that various lawyers and judges identified the obtaining of testimonies from Defence witnesses as one of the most serious obstacles to fair trial proceedings in Rwanda.⁷² It submits that witnesses have faced threats, mistreatment, including torture, and in some cases, murder.⁷³ HRW has documented approximately ten cases where persons who testified for the Defence before the Tribunal were subsequently arrested, re-arrested, subjected to worse conditions of incarceration or harassed after returning to Rwanda.⁷⁴ There are also reports of Defence witnesses being detained or intimidated by police or local authorities as a result of their testimonies in Gacaca proceedings.⁷⁵ HRW documented four recent cases of persons who refused, out of fear, to testify in defence of persons whom they knew to be innocent of charges against them.⁷⁶ Witnesses also fear being accused of crimes if they come forward to testify.⁷⁷

37. HRW further submits that the witness protection service is understaffed, and that witnesses will be unlikely to use the service, given how it is administered.⁷⁸ HRW reports that almost all Defence witnesses reside outside Rwanda,⁷⁹ and that no witnesses interviewed were

⁷⁰ *Ibid.*, para. 95.

⁷¹ *Ibid.*, paras. 91 and 92.

⁷² HRW *Amicus* Brief, para. 29. Interviews conducted over 2005, 2006 and 2007.

⁷³ *Ibid.*, paras. 89 to 102. According to at least two Rwandan judges, it is not uncommon for state agents to torture, mistreat, threaten or seek to force accused persons to confess or testify against co-defendants. HRW have documented at least three such cases since 2005. Each year, several survivors of the genocide are murdered in Rwanda. At least eight were murdered in 2007 and in some cases, the killings are related to testimony that the survivors provided or intended to provide in genocide prosecutions.

⁷⁴ *Ibid.*, para. 97; see also para. 36. Rwanda submits that HRW did not show how it authenticates its claim, contained in para. 36 of its Brief that in several cases witnesses who appeared for the Defence at the Tribunal were arrested on their return to Rwanda. It adds that HRW has never applied to be an *amicus curiae* before the respective trial chambers of the ICTR to express its concern or file any case before the relevant Rwandan Courts seeking protection for those witness, Rwanda's Response to HRW *Amicus* Brief, paras. 31.14-31.15.

⁷⁵ HRW *Amicus* Brief, para. 102.

⁷⁶ *Ibid.*, para. 37. These four incidents occurred between 3 November 2007 and 3 January 2008.

⁷⁷ *Ibid.*, paras. 30 to 40.

⁷⁸ *Ibid.*, paras. 27, 85 to 87. HRW submits that the witness protection service established in 2005 is understaffed, with only 16 staff members serving the entire country and refers all cases of threats to witnesses to the local police and political authorities. HRW also submits that the witness protection service refers all allegations of witness intimidation to the local police and political authorities. The witness protection service forms part of the national prosecutor's office, making it unlikely that defence witness would seek assistance.

⁷⁹ *Ibid.*, para. 38. HRW interviewed one experienced defence lawyer in December 2007 who estimated that 90% of witnesses called by his clients and other accused persons resided outside Rwanda.

willing to return to Rwanda to give testimony.⁸⁰ Finally, HRW has no knowledge of any mechanisms in Rwanda to facilitate safe travel for witnesses from abroad.⁸¹

B. Law

38. As reflected in Article 20 (4) (e) of the Statute, the Accused has the right to obtain the attendance of, and to examine witnesses for his case under the same conditions as witnesses against him.⁸² This right encompasses the issues of witness availability and protection.⁸³

C. Discussion

39. Despite Rwanda's legislated guarantees of the aforementioned right, including provision for the assistance and protection of witnesses,⁸⁴ the Chamber shares the concerns expressed by the Defence, the ICDA and HRW, that, under the current conditions in Rwanda, it is likely that this right would be violated.

⁸⁰ *Ibid.*, paras. 104 and 105. HRW interviewed Rwandans living abroad about their willingness to travel to Rwanda to testify for the defence in cases transferred under Article 11bis, and none were willing to do so. Even Rwandans otherwise willing to travel to Rwanda might be reluctant to do so because it could prevent their obtaining asylum or delay their obtaining citizenship in their countries of residence.

⁸¹ *Ibid.*, para. 103. HRW stated further that given the staffing and funding of the witness protection service, it is unlikely that it can offer such assistance in the near future.

⁸² Article 20 (4) of the Tribunal's Statute states that: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees:... (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her..." See also Article 14 (3) of the ICCPR, which states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) 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..." and Article 7 (1) of the ACHPR which states: "Every individual shall have the right to have his cause heard. This comprises: ... (c) the right to defence, including the right to be defended by counsel of his choice..." The right to a defence would arguably include the ability to call witnesses. The ACommHR also issued the Resolution of the Commission on the Right to Recourse to Procedure and Fair Trial (annexed to the Prosecutor's Request for Referral as Annex G).

⁸³ See, for example, *Stanković Referral*, paras. 81 and 89 (*Upheld by the Appeals Chamber*).

⁸⁴ Rwanda ratified the ICCPR on 16 April 1975 and the ACHPR on 15 July 1983. Further, Article 13 of the Transfer Law states "...an accused person in the case transferred by ICTR to Rwanda is guaranteed the following rights: ... (9) to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him or her; ..." and Article 14 of the Transfer Law states in its entirety that: "In the trial of cases transferred from the ICTR, the High Court of the Republic shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Articles 53, 69 and 75 of the ICTR Rules of Procedure and Evidence. 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 medical and psychological assistance. All witness who travel from abroad to Rwanda to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from their trials. The High Court of the Republic may establish reasonable conditions on a witness's right to safety in the country. As such there shall be a determination of limitations of movements in the country duration of stay and travel."

i. Witnesses Inside Rwanda

40. The Chamber has a number of concerns regarding witnesses within Rwanda, the first and foremost being their safety. The Chamber shares the concerns of ICDA and HRW, as detailed above, regarding the difficulty the Accused would have in securing Defence witnesses to testify on his behalf because of their fears of harassment, arrest and detention.⁸⁵ Specifically, the Chamber has concerns regarding the reports of murdered witnesses. HRW reported that at least eight genocide survivors were murdered in 2007 and in some cases, the killings were related to testimonies that the survivors provided, or intended to provide, in genocide prosecutions.⁸⁶ In this regard, the Chamber notes a US State Department Report which states that:

“...during the year unidentified individuals killed several witnesses to the genocide throughout the country to prevent testimony ... According to genocide survivor organizations, individuals killed between 12 and 20 genocide survivors during the year. (...) there were 328 incidents of violence involving gacaca trials during the year, and threats against genocide witnesses hampered the gacaca process...” (Emphasis added.)⁸⁷

41. Furthermore, many witnesses fear their appearance will lead to an indictment being issued against them, as in the past.⁸⁸ Defence witnesses may fear being accused of “genocidal ideology”, a crime referred to in the Rwandan Constitution but undefined under Rwandan law. For example, according to the 2006 Rwandan Senate report, questioning the legitimacy of the detention of a Hutu is one manifestation of “genocidal ideology.” In several cases documented by HRW, witnesses who appeared for the defence at the Tribunal, were arrested after their return to Rwanda.⁸⁹ The Government would appear to condone these arrests, for example, in February 2007, the Rwandan Minister of Justice, Tharcisse Karugarama, was quoted as saying:

“We have nothing to lose [by granting immunity] if anything, we have everything to gain, by these people turning up, it will be a step toward their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest.”⁹⁰

⁸⁵ See, *supra* paras. 35 and 36.

⁸⁶ HRW Amicus Brief, para. 96.

⁸⁷ ICDA Amicus Brief, para. 85. See US State Department's Report on Human Rights Practices – 2006, submitted to the US Congress by the Secretary of State, Condoleezza Rice, released by the Bureau of Democracy, Human Rights, and Labor, on 6 March 2007. The Report contains a separate section on Rwanda. See section on Arbitrary or Unlawful Deprivation of Life.

⁸⁸ *Ibid.*, para. 84. See also HRW Amicus Brief, paras. 30 to 40.

⁸⁹ HRW Amicus Brief, paras. 30 to 40.

⁹⁰ *Ibid.*, para. 39. This comment was in a response to Senate criticism of immunity for witnesses coming from outside Rwanda.

The Chamber's view of this apparent condoning by a Rwandan Minister is not altered by Rwanda's submission that the information about the whereabouts of fugitives has always been available, yet not all of them have been captured and that some of the fugitives have been removed from Interpol red notice as the ICTR needed them as witness in various cases.⁹¹

42. In light of the submissions, and although it recognises that no judicial system can guarantee absolute witness protection,⁹² the Chamber also has serious concerns regarding the operation of the Rwandan witness protection program. The Chamber observes that the program is understaffed, employing only 16 individuals to serve the entire country.⁹³ As the Appeals Chamber recently held, while the fact that the witness protection service is administered by the Prosecutor, and threats of harassment are reported to the police, does not necessarily render the service inadequate, witnesses may be afraid to avail themselves of it for this reason.⁹⁴ The Chamber agrees with the ICDA that, in light of this situation, the above circumstances would make it very unlikely that Defence witnesses will feel secure enough to testify in transferred cases.⁹⁵

ii. *Witnesses Outside Rwanda*

43. The Chamber accepts the submission of the Defence and HRW that most Defence witnesses reside outside Rwanda which is usual for cases before the Tribunal as recognised by the Appeals Chamber.⁹⁶ The Chamber recalls that Rwanda has taken steps to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states. Specifically, it recalls the Appeals Chamber finding that Rwanda has several mutual assistance agreements with states in the region and elsewhere in Africa, and that agreements have been arranged with other states as part of Rwanda's cooperation with the Tribunal and in the conduct of its domestic trials. In addition it notes that United Nations Security Council resolution 1503 provides a clear basis for requesting and obtaining cooperation.⁹⁷

⁹¹ Rwanda's Response to HRW *Amicus* Brief, para. 31.19.

⁹² See *Munyakazi Appeals Chamber Decision*, para. 38.

⁹³ HRW *Amicus* Brief, paras. 27, 85 to 87.

⁹⁴ *Kanyarukiga Appeals Chamber Decision*, para. 27; *Munyakazi Appeals Chamber Decision*, para. 38. See also, for example, ICDA *Amicus* Brief, para. 79. See also HRW *Amicus* Brief, paras. 27, 85 to 87.

⁹⁵ ICDA *Amicus* Brief, paras. 80 and 87.

⁹⁶ Defense Response, para. 11.9; HRW *Amicus* Brief, para. 38, footnote 25. The Chamber notes but is not convinced by Rwanda's criticism of HRW that they did not vet the source of this statistic – an experienced Defence Lawyer, and that only reliable sources should have been used, see Rwanda's Response to HRW *Amicus* Brief, para. 31.18; *Hategekimana Appeals Chamber Decision*, para. 24; *Kanyarukiga Appeals Chamber Decision*, para. 31; *Munyakazi Appeals Chamber Decision*, para. 40.

⁹⁷ *Hategekimana Appeals Chamber Decision*, para. 25; *Kanyarukiga Appeals Chamber Decision*, para. 32; *Munyakazi Appeals Chamber Decision*, para. 41.

44. However, the Chamber is concerned that Defence witnesses coming from abroad would fear the intimidation and threats currently faced by witnesses residing in Rwanda, as well as the fear of arrest, as mentioned above.

45. The Chamber considers that the availability of video-link facilities is not a complete solution to obtaining the testimony of witnesses residing outside Rwanda. The Chamber notes that it is preferable to hear direct witness testimony unless the interests of justice require otherwise.⁹⁸ In the Chamber's view, if the majority of Defence witnesses are heard via video-link, while the majority of those called for the Prosecution are heard in person, the right to examine witnesses under the same conditions, and consequently the principle of equality of arms, is undermined. This finding is in conformity with Appeals Chamber jurisprudence.⁹⁹

D. Conclusion

46. The Chamber is therefore not convinced that the Accused's fair trial right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, can be guaranteed at this time in Rwanda.

⁹⁸ Rule 90 (A) of the Rules states that "witnesses shall, in principle, be heard directly by the Chambers." However, video-link testimony may be ordered where it is in the interests of justice, based on a consideration of the importance of the testimony, the inability or unwillingness of the witness to attend and, whether a good reason has been adduced for that inability or unwillingness. Where the witness is unwilling to attend, his refusal must be genuine and well-founded, giving the Chamber reason to believe that the testimony would not be heard unless the video-link is authorized. See for example *Prosecutor v. Zejnil Delalic et. al.*, Case No: IT-96-21, "Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference", 28 May 1997, para. 17; and *Prosecutor v. Casimir Bizimungu et. al.*, "Decision on Confidential Motion from Mr. Bicamumpaka to Allow Video-Link Testimony for Witness CF-1", 23 January 2008, para. 3. Further, according to the Tribunal's jurisprudence, the evidentiary value of testimony provided by video-link is not as weighty as testimony given in a courtroom. See *Prosecutor v. Zejnil Delalic et. al.*, Case No: IT-96-21, "Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference", 28 May 1997, para. 18: "The distance of the witness from the solemnity of the courtroom proceedings and the fact that the witness is not able to see all those present in the courtroom at the same time, but only those on whom the video camera is focused, may detract from the reliance placed on his or her evidence. The Trial Chamber agrees with this general principle, whilst also considering that it is a matter for the assessment of the Chamber when evaluating the evidence as a whole, to determine how credible each witness is."

⁹⁹ *Hategekimana Appeals Chamber Decision*, para. 26; *Kanyarukiga Appeals Chamber Decision*, para. 33; *Munyakazi Appeals Chamber Decision*, para. 42.

D. Monitoring

A. Submissions

i. Parties

47. The Prosecutor's request was based on monitoring of national proceedings. It submits that it has entered into an agreement with the African Commission on Human and Peoples' Rights ("ACmHPR") to monitor proceedings of the Accused should his case be transferred.¹⁰⁰ In its rejoinder to the Defence Response, the Prosecutor clarifies that the agreement is in principle, but it does not anticipate any difficulties in reaching an agreement.¹⁰¹

48. The Defence submits that strictly speaking there is no monitoring agreement currently in place between the ICTR Prosecutor and the ACmHPR. Rather it is an exchange of correspondence between the Prosecutor and the President of the ACmHPR.¹⁰² Moreover, the Defence challenges the Prosecutor's competence to enter into such a monitoring agreement.¹⁰³

ii. Amici

49. Rwanda has expressed its commitment to facilitating the work of the monitors from the ACmHPR.¹⁰⁴

50. The ICDAAs argue 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.¹⁰⁵

B. Law

51. The Chamber recalls that Rule 11bis (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.¹⁰⁶

52. 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

¹⁰⁰ Referral Request, paras. 74-76.

¹⁰¹ Prosecutor's Reply, para. 85.

¹⁰² Defence Response, para. 14.2.

¹⁰³ Defence Response, para. 14.4.

¹⁰⁴ Rwanda's Amicus Brief, para. 41.

¹⁰⁵ ICDAAs Amicus Brief, paras. 128-142.

¹⁰⁶ *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11 Bis Referral (AC), 1 September 2005, paras. 50, 53, 57.

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.¹⁰⁷

53. According to Rule 11bis (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, as provided pursuant to Article 28 of the 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 Tribunal if a transfer order is revoked.

C. Discussion

54. The Chamber recalls that the Prosecutor has approached the ACmHPR, which has accepted to monitor proceedings in transferred cases.¹⁰⁸ Such an arrangement is within the Prosecutor's discretion. The Chamber notes that the ACmHPR is an independent body established under the African Charter on Human and Peoples' Rights. The Chamber has no reason to doubt that the Commission has the necessary qualifications to monitor trials. The Chamber is also satisfied that the revocation provisions are satisfactory and recalls Rwanda's commitment to complying with any revocation order.¹⁰⁹

D. Conclusion

55. The Chamber considers that the monitoring system envisaged is satisfactory and has taken this into account in its deliberations. However, the Chamber is not satisfied that it will solve the problems relating to witness availability and protection or eliminate the risk of solitary confinement in the case of life imprisonment.

IV. CONCLUSION

56. The Chamber concludes that Rwanda has made notable progress in improving its judicial system. The death penalty has been abolished. Its legal framework contains

¹⁰⁷ Places of detention are not only subject to monitoring under Article 19, but also inspection in pursuance of Article 23 concerning The International Committee of Red Cross or an observer appointed by the ICTR President.

¹⁰⁸ Letter of 2 June 2006 from the President of the African Commission on Human and People's Rights to the ICTR Prosecutor (Annex L to the Referral Request); Prosecutor's Reply, para. 85 (an agreement is in place in principle and the modalities for its implementation will be worked out as soon as a referral is granted).

¹⁰⁹ Rwanda's Amicus Brief, para. 43.

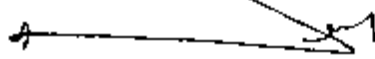
satisfactory provisions concerning jurisdiction and criminalises the alleged conduct of the Accused. However, for the reasons set out above, the Chamber finds that there is a risk that the Accused, if convicted to life imprisonment may risk solitary confinement. Furthermore, the Chamber is not satisfied that the Accused, if transferred to Rwanda, could exercise his fair trial right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution. Lastly, the Chamber concludes that monitoring will not solve the problems relating to witness availability and protection or eliminate the risk of solitary confinement in case of life imprisonment. The Chamber finds support for its conclusions in the Appeals Chamber jurisprudence.¹¹⁰ The Chamber therefore denies the Prosecutor's Referral Request.

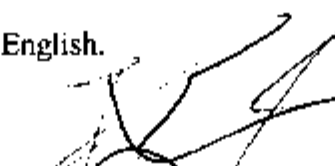
V. DISPOSITION

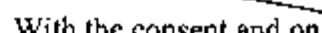
FOR THESE REASONS, THE CHAMBER:

DENIES the Prosecutor's Request for Referral.

Arusha, 16 December 2008, in English.


Inés M. Weinberg de Roca
Presiding Judge


Lee Gacuga Muthoga
Judge


With the consent and on
behalf of
Robert Fremr
Judge



¹¹⁰ *Hategekimana Appeals Chamber Decision*, paras. 22, 24, 29, 38; *Kanyarukiga Appeals Chamber Decision*, paras. 16, 35, 38; *Munyakazi Appeals Chamber Decision*, paras. 19 to 20, 45.