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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

UNITED  
NATIONS  
NATIONS  
UNIES

OR: ENG

**REFERRAL PROCEEDINGS PURSUANT TO RULE 11 BIS**

**Before Judges:** Vagn Joensen, Presiding  
Florence Rita Arrey  
Seon Ki Park

**Registrar:** Adama Dieng

**Date:** 8 May 2012

**THE PROSECUTOR**

v.

**Ladislav NTAGANZWA**

*Case No. ICTR-96-9-R11bis*

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

*Rule 11bis of the Rules of Procedure and Evidence*

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**Office of the Prosecutor:**  
Hassan Bubacar Jallow

**Counsel for the Fugitive Accused:**  
Francis K Stolla (Duty Counsel)

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**SITTING** as a Chamber designated under Rule 11 *bis*, composed of Judges Vagn Joensen, Presiding, Florence Rita Arrey and Seon Ki Park;

**BEING SEISED OF** the Prosecutor's Request of 2 April 2012 for the Referral of the Case of Ladislas Ntaganzwa ("Ntaganzwa" or "Accused") to Rwanda Pursuant to Rule 11 *bis* of the Procedure and Evidence ("Rules") and the subsequent filings of parties;

**HEREBY DECIDES** the Request.

**1. INTRODUCTION**

1. Rule 11 *bis* of the Rules governs the referral of cases to national jurisdictions. In its current amended form, Rule 11 *bis* provides as follows:

Rule 11 *bis*: Referral of the Indictment to another court

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

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

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

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

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

(D) When an order is issued pursuant to this Rule:

- (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
- (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
- (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate, and, in particular, the material supporting the indictment;
- (iv) the Prosecutor may, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.

(E) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may *proprio motu* or at the request of the Prosecutor and upon having given to the

authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

## 2. PROCEDURAL HISTORY

2. The current amended indictment against Ladislav Ntaganzwa was confirmed on 30 March 2012.<sup>1</sup> The Accused remains at large.

3. The present matter began on 2 April 2012, when the Prosecution filed a request for the referral of the case to Rwanda pursuant to Rule 11 *bis* of the Rules ("Referral Request").<sup>2</sup>

4. On 5 April 2012, the Registry appointed Dr. Francis K. Stolla as a Duty Counsel ("Duty Counsel") to represent the interests of the fugitive Accused in these referral proceedings.<sup>3</sup>

5. On 27 April 2012, the Duty Counsel filed a submission informing the Chamber that he opposed the transfer.<sup>4</sup>

6. On 2 May 2012, the Prosecution filed a Reply to the Duty Counsel's Submission.<sup>5</sup>

## 3. APPLICABLE LAW

7. Rule 11 *bis* and the jurisprudence of this Tribunal allow a designated Referral Chamber to order the referral of a case to a State that has jurisdiction over the charged crimes and is willing to prosecute and adequately prepared to accept the case,<sup>6</sup> provided that the Chamber is satisfied that the State has a legal system and penalty structure that conform to international human rights standards.<sup>7</sup> That is, the accused will receive a fair trial and the death penalty will not be imposed.<sup>8</sup>

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<sup>1</sup> *The Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9-I, Second Amended Indictment, 30 March 2012 ("Indictment"); See also, *The Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9-R11bis, Prosecutor's Request for the Designation of a Trial Chamber and request for Referral of the Case of Ladislav Ntaganzwa to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 2 April 2012 ("Referral Request").

<sup>2</sup> See Referral Request.

<sup>3</sup> *The Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9-R11bis, Assignment as Lead Counsel to Fugitive Accused Ladislav Ntaganzwa, 5 April 2012.

<sup>4</sup> *The Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9-R11bis, Duty Counsel Submission in Response to the Prosecutor's Request for Referral of the Case of Ladislav Ntaganzwa to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 27 April 2012 ("Duty Counsel Submissions").

<sup>5</sup> *The Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9-R11bis, Prosecutor's Reply to Duty Counsel's Submissions in Response to the Prosecutor's Request for Referral of the Case of Ladislav Ntaganzwa to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 2 May 2012 ("Prosecutor's Reply").

<sup>6</sup> *The Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11 *bis* Appeal (AC), 30 August 2006, para. 8 ("Bagaragaza Appeal Decision").

<sup>7</sup> *Bagaragaza Appeal Decision*, para. 9 (citing to *The Prosecutor v. Mejkic et al.*, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis* (AC), 7 April 2006, para. 60 ("Mejkic et al. Appeal Decision")).

<sup>8</sup> Rule 11*bis* (C).

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8. The final decision on whether to refer a case is within the discretion of the Referral Chamber.<sup>9</sup> In so determining, the Chamber may consider whatever information it reasonably deems to assist in determining whether the trial, if transferred, will be fair.<sup>10</sup>

9. Article 20 of the Statute provides guidance as to the rights that must be observed in order to ensure that the accused is given a fair trial.<sup>11</sup> It states that:

1. All persons shall be equal before the International Tribunal for Rwanda
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
  - (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
  - (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
  - (g) Not to be compelled to testify against himself or herself or to confess guilt.

10. The *Uwinkindi* Referral Decision remains the most relevant jurisprudence on matters of transfer to Rwanda. The Referral Chamber issued its decision on the transfer of Jean Uwinkindi on 28 June 2011.<sup>12</sup> On 16 December 2011, the Appeals Chamber upheld the Referral Chamber's

<sup>9</sup> *Bagaragaza* Appeal Decision, para. 9.

<sup>10</sup> *Uwinkindi* Appeal Decision, para. 16 (citing to *The Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral (AC), 1 September 2005, para. 50 (“*Stanković* Appeal Decision”).

<sup>11</sup> *Uwinkindi* Appeal Decision, para. 17 (citing to *Prosecutor v. Yusuf Munyakazi*, Case No. ICTR-96-37-R11bis, Decision on the Prosecution's Appeal Against Decision on Rule 11 bis (AC), para. 4 (“*Munyakazi* Appeal Decision”).

<sup>12</sup> *The Prosecutor v. Jean Uwinkindi*, ICTR-2001-75-R11bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 (“*Uwinkindi* Referral Decision”).

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Decision.<sup>13</sup> Additional jurisprudence specifically related to this matter may also be found in the *Kayishema* Referral Decision (2012)<sup>14</sup> and the *Sikubwabo* Referral Decision.<sup>15</sup>

#### 4. JURISDICTION

11. The Prosecution submits that Rwanda possesses territorial, personal, material and temporal jurisdiction to prosecute Ntaganzwa as required by Rule 11 *bis*.<sup>16</sup> It relies upon a letter from the Government of Rwanda dated 28 September 2011 as proof of Rwanda's willingness and readiness to prosecute Ntaganzwa for the charged crimes.<sup>17</sup>

12. The Second Amended Indictment charges the Accused pursuant to Article 6 (1) of the Statute with planning, instigating, ordering, committing and otherwise aiding and abetting the planning, preparation or execution of the crimes alleged.<sup>18</sup> Article 6 (1) of the Statute covers both principal perpetrators and accomplices. This mode of liability may be found in Articles 89-91 of the Rwandan Penal Code. Article 89 identifies both principal perpetrators and accomplices. Article 90 defines the author of a crime as someone who has executed the crime or has directly cooperated in the commission of the crime. The material elements of accomplice liability are laid out in Article 91.<sup>19</sup> The Chamber finds that these articles contain modes of liability that are adequate to cover the crimes alleged, pursuant to Article 6 (1) of the Statute.<sup>20</sup>

13. By virtue of his superior responsibility, the Prosecution also charges the Accused pursuant to Article 6 (3).<sup>21</sup> The Appeals Chamber has previously found that this mode of liability is found in Rwandan law, particularly under Article 53 of the Organic Law No. 16/2004 of 19 June 2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts, and Organic Law No. 33*bis*/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes.<sup>22</sup>

14. This Tribunal only has jurisdiction over crimes that occurred between 1 January and 31 December 1994.<sup>23</sup> In referring a case to a national jurisdiction, the Chamber must be certain that an accused will not be charged with crimes committed outside this time period. In 2008, the *Kanyarukiga* Referral Chamber found that, although the temporal jurisdiction for domestic genocide trials extended to 1990, Organic Law No. 11/2007 of 16 March 2007 concerning the

<sup>13</sup> *The Prosecutor v. Jean Uwinkindi*, ICTR-2001-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions (AC), 16 December 2011 ("*Uwinkindi* Appeal Decision").

<sup>14</sup> *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 22 February 2012 (*Kayishema* Referral Decision (2012)).

<sup>15</sup> *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 26 March 2012 (*Sikubwabo* Referral Decision).

<sup>16</sup> Referral Request, paras. 22-25.

<sup>17</sup> Referral Request, paras. 15, 32.

<sup>18</sup> Indictment, para. 1; *See also*, Indictment, paras. 49-55.

<sup>19</sup> Referral Request, para. 27.

<sup>20</sup> *See Uwinkindi* Referral Decision, para. 19.

<sup>21</sup> Indictment, para. 1 (Counts 1, 3-5). *See also*, Indictment, paras. 56-59.

<sup>22</sup> *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11 *bis*, Appeals, 4 December 2008, para. 12 ("*Hategekimana* Appeals Decision").

<sup>23</sup> *See* Statute Articles 1, 7.

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Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States ("Transfer Law") appropriately narrowed this jurisdiction in regards to any case transferred to Rwanda by the ICTR.<sup>24</sup> Therefore, the Chamber is satisfied that the Accused will only be tried for those acts occurring in 1994.

## 5. FAIR TRIAL

### 5.1 Presumption of Innocence

15. The Prosecution submits that Rwanda has made the presumption of innocence part of its statutory criminal law. It points to Article 13 (2) of the Transfer Law, Article 19 of Rwanda's Constitution and Article 44 (2) of Rwanda's Code of Criminal Procedure ("RCCP").<sup>25</sup> Duty Counsel's submissions state that this aspect of the Accused's fair trial rights is not in controversy.<sup>26</sup>

16. In 2007, the United Nations Human Rights Committee ("HRC") issued its General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), which concerns the right to equality before courts and to a fair trial. On the particular issue of presumption of innocence, the General Comment states: "[i]t is a duty for all public authorities to refrain from prejudging a trial, e.g. by abstaining from making public statements affirming the guilt of the accused [...] The media should avoid news coverage undermining the presumption of innocence."<sup>27</sup>

17. Article 19 of the Constitution of Rwanda provides that every accused person "shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing [...]".<sup>28</sup> This provision is in conformity with several human rights treaties to which Rwanda is party, namely, Article 14 (2) of the ICCPR. The fact that this principle is reiterated in Article 44 (2) of the RCCP and Article 13 (2) of the Transfer Law indicates that the presumption of innocence clearly forms part of Rwanda's statutory law.

### 5.2 *Non bis in idem*

18. The Prosecution submits that any previous judgements rendered in *Gacaca* courts against the Accused have been vacated by the *Gacaca* Court of Appeals pursuant to Article 93 of Rwanda's Transfer Law.<sup>29</sup>

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<sup>24</sup> *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008, para. 20 ("*Kanyarukiga* Referral Decision"). See also *Uwinkindi* Referral Decision, paras. 20-21.

<sup>25</sup> Referral Request, para. 44.

<sup>26</sup> Duty Counsel Submissions, para. 5.

<sup>27</sup> United Nations Human Rights Committee, General Comment No. 32: Article 14 Right to Equality Before Courts and Tribunal and to Fair Trial, CCPR/GC/32, 23 August 2007, para. 30 ("General Comment No. 32").

<sup>28</sup> Referral Request, para. 44. See also, Constitution of Rwanda, Article 19.

<sup>29</sup> Referral Request, para. 17.



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

20. General Comment No. 32 states that “[t]he prohibition [against double jeopardy] is not at issue if a higher court quashes a conviction and orders a retrial.”<sup>30</sup>

21. The Chamber finds that the vacation of the Accused's convictions by the *Gacaca* Court of Appeals, a higher court, means that a trial of the Accused before Rwanda's High Court or Supreme Court would not violate the principle of *non bis in idem*.

### 5.3 Article 59 of the Rwandan Code of Criminal Procedure (“RCCP”)

22. In its brief submitted as *Amicus Curiae* in the ongoing *Munyagishari* proceedings, the Government of Rwanda informed the *Munyagishari* Referral Chamber that in its most recent revision of its criminal code, Article 59 of the RCCP barring anyone who has been found guilty of an offence from testifying in other trials has been removed.<sup>31</sup> Additionally, it highlighted that the new Draft Code of Criminal Procedure explicitly contains a provision which states, “any person who has participated in the commission of an offence *may* be heard as a witness.”<sup>32</sup> The Chamber therefore finds no reason to revisit its analysis of Article 59 of the RCCP, found in previous Decisions.<sup>33</sup>

### 5.4 Extradition Cases

23. The Prosecution highlights several recent cases in which International Courts such as the European Court of Human Rights and the courts of States such as Norway, Canada and France have concluded that fair trial standards are observed in Rwandan courts, thus “recognizing Rwanda's capacity and commitment to ensuring that the accused in any referred case will receive a fair trial.”<sup>34</sup>

24. The Chamber notes that a reasoned analysis of two of these cases has already been provided in the *Kayishema* Referral Decision (2012) and the *Sikubwabo* Referral Decision.<sup>35</sup> Moreover, the Chamber considers that the French and Canadian cases merely serve to bolster the Prosecution's argument concerning the growing confidence of the international community in Rwanda's ability to guarantee a fair trial,<sup>36</sup> and recalls that this Tribunal is not bound to the decisions of national jurisdictions; thus, it does not deem an in-depth analysis of these two cases

<sup>30</sup> General Comment No. 32, para. 56.

<sup>31</sup> Referral Request, Annex H (*The Prosecutor v. Bernard Munyagishari*, ICTR-2005-89-I, Brief for the Republic of Rwanda as *Amicus Curiae*, January 2012, para. 10) (“*Munyagishari* GoR Brief”).

<sup>32</sup> *Munyagishari* GoR Brief, para. 10 (emphasis added) (citing to Exhibit C, Article 56 of Draft Law Relating to the Code of Criminal Procedure).

<sup>33</sup> See *Uwinkindi* Referral Decision, paras. 36-40; *Kayeshima* Referral Decision (2012), paras. 23-26; *Sikubwabo* Referral Decision, paras. 21-24.

<sup>34</sup> Referral Request, paras. 4-9.

<sup>35</sup> The *Kayishema* and *Sikubwabo* Referral Chambers discussed *NCIS Norway v. Charles Bandora*, and *Ahorugeze v. Sweden*, Judgement, European Court of Human Rights, 27 October 2011. See *Kayishema* Referral Decision (2012), paras. 29-30; *Sikubwabo* Referral Decision, paras. 27-28.

<sup>36</sup> Referral Request, paras. 8-9.

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to be necessary. However, the Chamber takes note of this seeming "trend" that may be seen in recent international and national decisions.

#### 5.5 Duty Counsel's Submissions to Undertake a "Comparative Analysis"

25. In his Submissions, the Duty Counsel asks the Chamber to undertake a comparative analysis of trials before the ICTR and Rwandan courts, contending that "the [A]ccused will receive a fairer trial at the ICTR than the state Courts in Rwanda."<sup>37</sup>

26. The Trial Chamber notes that while Duty Counsel's contention may be true, the standard for the referral of a case under Rule 11 *bis* is not whether the Accused will receive a trial that is *as fair* or *fairer* than he or she would receive at the ICTR, but simply that the "the accused will receive a fair trial in the courts of the State concerned [...]."<sup>38</sup> As the Prosecutor rightly points out in its Reply, "[o]nce the Chamber is satisfied that the trial in the referral State will be fair, it need not inquire further to determine if a 'fairer' trial might be possible in some other jurisdiction."<sup>39</sup>

#### 5.6 Conclusion

27. The Referral Chamber expects that the Republic of Rwanda will ensure that the Accused, upon surrender or apprehension, will be expeditiously brought before a judicial authority and, thereafter, will be extended, at a minimum, all the guarantees contained in Article 20 of the Statute and in the International Covenant on Civil and Political Rights to ensure a fair and expeditious conduct of proceedings against him.

### 6. PENALTY STRUCTURE

28. The Prosecution contends that any previous concerns regarding Rwanda's penalty structure, such as the imposition of the death penalty and life imprisonment with special provisions, have been resolved by Rwanda's Abolition of the Death Penalty Law (Organic Law No. 31/2007 of 25 July 2007).<sup>40</sup>

29. Duty Counsel also considers that Rwanda's penalty structure can be "presumed to have fulfilled the test of [R]ule 11 *bis* of the Rules of Procedure and Evidence."<sup>41</sup>

30. Although not expressly stated in Rule 11 *bis*, the jurisprudence of this Tribunal and the International Criminal Tribunal for the former Yugoslavia ("ICTY") has established that the State to which a case is referred must provide an appropriate punishment for the offences with which an accused is charged.<sup>42</sup> The Chamber is satisfied that Rwanda's recent legislative

<sup>37</sup> Duty Counsel Submissions, para. 8.

<sup>38</sup> Rule 11 *bis* (C) of the Rules.

<sup>39</sup> Prosecutor's Reply, para. 14.

<sup>40</sup> Referral Request, para. 34.

<sup>41</sup> Duty Counsel Submissions, para. 5.

<sup>42</sup> *The Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis* (TC), 17 May 2005 ("Stanković Trial Decision"); *Bagaragaza* Appeal Decision, para. 9.

changes have addressed previous concerns voiced by this Tribunal in earlier Referral Decisions.<sup>43</sup>

## 7. CONDITIONS OF DETENTION

### 7.1 Submissions

31. Concerning the specific detention facilities that will accommodate all cases transferred from the ICTR—Mpanga and Kigali prisons—the Prosecution submits that the facilities meet international standards, and notes that “[c]onvicts from the Special Court for Sierra Leone are currently serving their sentences in Mpanga prison [...]”<sup>44</sup> It contends that Rwanda’s Transfer Law provides further assurance that such conditions of detention will be maintained, as it allows for continued inspections and confidential reports by either the International Red Cross or an observer appointed by the ICTR.<sup>45</sup> Lastly, the Prosecution points to the ICTR monitoring mechanisms that have been established in recent Referral Decisions as an additional safeguard.<sup>46</sup>

32. Duty Counsel submits that the conditions of detention in Rwanda “fulfil[] the test of [R]ule 11 *bis*.”<sup>47</sup>

### 7.2 Applicable Law

33. The conditions of detention speak to the fairness of a country’s criminal justice system, and must be in accord with internationally recognised standards.<sup>48</sup> Rwanda’s Transfer Law states that any person transferred from this Tribunal to Rwanda shall be detained in accordance with the minimum standards of detention, as adopted by the United Nations General Assembly Resolution 43/173. This law also allows the ICRC or a monitor appointed by this Tribunal to submit a confidential report based on the findings of these inspections to the Rwandan Minister of Justice and the ICTR President.<sup>49</sup>

<sup>43</sup> See *Uwikindi* Referral Decision, para. 49; *Kayishema* Referral Decision (2012), para. 43; and *Sikubwabo* Referral Decision, para. 41.

<sup>44</sup> Referral Request, paras. 37, 39.

<sup>45</sup> Referral Request, para. 41.

<sup>46</sup> Referral Request, para. 43.

<sup>47</sup> Duty Counsel Submissions, para. 5.

<sup>48</sup> Conditions of detention in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction’s criminal justice system and is an inquiry squarely within the Referral Chamber’s mandate. *Stanković* Appeal Decision, para. 34. These internationally recognised standards include: (i) Freedom from torture, or cruel, inhuman or degrading treatment or punishment as contained in Article 5, Universal Declaration of Human Rights; Article 7, ICCPR; Article 5, African Charter on Human and Peoples’ Rights (“ACHPR”); Article 16 (1), Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment; Principle 6 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988) (“Body of Principles”); and (ii) all person deprived of their liberty shall be treated with humanity and 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.

<sup>49</sup> Transfer Law, Article 23(citing the Body of Principles which guarantees the same standards both upon transfer and after conviction).

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### 7.3 Discussion

34. The Chamber notes that adequate detention conditions are guaranteed by the Transfer Law, and expects that the monitoring mechanism will conduct regular prison visits to ensure that both the detention conditions and the treatment of the Accused in detention, if the referral request is granted, are satisfactory, and that the monitors will immediately report any concerns to the President of the Tribunal or the President of the International Residual Mechanism, as appropriate.

## 8. AVAILABILITY AND PROTECTION OF WITNESSES

### 8.1 Submissions

35. The Prosecution submits that issues relating to witness availability and protection found in previous Rule 11 *bis* Decisions have adequately been addressed by Rwanda.<sup>50</sup> Specifically as to the area of witness availability, the Prosecution points out that Article 13 of the Transfer Law has been amended to include immunity for anything said or done in the course of a trial, save for those actions or statements which amount to contempt of court and/or perjury.<sup>51</sup> Article 14 provides that any witness coming from outside of Rwanda to testify in a referred case shall not be subject to "search, seizures, arrest or detention during their testimony and their travel to and from the trials."<sup>52</sup>

36. The Prosecution further contends that previous concerns regarding the fact that the only witness protection program was run by the Prosecutor's office has been addressed by the creation of the Witness Protection Unit ("WPU") under the authority of the judiciary, specifically within the Supreme Court and High Court.<sup>53</sup> According to the Prosecutor, the immediate activation of this unit was ordered by Rwanda's Chief Justice upon the Tribunal's decision to transfer Uwinkindi's case to Rwanda.<sup>54</sup> The unit will be comprised of "six registrars from the Supreme Court and five registrars from the High Court[.]" with an additional three registrars expected to have been added by February 2012.<sup>55</sup> To assist the registrars in carrying out their duties, professionals who are highly-experienced in victim/witness related services will advise and consult with WPU.<sup>56</sup>

37. In his submission, Duty Counsel contests the assertion that the availability and protection of witnesses fulfil the requirements of Rule 11 *bis*. However, he offers no legal support for this contention, merely stating that "Prosecution witnesses may be in a better position than the Defence witnesses."<sup>57</sup> He further requests the Chamber to "take into consideration the practical

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<sup>50</sup> Referral Request, para. 46.

<sup>51</sup> Referral Request, para. 47.

<sup>52</sup> Referral Request, para. 47 (citing to Article 14 of the Transfer Law).

<sup>53</sup> Referral Request, para. 54.

<sup>54</sup> Referral Request, para. 55.

<sup>55</sup> Referral Request, para. 55 (citing to *Munyagishari* GoR Brief, paras. 11-12 and Exhibit D).

<sup>56</sup> Referral Request, para. 55 (citing to *Munyagishari* GoR Brief, para. 13 and Exhibit D).

<sup>57</sup> Duty Counsel Submission, para. 6.

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reality on the ground” and that “the making of those policies and legislation is one thing which the extent of compliance is another thing altogether.”<sup>58</sup>

38. In its Reply, the Prosecution argues that under Rule 11 *bis*, once a Chamber has determined that an adequate legal framework for witness protection exists, it need not look any further.<sup>59</sup> However, should the Chamber indeed decide to examine the situation on the ground, the Prosecution provides examples of the effectiveness of Rwanda's witness protection programs, such as the opening of the WPU, and the successful responses to 73 instances of witness security.<sup>60</sup>

## 8.2 Applicable Law

39. In assessing the availability of witnesses and the protection provided to such, this Chamber must assess the likelihood that, if his case were transferred to Rwanda, the Accused will be able to “obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.”<sup>61</sup> In conducting such an assessment in the present case, the Chamber recalls that previous Rule 11 *bis* cases that denied referral relied upon findings that “witnesses in Rwanda may be unwilling to testify for the defence due to their fear that they may face serious consequences, including prosecution, threats, harassment, torture, arrest or even murder.”<sup>62</sup> However, the Chamber echoes the findings of the *Uwinkindi* Referral Chamber that:

the defence in most [genocide] cases [tried in the High Court of Rwanda] was able to secure the attendance of witnesses even without the safeguards available to cases transferred from the Tribunal. It is logical to assume that with the amendments made to the laws regarding witness immunity, the creation of a new witness protection programme, and the safeguards imposed by the Chamber on Rwanda, the Appeals Chamber's finding that witnesses may be unwilling to testify is no longer a compelling reason for denying referral.<sup>63</sup>

## 8.3 Discussion

40. Since the *Kanyarukiga* Appeals Decision, Rwanda has shown itself willing and able to amend its laws to address concerns regarding the ability of defence teams to obtain witnesses willing to testify on the accused's behalf. The amendment of Article 13 of the Transfer Law to include immunity for statements made by witnesses at trial as well as the improvement in the operation of the Rwanda Victims and Witness Support Unit (“VWSU” or “WVSU”) and the establishment of the WPU under the Judiciary are significant steps towards allaying witnesses' fears.

<sup>58</sup> Duty Counsel Submission, para. 6.

<sup>59</sup> Prosecutor's Reply, para. 3.

<sup>60</sup> Prosecutor's Reply, paras. 4-5.

<sup>61</sup> Article 20(4)(e) of the Statute.

<sup>62</sup> *Uwinkindi* Referral Decision, para. 100 (citing to *Kanyarukiga* Appeals Decision, para. 33).

<sup>63</sup> *Uwinkindi* Referral Decision, para. 100.

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41. The Chamber notes that no witness protection programme can completely erase the fears that witnesses may possess in regards to testifying at trial. Indeed, even in cases before this Tribunal some witnesses are afraid to testify, despite the multiple safeguards provided. The Chamber is therefore satisfied that Rwanda has taken adequate steps to amend its laws to address these concerns. Full implementation of these and additional measures mandated by this Chamber would likely guarantee a fair trial for the Accused.

42. As regards the ability of the Defence to obtain testimony from those witnesses residing outside of Rwanda, the Chamber recalls the finding of the *Hategekimana* Referral Chamber that "the Defence claims and ICTR experience confirms that many Defence witnesses residing outside Rwanda have claimed refugee status, and thus there may be legal obstacles preventing them from returning to Rwanda."<sup>64</sup> However, the Chamber notes that Rwanda has taken specific and concrete steps to amend the law to secure the attendance, or at the very least, the evidence, of witnesses from abroad.<sup>65</sup>

43. Should a witness residing abroad be unwilling to travel to Rwanda to testify, despite the provisions above, the 2009 amendment to Article 14 of the Transfer Law presents three more ways in addition to providing *viva voce* testimony, that witnesses may give evidence to the relevant High Court in Rwanda. They may provide testimony via deposition in Rwanda; via video-link taken before a judge at trial, or in a foreign jurisdiction; or via a judge sitting in a foreign jurisdiction.<sup>66</sup>

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

## 9. RIGHT TO AN EFFECTIVE DEFENCE

### 9.1 Competence, Capacity and Availability

#### 9.1.1 Submissions

45. The Prosecution submits that Rwanda's legal framework provides for both the protection and realisation of an accused's right to an effective defence.<sup>67</sup>

<sup>64</sup> *The Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda (TC), 19 June 2008, para. 68 ("*Hategekimana* Referral Decision").

<sup>65</sup> Referral Request, para. 67 (citing to *Uwinkindi* Referral Decision, para. 108; *Kayishema* Referral Decision (2012), para. 80; *Sikubwabo* Referral Decision, para. 78).

<sup>66</sup> Referral Request, para. 68 (citing to Amended Transfer Law, Article 14 *bis*).

<sup>67</sup> Referral Request, para. 86.

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46. Duty Counsel does not oppose this assertion by the Prosecution, and believes that for the purposes of transferring the case of the Accused under Rule 11 *bis*, all required elements of the right to an effective defence have been met.<sup>68</sup>

#### 9.1.2 *Applicable Law*

47. Article 14 (3) of the ICCPR recognises and protects the right to a fair trial, including the right of accused persons to defend themselves through the counsel of their choice and the right to have adequate time and facilities for the preparation of their defence.<sup>69</sup>

#### 9.1.3 *Availability of Counsel*

48. The Prosecution submits that "Rwanda's Constitution and laws guarantee the right to legal representation before courts of law to all accused persons."<sup>70</sup> Specifically, it points to Articles 18 and 19 of the Rwandan Constitution which establish, respectively, that "[...] the right to defence [is] absolute at all levels and degrees of proceedings before [...] judicial [...] organs[...]"<sup>71</sup> and provide for a fair and public hearing "in which all the necessary guarantees for defence have been made available."<sup>72</sup>

49. In addition to such legal guarantees, the Prosecution states that Rwanda also has the actual capacity to provide counsel to Accused transferred from the Tribunal.<sup>73</sup> Of the 890 lawyers admitted to the Kigali Bar Association ("KBA"), approximately 173 have been practicing for more than 7 years.<sup>74</sup> Additionally, should the Accused so choose, he may also be represented by a foreign lawyer who has been admitted to practice before Rwandan courts. The Prosecution submits that "[i]n the past 4 years, Rwanda has extended bar membership to attorneys from the United States, France, Canada, Uganda, Cameroon and Burundi."<sup>75</sup>

50. The Chamber recalls that the admission of foreign attorneys to the Rwandan Bar does not, in and of itself, create a foolproof safeguard for the Accused, who may be indigent and unable to afford foreign counsel. However, in examining whether or not an effective right to counsel exists, the Chamber is of the view that the most important factor is Article 13 (6) of the Transfer Law, which entitles an accused to counsel of his choice or legal representation, should he not have the means to pay for such.<sup>76</sup> While the Chamber welcomes Rwanda's decision to permit foreign lawyers to practice before its courts, it is not for the Referral Chamber to decide whether Rwandan or foreign lawyers would most effectively represent the Accused. The Chamber accepts that the level of funding available to the Defence may be lower than that provided at this Tribunal. However, Rule 11 *bis* does not require an objective level of funding; it simply requires that the Accused be afforded equality of arms. In this regard, the Chamber is

<sup>68</sup> Duty Counsel Submission, para. 5.

<sup>69</sup> Rwanda acceded to ICCPR on 16 April 1975. Status of Ratification, Reservations and Declarations, ICCPR.

<sup>70</sup> Referral Request, para. 73.

<sup>71</sup> Referral Request, para. 74 (citing to Article 18 of the Rwandan Constitution).

<sup>72</sup> Referral Request, para. 74 (citing to Article 18 of the Rwandan Constitution).

<sup>73</sup> Referral Request, para. 75.

<sup>74</sup> Referral Request, para. 75.

<sup>75</sup> Referral Request, para. 76.

<sup>76</sup> See Referral Request, para. 81.

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satisfied that this requirement has been met. Should Rwanda fail to ensure the fair trial rights of the Accused and guarantee the equality of arms between the parties, the case may be revoked by this Tribunal under Rule 11 *bis*.

#### 9.1.4 Legal Aid

51. The Prosecution submits that Article 13 (6) of the Transfer Law provides a legal framework that guarantees an indigent accused the right to legal aid.<sup>77</sup> According to the Prosecution, 92 million Rwandan Francs have been provided for legal aid in Rwanda's current budget. The government has also designated an additional 30 million Rwanda Francs for ICTR-related issues, which includes offering aid to indigent accused.<sup>78</sup>

52. This Chamber observes that the *Gatete* and *Kanyarukiga* Rule 11 *bis* Referral Chambers asserted that they were not in a position to inquire into the sufficiency of available funds.<sup>79</sup> Both of these Referral Chambers relied upon jurisprudence from *Stankovic*, concluding: "there is no obligation to establish in detail the sufficiency of the funds available as a precondition for referral."<sup>80</sup> Likewise, this Chamber does not consider it to be necessary to verify the availability of funds for legal aid at the domestic level. First, the Chamber trusts that the Prosecution and Rwanda have provided sufficient budgetary allocation for legal aid to the Accused in good faith. Second, the Chamber will not lightly intervene in the domestic jurisdiction of Rwanda, and considers that it is not obliged to either scrutinise Rwanda's budget or verify its disbursement.

53. Accordingly, this Chamber is satisfied that the Accused will have access to legal aid if transferred. Should there be future financial constraints, the existence of monitors and the possibility of revocation of the Accused's referral should address any failure by the Rwandan authorities to make counsel available or disburse funds necessary for legal aid and to ensure the Accused's fair trial rights.<sup>81</sup>

## 9.2 Working Conditions

### 9.2.1 Submissions

54. The Prosecution submits that Rwanda's legal framework "proscribes any interference with counsel in the performance of their responsibilities."<sup>82</sup> Moreover, it references the recent *Uwinkindi* and *Kayeshima* Referral Decisions and their recognition of the "demonstrated record of cooperation with defence teams from the ICTR and other jurisdictions."<sup>83</sup> This record of

<sup>77</sup> Referral Request, para. 81.

<sup>78</sup> Referral Request, para. 83 (The Prosecution states that these two line items equal 122 million Rwandan Francs, which it estimates to be approximately \$205,000 U.S. Dollars).

<sup>79</sup> *Kanyarukiga* Referral Decision, para. 57; *Gatete* Referral Decision, para. 48.

<sup>80</sup> *Stanković* Appeal Decision, para. 21.

<sup>81</sup> See *Hategemimana* Referral Decision, para. 55; *Stanković*, Appeal Decision, paras. 50-52.

<sup>82</sup> Referral Request, para. 77.

<sup>83</sup> Referral Request, para. 78.



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cooperation has also been noted by the European Court of Human Rights.<sup>84</sup> Lastly, the Prosecution submits that Defence teams will have an avenue for redress if they experience instances of harassment, threats or arrest of lawyers. Such matters may be raised by Defence Counsel before the High Court or the Supreme Court, which would then “be under a duty to investigate the matter and provide a remedy.”<sup>85</sup>

55. Duty Counsel has not commented on this matter in his Submission.

### 9.2.2 Legal Framework

56. According to Article 15 of the Transfer Law, the Defence will be entitled to security and the right to enter and move within Rwanda, and to carry out its functions without threat of search, seizure or deprivation of liberty. According to Article 2 of the Transfer Law, apart from contempt and perjury “no person shall be criminally liable for anything said or done in the course of a trial.”<sup>86</sup>

### 9.2.3 Conclusion

57. The Chamber notes that previous Referral Chambers and the Appeals Chamber have concluded that should instances of harassment, threats or arrests of Defence Counsel occur after transfer under Rule 11 *bis*, as the Prosecution rightly points out, a legal basis exists under which the Defence may bring the matter to the attention of the High Court or the Supreme Court, which have a duty to investigate and provide a remedy in order to ensure an efficient defence. Ultimately, if the Defence team is prevented from carrying out its work effectively, the monitoring mechanism may address this matter, and, if warranted, the referral may be revoked.<sup>87</sup>

58. The Chamber notes that, in the past, working conditions for the Defence may have been difficult, which may have had a chilling effect on potential Defence team members.<sup>88</sup> However, the Chamber notes that the Transfer Law addresses this possibility and that the Rwandan legal framework provides for an effective remedy. While the guarantees offered by the Transfer Law have not been tested yet, the Chamber does not consider this to prevent transfer of the present case. The Chamber agrees with recent referral decisions that “if the Defence Team is prevented from carrying out its work effectively, this will become a matter for the monitoring mechanism to address and may lead to the revocation of the referral.”<sup>89</sup>

<sup>84</sup> Referral Request, para. 79 (citing to Observations in Intervention of the Government of the Netherlands concerning Application No. 37075/09, 27 July 2010, filed in the European Court of Human Rights, *Ahorugeze v. Sweden*, Application No. 37075/09, para. 7).

<sup>85</sup> Referral Request, para. 80.

<sup>86</sup> Transfer Law, Article 2.

<sup>87</sup> *Gatete* Referral Decision, para. 52; *Hategemana* Referral Decision, para. 60; *Kanyarukiga* Referral Decision, para. 61.

<sup>88</sup> *Uwinkindi* Referral Decision, para. 160.

<sup>89</sup> *Uwinkindi* Referral Decision, para. 159, *Kayishema* Referral Decision (2012), para. 115; *Sikubwabo* Referral Decision, para. 113.

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

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## 10.1 Submissions

## 10.1.1 Prosecution

59. The Prosecution submits that the Rwandan judiciary is independent and impartial.<sup>90</sup> To support this claim, it highlights that all judges are qualified and experienced lawyers, enjoy security in their tenure, operate in a judicial system that is independent from other government branches and are governed by a strict code of ethics.<sup>91</sup>

60. In its Request, the Prosecution submits that “all judges of the Supreme Court and High Court are trained lawyers and experienced jurists, who hold, at a minimum, a university law degree [...] and possess adequate legal experience.”<sup>92</sup>

61. The Prosecution contends that, in respect to their judicial roles and functions, Rwandan judges enjoy tenure for life, pursuant to Article 142 of the Rwandan Constitution.<sup>93</sup> While previous Referral Chambers have indicated that this is not the case, the Prosecution has clarified in its present submission that the 2008 amendment providing that judges would be appointed for a “determinate term of office that may be renewable by the High Council of the Judiciary in accordance with the provision of the law relating to their status, following their evaluation” was removed in subsequent amendments made to the Constitution in 2010.<sup>94</sup> Therefore, determinate terms of office only apply to “judges serving as the administrative heads of the judiciary [...] and] have no bearing on the judges’ judicial roles.”<sup>95</sup>

62. The Prosecution highlights Rwanda’s legal framework and its provisions against outside pressure as evidence that the system as a whole is independent and impartial. Additionally, it relies upon the acquittal rate before the High Court in Rwanda,<sup>96</sup> and further draws the attention of the Chamber to the qualifications and expertise of the Rwandan judges, particularly regarding genocide cases.<sup>97</sup>

63. In discussing the acquittal rate, the Prosecution submits that it shows that no bias exists on the part of Rwandan judges. It submits that in 2008, the High Court was seized of 283 criminal trials, with slightly over 200 of these cases resulting in conviction and the remainder in acquittal—constituting a 30% acquittal rate. It further submits that the acquittal rate is “tangible

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<sup>90</sup> Referral Request, para. 87.

<sup>91</sup> Referral Request, paras. 87-88.

<sup>92</sup> Referral Request, para. 95 (As to legal experience, the Prosecution specifically notes “For appointment as a judge of the High Court, applicants must have a working experience of at least six years in the legal field. Applicants with a doctoral degree in law are required to have a minimum working experience of at least three years in the legal field.”).

<sup>93</sup> Referral Request, paras. 88-89, 94.

<sup>94</sup> See Referral Request, para. 88, fn. 181.

<sup>95</sup> Referral Request, para. 94.

<sup>96</sup> Referral Request, paras. 100-101.

<sup>97</sup> Referral Request, para. 96.

proof that persons tried before the High Court are ensured a fair trial before an impartial and independent judge.”<sup>98</sup>

64. Lastly, the Prosecution seeks to demonstrate that Rwandan judges are subject to a strict code of legal ethics—specifically citing Article 157 of the Rwandan Constitution and Articles 12, 21-28 of the Law on High Council of the Judiciary.<sup>99</sup> It contends that the removal of 13 registrars and 4 judges from office on charges related to official misconduct provide “tangible proof that the removal process is not an empty formalism.”<sup>100</sup> It further highlights that these removals show that official misconduct such as corruption is the exception rather than the norm, and that none of the judges removed were members of either the Supreme Court or High Court.<sup>101</sup>

#### 10.1.2 Duty Counsel

65. In his Submissions, Duty Counsel seems to imply that no judge in Rwanda is able to hear the case, stating that “any person who is a citizen of Rwanda and qualifies to be a judge today must have either witnessed or experienced or felt the commission of the alleged crimes.”<sup>102</sup> Therefore, Duty Counsel argues, any judge that is a Rwandan citizen necessarily lacks the required impartiality to try cases involving crimes that occurred during 1994.<sup>103</sup>

#### 10.2 Applicable International Law

66. Article 20 (2) of the Statute guarantees the right to a fair and public hearing.<sup>104</sup> This right encompasses the right to be tried before an independent and impartial tribunal, as reflected in major human rights instruments<sup>105</sup> and international criminal jurisprudence.<sup>106</sup> The criteria of independence and impartiality are distinct yet interrelated.

67. Article 14 (1) of the ICCPR states: “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>107</sup>

<sup>98</sup> Referral Request, para. 100.

<sup>99</sup> Referral Request, para. 91.

<sup>100</sup> Referral Request, para. 92.

<sup>101</sup> Referral Request, para. 92.

<sup>102</sup> Duty Counsel Submissions, para. 7.

<sup>103</sup> Duty Counsel Submissions, para. 7.

<sup>104</sup> Statute, Article 20 (2); Amended Transfer Law, Article 13 (1).

<sup>105</sup> ICCPR, Article 14 (1) (providing that “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”); ECHR, Article 6 (1) (protecting the right to a fair trial and providing *inter alia* that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”); AChHPR, Article 7 (1) (providing that every person shall have the right to have his case tried “within a reasonable time by an impartial court or tribunal.” The AChHPR “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa” recognises “General Principles Applicable to All Legal Proceedings,” among them a fair and public hearing, independent and impartial tribunal).

<sup>106</sup> *Furundzija* Appeal Judgement, para. 177, fn 239 (holding that under Article 21 (2) of the Statute of the ICTY, which is identical to Article 20 (2) of the Statute of the ICTR, the accused is entitled to “a fair and public hearing” in the determination of the charges against him).

<sup>107</sup> Article 14 (1) of the ICCPR.

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

The requirement of independence refers, in particular, to the procedure and qualification for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term in office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. [...] States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political interference in their decision making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension, and dismissal of the members of the judiciary and disciplinary sanctions taken against them.<sup>108</sup>

69. An independent tribunal must be independent of the country's executive, the legislature and the parties to a case.<sup>109</sup> The criteria encompassing judicial independence include: the manner in which members of the judiciary are appointed and their terms of office, as well as the existence of guarantees against outside pressures and the appearance of independence.<sup>110</sup>

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

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

- i. A Judge is a party to the case or has a financial or proprietary interest in the outcome of a case, or if the judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances a Judge's disqualification from the case is automatic; or
- ii. The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

71. In expanding on the second branch of the appearance of bias, the Appeals Chamber noted that the reasonable person must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that judges swear to uphold.<sup>111</sup>

<sup>108</sup> General Comment No. 32, para. 19.

<sup>109</sup> *Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v. Italy*, App. No. 8603/79, European Court of Human Rights, 18 December 1980, p. 212.

<sup>110</sup> The European Court of Human Rights has held that "in order to establish whether a tribunal can be considered as 'independent', regard must be had, *inter alia*, to the manner of the appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence." *Findlay v. United Kingdom*, No. 22107/93, European Court of Human Rights, para. 73; *Bryan v. United Kingdom*, 19178/91, European Court of Human Rights, para. 37.

<sup>111</sup> *Furundžija* Appeal Judgement, paras. 181-215.

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### 10.3 Discussion

72. As regards the competencies of the Rwandan judiciary, the Chamber is satisfied that judges of the Supreme Court and the High Court of Rwanda are qualified and experienced and that they have the necessary skills to handle the case at issue if transferred.

73. As the Prosecution notes in its Reply, it is well established in Tribunal jurisprudence that there exists a presumption of impartiality which attaches to a judge or a tribunal,<sup>112</sup> deriving from the judges' oath of office as well as the qualification for their appointment. The Chamber notes that though absolute neutrality can hardly, if ever, be achieved, in the absence of evidence to the contrary, it must be assumed that judges can "disabuse their minds of any irrelevant personal beliefs or predispositions."<sup>113</sup> The ICTY Appeals Chamber held in *Furundžija* that there is a high threshold that must be reached in order to rebut the presumption of impartiality, and partiality must be established on the basis of adequate and reliable evidence.<sup>114</sup> As in *Uwinkindi*, this Chamber is of the view that as professional judges, Rwandan judges benefit from this presumption of independence and impartiality—a presumption which cannot easily be rebutted.<sup>115</sup>

74. The Chamber notes that Duty Counsel has not provided any specific instances or examples of the bias he attributes to the Rwandan judiciary, and thus has not rebutted this presumption. The Chamber finds that the judges of Rwanda are capable, experienced and impartial, and that the transfer of the present case to Rwanda would not prejudice the rights of the Accused.

## 11. MONITORING AND REVOCATION

### 11.1 Monitoring

#### 11.1.1 Submissions

75. The Prosecution argues that "the monitoring and revocation system provides an additional safeguard for ensuring the Accused's right to a fair trial in Rwanda."<sup>116</sup>

<sup>112</sup> *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 para. 48 ("Nahimana Appeal Judgement"); *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001, para. 91; *The Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges (TC), 25 April 2006, para. 9; *The Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision by Nzirorera for Disqualification of Trial Judges (TC), 17 May 2004, para. 11; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings (TC), 20 February 2009, para. 6.

<sup>113</sup> *The Prosecutor v. Furundžija*, Case No. IT-97-17/1-A, Judgement (AC), 21 July 2000, para. 203 ("Furundžija Appeal Judgement").

<sup>114</sup> *Furundžija Appeal Judgement*, para. 197.

<sup>115</sup> *Uwinkindi Referral Decision*, para. 166.

<sup>116</sup> *Referral Request*, para. 102.

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11.1.2 *Applicable Law*

76. In 2011, Rule 11 *bis* (D) (iv), which had previously stated that the Prosecutor could appoint observers to monitor the proceedings of any case referred to Rwanda, was amended to enable the Referral Chamber to request that the Registrar appoint a monitor for the proceedings.

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

11.1.3 *Discussion*

78. The Chamber considers it to be in the interests of justice to ensure that there is an adequate system of monitoring in place if this case is to be transferred to Rwanda. In fashioning such a mechanism, it is important that any system of monitoring the fairness of the trial should be cognizant of and responsive to genuine concerns raised by the Defence, as well as by the Prosecution. Under Rule 11 *bis*, as amended in 2011, the Referral Chamber, as well as the Tribunal's Prosecutor, has the ongoing capacity to monitor a case which it has referred to a national jurisdiction and, where the circumstances so warrant, to have the transferred case recalled to this Tribunal.<sup>117</sup>

79. Additionally, the Chamber notes that Article 19 of the Transfer Law provides that "[o]bservers appointed by the ICTR Prosecutor shall have access to court proceedings, documents and records relating to the case as well as access to places of detention." In consideration of the amended Rule 11 *bis* D (iv) which not only provides for the Prosecutor's monitoring, but now also enables the Chamber to request the Registrar to send observers to monitor the proceedings of the trials in referred cases, the Referral Chamber requests Rwanda to provide monitors with access to the court proceedings, documents, records and locations, including any detention facility where the Accused would be detained.

80. In determining the monitoring mechanism that should be put in place in the case at bar, the Prosecution requests that the Chamber consider "ordering that the monitoring mechanism implemented in *Uwkindi* apply *mutatis mutandis* in the case of this Accused once he is arrested and transferred to Rwanda."<sup>118</sup>

<sup>117</sup> On 1 April 2011, the ICTR Rules Committee presented the revised Rule 11 *bis* and it was adopted by the Chambers Plenary session. The Rule was amended to read as follows:

Rule 11 *bis* :

(D) [...]

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

[...]

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

<sup>118</sup> Referral Request, para. 114.

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81. Following the *Kayeshima* and *Sikubwabo* Referral Chambers, the Chamber considers this suggestion to be most suitable. It notes that the President of the Tribunal has requested that ICTR Legal Staff be appointed as interim monitors while negotiations are ongoing with the African Commission on Human and Peoples' Rights ("ACHPR"), or, should such discussions prove unsuccessful, another organisation is appointed monitor together with ICTR Legal Staff.<sup>119</sup> Therefore, the Chamber finds that such arrangements should apply, *mutatis mutandis*, to the case of the Accused, when he is arrested and transferred to Rwanda.

82. The Referral Chamber recognises and reiterates the importance of the continued cooperation of Rwanda with this Tribunal.<sup>120</sup> It expects Rwanda to facilitate and assist the monitors in their monitoring activities.

#### 11.1.4 Tribunal's Monitoring

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

#### 11.1.5 Residual Mechanism's Monitoring

84. Article 6 (4) of the Statute of the Residual Mechanism reads as follows: "The Mechanism shall monitor the cases referred to national courts by the ICTY, ICTR, and those referred in accordance with this Article, with the assistance of international and regional organizations and bodies." The ICTR branch of the Residual Mechanism is scheduled to commence functioning on 1 July 2012.<sup>121</sup>

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

### 11.2 Revocation

86. The Chamber is mindful of the revocation mechanism established under Rule 11 *bis*. However, bearing in mind the delays occasioned by the transfer proceedings, it must consider that proceedings requesting revocation could be equally time-consuming. In addition, if a case

<sup>119</sup> See *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75R11bis, Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012, Disposition.

<sup>120</sup> Referral Request, paras. 74-94; GoR Brief, paras. 117-128.

<sup>121</sup> United Nations Security Council Resolution 1966 (2010), 22 December 2010.

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were revoked, further time would be spent by the parties at the Tribunal preparing for trial. Even if the revocation is sought by the Accused due to concerns regarding his fair trial rights, the delay in proceedings would inevitably adversely impact his right to an expeditious trial. With these constraints in mind, the Referral Chamber will only consider the revocation mechanism as a remedy of last resort. Thus, while it does constitute a safeguard, it is not a panacea.

87. Having said that, the Chamber is cognizant that the nature and importance of this case would require a great degree of diligence on the part of any person or agency charged with monitoring. Such a monitor would be in a position, not only to provide accurate and up-to-date data on the conduct of the proceedings in Rwanda, but to support or investigate any application for the revocation of a transferred case.

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

## 12. CONCLUSION

89. Upon assessment of the submissions of the parties, the Chamber has concluded that the case of this Accused should be referred to the authorities of the Republic of Rwanda for his prosecution before the competent national court for charges brought against him by the Prosecutor in the Indictment.

90. This Chamber notes that Rwanda has made material changes in its laws and has indicated its capacity and willingness to prosecute cases referred by this Tribunal. It also notes that three other Referral Chambers constituted by this Tribunal have referred similar cases to Rwanda in the preceding months.<sup>122</sup> This gives the Referral Chamber confidence that the case of the Accused, if referred, will be prosecuted consistent with internationally recognised fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments. The Referral Chamber is persuaded to refer this case after receiving assurances that a robust monitoring mechanism will ensure that any material violation of the fair trial rights of this Accused will be brought to the attention of the President of the Tribunal or the President of the International Residual Mechanism, as appropriate, forthwith so that remedial action, including revocation, can be considered by this Tribunal, or if applicable, by the Residual Mechanism.

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

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<sup>122</sup> See *Kayishema* Referral Decision; *Sikubwabo* Referral Decision; *Uwinkindi* Referral Decision.



**13. DISPOSITION**

**FOR THE FOREGOING REASONS, THE REFERRAL CHAMBER**

**PURSUANT** to Rule 11 *bis* of the Rules;

**GRANTS** the Motion;

**ORDERS** the case of *The Prosecutor v. Ladislav Ntaganzwa* (Case No. ICTR-96-9-R11bis) to be referred to the authorities of the Republic of Rwanda, so that those authorities should forthwith refer the case to the High Court of Rwanda for an expeditious trial;

**DECLARES** that the referral of this case shall not have the effect of revoking the previous Orders and Decisions of this Tribunal in this case, including any protective measures for witnesses previously imposed;

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

**REQUESTS** Rwanda, upon apprehension and arrest of the Accused, to inform this Tribunal or the International Residual Mechanism for Criminal Tribunals within 7 days, upon which the directions contained in the 28 June 2011 Decision, as modified by the Appeals Chamber's decision on the Prosecutor's Request for Referral to the Republic of Rwanda, issued in *The Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75-R11bis), will apply *mutatis mutandis*;

**REQUESTS** Rwanda, that until such time as the Accused is arrested or it receives news and confirmation of his death, to provide the Tribunal or the International Residual Mechanism for Criminal Tribunals with quarterly reports on efforts taken to apprehend him;

**REQUESTS** the Registrar, that within 30 days of receiving notice that the Accused has been arrested, in order to allow for the trial in Rwanda to begin, to arrange for the monitoring mechanism as determined suitable in *The Prosecutor v. Jean Uwinkindi*, to become functional;

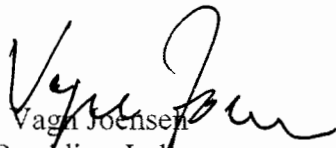
**REQUESTS** the Registrar to inform the President to any hurdles in the implementation and operation of the monitoring mechanism for any consequential guidance or orders;

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

**REQUESTS** the President to cause to be issued an Amended Arrest Warrant, pursuant to the Prosecution's request, urging all Member States to provide their fullest cooperation and assistance in the apprehension of the Accused.

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Done in English, Arusha, 8 May 2012.

  
Vagn Joensen  
Presiding Judge

  
Florence Rita Arrey  
Judge

  
Seon Ki Park  
Judge

[Seat of the Tribunal]

