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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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**REFERRAL CHAMBER DESIGNATED UNDER RULE 11 *BIS***

**Before:** Judge Lee Gacuiga Muthoga, presiding  
Judge Seon Ki Park  
Judge Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 6 June 2012

**THE PROSECUTOR**

v.

**BERNARD MUNYAGISHARI**

**Case No. ICTR-2005-89-R11bis**

JUDICIAL RECORDS/REGISTRY  
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**DECISION ON THE PROSECUTOR'S REQUEST FOR REFERRAL OF THE CASE  
TO THE REPUBLIC OF RWANDA**

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

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## THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

**SITTING** as a Chamber designated under Rule 11 *bis*, composed of Judges Lee Gacuiga Muthoga, Presiding, Seon Ki Park, and Gberdao Gustave Kam (“Referral Chamber”);

**BEING SEISED OF** the Prosecutor’s “Request for the Referral of the case of Bernard Munyagishari to Rwanda Pursuant to Rule 11 *bis* of the Tribunal’s Rules of Procedure and Evidence” and the subsequent filings of parties;

**HEREBY DECIDES** the Request.

### 1. PROCEDURAL HISTORY

1. On 9 June 2005, the Prosecution filed the original Indictment charging Bernard Munyagishari (“Accused”) with Conspiracy to Commit Genocide, Genocide, Complicity in Genocide, Murder and Rape as Crimes against Humanity pursuant to Article 6(1) and 6(3) of the Statute of the Tribunal (“ICTR Statute”).<sup>1</sup>

2. On 25 May 2011, the Accused was arrested in the Democratic Republic of Congo (“DRC”). He was transferred to the United Nations Detention Facility in Arusha on 14 June 2011.<sup>2</sup> Munyagishari made an initial appearance pursuant to Rule 62 on 20 June 2011 and pleaded not guilty to all counts.<sup>3</sup> On 9 November 2011, the Prosecution filed a request, pursuant to Rule 11 *bis*, to transfer the case of *The Prosecutor v. Bernard Munyagishari*, ICTR Case No. 2005-89-I to the Republic of Rwanda (“Motion”).<sup>4</sup> Having been granted *amicus curiae* status, the Republic of Rwanda (“GoR” or “Rwanda”) and Kigali Bar Association (“KBA”) also filed briefs in support of the Motion on 19 and 23 January 2012, respectively.<sup>5</sup> On 1 February 2012, the Defence filed a Response to the Motion opposing the request for transfer of the case to Rwanda (“Response”).<sup>6</sup> On 29 February 2012, the Prosecution filed a Consolidated Reply to the Response (“Reply”).<sup>7</sup> Finally, on 12 April 2012, the Chamber received oral submissions from the Prosecution and Defence.<sup>8</sup>

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<sup>1</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Indictment, 8 September 2005 (“Indictment”).

<sup>2</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Order Relating to the Initial Appearance of Bernard Munyagishari, 16 June 2011.

<sup>3</sup> T. 20 June 2011 pp. 8-9.

<sup>4</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Prosecutor’s Request for the Referral of the Case of Bernard Munyagishari to Rwanda pursuant to Rule 11 *bis* of the Tribunal’s Rules of Procedure and Evidence, 9 November 2011 (“Motion”).

<sup>5</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Brief for the Republic of Rwanda as *Amicus Curiae*, 19 January 2012; *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, *Amicus Curiae* Brief of the Kigali Bar Association in the Matter of *Prosecutor’s* Request for the Referral of the Case of Bernard Munyagishari, 23 January 2012.

<sup>6</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Defence Response to *Prosecutor’s* Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence (“Response”), 1 February 2012.

<sup>7</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Prosecutor’s Consolidated Reply 29 February 2012 (“Reply”).

<sup>8</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Oral Hearing, 12 April 2012.



## 2. APPLICABLE LAW

3. Rule 11 *bis* permits a designated Trial Chamber to refer a case to a State that has jurisdiction over the crimes of the accused and is willingly and adequately prepared to accept such a case.<sup>9</sup> Prior to ordering referral, a Trial Chamber must be satisfied that the accused will receive a fair trial in the courts of the State and that the death penalty will not be imposed or carried out.<sup>10</sup> In considering whether the accused will receive a fair trial, the accused must be accorded by the State the rights set out in Article 20 of the ICTR Statute.<sup>11</sup>

4. The designated Trial Chamber must also consider whether the State has a legal framework that criminalises the alleged conduct of the accused and provides an adequate penalty structure.<sup>12</sup> The penalty structure must provide an appropriate punishment for the offences for which the accused is charged, and conditions of detention must accord with internationally recognised standards.<sup>13</sup>

5. The final decision on whether to refer is within the discretion of the Trial Chamber.<sup>14</sup> The Prosecution bears the burden of proof to demonstrate that the conditions set out in Rule 11 *bis* are met.<sup>15</sup> However, the designated Trial Chamber may rely on any orders and information it reasonably deems necessary so long as the information assists it in determining whether the proceedings following the transfer will be fair.<sup>16</sup>

## 3. JURISDICTION

6. The Prosecution submits that Rwanda possesses territorial, personal, material and temporal jurisdiction to prosecute Munyagishari as required by Rule 11 *bis*.<sup>17</sup> It relies upon a letter from the GoR dated 28 September 2011 as proof of Rwanda's willingness and readiness to prosecute Munyagishari for the charged crimes.<sup>18</sup>

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<sup>9</sup> Rule 11 *bis* (A) of the ICTR Rules of Procedure and Evidence ("ICTR Rules").

<sup>10</sup> ICTR Rules, 11 *bis* (C).

<sup>11</sup> *Uwinkindi* Appeal Decision, para. 22; *Uwinkindi* Referral Decision, para. 17; *Munyakazi* Appeal Decision, para. 4.

<sup>12</sup> *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions (AC), 16 December 2011 ("*Uwinkindi* Appeal Decision"), para. 22; *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 16 December 2011 ("*Uwinkindi* Referral Decision"), para. 15; *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11 *bis* (TC), 8 October 2008 ("*Munyakazi* Referral Decision"), para. 4.

<sup>13</sup> *Uwinkindi* Appeal Chamber Decision, para. 22; *Uwinkindi* Referral Decision, para. 15; *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on Prosecutor's Request for Referral of the Case to the Republic of Rwanda (AC), 28 May 2008 ("*Munyakazi* Appeal Decision"), para. 4.

<sup>14</sup> *Uwinkindi* Referral Decision, para. 16; *Munyakazi* Appeal Decision, para. 5; *Prosecutor v. Michael Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11 *bis* Appeal, 30 August 2006 ("*Bagaragaza* Appeal Decision"), para. 9.

<sup>15</sup> *Uwinkindi* Appeal Decision, para. 28.

<sup>16</sup> *Uwinkindi* Referral Decision, para. 17; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2/-AR11bis, Decision on Rule 11 *bis* Referral (AC), 1 September 2005 ("*Stanković* Appeal Decision"), para. 50; *Uwinkindi* Appeal Decision, para. 28.

<sup>17</sup> Motion, paras. 16-19.

<sup>18</sup> Motion, para. 24.

7. The Chamber recalls that the Appeals Chamber has explicitly stated that the concept of a case is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before this Tribunal.<sup>19</sup> Furthermore, Article 4 of the Transfer Law states that ICTR indictments will be adapted to the Rwandan Code of Criminal Procedure.

8. At the outset, Article 3 of the Transfer Law proscribes that persons subject to transfer will only be prosecuted for crimes falling within the jurisdiction of the Tribunal.<sup>20</sup> The High Court shall handle cases in the first instance and the Supreme Court shall have jurisdiction of appeals.<sup>21</sup>

9. The Genocide Convention of 1948 as well as the Geneva Conventions of 1949 and their two Additional Protocols of 1977 were binding on Rwanda in 1994.<sup>22</sup> Similarly, Rwanda had also ratified the Convention of 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>23</sup> According to Article 190 of the Rwandan Constitution of 2003, treaties which Rwanda has ratified are more binding than organic and ordinary laws.<sup>24</sup> Nonetheless, Rwandan domestic legislation refers to these treaties and jurisprudence reflects that these treaties have been applied, depending on the charges, together with material provisions of Rwandan domestic law.<sup>25</sup>

10. In this context, the Chamber is satisfied that Rwanda's legal framework criminalises conspiracy to commit genocide, genocide, complicity in genocide, as well as murder and rape as crimes against humanity, as charged in the Indictment.<sup>26</sup> The Defence does not dispute that Rwandan law comports with the requirements found in Rule 11 *bis* (A)(iii) as it relates to material jurisdiction over the crimes charged. The Chamber is satisfied that it does.

11. This Tribunal only has jurisdiction over crimes that occurred between 1 January and 31 December 1994.<sup>27</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 Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States ("Transfer Law") appropriately narrowed this

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<sup>19</sup> *Bagaragaza* Appeal Decision, para. 17; *Prosecutor v. Zeljko Međaković 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 ("*Međaković* Appeal Decision"), para. 60.

<sup>20</sup> See Article 3 of the Transfer Law.

<sup>21</sup> See Articles 2 and 16 of the Transfer Law, respectively.

<sup>22</sup> See *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 ("*Kanyarukiga* Referral Decision"), para. 16.

<sup>23</sup> See *Kanyarukiga* Referral Decision, para. 16.

<sup>24</sup> See *Kanyarukiga* Referral Decision, para. 16.

<sup>25</sup> See *Kanyarukiga* Referral Decision, para. 17.

<sup>26</sup> See *Kanyarukiga* Referral Decision, para. 16.

<sup>27</sup> ICTR Statute, Articles 1, 7.



jurisdiction in regards to any case transferred to Rwanda by the ICTR.<sup>28</sup> Therefore, the Chamber is satisfied that the Accused will only be tried for those acts occurring in 1994.

12. The Indictment charges the Accused pursuant to Article 6(1) of the ICTR Statute with planning, instigating, ordering, committing and otherwise aiding and abetting the planning, preparation or execution of the crimes alleged.<sup>29</sup> It further alleges that by virtue of his superior responsibility, the Accused is also liable for crimes committed pursuant to Article 6(3) of the ICTR Statute.<sup>30</sup>

13. Article 6(1) of the ICTR Statute covers both principal perpetrators and accomplices. These modes 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>31</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 ICTR Statute.<sup>32</sup>

14. With respect to liability established pursuant to Article 6(3) of the ICTR Statute, 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. 33bis/2003 of 6 September 2003, Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes.<sup>33</sup> Consequently, the Chamber considers that Rwandan law adequately covers this mode of liability as well

15. The Chamber observes that the Indictment further alleges Munyagishari's participation in a joint criminal enterprise, a mode of liability implicit in Article 6(1) of the ICTR Statute.<sup>34</sup> The Defence submits that Rwanda cannot try the Accused for participation in a joint criminal enterprise because the concept is not recognised by Rwandan law.<sup>35</sup> In the Defence's view, the Indictment must be amended in accordance with Rule 50, which will unduly extend the duration of the trial in violation of Articles 19(1) and 20(4)(c) of the ICTR Statute.<sup>36</sup>

16. In reply, the Prosecution argues that joint criminal enterprise is applicable before Rwandan courts. Moreover, there is no requirement that the legal framework of the referral state must recognise all modes of liability charged in the Indictment.<sup>37</sup> Of greater

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<sup>28</sup> *Kanyarukiga* Referral Decision para. 20; *See also Uwinkindi* Referral Decision, paras. 20-21.

<sup>29</sup> Indictment, paras. 8, 23, 43, 50.

<sup>30</sup> Indictment, paras. 34, 47, 53.

<sup>31</sup> Motion, para. 21.

<sup>32</sup> *See Uwinkindi* Referral Decision, para. 19.

<sup>33</sup> *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis (AC), 4 December 2008 ("*Hategekimana* Appeal Decision"), para. 12.

<sup>34</sup> Indictment, paras. 23, 24, 43, 50.

<sup>35</sup> Response, paras. 4, 5, 56-68.

<sup>36</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, *Réponse de la défense de Bernard Munyagishari au Memorandum du Procureur déposé le 13 avril 2012*, 16 April 2012, paras. 5, 7, 10-12.

<sup>37</sup> Reply, paras. 74-88.

significance, the Prosecution declared that it would no longer pursue joint criminal enterprise as a mode of liability if the case were to be transferred to Rwanda.<sup>38</sup> On 13 April 2012, the Prosecution confirmed this in a written memorandum and further argued that formal amendment is not necessary.<sup>39</sup> The Prosecution has submitted that this concession will only be made if the case is transferred to the Rwanda but shall not prejudice its right to retain this mode of liability should the case remain with the Tribunal.<sup>40</sup>

17. In light of this concession, the Chamber considers that it need not determine whether joint criminal enterprise liability is a concept recognised in Rwandan law. Furthermore, the Chamber is not convinced that formal amendment to the Indictment pursuant to Rule 50 is necessary to effect this concession. Indeed, it is not uncommon for the Prosecution to state at the commencement or close of trial that it no longer wishes to adduce evidence on a specific charge.<sup>41</sup> The Chamber notes that this is more efficient than formally amending the Indictment. It further notes that the Accused's rights will not be prejudiced since it reduces the applicable modes of liability that he may face if his case is transferred to Rwanda. Notwithstanding, it conditions the transfer of this case on a binding concession in writing from the Prosecutor General of Rwanda to the President of this Tribunal or the Residual Mechanism that joint criminal enterprise shall not be included as a mode of liability pursued against the Accused.

#### 4. ALLEGED VIOLATION OF PRINCIPLES OF INTERNATIONAL LAW

##### 4.1 Security Council Resolutions

18. The Defence submits that the referral of Munyagishari to Rwanda is in violation of Security Council Resolutions 1503 and 1534, which state that only cases involving intermediate and lower rank accused should be transferred to competent domestic jurisdictions.<sup>42</sup> Despite the fact that his authority was restricted to one region, Munyagishari's position was such that he cannot be considered of low or intermediate rank. He is alleged to have had effective control and authority over members of the *Interahamwe* and *Impuzamugambi* militias in Gisenyi and its environs and should be tried by the ICTR. Furthermore, since the Accused's Indictment was confirmed after the adoption of Security

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<sup>38</sup> T. 12 April 2012, pp. 9-12.

<sup>39</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Memorandum from the Prosecution on Joint Criminal Enterprise, 13 April 2012 ("Memorandum"); *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Prosecutor's Reply to Defence Response to Prosecutor's Memorandum Confirming His Intention Not to Pursue Joint Criminal Enterprise as a Mode of Liability if this case is Referred to Rwanda, 17 April 2012.

<sup>40</sup> Memorandum, para. 4.

<sup>41</sup> *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, Judgement (TC), 31 March 2011 ("*Gatete* Trial Judgement"), para. 48; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006 ("*Ntagerura et al.* Judgement"), paras. 146-150, 164 (determining that it may be unfair to convict an accused based on allegations that no longer appear to be pursued by the Prosecution); *Prosecutor v. Augustin Ndirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Judgement of Acquittal, 14 October 2010, paras. 19-21.

<sup>42</sup> Response, paras. 18-30.

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Council Resolution 1534, the Prosecutor should not have charged him if he considered it unnecessary to try him at the ICTR.<sup>43</sup>

19. The Prosecution submits that unlike at the ICTY, there is no legal requirement that transferred accused be of low or intermediate rank.<sup>44</sup> Nonetheless, the Indictment does not even establish that the Accused was one of the “most senior leaders”.<sup>45</sup> Allegations of participation in a joint criminal enterprise or of effective control are insufficient to demonstrate that someone is a “most senior leader”.<sup>46</sup> Rather, an accused’s level of responsibility is determined by reference to his particular position and functions, not to the levels of responsibility of others in the joint criminal enterprise.<sup>47</sup>

20. The Tribunal is bound by resolutions passed by the Security Council pursuant to its Chapter VII authority.<sup>48</sup> Indeed, the Appeals Chamber has explicitly confirmed that the legal basis for transfer under Rule 11 *bis* is derived from the Security Council.<sup>49</sup> In resolutions 1503 and 1534, the Security Council evidently contemplated the transfer of cases outside the Tribunal’s jurisdiction, and specified that they be “intermediate or lower ranked” or not “the most senior leaders”.<sup>50</sup> As the Appeals Chamber noted in the *Stanković* case, the Security Council did not alter the Statutes of the ICTY and ICTR but confirmed the legal authority behind the referral process, thereby leaving it to the discretion of the Tribunals as to how best to implement the logistics behind the transfers.<sup>51</sup> Subsequent to these resolutions, the ICTY altered its Rules of Procedure and Evidence to include the *proviso* that its Chambers shall consider the “gravity of crimes charged and the level of responsibility of the accused”.<sup>52</sup> In contrast to the ICTY’s Rules of Procedure and Evidence, Rule 11 *bis* of the ICTR’s Rules of Procedure and Evidence does not include this stipulation. Consequently, the position of the Defence that Munyagishari’s status precludes the transfer of his case is baseless.

21. In any event, the Chamber does not consider the Accused to have been one of the “most senior leaders” during the Rwandan genocide. The Chamber must consider the gravity of the offences charged against the Accused rather than the gravity of the whole of the

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<sup>43</sup> Response, paras. 21-29; Indictment paras. 2, 4; Security Council Resolution 1503, UN Doc. S/RES/1503 (2003) (“SC Res 1503”), para. 2; Security Council Resolution 1534, UN Doc. S/RES/1534 (2004), (“SC Res 1504”), paras. 2, 3, 6; Security Council Resolution 955, UN Doc. S/Res/955 (1994), (“SC Res 955”); ICTY Rules of Procedure & Evidence, Rule 11 *bis*.

<sup>44</sup> Reply, paras. 22-28, 30; *Munyakazi* Referral Decision paras. 7-11; *Prosecutor v. Clément 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”), paras. 11-15; *Uwinkindi* Referral Decision, footnote 20; *Stanković* Appeal Decision, paras. 15, 16; SC Res 1503; SC Res 1534; Strategy of the International Criminal Tribunal for Rwanda (2004), UN Doc. S/2004/341; ICTR Completion Strategy Report 2007, UN Doc. S/2007/323, para. 15.

<sup>45</sup> Reply, para. 31.

<sup>46</sup> Reply, para. 32-35, 36.

<sup>47</sup> Reply, para. 37; *Mejakić* Referral Decision, para. 24.

<sup>48</sup> *Stanković* Appeal Decision, para. 15.

<sup>49</sup> *Stanković* Appeal Decision, para. 15.

<sup>50</sup> SC Res 1503; SC Res 1534.

<sup>51</sup> *Stanković* Appeal Decision, para. 15.

<sup>52</sup> See ICTY Rules of Procedure and Evidence, 12 December 2004, Rev. 29 in comparison to ICTY Rules of Procedure and Evidence, 20 October 2011, Rev. 46.



alleged joint criminal enterprise.<sup>53</sup> Furthermore, the command of others on a local level does not suffice to qualify a person as a “leader” for the purposes of Rule 11 bis.<sup>54</sup>

22. The Indictment alleges that Munyagishari was the Secretary General of the MRND for Gisenyi city and President of the *Interahamwe* for Gisenyi prefecture. Of particular relevance is the case of *Munyakazi*, who was also an alleged regional *Interahamwe* leader. When adjudicating that referral request, the Referral Chamber explicitly stated that the accused, an *Interahamwe* leader, had a “level of responsibility comparable to many of those referred to national jurisdictions and is lower than Laurent Bucyibaruta, a former *préfet* of Gikongoro préfecture in Rwanda, whose case was referred to the Republic of France”.<sup>55</sup> The Chamber considers the situation as it relates to Munyagishari analogous to that in the *Munyakazi* proceeding. Indeed, a broad consideration of other referral cases demonstrates that, if the ICTR were only permitted to transfer “intermediate or lower ranked” or not “the most senior leaders”, this case would be appropriate for transfer.<sup>56</sup>

#### 4.2 General Principles of International Law

23. The Defence submits that the Accused is a national of the Democratic Republic of the Congo (“DRC”). Since he was arrested there, the Defence argues that the ICTR has failed to respect the international law principles of cooperation and good faith by not notifying the DRC of the possibility of his transfer there.<sup>57</sup> Although Security Council Resolutions, pursuant to which the 11 bis is implemented, have primacy over treaties and domestic laws governing extradition, they must be interpreted within the context of international law. This includes the principle of *aut dedere aut judicare*, and the principle that States have no obligation to extradite their own nationals. Referral of the Accused to Rwanda, even if such a transfer is not extradition *stricto sensu*, will amount to the extradition of a Congolese national by the DRC to Rwanda. Yet, international law does not impose any such obligation on any State.<sup>58</sup>

<sup>53</sup> *Mejakić* Referral Decision, para. 24.

<sup>54</sup> *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11bis, Decision on Rule 11bis Referral (AC), 15 November 2005 (“*Janković* Appeal Decision”), para 19.

<sup>55</sup> *Munyakazi* Appeal Decision, para.13

<sup>56</sup> For examples of accused persons whose status did not preclude transfer, see *Janković* Appeal Decision, paras. 4, 11, 19, 20 (a sub-commander of the military police and one of the main paramilitary leaders in Foča); *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11bis.1& Case No. IT-97-25/1-AR11bis.2, Decision on Savo Todović’s Appeal Against Decisions on Referral under Rule 11 bis (AC), 4 September 2006 (“*Todović* Appeal Decision”), paras. 9, 17-22 (a prison administrator); *Prosecutor v. Pasko Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal Against Decision on Referral under Rule 11bis (AC), 4 July 2006 (“*Ljubičić* Appeal Decision”), para. 3 (a commander of a military police battalion including a formation known as “the jokers”); *Mejakić* Appeal Decision, paras. 3, 4, 18-26 (four Bosnian Serb authorities involved in a joint criminal enterprise in two detention camps); *Stanković* Appeal Decision, para. 3 (a soldier); For examples of positions considered too senior for referral in the ICTY, 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 (“*Delić* Referral Decision”), paras. 11, 20-26, (the most senior commander of the Army of Bosnia and Herzegovina); *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 bis (TC), 8 July 2005 (“*Dragomir Milošević* Referral Decision”), paras. 21-23 (a commander involved in peace negotiations who was one rank below the highest military command).

<sup>57</sup> Response, paras. 37-47.

<sup>58</sup> Response, paras. 40-46.



24. The Prosecution disputes that Munyagishari is a national of the DRC.<sup>59</sup> However, even if he were, it argues that there is no obligation that the DRC be explicitly informed of the possibility that the Accused would be transferred to another State.

25. Likewise, the Accused's State need not consent to such a transfer.<sup>60</sup> The principles regarding extradition are inapplicable to referral cases.<sup>61</sup> Moreover, even if the Accused was a national of the DRC, that country would have been obligated to transfer him to the ICTR pursuant to Article 28 of the ICTR Statute, in accordance with Article 8(2) of the ICTR Statute, which gives the Tribunal primacy to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. Moreover, a State transferring an accused to the ICTR does so with the awareness that the Prosecutor may request referral pursuant to Rule 11 *bis*.<sup>62</sup>

26. As noted by both the Defence and the Prosecution, the Appeals Chamber has explicitly stated that referral pursuant to Rule 11 *bis* does not amount to an extradition *stricto sensu*.<sup>63</sup> As extrapolated in the *Uwinkindi* Referral Decision, the nature of extradition and referral proceedings is materially different. Extradition is a bilateral arrangement between two States. During extradition the extraditing State transfers the custody of the accused to the receiving State and the former exercises no control over the trial of the extradited person. In contrast, referral is *a sui generis* mechanism wherein the referring Tribunal retains the power to revoke its decision if fair trial rights are not respected. Referral is also ordered pursuant to a stringent monitoring mechanism that keeps the Tribunal informed of the receiving State's adherence to the conditions of referral.<sup>64</sup>

27. The Chamber reiterates that pursuant to Article 8(2) of the ICTR Statute, the Tribunal has primacy over domestic courts. States are obliged cooperate with the Tribunal and to comply with its orders.<sup>65</sup> The referral procedure envisaged in Rule 11 *bis* is implemented pursuant to a Security Council Resolution, which, under the United Nations Charter, overrides any State's extradition requirements under treaty or national law.<sup>66</sup>

28. Consequently, the Chamber is unpersuaded by the Defence's reference to undefined principles and sources of international law. Since the laws of extradition do not apply to the present case, the Chamber considers it unnecessary to determine the Accused's nationality.

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<sup>59</sup> Reply, paras. 53, 54; *Annex D*, Certified Copies of Documents from Munyagishari's employment records at SONARWA, obtained by *Prosecutor* on 13 February 2012; *Annex E*, Certified copies of social security records obtained by *Prosecutor* on 13 February 2012. Response, *Annex 2*, Birth Certificate issued by the head of the *Groupement* Bashali-Kaembe, *Territoire* de Masisi, North-Kivu Province, DRC, on 17 December 2011; *Annex 12*, Constitution of the Democratic Republic of the Congo; *Annex 1*, Voter's card equivalent to provisional identity card No. 10216791792 issued by the DRC.

<sup>60</sup> Reply, paras. 51-65.

<sup>61</sup> Reply, paras. 55-58.

<sup>62</sup> Reply, paras. 60-62.

<sup>63</sup> *Mejakić* Appeal Decision, para. 31; Response, para. 46; Reply, para. 57.

<sup>64</sup> *Uwinkindi* Referral Decision, para. 43.

<sup>65</sup> ICTR Statute, Article 28.

<sup>66</sup> *Mejakić* Appeal Decision, para. 31; *Ljubičić* Appeal Decision, paras. 8, 9.

#### 4.3 The Possibility of Referral to the Democratic Republic of the Congo

29. The Defence submits that the Chamber should consider the possibility of referring the Accused's case to the Democratic Republic of the Congo. It is the most appropriate jurisdiction in which the Accused should be tried. Specifically, the Accused is a national of the DRC, exercises his political and civil rights there, was arrested there and has no personal ties with Rwanda.<sup>67</sup>

30. The Prosecution submits that the Chamber is not obligated to consider transferring the Accused to the DRC *proprio motu*, particularly as the DRC has not declared its willingness or preparedness to try the Accused.<sup>68</sup> Moreover, Rwanda has the greatest nexus with the case. Specifically, the crimes were alleged to have been committed in Rwanda, against persons living in Rwanda, and by an Accused who was living in Rwanda. Moreover, the crimes were perpetrated by Rwandan subordinates of the Accused, including the *Interahamwe* and *Impuzamugambi* militias.<sup>69</sup> Finally, the Prosecution argues that Munyagishari's transfer to the DRC is precluded by Rule 11 *bis* because that country has the death penalty.<sup>70</sup>

31. Despite being empowered by Rule 11 *bis* (B) of the Rules to order the referral of a case *proprio motu*, the Chamber declines the Defence request to refer the case to the DRC. The Chamber notes that the DRC, in conformity with its obligations under Article 28 of the ICTR Statute, cooperated with the ICTR by transferring the Accused to the custody of the Tribunal. It did so with the full knowledge that the Prosecutor might request that the Accused be transferred to another State. The DRC has not expressed any interest in trying the Accused. Moreover, the Chamber notes that the DRC retains the death penalty. Consequently, any referral would be in clear violation of Rule 11 *bis* (C) of the Rules.

32. Accordingly, the Chamber considers it unnecessary to determine both whether the DRC or Rwanda has the greatest nexus to the present case, and consequently, the nationality of the Accused.

#### 4.4 Undue Delay

33. The Defence submits that if referral is granted, the Accused's right to be tried without undue delay will be violated.<sup>71</sup> The Prosecutor did not file the request until five months after the arrest of the Accused despite the fact he could have filed it prior to his arrest.<sup>72</sup> This has prejudiced the Accused because although he is ready to present his case, he cannot be tried before a determination is made on the referral request. Furthermore, he claims that the counsel who has prepared his defence cannot represent him before the Rwandan courts,<sup>73</sup> and

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<sup>67</sup> Response, paras. 48-54

<sup>68</sup> Reply, para. 66.

<sup>69</sup> Reply, paras. 70, 71.

<sup>70</sup> T. 12 April 2007, p. 37.

<sup>71</sup> Response, para. 123; ICTR Statute, Articles 19(1), 20(4)(c); International Covenant on Civil and Political Rights ("ICCPR"), Article 14(3)(c); African Charter on Human and Peoples' Rights ("AChHPR"), Article 7(1)(d).

<sup>72</sup> Response, paras. 32-34.

<sup>73</sup> Response, paras. 121-123.

that he is prevented from accessing evidence that may be useful to him in the preparation of his defence until the referral decision.<sup>74</sup>

34. The Prosecution contends that it filed its referral request expeditiously. It was within the Prosecutor's discretion to delay the request for referral until it was satisfied that Rwanda had made sufficient progress in instituting reforms that would facilitate transfer.<sup>75</sup> To the contrary, by remaining a fugitive for over five years, it is the Accused that is accountable for any delay in the initiation of proceedings against him. Furthermore, he could have consented to the referral upon his arrest. This would have expedited the Chamber's decision.<sup>76</sup> The postponement of trial resulting from referral litigation pursuant to Rule 11 *bis* does not necessarily result in undue delay.<sup>77</sup> Furthermore, the Prosecution argues that practical measures have been implemented to ensure that once the referral decision has been made, the trial will be conducted expeditiously, including disclosure pursuant to Rule 66(A)(i) and pre-trial preparations. Article 13(5) of the Transfer Law guarantees the Accused the right to a speedy trial.<sup>78</sup> Neither a change in counsel or lack of disclosure of confidential documents at this stage of trial will result in undue delay.<sup>79</sup>

35. Pursuant to Article 20(4)(c) of the ICTR Statute, an accused is guaranteed the right to trial without undue delay. Article 19 of the ICTR Statute obligates Trial Chambers to ensure that a trial is fair and expeditious. The Chamber has previously stated that the postponement of a trial during referral litigation pursuant to Rule 11 *bis* does not necessarily result in undue delay.<sup>80</sup> It re-emphasises that although requests for transfer pursuant to Rule 11 *bis* are not an essential feature of litigation before the Tribunal, they are rooted in Article 8 of the ICTR Statute and supported by the Security Council as a means of ensuring the timely fulfilment of the Tribunal's mandate.<sup>81</sup> The Chamber was aware of the date of the Prosecution's request for referral when it concluded in its previous decision that the present case had not been subject to undue delay.<sup>82</sup>

36. In relation to the Defence assertion that the present case may suffer undue delay as a consequence of a change of counsel, the Chamber notes that the Defence has indicated that it has already spent six months preparing its case.<sup>83</sup> It also notes that the Accused has been declared indigent and that Rwanda's legal aid system provides lawyers without payment for accused persons who cannot finance their own defence.<sup>84</sup> Accordingly, the Chamber

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<sup>74</sup> Response, paras. 35, 123.

<sup>75</sup> Reply, para. 42.

<sup>76</sup> Reply, para. 43.

<sup>77</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I, Decision on Defence Request to Commence Proceedings, 13 December 2011, para. 7; Reply, para. 44 ("Decision on Defence Request to Commence Proceedings").

<sup>78</sup> Reply, paras. 45, 46; Decision on Defence Request to Commence Proceedings, para. 8; *Stanković* Referral Decision, para. 77; GoR Brief, para. 20.

<sup>79</sup> Reply, para. 47-49; *Ljubičić* Appeal Decision, para. 28.

<sup>80</sup> Decision on Defence Request to Commence Proceedings, para. 7; *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B, Decision on Defence Motion for the Continuation of Proceedings Before the Tribunal (TC), 5 November 2007, para. 10.

<sup>81</sup> SC Res 1503; SC Res 1534.

<sup>82</sup> Decision on Defence Request to Commence Proceedings, 13 December 2011, disposition.

<sup>83</sup> Response, paras. 35, 121, 123.

<sup>84</sup> See Section 10.2.2.



envisages that should the Accused remain indigent and require the use of a Rwandan lawyer, the pre-trial preparations by the current Defence team shall ensure that transfer shall not constitute a reason for delay.<sup>85</sup> Indeed, the Defence has ethical obligations to ensure a smooth transition should a new team be appointed, in order to protect the rights of their client.<sup>86</sup>

37. Both the *Karemera et al.* and *Ngirabatware* benches rejected the Defence request for the disclosure of documents on the basis that such a move would be premature given that the case is currently in the pre-trial phase.<sup>87</sup> Accordingly, the Chamber considers that once the present case has advanced beyond the pre-trial phase, the Defence can request disclosure of the documents again. It would then have time to examine the documents before trial. For this reason, the aforementioned decisions have not unduly delayed the Accused's trial.

38. The Chamber welcomes the pre-trial preparations of both parties and recognises their efforts to assist with guaranteeing fair and expeditious trial for the Accused following the determination of the present referral request.

## 5. THE APPLICABILITY OF PREVIOUS REFERRAL DECISIONS

### 5.1 The *Uwinkindi* Referral Decision

39. The Defence submits that Rwanda's ability to respect the fair trial rights of Uwinkindi does not automatically translate into its ability to ensure a fair trial and security for Munyagishari.<sup>88</sup> The Defence advances six arguments that distinguish the Accused's case from previous transfers. First, the Accused held a high-level position.<sup>89</sup> Second, he is charged with rape which may attract special condemnation by public opinion and specific treatment in prison from co-detainees and wardens.<sup>90</sup> Third, the allegations against Uwinkindi are limited to one commune, whereas Munyagishari is charged with murder and rape perpetrated throughout the country as part of a conspiracy with high level military and political leaders.<sup>91</sup> Fourth, Munyagishari is Congolese and as a foreigner risks being subjected to harsher treatment and specific abuse in prison.<sup>92</sup> Fifth, he comes from North-Kivu which has historically experienced high tensions between Hutus and Tutsis. Therefore, the Accused will be especially vulnerable when confronting the Rwandan authorities.<sup>93</sup> Finally, the Accused's

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<sup>85</sup> *Ljubičić* Appeal Decision, para. 28.

<sup>86</sup> ICTR Directive on the Assignment of Defence Counsel, 14 March 2008, Articles 6, 9.

<sup>87</sup> *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Bernard Munyagishari's Motion for Disclosure of Confidential Information in the *Karemera et al.* case (TC), 21 December 2011, paras. 5,6 ; *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Bernard Munyagishari's Motion for Disclosure of Confidential Documents in the *Ngirabatware* case (TC), 1 February 2012, paras. 15, 16.

<sup>88</sup> Response, para. 5.

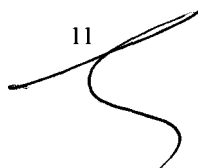
<sup>89</sup> Response, paras. 6, 7.

<sup>90</sup> Response, paras. 8.

<sup>91</sup> Response, para. 9.

<sup>92</sup> Response, para. 10.

<sup>93</sup> Response, para. 11; *Annex 1*, DRC Voters card; *Annex 2*, Birth certificate; *Annex 3*, Mapping Exercise Report, para. 157, 18, footnote 18, paras. 29, 31; *Annex 4*, letter of provisional designation issued to Mr Mushari Nyamudede; *Confidential Annex 49*.



name features on a public list of Category One Offenders published in the official Gazette and will therefore receive more media attention and strong reactions.<sup>94</sup>

40. The Prosecution submits that nothing distinguishes the Accused's case from that of Uwinkindi's in relation to fair trial rights in Rwanda.<sup>95</sup> The first five of the Defence arguments are speculative and unsupported.<sup>96</sup> The Prosecution maintains that the Accused is Rwandan.<sup>97</sup> It reiterates that transferees will be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, which includes a non-discrimination clause.<sup>98</sup>

41. The Chamber considers the Defence assertions to be vague. The Chamber is obligated by Rule 11 *bis* to satisfy itself that Munyagishari, specifically, will receive a fair trial in the courts of Rwanda. The referral of one accused does not necessitate that all subsequent requests under Rule 11 *bis* must be automatically granted. The facts pertaining to each request vary and the Chamber shall consider the merits of the Accused's arguments, particularly those that have not previously been advanced. Nonetheless, the Chamber is bound by the Appeals Chamber interpretation of the law.<sup>99</sup>

## 5.2 Other Transfer Decisions

42. The Prosecution submits that over the past year, the European Court of Human Rights ("ECtHR"), African Union and the Oslo District Court have expressed confidence in Rwanda's ability to ensure that fair trial rights of accused would be respected if their cases were tried in Rwanda.<sup>100</sup>

43. The Defence argues that transfer jurisprudence from the ECtHR and the Oslo District court is inapplicable to the present case because it is either appealable, or applies a different threshold and, or is inspired by the *Uwinkindi* decision.<sup>101</sup> The African Union has not yet transferred the Hissènè Habré case to Rwanda, despite its stated intention to do so.<sup>102</sup> The

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<sup>94</sup> Response, para. 12; *Annex 5*, Publication of the updated list of Category 1 offenders, pursuant to Article 9 of Organic Law No. 8/96 of 30 August 1996, Official Gazette, 38<sup>th</sup> Year, Special Issue, 31 December 1999.

<sup>95</sup> Reply, paras. 1, 5; *Uwinkindi* Referral Decision, para. 223; *Uwinkindi* Appeal Decision, para. 87; *Kayishema* Referral Decision, para. 163.

<sup>96</sup> Reply, paras. 1, 6, 8, 9; *Uwinkindi* Referral Decision, para. 223; *Uwinkindi* Appeal Decision, para. 87; *Kayishema* Referral Decision, para. 163

<sup>97</sup> Reply, para. 6.

<sup>98</sup> Reply, para. 7; UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, UN DOC A/Res/43/173, principle 5.

<sup>99</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000, paras.112, 113.

<sup>100</sup> Motion, paras. 3-6; T. 12 April 2012, pp. 2, 3.

<sup>101</sup> Motion, para. 5; *Annex A, Ahorugeze v. Sweden*, Application No. 37075/09, European Court of Human Rights, Judgement, 27 October 2011, pp. 1, 5-12, 113, 114, 39, 51-61, 121, 124, 125, 127, 128 ("ECtHR *Ahorugeze* Judgement"); *Annex B, NCIS Norway v. Charles Bandora*, File No. 11-050224ENE-OTIR/01, Oslo District Court, 11 July 2011 ("*Bandora* Judgement"); *Annex C*, Letter from Ben Kioko, Director/Legal Adviser of the African Union. Response, paras. 15-16; *Annex 6*, FIDH, Statement of the Steering Committee of the International Committee for the Fair Trial of Hissènè Habré, A Real Solution or More Dilatory Tactics? 27 October 2011 ("FIDH Letter").

<sup>102</sup> Response, paras. 15, 16; *Annex 6*, FIDH Letter. Motion, para. 5, *Annex B: Bandora* Judgement; *Annex C*: Letter from Ben Kioko, Director/Legal Adviser of the African Union.

Defence also cites the refusal of the Paris Court of Appeal to extradite Agathe Habyarimana to Rwanda and the UN Committee Against Torture's request to Canada to stay the transfer of Leon Mugesera as two examples of a lack of confidence in Rwanda's ability to provide fair trials to genocide defendants.<sup>103</sup>

44. The Prosecution asserts that the extradition cases can be relied on as indication of the confidence of national and regional bodies in Rwanda's ability to respect the fair trial rights of transferees. It does not rely on them as precedent.<sup>104</sup> It rebuts the Defence assertions in relation to the ECtHR and Oslo District court cases and the African Union letter.<sup>105</sup> In its opinion, the Mugesera decision does not support the Defence's position since Mugesera was extradited notwithstanding the UN Committee Against Torture's request not to do so.<sup>106</sup> It submits that Agathe Habyarimana's referral was denied on the basis that Rwandan law provided no sanction for the alleged crimes at the time they were committed and is therefore immaterial as to considerations of whether Munyagishari's trial will be fair in Rwanda.<sup>107</sup>

45. The Chamber is not bound by the decisions of national jurisdictions. It applies the test expounded in Rule 11 *bis* and the law as developed by the jurisprudence and practice of the Tribunal. Nonetheless, the Chamber may rely on any orders and information it reasonably deems necessary so long as the information assists it in determining whether the proceedings following the transfer will be fair.<sup>108</sup> It is mindful of the fact that domestic jurisdictions may include reference to the approval of transfer by the ICTR as one of several reasons for approving their own extraditions to Rwanda.

46. Furthermore, previous Referral Chambers have used recent findings by national and international courts to determine whether or not the general practice of States is to deny Rwandan extradition requests for fear that the individual will suffer grave human rights violations.<sup>109</sup> The Chamber considers such national and international findings in a similar manner. The Chamber reiterates that even if the general practice of States is not to deny extradition to Rwanda, it must be satisfied that the requirements of Rule 11 *bis* will be satisfied before granting a request for transfer.

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<sup>103</sup> Response, para. 17; *Annex 7*, "Mrs. Habyarimana will not be extradited to Rwanda", Hirondelle News Agency, 30 September 2011; *Annex 8*, "Application for the extradition of Agathe Habyarimana dismissed"; *Annex 9*, "Rwanda/Canada Mugesera takes his case to a UN body", Hirondelle News Agency, 12 January 2012; *Annex 10*: "Rwanda/Canada: A Quebec court orders a stay of the expulsion of Mugesera, Hirondelle News Agency, 13 January 2011.

<sup>104</sup> Reply, paras. 13, 14, 21.

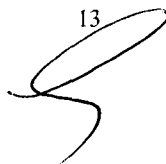
<sup>105</sup> Reply, paras. 14-16.

<sup>106</sup> Reply, paras. 17-21.

<sup>107</sup> Reply, paras. 17-21.

<sup>108</sup> *Uwinkindi* Referral Decision, para. 17; *Stanković* Appeal Decision, para. 50; *Uwinkindi* Appeal Decision, para. 29.

<sup>109</sup> *Kayishema* Referral Decision 2012, para. 31.





## 6. FAIR TRIAL

### 6.1 Presumption of Innocence

#### 6.1.1 Applicable Law

47. The presumption of innocence is an essential element of a fair trial.<sup>110</sup> In considering whether the accused will receive a fair trial, the accused must be accorded by the State the rights set out in Article 20 of the ICTR Statute.<sup>111</sup> Article 20(3) of the ICTR Statute provides that the accused shall be presumed innocent until proven guilty.

48. Article 13(2) of the Transfer Law, Article 19 of the Rwandan Constitution and Article 44(2) of the Rwandan Code of the Criminal Procedure provide that an accused shall be presumed innocent until proven guilty.<sup>112</sup>

#### 6.1.2 Submissions

49. The Prosecution submits that the presumption of innocence is guaranteed by the Transfer Law, Rwandan Constitution and Rwandan Code of Criminal Procedure, as recognised by four previous Referral Chambers.<sup>113</sup> The Defence acknowledges that Rwandan law recognises the presumption of innocence in conformity with international treaties but disputes that it will be enforced in practice.<sup>114</sup> This is evidenced by Rwanda's failure to separate convicted prisoners from those awaiting trial, in violation of Article 14(2) of the ICCPR.<sup>115</sup>

50. The Defence further submits that senior officials, including the President of Rwanda and the Rwandan media, have made public statements in violation of the principle of presumption of innocence with regard to accused persons on trial at the ICTR. This raises doubt as to the ability and willingness of the Rwandan authorities to ensure respect for the presumption of innocence.<sup>116</sup> The Prosecution replies that none of these comments implicate members of the Rwandan judiciary, who are held to high ethical standards and prohibited

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<sup>110</sup> UN Human Rights Committee General Comment 32, Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32 ("General Comment 32"); ICCPR, Article 14.

<sup>111</sup> *Uwinkindi* Appeal Decision, para. 22; *Uwinkindi* Referral Decision, para. 17; *Munyakazi* Appeal Decision, para. 4.

<sup>112</sup> Organic Law No. 11/2007 of 16/03/2007, as amended, Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Article 13(2) ("Transfer Law"); Law No. 13/2004 of 17/5/2004, as amended, Relating to the Code of Criminal Procedure, Article 44 ("Rwandan Code of Criminal Procedure"); Constitution of the Republic of Rwanda, Article 19 ("Constitution").

<sup>113</sup> Motion, paras. 34, 35; *Uwinkindi* Referral Decision, paras. 22, 26; *Kanyarukiga* Referral Decision, para. 43; *Gatete* Referral Decision, para. 40; *Hategekimana* Referral Decision; para. 47.

<sup>114</sup> Response, para. 88

<sup>115</sup> Response, para. 89.

<sup>116</sup> Response, paras. 91, 92; *Annex 28*, "Kagame speaks out on US, Canada Visits", *New Times*, 8 May 2006; *Annex 29*, "Arusha Court Has Shown You Can Be in Power Today and in the Dock Tomorrow", *New Times*, 22 May 2009.



from publicly commenting on the guilt or innocence of an accused prior to the completion of trial.<sup>117</sup>

51. In support of the Defence, the International Association of Defence Lawyers (“IADL”) argues that the Accused has already been presumed guilty. There is no independent judiciary in Rwanda and previous acquittals by the ICTR have been denounced through mass demonstrations in Kigali.<sup>118</sup> The Prosecution counters that these comments occurred after the completion of trials and did not impact upon the presumption of innocence.<sup>119</sup>

### 6.1.3 Discussion

52. Seven Referral Chambers have concluded that the presumption of innocence clearly forms part of Rwandan law. It has never been an issue on appeal.<sup>120</sup> Having analysed Article 13(2) of the Transfer Law, Article 19 of the Rwandan Constitution and Article 44(2) of the Rwandan Code of the Criminal Procedure, this Chamber concludes that the presumption of innocence forms a part of Rwandan statutory law. Its provisions, reiterated in three separate instruments, conform to international human rights standards and the treaties to which Rwanda is a party.

53. The Chamber considers the Defence argument that these provisions will not be respected in practice to be unsupported and speculative. The Chamber notes that the Commissioner General of the Rwandan Correctional Services has explained that prisoners are segregated in accordance with international standards on the basis of gender and whether awaiting trial or convicted.<sup>121</sup> In this regard, the Defence’s submissions are without merit.

54. With regard to comments made by the media and public authorities, the Chamber is of the view that judges are trained and experienced professionals capable of separating comments made by public officials from evidence presented in the courtroom. Accordingly, these comments, in and of themselves, do not violate the right of the Accused to the presumption of innocence.<sup>122</sup> Notwithstanding, the Chamber highlights that the Human Rights Committee (“HRC”) General Comment No. 32 on Article 14 of the ICCPR states: “[i]t is a duty for all public authorities to refrain from prejudging a trial, e.g. by abstaining

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<sup>117</sup> Reply, para. 105; Law No. 09/2004 of 29 May 2004 Relating to the Code of Ethics for the Judiciary, Articles 7, 16 (“Code of Ethics for the Judiciary”). Motion, *Annex J*, GoR Brief in the *Uwinkindi* case, para. 130.

<sup>118</sup> IADL, “An Open Letter to ICTR President Khalida Rachid Khan on IADL’s Opposition to the Prosecution’s Request to Refer the Munyagishari Case to Rwanda” annexed to *Requête de la défense de Bernard Munyagishari aux fins d’accepter la lettre ouverte et la résolution de l’association internationale des juristes démocrates relative au renvoi de l’affaire Munyagishari au Rwanda*, 15 February 2012, admitted by Decision on Defence Request to Admit a Letter, 21 February 2012 (“IADL Resolution”).

<sup>119</sup> Reply, para. 106.

<sup>120</sup> *Prosecutor v. Ladislas Ntaganzwa*, Case No. ICTR-96-9-R11bis, Decision on Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, 8 May 2012, paras.15-27 (“*Ntaganzwa* Referral Decision”); *Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Decision on Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, para. 17 (“*Sikubwabo* Referral Decision”); *Kayishema* Referral Decision, para. 19; *Uwinkindi* Referral Decision, paras. 22, 26; *Kanyarukiga* Referral Decision, paras. 43-45; *Gatete* Referral Decision, paras. 40-42; *Hategekimana* Referral Decision; para. 52; See: *Uwinkindi* Appeal Decision; *Kanyarukiga* Appeal Decision; *Hategekimana* Appeal Decision.

<sup>121</sup> Reply, *Annex F*, Affidavit of Paul Rwarakabije, Commissioner General of Rwandan Correctional Services, 13 February 2012 (“*Rwarakabije* Affidavit”).

<sup>122</sup> *Uwinkindi* Referral Decision, para. 26.

from making public statements affirming the guilt of the accused [...] The media should avoid news coverage undermining the presumption of innocence”.<sup>123</sup>

55. The Chamber notes that any transfer of this case would be accompanied by independent monitoring in accordance with Rule 11 *bis* (D)(iv). At this stage, the Chamber is not concerned that the Accused’s presumption of innocence would not be protected. However, should actions or statements of authorities, including the judiciary, undermine legal framework that ensures the presumption of innocence of the Accused, the case is subject to revocation in accordance with Rule 11 *bis* (F).

## 6.2 *Non Bis In Idem*

56. It is undisputed that Munyagishari has been previously convicted *in absentia* in Gacaca proceedings in Rwanda. However, the Prosecution submits that, pursuant to Article 93 of the Gacaca Law, the Gacaca Court of Appeal has nullified the Accused’s conviction by the Gacaca Court of Kayove sector. It did so on the basis that it contravened Article 2 of the Transfer Law, and, by extension, the Tribunal’s primacy pursuant to Article 8(2) of the ICTR Statute.<sup>124</sup>

57. The Defence submits that the document is surprising because it incorrectly refers to the Accused as a businessman and does not contain a penalty. This demonstrates a low level of organisation and competence, raising questions as to how proceedings are in fact conducted on appeal in Rwanda.<sup>125</sup>

58. 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 ICTR Statute embodies this principle.

59. The Human Rights Committee (“HRC”) General Comment No. 32 on Article 14 of the ICCPR states that “[t]he prohibition [against double jeopardy] is not at issue if a higher court quashes a conviction and orders a retrial.”<sup>126</sup>

60. The Chamber finds that the invalidation 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*. Likewise, the Chamber is not concerned that this prior conviction, which has since been vacated, undermines the Accused’s presumption of innocence as it relates to a prospective trial in Rwanda.

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<sup>123</sup> General Comment No. 32, para. 30.

<sup>124</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-I Prosecutor’s Filing of Additional Information, 5 March 2012, paras. 1-3.

<sup>125</sup> T. 12 April 2012, p. 25.

<sup>126</sup> General Comment No. 32, para. 56.



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### 6.3 Article 59 of the Rwandan Code of Criminal Procedure

61. Article 59 of the Rwanda Code of Criminal Procedure formerly provided that “[p]ersons against whom the Prosecution has evidence to suspect that they were involved in the commission of an offence cannot be heard as witnesses.”<sup>127</sup>

62. The GoR states in its *amicus* brief that Article 59 of the Code of Criminal Procedure has been eliminated. Specifically, Article 56 of the Code of Criminal Procedure has been amended to expressly provide that “[a]ny person who has participated in the commission of an offence may be heard as witness.” This represents a further assurance that the referred trial to Rwanda will be fair.<sup>128</sup>

63. The Chamber therefore finds no reason to conduct an analysis of Article 59 of the Rwandan Code of Criminal Procedure, as it is no longer a barrier when considering whether the Accused will receive a fair trial in Rwanda.

### 6.4 Language

64. The Defence submits that the Accused only speaks French, Swahili and Lingala. Rwanda has provided no guarantee that the right to free assistance from an interpreter will be respected. Moreover, it has failed to mention the language in which the trial will be conducted, is silent about the availability of interpreters and the financial resources to cover the cost of paying for their services. Similarly, Rwanda has not assured that the Accused will obtain translations of exhibits and other important documents.<sup>129</sup>

65. The Prosecution responds that pursuant to Articles 79-83 of the Rwandan Code of Criminal Procedure, accused persons have the free assistance of an interpreter. Interpretation services are currently in use and additional funds have been made available in the January 2012 supplementary appropriation of 118 million Rwandan francs to enhance the capacity to provide this service.<sup>130</sup>

66. The Defence notes that Leon Mugesera’s request for his trial in Rwanda to be conducted in English was denied. The Defence does not dispute that Rwanda has interpreters and interpretation booths.<sup>131</sup>

67. Article 20(4)(f) of the ICTR Statute of the Tribunal provides the accused the right to the free assistance of an interpreter if he or she cannot understand or speak the language used at the ICTR.<sup>132</sup> Noting the additional funds allocated for transferred cases and the construction of interpreter’s booths, the Chamber is satisfied that the Accused shall be guaranteed the same right in Rwanda, in accordance with the provisions of the Rwandan

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<sup>127</sup> Rwandan Code of Criminal Procedure, Art. 59.

<sup>128</sup> GoR Brief, paras. 9,10; *Annex C*: Draft Law Relating to the Code of Criminal Procedure, Article 56.

<sup>129</sup> Response, para. 148.

<sup>130</sup> T. 12 April 2012, pp. 31, 32.

<sup>131</sup> T. 12 April 2012, p. 42.

<sup>132</sup> GoR Brief, para. 20; *Annex G*, Affidavit of Fred Gashemeza, Director General in Charge of ICTR for the Supreme Court of Rwanda, addendum A (“Gashemeza Affidavit”).

Criminal Code. Should the Accused be denied this right, the case is subject to revocation in accordance with Rule 11 *bis* (F).

## 7. PENALTY STRUCTURE

68. In order to be competent to receive a transfer case from the Tribunal within the meaning of Rule 11 *bis*, a State must provide an adequate penalty structure that prescribes an appropriate punishment for the offences for which the accused is charged.<sup>133</sup> The death penalty must not be imposed.<sup>134</sup> Four Referral Benches and the Appeals Chamber are satisfied that Rwandan law provides an adequate penalty structure and that the death penalty will not be imposed.<sup>135</sup>

69. It is not disputed that Rwandan law provides for a penalty structure that meets the standards of the jurisprudence of the Tribunal and guarantees that the accused will not be sentenced to death or executed.<sup>136</sup>

70. The Chamber notes that the death penalty was abolished in Rwanda pursuant to the Abolition of the Death Penalty Law (Organic Law No. 31/2007 of 25 July 2007).<sup>137</sup> Article 1 of the Organic Law, which modifies Article 3 of the Abolition of the Death penalty, states that in accordance with the Transfer Law, life imprisonment with special circumstances will not apply to transfer cases.<sup>138</sup> Article 21 of the Transfer Law allows for a maximum penalty of life imprisonment. Article 82 of the Rwandan Penal Code permits the consideration of the individual circumstances of a convicted person in determining sentencing.<sup>139</sup> Article 22 of the Transfer Law states that convicted persons will be given credit for time spent in custody.

71. The Chamber finds that these provisions are in conformity with the jurisprudence of the Tribunal and consistent with Rule 101, which sets forth the Tribunal's sentencing practice. Accordingly, Rwanda possesses an adequate penalty structure and is satisfied that the death penalty will not be imposed.

## 8. CONDITIONS OF DETENTION

### 8.1 Applicable Law

72. The conditions of detention in a national jurisdiction are a matter that touches upon the fairness of that jurisdiction's criminal justice system. It is an inquiry squarely within the Referral Chamber's mandate.<sup>140</sup> In assessing conditions of detention, the Referral Chamber

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<sup>133</sup> *Uwinkindi* Appeal Decision, para. 22; *Uwinkindi* Referral Decision, para. 15; *Munyakazi* Appeal Decision, para. 4; *Bagaragaza* Appeal Decision, para. 9.

<sup>134</sup> *Uwinkindi* Referral Decision, para. 15.

<sup>135</sup> *Ntaganzwa* Referral Decision, para. 30; *Sikubwabo* Referral Decision, para. 50; *Kayishema* Referral Decision, para. 52; *Uwinkindi* Referral Decision, para. 60; *Kanyarukiga* Referral Decision, paras. 92, 93, 96, 97.

<sup>136</sup> Motion, paras. 26-28; Response, para. 70.

<sup>137</sup> Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, 25 July 2007, Official Gazette of the Republic of Rwanda, 25 July 2007 ("Abolition of the Death Penalty Law").

<sup>138</sup> Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

<sup>139</sup> Rwandan Code of Criminal Procedure.

<sup>140</sup> *Stanković* Appeal Decision, para. 34.

should ascertain whether the laws governing detention incorporate relevant international standards regarding the treatment of prisoners.<sup>141</sup>

73. Article 23(1) of the Transfer Law provides that any person transferred to Rwanda by the ICTR shall be detained in accordance with the minimum standards of detention as provided in the United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173. Article 23(2) provides that an ICRC or ICTR observer appointed by the President of the Tribunal shall have the right to inspect the conditions of detention of transferred persons, and shall submit a confidential report of these findings to the Minister of Justice and President of the ICTR.<sup>142</sup>

## 8.2 Submissions

74. The Prosecution submits that the Transfer Law guarantees adequate conditions of detention and that the detention facilities at Mpanga and Kigali Central prisons meet international standards.<sup>143</sup> The *Uwinkindi* Trial Chamber, ECtHR, Government of the Netherlands and Oslo District Court share this assessment.<sup>144</sup> Persons convicted by the Special Court for Sierra Leone are currently serving sentences in Mpanga prison under conditions that meet international standards. The regulations governing their detention would also apply to prisoners transferred by the ICTR.<sup>145</sup> Furthermore, Article 23 of the Transfer Law, in combination with the monitors appointed under Rule 11 *bis* D(iv), provide an ongoing evaluation to ensure that the detention conditions and treatment of the Accused remain satisfactory throughout any custodial detention he may serve in Rwanda.<sup>146</sup>

75. The Defence concedes that Rwanda has incorporated human rights provisions concerning detention into its Transfer Law but is unconvinced that these will be applied in practice.<sup>147</sup> Penal Reform International, the HRC and the ACHPR have published concerns about the unsatisfactory conditions of detention in Rwandan prisons.<sup>148</sup>

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<sup>141</sup> *Uwinkindi* Appeal Decision, para. 37.

<sup>142</sup> Transfer Law, Article 23

<sup>143</sup> Motion, para. 29

<sup>144</sup> Motion, paras. 30, 31; *Annex A*, ECtHR *Ahorugeze* Judgement, para. 92; *Annex B*, *Bandora* Judgement, para. 14; *Annex H*, Observations in Intervention of the Government of the Netherlands concerning Application No. 37075/70, 27 July 2010, filed in the European Court of Human Rights, *Ahorugeze v. Sweden* Application No. 37075/09, para. 8 (“Netherlands Observations”).

<sup>145</sup> Motion, para. 31; *Annex I*, Memorandum of Understanding between the Special Court for Sierra Leone and The Government of the Republic of Rwanda, 2 October 2009; *Annex J*, GoR Brief in the *Uwinkindi* case, footnote 171.

<sup>146</sup> Motion, para. 32; Reply, para. 98.

<sup>147</sup> Response, paras. 75-78.

<sup>148</sup> Response, para. 86; *Annex 20*, African Union, African Commission on Human and People’s Rights, 47<sup>th</sup> Ordinary Session, 12 to 26 May 2010, Banjul, the Gambia, Concluding Observations and Recommendations on the Ninth and Tenth Periodic Reports of the Republic of Rwanda, para. 33; *Annex 27*, Penal Reform International, Great Lakes, Africa; *Annex 22*, Consideration of reports presented by the State Parties in Accordance with Article 40 of the Convention, Final Observations of the Human Rights Commission, Rwanda, CCPR/C/CRWA/CO/3, para. 15.



76. The Defence argues that in violation of Article 10(2)(a) of the ICCPR and its domestic law, Rwanda does not separate accused and convicted persons in detention.<sup>149</sup> Additionally, no information has been provided on how guarantees such as family visits will be implemented in practice.<sup>150</sup> The Prosecution contends that Rwanda's correctional services guarantee the implementation of international standards, and that the rights afforded to prisoners under Rwandan law are materially identical to those accorded by prevailing international standards. Accordingly, prisoners are separated and the guarantees will be effected in practice.<sup>151</sup>

77. The Defence submits that Mpanga prison is insufficiently close to Kigali to detain an accused on trial in Rwanda's capital. It further argues that Rwanda proposes to relocate Kigali Central prison, which may require moving prisoners elsewhere before 2013.<sup>152</sup> The GoR confirms that it plans to commence the construction of a state of the art detention facility to replace Kigali Central prison in 2013. Until its completion, Kigali Central prison and the separate unit for transferees will be retained.<sup>153</sup>

78. The Defence submits that the regime applicable to those convicted by the SCSL is inapplicable to transferees on the basis that it is funded by the SCSL.<sup>154</sup> Furthermore, persons convicted by the SCSL have been subjected to unsatisfactory treatment including, *inter alia*, looting and physical assault.<sup>155</sup> The Prosecution and the GoR clarify that the same regulations will apply to persons transferred by the ICTR and that sufficient funds are available to ensure this.<sup>156</sup> The Prosecution refutes the allegations of improper treatment citing the SCSL Special Registrar and Deputy Registrar's conclusion that the complaints were in relation to dissatisfaction over new telephone and supply assessment procedures. It also argues that the review of these complaints were in line with international human rights standards.<sup>157</sup>

### 8.3 Discussion

79. The Chamber notes that five Referral Benches and the Appeals Chamber have been satisfied that the conditions of detention in Rwanda meet international standards and therefore

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<sup>149</sup> Response, paras. 79, 80.

<sup>150</sup> Response, para. 83.

<sup>151</sup> Motion, *Annex J*, GoR Brief in the *Uwinkindi* case. Reply, paras. 95-97, *Annex F*, Rwarakabije Affidavit paras. 2, 3. Law No. 34/2010 of 12 November 2010 on the Establishment, Functioning and Organisation of Rwanda Correctional Service, 24 January 2011.

<sup>152</sup> Response, para. 84; *Annex 25*, "Kigali Central Prison to Relocate This Year", 14 January 2011.

<sup>153</sup> GoR Brief, paras. 21,22; *Annex H*, Affidavit of Paul Rwarakabije, Commissioner General of Rwandan Correctional Services, January 2012, para. 3 ("Second Rwarakabije Affidavit"). Reply, para. 102, *Annex F*, Rwarakabije Affidavit, para 5.

<sup>154</sup> Response, para. 81. Motion, *Annex A*, Memorandum of Understanding between the Special Court for Sierra Leone and the Government of the Republic of Rwanda, para. 4.1.

<sup>155</sup> Response, para. 82; *Annex 23*, Article "Sierra Leone War Criminals Complain about Rwanda Jail Treatment"; *Annex 24*: "In Rwanda Prison...Issa Sesay, Others in Danger".

<sup>156</sup> GoR Brief, para. 23; *Annex H*, Second Rwarakabije Affidavit. Reply, para. 99; *Annex H*, Affidavit of Anne Gahongayire, Secretary-General of the Supreme Court, 21 February 2012, para. 6 ("Gahongayire Affidavit").

<sup>157</sup> Reply, para. 100; *Annex G*, Remarks to the Rwandan authorities by Special Court Registrar Binta Mansaray at the end of the annual visit by the Registrar and Deputy Registrar, 9 November 2011.



convinced that the Accused will be detained in appropriate conditions if his case is referred to Rwanda.<sup>158</sup>

80. The Chamber recalls that, according to the jurisprudence, it is required to ascertain whether the laws governing detention incorporate relevant international standards.<sup>159</sup> It is therefore limited to an assessment of the applicable legal framework. The Chamber considers the Transfer Law, supplemented by the Rwandan law on prisoner rights to be in line with international human rights standards.

81. The Chamber considers the Defence argument that the international human rights law will not be implemented in practice to be purely speculative. However, with regard to this concern, the Chamber notes that both Rule 11 *bis* (D)(iv) and Article 23(2) of the Transfer Law provides for monitors and observers. This monitoring extends to conditions of detention.<sup>160</sup> The Chamber therefore envisages that the detention conditions of the Accused will be monitored at the pre-trial, trial and, if necessary, post-trial phases by either ICTR appointed monitors or the ICRC. Moreover, if adequate conditions are not provided the case is subject to revocation in accordance with Rule 11 *bis* (F).

82. The Chamber considers the specific Defence allegations in relation to the applicability of the SCSL regulations, the effects of the relocation of Kigali Central prison, the separation of prisoners and the implementation of international guarantees to be speculative and based on little credible evidence.<sup>161</sup> The Prosecution has refuted all of these contentions with references to Rwandan law and affidavits from Paul Rwarakabije, Commissioner General of Rwandan Correctional Services. Furthermore, the GoR has also attested that these principles and regulations will be applied, and that since the relocation of Kigali Central prison will not be implemented until 2013, Munyagishari will be unaffected.<sup>162</sup> Accordingly, the Chamber is not persuaded of their merit.

83. With regard to the Defence allegation concerning the mistreatment of SCSL convicts, the Chamber considers the remarks of the Special and Deputy registrars of the SCSL to be more persuasive than references to news articles cited by the Defence. The Registrars personally met with and interviewed the prisoners who had submitted complaints and concluded that there were no human rights abuses. Accordingly, the SCSL was satisfied with the implementation of the sentence enforcement agreement and the excellent cooperation of the Rwandan authorities.<sup>163</sup>

84. In relation to the Penal International, HRC and ACPHR statements, the Chamber recalls that the question before it is limited to whether Munyagishari will be detained

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<sup>158</sup> *Ntaganzwa* Referral Decision, para. 34; *Sikubwabo* Referral Decision, para. 50; *Kayishema*, Referral Decision, para. 52; *Uwinkindi* Referral Decision, para. 60; *Kanyarukiga* Referral Decision, para. X; *Uwinkindi* Appeal Decision, para. 37.

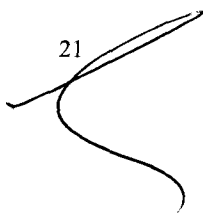
<sup>159</sup> *Uwinkindi* Appeal Decision, para. 37.

<sup>160</sup> Transfer Law, Article 23(2); *Uwinkindi* Referral Decision, para. 84 states: “[t]he Appeal Chamber considers that a trial chamber has the authority to dictate the scope of the monitoring and the frequency and nature of the reporting”, citing *Stanković* Appeal Decision, para. 52; *Uwinkindi* Appeal Decision, para. 38.

<sup>161</sup> Response, paras. 80-87.

<sup>162</sup> GoR Brief, paras. 21-23.

<sup>163</sup> Reply, *Annex G*, Remarks to the Rwandan authorities by the Special Court Registrar Binta Mansaray at the end of the Annual Visit by the Registrar and Deputy Registrar, 9 November 2011.





according to international standards. These reports concern the entire Rwandan prison system and do not consider the separate facilities that have been established for accused transferred from the Tribunal.

85. Accordingly, the Chamber concludes that the Rwandan laws governing detention incorporate relevant international standards. In combination with the monitoring mechanisms provided for by Rule 11 *bis* (D)(iv), and Article 23(2) of the Transfer Law, the Chamber is convinced that the accused will be detained in appropriate conditions if his case is transferred to Rwanda.

## 9. THE AVAILABILITY AND PROTECTION OF WITNESSES

### 9.1 Applicable Law

86. Pursuant to Rule 20(4)(e) of the ICTR Statute, and in accordance with fundamental international human rights standards, the Accused is entitled to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.<sup>164</sup> This provision is repeated *verbatim* in Article 13(10) of the Transfer Law.

### 9.2 Protections Contained within the Legal Framework

#### 9.2.1 Introduction

87. Article 13 of the Transfer Law states, *inter alia*, that “[w]ithout prejudice to the relevant laws of contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial.”<sup>165</sup> Article 14 of the Transfer Law states that “[a]ll witnesses who travel from abroad to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials.”<sup>166</sup> Pursuant to Article 25, the Transfer Law is *lex specialis* with regard to transfer cases.

88. The Prosecution, supported by the GoR and KBA, submits that the protections and immunities afforded to witnesses under the Transfer Law are adequate to ensure a fair trial for the Accused.<sup>167</sup> This is reinforced by an adequate and improved witness protection programme and alternative means for securing witness testimony.<sup>168</sup>

89. The Defence does not dispute that Rwanda has amended its laws regarding witness protection and immunity. However, it doubts that this legal framework will be applied in practice. It emphasises that despite the immunities afforded by the Transfer Law and Rwanda’s efforts to improve its witness protection programme, defence witnesses genuinely fear their own arrest, prosecution, conviction and detention. They have similar concerns as it relates to the safety of their families. Consequently, in violation of fair trial standards,

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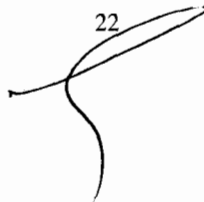
<sup>164</sup> ICTR Statute, Article 20 (4)(e); ICCPR, Article 14(e).

<sup>165</sup> Request, para. 37.

<sup>166</sup> Request, para. 37.

<sup>167</sup> Motion, paras. 36, 37; T. 12 April 2012, p. 13; GoR Brief, paras. 5-16; KBA Brief, para. 45.

<sup>168</sup> Motion, paras. 56-58.



Rwanda cannot guarantee that the Accused will be able to obtain the attendance and examination of witnesses under the same conditions as prosecution witnesses.<sup>169</sup>

## 9.2.2 Transfer Law

90. In addition to its assertion that the Chamber should not rely on an unimplemented legal framework, the Defence submits that Rwanda demonstrates a negative attitude towards ensuring fair trials by applying a separate legal regime providing fundamental guarantees to transferred accused rather than all accused persons. Had they been applied to all accused persons, the Chamber would have been able to assess their effective application prior to referral.<sup>170</sup> The Prosecution, GoR and KBA reiterate Rwanda's commitment to the application of the provisions of the Transfer Law.<sup>171</sup>

91. The Chamber notes that following the rejection of previous transfer requests in the *Kanyarukiga*, *Gatete* and *Hategekimana* cases and Rwanda's subsequent amendments to the Transfer Law, four Referral Chambers and the Appeals Chamber have concluded that Rwanda is capable of guaranteeing the right of transferred accused persons to obtain the attendance and examination of his or her witnesses under the same conditions as witnesses appearing against him or her.<sup>172</sup> The amendment to Article 13 of the Transfer Law to include immunity for statements made by witnesses at trial and the inclusion of alternative modes of testimony in Article 14 *bis*, discussed *supra*,<sup>173</sup> were essential to these findings.<sup>174</sup> In its assessment of whether the Accused's right to the attendance and examination of his witnesses will be respected, this Chamber has considered a number of different factors. As one such factor, it considers the immunities contained in the Transfer Law, subject to further conditions discussed in detail *infra*,<sup>175</sup> adequate to protect defence witnesses, diminish their fears of testifying and, accordingly, facilitate their attendance at trial.

92. The Chamber is unconvinced by the Defence argument that it cannot rely on unimplemented provisions in its determination of whether the Accused shall receive a fair trial. The Chamber notes that it is within the scope of its discretion to rely on the existence of an applicable legal framework as the primary basis for determining whether an accused will be able to secure the attendance of reluctant witnesses.<sup>176</sup> No previous Referral Chamber or the Appeals Chamber have considered that they were unable to make an objective assessment of Rwanda's ability to ensure a fair trial on the basis of an unimplemented applicable legal

<sup>169</sup> Response, paras. 94-118.

<sup>170</sup> Response, para. 96; *Annex 30*, Amnesty International Public Statement, "Completing the Work of the International Criminal Tribunals for Former Yugoslavia and Rwanda", AI Index REG 01/005/2010 of 26 November 2010, p. 9.

<sup>171</sup> Reply, paras. 109, 110. Motion, paras. 36-40; *Annex J*: GoR Brief in the *Uwinkindi* case, para. 54. KBA Brief, para. 4.

<sup>172</sup> *Ntaganzwa* Referral Decision, paras. 40-44; *Sikubwabo* Referral Decision, paras. 57-59, 89, 62, 67, 79; *Kayishema* Referral Decision, para. 95; *Uwinkindi* Referral Decision, paras. 61-131; *Uwinkindi* Appeal Decision, para. 68 *Kanyarukiga* Appeal Decision, para. 34; *Gatete* Appeal Decision; *Hategekimana* Appeal Decision, para. 30.

<sup>173</sup> See Section 9.2.1.

<sup>174</sup> *Ntaganzwa* Referral Decision, para. 40; *Sikubwabo* Referral Decision, para. 62; *Kayishema* Referral Decision, para. 64; *Uwinkindi* Appeal Decision, para. 62.

<sup>175</sup> See paras. 122-125, 128.

<sup>176</sup> *Uwinkindi* Appeal Decision, para. 64.

framework.<sup>177</sup> This Chamber feels similarly unrestrained and considers that the legal framework, subject to further conditions discussed below, sufficiently protective to ensure the fundamental right of the Accused to obtain the attendance and examination of his witnesses under the same conditions as those testifying for the prosecution.

### 9.2.3 Genocide Ideology

93. Article 13 of Rwanda's constitution states that "[r]evisionism, negationism and trivialisation of genocide are punishable by the Law". The Genocide Ideology Law of 2008 further defines the crime of genocide ideology, its characteristics, sentencing and penalties.<sup>178</sup> The law is intended to prevent hate speech, genocide denial and ethnic division following the 1994 genocide.<sup>179</sup>

94. The GoR states that subsequent to the *Uwinkindi* Referral Decision, the range of sentences for those convicted of genocide ideology has been reduced as part of an overhaul of the Penal Code.<sup>180</sup> The GoR explains that it aims to undertake further amendments to the 2008 Genocide Ideology Law but requires additional time to build public consensus and support.<sup>181</sup>

95. The Prosecution, relying on Article 13 of the Transfer Law and Rwanda's efforts to amend the Penal Code, submits that witnesses are protected from arrest and prosecution for the crime of genocide ideology.<sup>182</sup> There is no reason to believe Rwanda's judiciary will abdicate its responsibility to fairly and impartially interpret the laws.<sup>183</sup> There is no history of the arrest or prosecution of Rwandan defence witnesses for genocide ideology.<sup>184</sup>

96. The Defence and IADL contend that witnesses still fear prosecution, persecution, disappearance or incarceration for genocide ideology.<sup>185</sup> The Defence is concerned that Rwanda has failed to indicate both the date of adoption of the revised Penal Code and the date on which it will come into effect.<sup>186</sup> Furthermore, these alterations are insufficient to assuage witness fears of prosecution. The failure of the Rwandan government to reform the law is demonstrative of its lack of will to provide a fair trial for the Accused.<sup>187</sup>

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<sup>177</sup> *Ntaganzwa* Referral Decision, para. 40; *Sikubwabo* Referral Decision, para. 62; *Kayishema* Referral Decision, para. 64; *Uwinkindi* Appeal Decision, para. 62.

<sup>178</sup> Law No 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology ("Genocide Ideology Law").

<sup>179</sup> GoR Brief, para. 8; *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2011-75-R11bis, Letter from Martin Ngoga, Prosecutor General, Republic of Rwanda, to Judge Khalida Rachid Khan, 10 August 2011 ("Report on Genocide Ideology").

<sup>180</sup> GoR Brief, para. 6.

<sup>181</sup> Report on Genocide Ideology, pp. 2-6.

<sup>182</sup> Motion, paras. 45-47.

<sup>183</sup> Motion, para. 47; Report on Genocide Ideology, pp. 10, 11.

<sup>184</sup> Reply, paras. 122, 131, 133. Motion, *Annex J*, GoR Brief in the *Uwinkindi* case, paras. 55, 128-133.

<sup>185</sup> Response, para. 114; IADL Resolution, p. 490.

<sup>186</sup> Response, paras. 101, 113-116; *Annex 32*, Amnesty International Annual 2011 Report: Rwanda, July 2010, p. 5; *Annex 33*, Human Rights Watch, Presentation for EPU, Rwanda, July 2010, p. 5.

<sup>187</sup> Response, paras. 101, 113-116; *Annex 32*, Amnesty International Annual Report 2011, p.5; *Annex 33*, Human Rights Watch, Presentation for EPU, Rwanda, July 2010, p.5.



97. The Chamber notes that the criminalisation of genocide ideology has been consistently raised as an alleged barrier to fair trial in Rwanda because of the fear of prosecution it creates for potential witnesses.<sup>188</sup> However, the Chamber considers Article 13 of the Transfer Law, subject to further conditions discussed *infra*,<sup>189</sup> adequate to protect witnesses who may testify in the present case. The Chamber notes that, as requested by the *Uwinkindi* Referral Chamber,<sup>190</sup> Rwanda reported to the President of the ICTR on its proposed amendments to the law.<sup>191</sup> It has reduced the applicable sentences for the crime of genocide ideology and eliminated criminal responsibility for minors in the draft Penal Code.<sup>192</sup> Nonetheless, it expects that Rwanda will continue with its efforts at further amendments and requests that it submit another report updating the President of the Tribunal or the Residual Mechanism on the ongoing reforms. The Chamber expects that if in the course of the trial in Rwanda, the Accused, his counsel or any witnesses on his behalf makes a statement amounting to genocide ideology, he or she shall not be prosecuted in contravention of Article 13 of the Transfer Law.

#### 9.2.4 Protective Orders

98. Article 14 of the Transfer Law states that with regard to transferred cases, the High Court “shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence”. Rules 53, 69 and 75 include provisions on protective measures to ensure the non-disclosure of information including the identity and whereabouts of victims, witnesses or persons related or associated with them. Article 145 of the Code of Criminal Procedure enables courts to order closed sessions where a public hearing may be detrimental to public order and good morals, or necessary for the protection of witnesses.<sup>193</sup> Rule 11 *bis* (D)(ii) states that where an order is issued pursuant to Rule 11 *bis*, the Trial Chamber may order that protective measures for certain witnesses or victims remain in force.

99. The Defence submits that these protective measures are insufficient to mitigate the fear of defence witnesses.<sup>194</sup> Moreover, Article 128 of the Law on Evidence and its Production affords a wider and higher degree of protection to prosecution witnesses.<sup>195</sup> It demonstrates the well-established bias in favour of prosecution witnesses that is inherent in the Rwandan justice system.<sup>196</sup>

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<sup>188</sup> *Sikubwabo* Referral Decision, paras. 63-37; *Kayishema* Referral Decision, paras. 65-69; *Uwinkindi* Referral Decision, paras. 94-96.

<sup>189</sup> See Paras 122-125, 128.

<sup>190</sup> *Uwinkindi* Referral Decision, para. 96.

<sup>191</sup> Report on Genocide Ideology, pp. 2-6.

<sup>192</sup> GoR Brief, para. 8.

<sup>193</sup> Motion, para. 41.

<sup>194</sup> Response, para. 110.

<sup>195</sup> Response, para. 102; *Annex 34*, Law No. 15/2004 of 12 June 2004 Relating to Evidence and its Production, Article 128 (“Law Relating to Evidence and its Production”).

<sup>196</sup> Response, para. 104; T. 12 April 2012, p. 25.



100. The Prosecution replies that pursuant to Article 25, the Transfer Law is *lex specialis* and *lex posterior* with respect to transferred cases. Moreover, the provisions of Article 128 are consonant with Article 14 of the Transfer Law.<sup>197</sup>

101. The Chamber does not consider Article 128 of the Law on Evidence and its Production to demonstrate that Rwanda is biased in favour of prosecution witnesses. Article 14 of the Transfer Law will be applied to transfer cases.<sup>198</sup> Article 14, in addition to Article 145 of the Criminal Code and Rule 11 *bis* (D)(ii) provide adequate protective measures for prosecution and defence witnesses and their families.

102. In the view of the Chamber, the legal immunities contained in the Transfer Law and the provisions delineating robust protective mechanisms constitute an adequate legal framework to ensure the attendance of defence witnesses in Rwanda. The Chamber places its confidence in Rwanda that it will apply the legal framework appropriately. The Chamber emphasises that should it come to the attention of the appointed monitors that it is not, the case is subject to revocation pursuant to Rule 11 *bis* (F).

### 9.3 Witness Protection Programmes

103. The Prosecution submits that the witness protection programme is effective. The Victims and Witness Support Unit (“VWSU”), administered by the National Public Prosecution Authority (“NPPA”), has seen an increase in staff, size, funding and awareness-raising programmes.<sup>199</sup> In 2011, the ICTR Registry relied on the VWSU to investigate 73 incidents of threats against witnesses.<sup>200</sup> It also provided assistance to the ICC and domestic courts in the Netherlands, Norway, France, Germany, Canada, Sweden and Denmark.<sup>201</sup> According to the Prosecution and the KBA, the VWSU does not distinguish between prosecution and defence witnesses.<sup>202</sup>

104. The KBA attests that from the initial phase of investigations, both prosecution and defence witnesses are equally entitled to and benefit from its protection measures.<sup>203</sup> In response to concerns that defence witnesses might be reluctant to seek assistance from the NPPA, which is managed by the VWSU, Rwanda has established a Witness Protection Unit (“WPU”), administered by the Chief Registrar of the Supreme Court.<sup>204</sup> It is now operational

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<sup>197</sup> Response, para. 136; Reply, paras. 135-137.

<sup>198</sup> Transfer Law, Articles 1, 25.

<sup>199</sup> Motion, para. 43; AC para. 38; TC, para. 129.

<sup>200</sup> Reply, para. 139; GoR brief, paras. 14-16.

<sup>201</sup> GoR brief, paras. 11-16, *Annex D*, Affidavit of Anne Gahongayire, Secretary-General of the Supreme Court of Rwanda, paras. 2-4 (“GoR Brief Gahongayire Affidavit”); *Annex F*, Affidavit of Theoneste Kareenzi, Coordinator of Witness and Victim Protection and Support Unit, paras. 3-8 (“Kareenzi Affidavit”). Motion, *Annex J*, GoR brief in the *Uwinkindi* case, pp. 10-15, 30-31; Reply, para. 139.

<sup>202</sup> Prosecution Reply, para. 139; KBA Brief, para. 49.

<sup>203</sup> GoR brief, paras. 11-16; *Annex D*, GoR Brief Gahongayire Affidavit, paras. 2-4; *Annex F*, Kareenzi Affidavit, paras. 3-8. Motion, *Annex J*, GoR Brief in the *Uwinkindi* case, pp. 10-15, 30-31. Reply, para. 139. KBA Brief, para. 49.

<sup>204</sup> GoR Brief, paras. 11-16; *Annex D*, GoR Brief Gahongayire Affidavit, paras. 2-4; *Annex F*, Kareenzi Affidavit. Motion, para. 43; *Annex J*, GoR Brief in the *Uwinkindi* case, pp. 10-15, 30-31; *Uwinkindi* Referral Decision, para. 131; Reply, para. 138.

and shall recruit an international consultant with prior experience in the provision of witness services at the international level.<sup>205</sup>

105. The Defence asserts that the witness protection measures are insufficient to alleviate the fears of defence witnesses. It maintains that Article 14 of the Transfer Law inappropriately tasks the Prosecutor General with handling defence witnesses and safeguarding their testimony.<sup>206</sup> It maintains that witnesses will be afraid to seek help from the VWSU.<sup>207</sup> It disputes that the VWSU is unaware which party is seeking the witnesses.<sup>208</sup> Citing a Human Rights Watch (“HRW”) report, the Defence fears that the role of the WPU will be strictly administrative, and regrets that its practical efficiency cannot yet be assessed because it was established only in reaction to the *Uwinkindi* referral decision.<sup>209</sup>

106. The Prosecution replies that the Fugitive Tracking Unit (“FTU”), headed by the NPPA, is the logical choice to arrange the logistics for witnesses travelling to Rwanda since it works regularly with foreign governments. The WPU has been established in response to criticism against the VWSU. Article 14 of the Transfer Law affords witnesses immunity.<sup>210</sup>

107. The Chamber recognises that defence witnesses may fear approaching the VWSU or utilising services provided by the FTU because both are administered by the Prosecutor General. However, this does not necessarily render them inadequate.<sup>211</sup> Furthermore, Rwanda has established the WPU under the auspices of the judiciary. This, in combination with the immunity provisions contained within Articles 13 and 14 of the Transfer Law, subject to further conditions discussed *infra*,<sup>212</sup> should address any witness protection problems that may arise.

108. The Chamber observes 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 and establish the WPU in order to address these concerns, and, in particular, those held by defence witnesses. The Chamber is further satisfied that full implementation of these mechanisms and application of these laws will increase the likelihood that defence witnesses will appear before the Rwandan courts.

109. In reaching this conclusion, this Chamber is mindful that the Trial Chamber in the *Bizimungu et al.* case issued a confidential decision in response to submissions on witness intimidation in the *Mugiraneza* case. The allegations primarily concerned IBUKA members, but the Chamber also concluded that a Rwandan government official employed by the VWSU had threatened and intimidated a witness for giving evidence on Mugiraneza’s

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<sup>205</sup> Reply, para. 142. GoR Brief, paras. 11-12; *Annex D*, GoR Brief Gahongayire Affidavit, paras. 2-3.

<sup>206</sup> Response, para. 105; T. 12 April 2012, pp. 24, 25.

<sup>207</sup> Response, para. 105.

<sup>208</sup> Response, para. 107.

<sup>209</sup> Response, para. 109; *Annex 19*, Human Rights Watch *Amicus Curiae* Brief filed in the matter of the *Prosecutor v. Jean-Bosco Uwinkindi* (ICTR-2001-75-1), para. 62.

<sup>210</sup> Reply, paras. 143-146. Motion, *Annex J*, GoR Brief in the *Uwinkindi* case, *Exhibit D*, Siboyintore Affidavit, paras. 2-4.

<sup>211</sup> *Kanyarukiga* Appeal Decision, para. 27.

<sup>212</sup> See paras. 122-125, 128.



behalf.<sup>213</sup> The Chamber does not consider that one incidence of witness intimidation sufficient to demonstrate that the VWSU is ineffective. The Defence has failed to adduce further examples. Moreover, the *Bizimungu et al.* Trial Chamber concluded that the Rwandan government had taken decisive steps to address the alleged improper conduct by the VWSU official.<sup>214</sup> The Chamber considers Rwanda's recent efforts to improve the VWSU demonstrative of a continuation of its efforts to ensure a functional and effective VWSU.<sup>215</sup>

110. Following the rejection of previous referrals in the *Kanyarukiga*, *Gatete* and *Hategekimana* cases, and the referral in the *Uwinkindi* case, Rwanda has made efforts to develop and expand the protection services available to witnesses. The Chamber considers these improvements complementary to Rwanda's amendment to its Transfer Laws regarding witness immunity and is satisfied that they will facilitate the attendance of defence witnesses.

111. The Chamber is of the view, that should witnesses suffer harassment or intimidation, it is the duty of the High Court or Supreme Court to initiate investigations to clarify the facts and ensure necessary protection of the witness. The Chamber reiterates that if this is not done, or if witness protection measures are insufficient, it would be a matter for evaluation by the monitoring mechanism. To the extent the practical implementation of these measures fail to obtain the attendance and examination of witnesses on the Accused's behalf under the same conditions as witnesses against him, the case is subject to revocation in accordance with Rule 11 *bis* (F).

## 9.4 Ability to Call Witnesses

### 9.4.1 Factual Evidence of Actual Appearance of Defence Witnesses

112. The Prosecution, relying on the positive experiences of the Oslo District Court,<sup>216</sup> the Government of the Netherlands,<sup>217</sup> and the High Court of Rwanda,<sup>218</sup> asserts that Defence witnesses in Rwanda are willing to testify in genocide trials in practice. In the KBA's experience, witnesses testify freely for both the prosecution and defence. It notes that for more than 11 years, witnesses residing in Rwanda have testified on behalf of both the prosecution and defence at the ICTR and in foreign jurisdictions, most of whom returned home without problem.<sup>219</sup>

113. The Defence contends that, in reality, defence witnesses will not appear in the present case because they genuinely fear accusation, arrest, detention or conviction. They possess similar fears as it relates to the safety of their families.<sup>220</sup> The amendments to Rwandan law

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<sup>213</sup> *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-T, Confidential Decision on Request to Initiate Contempt Proceedings (TC), 19 August 2011, paras. 41, 48, 51, 52 ("Bizimungu Confidential Decision").

<sup>214</sup> Bizimungu Confidential Decision, para. 54.

<sup>215</sup> Motion, para. 43; *Uwinkindi* Appeal Decision, para. 38; *Uwinkindi* Referral Decision, para. 129.

<sup>216</sup> Motion, para. 49; *Annex B*, Bandora Judgement, p. 12. T. 12 April 2012, pp. 13, 14.

<sup>217</sup> Motion, para. 50; *Annex H*, Netherlands Observations, para. 7. T. 12 April 2012, p. 14.

<sup>218</sup> *Uwinkindi* Referral Decision, paras. 64, 100. Motion, *Annex N*, *Prosecutor v. Uwinkindi*, Case No. ICTR-2001-75R11bis, Republic of Rwanda's Response to 6 June 2011 Order to Provide Further Information regarding 36 Genocide Cases at the High Court, 20 June 2011, paras. 2-16. T. 12 April 2012, p. 13.

<sup>219</sup> KBA Brief, paras. 44, 46; T. 12 April 2012, p. 13.

<sup>220</sup> Response, para. 119; *Confidential Annex 51*.



may have reduced the danger but they have not eliminated witness fears.<sup>221</sup> It has presented 16 affidavits from potential defence witnesses in the present case stating they cannot or do not want to testify in Rwanda.<sup>222</sup>

114. The Prosecution challenges the affidavits on the basis that they give suspiciously similar information. It further argues that their veracity cannot be probed because the identities of the witnesses are unknown.<sup>223</sup> Similarly, it is unknown if the fears can be ameliorated by witness protection services or court orders.<sup>224</sup> While all witnesses stated that they were informed witness protection mechanisms had been put in place, there is no indication that they were advised of the immunities under Article 13 and 14 of the Transfer Law.<sup>225</sup> It notes that, pursuant to Rule 11 *bis* (D)(ii), the Chamber can order protective measures for family members. Following referral, witnesses can apply to the High Court for similar measures.<sup>226</sup> There has not been a single instance where a witness in a criminal case has been arrested or prosecuted for violations of the law on genocide ideology.<sup>227</sup>

115. The Chamber considers that the affidavits are *prima facie* credible and rejects the Prosecution suggestion that the statements contained therein do not reflect positions taken by the prospective defence witnesses. Notwithstanding, it is beyond the discretion of this Chamber to subjectively determine whether witness fears are well-founded. Its role is limited to an objective assessment of the likelihood that the Accused will be able to secure the appearance of witnesses on his behalf under the same conditions as those testifying against him.<sup>228</sup> The Chamber is cognisant that, regardless of whether the fears of witnesses are well-founded, witnesses may be unwilling to testify for the Defence in Rwanda as a result of the fear that they may face consequences for doing so.<sup>229</sup>

116. The Defence has adduced evidence in the form of witness affidavits,<sup>230</sup> and NGO reports highlighting the fears of potential defence witnesses about testifying in Rwanda.<sup>231</sup> The Chamber recognises that reconciliation and the socio-political context following the genocide in Rwanda is complex and sensitive. It accepts that some witnesses may fear being threatened, harassed, detained or killed. Likewise, some may be of the opinion that the Rwandan authorities will inevitably victimise them.<sup>232</sup> Most witnesses who provided affidavits in this proceeding expressed concerns that if they testify for the Defence in Rwanda, their family members still living there will face repercussions. Some state that members of their family have been killed in Rwanda because they testified for the defence at

<sup>221</sup> Response, paras. 94-101.

<sup>222</sup> Response, para. 119; *Confidential Annex 51*.

<sup>223</sup> Reply, paras. 118, 119.

<sup>224</sup> Reply, paras. 118, 119.

<sup>225</sup> Reply, para. 120.

<sup>226</sup> Reply, para. 121.

<sup>227</sup> Reply, para. 151. Motion, *Annex M*, GoR Brief in the *Uwinkindi* case, para. 55.

<sup>228</sup> *Uwinkindi* Appeal Decision, para. 61.

<sup>229</sup> *Kanyarukiga* Appeal Decision, para. 26; *Hategekimana* Appeal Decision, para. 22.

<sup>230</sup> Response, *Confidential Annexes 49-51*.

<sup>231</sup> Response, *Annex 32*, Amnesty International Report 2011, Rwanda; *Annex 33*, Human Rights Watch Report, Presentation for EPU, Rwanda July 2010.

<sup>232</sup> Response, *Confidential Annex 51*, TKM, TSR, TST, TSH, TSJ.



the ICTR.<sup>233</sup> They unequivocally state that they are willing to testify before the ICTR, but not before a Rwandan court.<sup>234</sup>

117. The Chamber takes note of these fears and recalls that previous requests for transfer to Rwanda were rejected on the basis that Defence witnesses feared to testify before Rwandan courts.<sup>235</sup> However, following the amendments to the Transfer Law in 2009 and improvements to the witness protection services, the Chamber is satisfied that there now exist adequate safeguards to address the fears of witnesses and increase the likelihood of their appearance. It repeats and emphasises that it is limited to an objective assessment of the likelihood that the Accused's witnesses will appear on his behalf.<sup>236</sup>

118. Indeed, the Chamber recalls that it will be the role of the Rwandan judiciary as well as the independent monitor appointed to continually review and assess the situation on the ground. To the extent the legal framework and protective measures fail to ensure the attendance of defence witnesses as guaranteed by Article 13(10) of the Transfer Law, the Chamber has full faith that the Rwandan judiciary as well as the independent monitor shall handle the matter appropriately. Should this not occur, the case is subject to revocation in accordance with Rule 11 *bis* (F).

#### 9.4.2 Witnesses Inside Rwanda

119. Articles 54 and 55 of the Rwandan Code of Criminal Procedure obligate witnesses in Rwanda to appear and give evidence. Article 57 provides that a witness who fails to appear and testify without advancing a justifiable excuse after being summoned is subject to criminal prosecution.<sup>237</sup>

120. The Defence submits that these provisions are inapplicable to Defence witnesses and therefore inadequate to secure their appearance. Despite the fact that the Constitution and Transfer Law guarantee the Accused the right to have witnesses appear under the same conditions as prosecution witnesses and take precedence over the Code of Criminal Procedure, Articles 54 and 55 fail to respect these laws. Furthermore, if applied to defence witnesses, it will only serve to intimidate them.<sup>238</sup> The Prosecution responds that Articles 54, 55 and 57 refer to the role of the Prosecutor rather than to prosecution witnesses. The Prosecutor is tasked with the investigation of the case and collection of evidence *à charge* and *à discharge* in Rwandan procedure. If the Defence wants to summon a defence witness it can do so under Articles 66 and 74 of the Law Relating to Evidence and its Production.<sup>239</sup>

121. The Chamber recalls that it is within its discretion to find that the ability to compel testimony is a factor which can be taken into account in addressing the subjective fears of

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<sup>233</sup> Response, *Confidential Annex 51*, TCBN.

<sup>234</sup> Response, *Confidential Annex 51*, TCBT, TCBB, TCBI, TCBN, TCBH, TTK, TTH, TKM, TUB, TUF, TKH, TKM, TSR, TST, TSH, TSJ, TSS.

<sup>235</sup> See *Munyakazi* Appeal Decision, paras. 32, 37, 40; *Kanyarukiga* Appeal Decision, paras. 23, 26-28, 31, 35; *Hategikimana* Appeal Decision, paras. 15, 21-22, 26.

<sup>236</sup> *Uwinkindi* Referral Decision, para. 85.

<sup>237</sup> Motion, para. 57.

<sup>238</sup> Response, paras. 111, 112; Transfer Law, Articles 13(10) and 25; Rwandan Constitution, *preamble*, para. 9.

<sup>239</sup> Reply, para. 149; KBA Brief, paras. 39-43.

defence witnesses and increasing the likelihood of their appearance.<sup>240</sup> The Chamber sees no merit in the Defence argument that Code of Criminal Procedure creates a bias in favour of the appearance of the prosecution witnesses. Articles 54 and 55 clearly refer to the powers of the “Public Prosecutor” rather than prosecution witnesses. Furthermore, as noted by the Prosecution, the Defence can summon witnesses under Articles 66 and 74 of the Law Relating to Evidence and its Production. The Transfer Law is the *lex specialis* for all transferred cases and guarantees that the Accused will have the right to call his witnesses under the same condition as prosecution witnesses.<sup>241</sup> The Code of Criminal Procedure must be interpreted in accordance with these provisions. Indeed, the Defence itself states that the Transfer Law will “certainly be applied”.<sup>242</sup>

122. In addition to the concerns stated above, the Defence also submits that witnesses who testify in its transfer case may provide evidence that is relevant to another non-transfer case. On this basis, these witnesses may be subsequently compelled to testify in other domestic proceedings pursuant to Articles 54 and 55 of the Code of Criminal Procedure. However, compelled testimony given in domestic proceedings would not be afforded the same immunities as those provided in the Transfer Law, which are only applicable to transfer cases.<sup>243</sup> The Defence argument implies that a loophole exists that would allow for the prosecution of defence witnesses notwithstanding protections in the Transfer Law. Conceivably, the situation is exacerbated as witnesses testifying for the Defence may have considerably greater concerns than prosecution witnesses that their evidence may be a basis for prosecution under Rwanda’s genocide ideology laws. As noted by Amnesty International, only a repeal of the genocide ideology law and the policy on limiting the freedom of expression will reassure witnesses.<sup>244</sup> The Prosecution responds that Article 13 protects witnesses from anything said or done in the course of a referred case.<sup>245</sup>

123. Notwithstanding, the substantial and significant legislative reforms taken by Rwanda to ensure that the defence will be able to secure the attendance and examination of defence witnesses, the Chamber is concerned that witnesses in Rwanda are exposed to a gap in immunity. Specifically, the Chamber is satisfied that the Defence submissions demonstrate that a witness in Rwanda may be compelled to testify in other domestic cases, pursuant to Articles 54 and 55 of the Code of Criminal Procedure, as a result of the evidence adduced during his or her testimony in a transfer proceeding. The Prosecution, GoR and KBA have failed to demonstrate that this position is incorrect or that immunity afforded to witnesses by Article 13 of the Transfer Law would apply in domestic cases.

124. In the Chamber’s view, this potential loophole in the existing legal framework may create objectively reasonable fears among defence witnesses in Rwanda and interfere with the ability of the Accused to obtain witnesses as guaranteed by Article 20(4)(e) of the ICTR Statute and Article 13(10) of the Transfer Law. This fear of prosecution is a product of both the laws criminalising genocide ideology and the differences between the protections

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<sup>240</sup> *Uwinkindi* Appeal Decision, para. 64.

<sup>241</sup> Transfer Law, Articles 13(9), 25.

<sup>242</sup> Response, para. 103.

<sup>243</sup> Transfer Law, Article 1.

<sup>244</sup> Response, para. 112; *Annex 31*, Amnesty International “Safer to Stay Silent”, p. 30; T. 12 April 2012, pp. 26, 43.

<sup>245</sup> T. 12 April 2012, p. 35.



afforded to witnesses in transferred cases as opposed to domestic cases. The Chamber recalls that Rwanda is working towards amending the laws criminalising genocide ideology.<sup>246</sup> Nonetheless, the Chamber observes that according to the report submitted to the President, none of these intended amendments includes abolishment of the criminalisation of genocide ideology.<sup>247</sup> Consequently, the potential gap in immunity will not be closed by amendments to the law on genocide ideology. Under these circumstances, the Chamber considers that these objectively justified fears would be eliminated if the Prosecutor General:

1. demonstrates in writing to the President of this Tribunal or the Residual Mechanism that Articles 54 and 55 of the Code of Criminal Procedure *could* not be used to compel witnesses testifying in a transfer case to testify in a subsequent domestic case on the basis of their evidence in this transfer case; or
2. makes a binding concession in writing to the President of this Tribunal or the Residual Mechanism that Articles 54 and 55 of the Code of Criminal Procedure *would* not be used to compel witnesses testifying in a transfer case to testify in a subsequent domestic case on the basis of their evidence in this transfer case; or
3. makes a binding concession in writing to the President of this Tribunal or the Residual Mechanism that any witnesses who testify in this transfer case and who may be then compelled to testify in subsequent domestic cases pursuant to Articles 54 and 55 of the Code of Criminal Procedure shall also be granted the same immunities contained within Article 13 of the Transfer Law while participating in such domestic cases.

125. The Chamber considers that any transfer of this proceeding would necessarily have to be conditioned on any one of the above referenced assurances and only once the President of the Tribunal or the Residual Mechanism is satisfied that this category of potential witnesses shall not risk prosecution that would otherwise be prohibited by Article 13 of the Transfer Law as an indirect consequence of appearing as witnesses in the transfer case. The Chamber considers that this measure should increase the likelihood of the attendance of witnesses and therefore contribute to guaranteeing the Accused's right to the attendance and examination of his witnesses under the same conditions as those of the prosecution as guaranteed by Article 20(4)(e) of the ICTR Statute and Article 13(10) of the Transfer Law.

### 9.4.3 Witnesses Outside Rwanda

126. It is usual that many of the witnesses who testify in cases before the Tribunal reside outside of Rwanda. Article 14 of the Transfer Law provides immunity during travel to and from the trial and Article 14 *bis* provides for alternative modes of testimony, as discussed *infra*.<sup>248</sup> Nevertheless, unlike witnesses in Rwanda, witnesses outside of Rwanda cannot be compelled to testify.

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<sup>246</sup> See Section 9.2.3.

<sup>247</sup> Report on Genocide Ideology, pp. 2-6.

<sup>248</sup> See Section. 9.4.4.

127. The IADL submits that this category of witnesses fear prosecution if they return to Rwanda to testify.<sup>249</sup> The Prosecution notes that Rwanda has no power to compel witnesses abroad to testify in Rwanda and argues that they can testify via the alternative means contained in Article 14 *bis*. Additionally, Rwanda has mutual assistance agreements with several states and Article 28 of the ICTR Statute as well as Security Council resolution 1503 provides a basis for requesting and obtaining cooperation from member states to facilitate witness testimony from abroad.<sup>250</sup>

128. The Chamber considers the insertion of Article 14 *bis* in the Transfer Law and Rwanda's mutual assistance agreements with several other States demonstrative of Rwanda's efforts to facilitate the testimony of this category of witness. Furthermore, the United Nations Security Council Resolution 1503, calling on all states to assist national jurisdictions where cases have been referred, provides a clear basis for requesting and obtaining cooperation.<sup>251</sup> The Chamber observes that, as discussed *supra*,<sup>252</sup> Article 14 of the Transfer Law provides witnesses who travel from abroad to testify with immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials. The Chamber expects that the same immunities discussed *supra* will also applied to these witnesses.<sup>253</sup> In this regard, they will not be subject to prosecution in contravention to the immunities provided by the Transfer Law as the indirect result of their participation in the transfer case.

#### 9.4.4 Alternative Modes of Testimony

129. The Prosecution highlights that if defence witnesses are still afraid to appear before Rwandan courts, Article 14 *bis* of the Transfer Law permits the provision of testimony via written deposition, video-link or before a judge sitting in a foreign jurisdiction. The GoR has enhanced its video-link capacity following the *Uwinkindi* referral.<sup>254</sup> The technology can also be deployed to foreign jurisdictions.<sup>255</sup> These modes are consistent with ICTR Rules of Procedure and Evidence. With appropriate logistical support, the Accused could also travel to the witnesses' location to hear *viva voce* testimony.<sup>256</sup>

130. The Defence submits that the video-link option is costly and time consuming. The GoR has not explained where the funds will come from.<sup>257</sup> The Prosecution reiterates that the

<sup>249</sup> IADL Resolution, p. 490.

<sup>250</sup> T. 12 April 2012, p. 16, 32-33; *Hategekimana* Appeal Decision, para. 25.

<sup>251</sup> *Munyakazi* Appeal Decision, para. 41; Security Council Resolution 1503 states at Para. 1 that the Security Council "[c]alls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR [...]", S/RES/1503 (2003). See *Stanković* Appeal Decision, para. 26, where the Appeal Chamber approved of the Trial Chamber's consideration of Security Council Resolution 1503 and interpreted this paragraph of the resolution as implicitly including cooperation with respect to witnesses; *Kanyarukiga* Appeal Decision, para. 32.

<sup>252</sup> See paras. 87, 126.

<sup>253</sup> See paras. 122-125.

<sup>254</sup> GoR Brief, para. 17; *Annex G*, Affidavit of Fred Gashemeza, Director General in Charge of ICTR for the Supreme Court of Rwanda, para. 3 ("Gashemeza Affidavit"); T. 12 April 2012, pp. 14, 15.

<sup>255</sup> GoR Brief, paras. 18-20; *Annex G*, Gashemeza Affidavit, addendum A.

<sup>256</sup> Motion, para. 56; Transfer Law, Article 14 *bis*; ICTR Rules, Rules 71, 90 (A); *Prosecutor v. Jean Paul Akayesu* Judgement, Case No. ICTR-96-4-A, Judgement (AC), para. 134, 286 ("*Akayesu* Appeal Judgement"); Reply, paras. 113, 123-125.

<sup>257</sup> Response, para. 98.

budget for transferred cases was increased in January to 100 million Rwandan francs and that appropriate budget provisions will be made for 2012.<sup>258</sup>

131. The Chamber welcomes Rwanda's efforts to facilitate the provision of testimony by witnesses both inside and outside of Rwanda by providing three alternative modes of testimony in the form of video-link, written deposition and *viva voce* testimony before a judge in a foreign jurisdiction. Despite the fact that the states in which potential defence witnesses are located may present logistical and technical challenges to the use of video-link technology, the Chamber recalls that it is not required to determine whether video-link is technically feasible in each of these locations.<sup>259</sup>

132. The Chamber is satisfied that Rwanda has indicated that sufficient funds have been allocated to its budget for transfer cases, and that such funds would be available for these alternative methods of obtaining evidence. Nonetheless, given the obvious and significant practical hurdles that exist as it relates to each of these alternative modes of obtaining evidence, the Chamber considers it necessary that there exist a transparent procedure for the use of alternative modes of testimony in order to ensure that the rights of the Accused are respected and to enable effective monitoring. In this context, the Chamber notes that Article 14 *bis* of the Transfer Law includes requirements for the activation of the modalities that comport with Rules 71(D) and 90 of the ICTR Rules of Procedure and Evidence. The Chamber believes that these will assist in ensuring that should the relevant requirements be fulfilled, the use of 1) video-link testimony, 2) testimony in the form written deposition or 3) *viva voce* testimony before a judge in a foreign jurisdiction will occur in practice when necessary.

133. The Defence submits that the appearance of defence witnesses in circumstances substantially different from those of prosecution witnesses will amount to a violation of the principle of equality of arms.<sup>260</sup> The Prosecution responds that, as in the *Uwinkindi* case, the Defence has failed to identify how many of his potential witnesses might fall into this category. It has equally failed to notify whether such witnesses constitute a sufficiently significant part of his possible evidence.<sup>261</sup>

134. The Chamber notes that it constitutes a violation of the principle of equality of arms if the majority of defence witnesses appeared by means substantially different from those for the prosecution.<sup>262</sup> However, it cannot be said that hearing a portion of evidence from either party by alternative means *per se* amounts to a violation of an accused's rights.<sup>263</sup> The relevant inquiry is a fact-based assessment that is best left to a Chamber with a fully developed record as to the nature of the evidence against the accused, and with specific knowledge of the nature of the proposed defence case and the relevant sources of evidence.<sup>264</sup> The Chamber, having reviewed the relevant submissions and supporting affidavits presented by the Defence does not consider that his defence will necessarily rely on alternate modes of

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<sup>258</sup> Reply, para. 115; GoR Brief, para. 19.

<sup>259</sup> *Uwinkindi* Appeal Decision, para. 66.

<sup>260</sup> Response, para. 99.

<sup>261</sup> Reply, para. 116.

<sup>262</sup> *Uwinkindi* Appeal Decision, para. 67; *Munyakazi* Appeal Decision, para. 42.

<sup>263</sup> *Uwinkindi* Appeal Decision, para. 67.

<sup>264</sup> *Uwinkindi* Appeal Decision, para. 67.

obtaining testimony to the extent that it will necessarily render the trial unfair. Accordingly, the Chamber cannot conclude based on the evidence before it that there will be an inequality of arms. Notwithstanding, the Chamber emphasises that should such a situation arise, the case is subject to revocation in accordance with Rule 11 *bis* (F).

135. The provision of testimony by witnesses located outside of Rwanda *via* the alternative modes of testimony contained in Rule 14 *bis* of the Transfer Law presents unique challenges. Notwithstanding the finding above, the Defence has demonstrated that a considerable number of prospective witnesses live outside of Rwanda. Under the circumstances, the Chamber considers it necessary in the present case that Munyagishari's defence team include a lawyer with previous experience in eliciting testimony from international witnesses and familiarity with video-link technology. As detailed *infra*, such a lawyer can be a current or prospective member of the Kigali Bar Association.<sup>265</sup>

#### 9.4.5 Conclusion

136. The Chamber recalls that four Referral Chambers and the Appeals Chamber have held that Rwanda is competent to ensure the right of transferred accused to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.<sup>266</sup>

137. The Chamber understands that defence witnesses may fear testifying before Rwandan courts. However, the amendments to the Transfer Law regarding witness immunity, the creation of a new witness protection programme, efforts to facilitate testimony through alternate means and the procedural safeguards that this Chamber is imposing as a condition precedent to the transfer of this case, will ensure the Accused's right to obtain witnesses as guaranteed by Article 20 (4)(e) of the ICTR Statute and Article 13(10) of the Transfer Law.

138. The Chamber recalls that should the implementation of the Transfer Law fail to protect the rights of the Accused, the case is subject to revocation in accordance with Rule 11 *bis* (F). The Appeals Chamber decided in relation to the *Uwinkindi* case that subsequent to an initial report, monitors should provide monthly reports until such time as the President decides otherwise.<sup>267</sup> The Chamber considers that this requirement should be applied to the present case. The Chamber is confident that should Munyagishari's right to call witnesses be violated, it would be reported forthwith. In this regard, this Chamber expects that the ICTR appointed monitors will meet with defence counsel and the WPU on the conditions set forth in the President's Decision on the monitoring arrangements for the *Uwinkindi* trial in the Republic of Rwanda and shall address any concerns raised by the Defence in regular reports to this Tribunal.<sup>268</sup>

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<sup>265</sup> See para. 149.

<sup>266</sup> *Ntanzwa* Referral Decision, paras. 40-44; *Sikubwabo* Referral Decision, paras. 57-59, 89, 62, 67, 79; *Kayishema* Referral Decision, para. 95; *Uwinkindi* Referral Decision, paras. 61-131; *Uwinkindi* Appeal Decision, para. 68

<sup>267</sup> *Uwinkindi* Appeal Decision, para. 52; President's Decision in the *Uwinkindi* Case, para. 24.

<sup>268</sup> *Prosecutor v. Jean Uwinkindi*, ICTR-01-75-R11bis, Office of the President, Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012, paras. 18-34 ("President's Decision in the *Uwinkindi* Case").

139. Accordingly, the Chamber is satisfied that Rwanda has the capacity to ensure and respect the right of the Accused to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him as guaranteed by Article 20(4)(e) of the ICTR Statute and Article 13(10) of the Transfer Law.

## 10. RIGHT TO AN EFFECTIVE DEFENCE

### 10.1 Applicable Law

140. Pursuant to Article 20(4)(b) of the ICTR Statute and Article 14(3) of the ICCPR, accused persons have the right to adequate time and facilities for the preparation of their defence and to defend themselves through the counsel of their choice. Article 20(4)(d) of the ICTR Statute provides that legal assistance shall be assigned without payment where required by the interests of justice, or if the accused has insufficient means to pay for it. Articles 13(4) and 13(6) of the Rwandan Transfer Law repeat these provisions.

### 10.2 Submissions

#### 10.2.1 Introduction

141. Both the Prosecution and KBA submit that the right to legal representation is guaranteed by Rwandan law and secured by a sufficiently funded legal aid system.<sup>269</sup> The Accused will be guaranteed the right to counsel.<sup>270</sup> Furthermore, a sufficient number of competent and experienced lawyers exist to represent the Accused. Many have experience in complex genocide trials and five are currently enrolled on the ICTR list of potential defence counsel.<sup>271</sup> Foreign lawyers may also be admitted to practice before the Rwandan courts.<sup>272</sup>

142. The Defence does not appear to dispute that Rwandan law guarantees the right to legal representation, nor does it doubt that Rwandan lawyers are competent and experienced. Rather, it contends that due to the manner in which legal aid is organised, Rwanda cannot guarantee the Accused the right to an effective defence.<sup>273</sup> The system is inadequately funded and the Accused will be unable to select the counsel of his choice. Moreover, defence lawyers in Rwanda regularly suffer intimidation.<sup>274</sup>

#### 10.2.2 Legal Aid: Choice of Counsel

143. The Prosecution and the KBA submit that the right to legal aid for indigent accused is guaranteed by the legal framework contained within the Rwandan Constitution, Transfer

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<sup>269</sup> Motion, paras. 60, 61, 67; KBA Brief, paras. 8-11; Rwandan Constitution, Articles 18, 19; Transfer Law, Articles 13(4), 13(6); Rwandan Code of Criminal Procedure, Articles 39, 64, 96 and 185.

<sup>270</sup> Motion, paras. 60, 61; Constitution, Articles 18, 19; Transfer Law, Articles 13(4) and 13(6); KBA Brief, para. 10.

<sup>271</sup> Motion, para. 62; KBA Brief, paras. 3, 12-18.

<sup>272</sup> Motion, para. 63; *Annex L*, Affidavit of Maitre Emmanuel Rukangira, Acting President of the Kigali Bar Association (“Rukangira Affidavit”); KBA Brief, para. 17; Law No. 3/1997 of 19 March 1997 Establishing a Bar in Rwanda, Article 6 (“Law Establishing a Bar in Rwanda”).

<sup>273</sup> Response, para. 120.

<sup>274</sup> Response, paras. 135-136.



Law, Code of Criminal Procedure and the Law Establishing the Bar in Rwanda.<sup>275</sup> The KBA is the primary administrator of the legal aid system and attests that the legal aid system functions in practice.<sup>276</sup>

144. The Defence's primary contention is that the legal aid system is in violation of Article 20(4)(d) of the ICTR Statute, Article 14(3)(d) of the ICCPR, and Article 13(6) of the Transfer Law because it will not accord the Accused, who has been declared indigent, the right to choose his own counsel. The Accused's French counsel, with whom he has been preparing his defence for six months, is unable to represent him before the Rwandan courts because the French bar requires a knowledge test thereby preventing reciprocal admission. A change of counsel will seriously prejudice the rights of the accused and delay the commencement of his trial in violation of Article 20(4)(d) of the ICTR Statute.<sup>277</sup>

145. The Prosecution asserts that this is a misinterpretation of the applicable Rwandan law. Rwandan law permits expedited temporary accreditation without the requirement of reciprocity to enable foreign defence lawyers in possession of a law degree and in good standing with their bars to represent specific clients, as evidenced by the *Ingabire* and *Erlinder* cases.<sup>278</sup> In practice, French lawyers have been admitted to the Rwandan bar and Rwandan lawyers to the French bar. Furthermore, the Appeals Chamber has held that the right of an indigent defendant to effective representation does not permit them to choose their own counsel. Notwithstanding, the appointment of two Kenyan lawyers to defend Mr. Erlinder demonstrates that Rwanda is flexible in this regard.<sup>279</sup>

146. The Chamber notes that the Accused has been declared indigent.<sup>280</sup> The right to choose counsel applies only to those accused who can financially bear the costs of counsel. Indigent accused are protected by the right to legal assistance without payment.<sup>281</sup> The

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<sup>275</sup> Motion, para. 67; Rwandan Constitution, Articles 18, 19; Transfer Law, Article 13; Rwandan Code of Criminal Procedure, Articles 39 and 185; Law Establishing a Bar in Rwanda, Articles 56, 60-63.

<sup>276</sup> KBA Brief, paras. 19-24; Motion, para. 68; Reply, para. 170.

<sup>277</sup> Response, paras. 119-125; *Annex 35*, Law No. 71-1130 Relating to the Reform of Some Legal and Judicial Professions, 31 December 1971, consolidated version of 14 May 2009; *Annex 36*, Decree No. 91-1197 of 27 November 1991 Organising the Profession of Lawyers, consolidated version of 1 January 2012. Motion, *Annex J*, GoR Brief in the *Uwinkindi* Case, para. 14; *Annex L*, Rukangira Affidavit, paras. 6, 9; *Annex M*, KBA Brief in the *Uwinkindi* case.

<sup>278</sup> Reply, *Annex I*, Affidavit of Paul Maitre Athanase Rutabingwa, President and Council Member of the Kigali Bar Association, signed 21 February 2012, ("Rutabingwa Affidavit"); Law Establishing a Bar in Rwanda, Article 6.

<sup>279</sup> Reply, paras. 155-160; *Annex I*, Rutabingwa Affidavit

<sup>280</sup> Response, para. 124.

<sup>281</sup> Prosecutor v. *Nahimana et al.*, Case No. ICTR-96-11-A, Judgement (AC), 28 November 2007, para. 128; Prosecutor v. *Blagojević and Jokić*, Case No. IT-02-60, Judgement (AC), 9 May 2007, para. 17; Prosecutor v. *Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006, para. 10; Prosecutor v. *Jadranko Prlić et al.*, Case No. IT-04-74-AR73.1, Decision on the Appeal by Bruno Stojić against the Trial Chamber's Decision on his Request for Appointment of Counsel, 24 November 2004, para. 19; Prosecutor v. *Vidoje Blagojević et al.*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 22; *Akayesu* Appeal Judgement, para. 61; Prosecutor v. *Kambanda*, Case No. ICTR-97-23, Judgement (AC), 19 October 2000, para. 33; European Court of Human Rights, *Pakelli v. Federal Republic of Germany*, Application No. 8398/78, Judgement, para. 31; European Court of Human Rights, *Artico v. Italy*, Application No. 6694/74, Judgement, 13 May 1980, para. 33.





Transfer Law accords transferees these rights. Moreover, the KBA's membership consists of a sufficient number of competent, qualified and experienced lawyers who the President of the the KBA can assign to represent a transferred accused. Notably, five of these lawyers are included on the ICTR roster of defence counsel and many have over five or seven years of experience.<sup>282</sup> The Chamber observes that Article 56 of the Law Establishing the Bar in Rwanda prohibits counsel from refusing or neglecting the defence of an accused, or to assist a party where they have been appointed to do so. Articles 77-83 of the aforementioned law provide for disciplinary proceedings should Article 56 be violated. Accordingly, the Chamber is satisfied that Rwandan law and practice ensures the right of the accused to be assigned legal assistance without payment.

147. The Chamber considers the legislative provisions permitting the expedited temporary accreditation of foreign lawyers to appear before Rwandan courts to be a positive move towards ensuring the right of transferees to defend themselves through the counsel of their choice. The Chamber recalls that the Accused has been declared indigent; however, should this status change following transfer to Rwanda, the Chamber is convinced by the President of the KBA's attestations that the expedited temporary accreditation of Munyagishari's lawyers would be possible provided that they hold a law degree and are in good standing with their bar.<sup>283</sup> The Defence has failed to adduce any other evidence that this would not be the case, aside from an unsubstantiated assertion that it is impossible in accordance with Rwandan law.

148. Nonetheless, the Chamber notes that the Defence has adduced sixteen affidavits of potential defence witnesses, all of whom are located outside of Rwanda, stating that they are unwilling to testify in Rwanda. The Chamber is satisfied that the Defence submissions substantiate that preparation of its Defence may well entail considerable work outside of Rwanda. Given the unique challenges posed by this particular case, the Chamber considers that the Accused should be assigned a defence lawyer, whether through legal aid, if indigent, or at his own expense, if not, with previous international experience, particularly in eliciting testimony from witnesses based abroad.

149. This Chamber envisions that such a lawyer can be a current or prospective member of the Kigali Bar. Consequently, the Chamber conditions the transfer of the Accused on assignment of counsel with sufficient international experience. This guarantee should come in writing from the President of the Kigali Bar Association. Likewise, it shall be within the discretion of the President of this Tribunal or the Residual Mechanism to determine whether prospective counsel has sufficient international experience.<sup>284</sup>

150. With regard to the Defence assertion that the Accused's trial will face undue delay in violation of Article 20(4)(d) should he have to change counsel, the Chamber responds that his

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<sup>282</sup> ICTR Directive on the Assignment of Defence Counsel, 14 March 2008, Article 13. Motion, *Annex M*, KBA Brief in the *Uwinkindi* case; *Annex 1, Rule 88 Ordre des Avocats, Barreau de Kigali, règlement d'ordre intérieur*; KBA Brief, para. 8.

<sup>283</sup> Reply, *Annex 1*, Rutabingwa Affidavit, para. 8.

<sup>284</sup> Motion, *Annex M*, KBA Brief in the *Uwinkindi* case; *Annex 1, Rule 88 Ordre des Avocats, Barreau de Kigali, règlement d'ordre intérieur*.

current lawyers have a professional obligation to transfer the work done thus far to any newly assigned counsel.<sup>285</sup> This should therefore mitigate any such delay.

### 10.2.3 Legal Aid: Funding

151. The Defence submits that the Rwandan legal aid system is insufficiently funded. Rwandan lawyers do not receive an honorarium therefore the purpose of funds earmarked for legal aid is unknown. Moreover, the extra 30 million Rwandan francs added to the 2010-2011 budget cannot be considered legal aid funds since they are designated for general ICTR related costs. Furthermore, the fund allocated to the KBA by the Ministry of Justice cannot be used for transferees because it has been expressly allocated for vulnerable people; namely, minors and female victims of sexual violence. Consequently, in 2011, only 92 million Rwandan francs were available for all referred cases. This is insufficient for more than one accused. There exists no information on the budgetary allocation for legal aid in 2012.<sup>286</sup>

152. The Prosecution, relying on the KBA's submissions, notes that Rwandan legal aid lawyers receive compensation in accordance with legal aid tariffs. It asserts that the cost of defending an accused person at the ICTR is much higher than in Rwanda.<sup>287</sup> In the 2010-2011 budget, 92 million Rwandan francs were allocated for legal aid in general, supplemented by 30 million Rwandan francs designated for ICTR-related issues including the provision of legal assistance to indigent accused in transferred cases.<sup>288</sup> No information has been provided on the 2012-2013 budget because it begins in July 2012. However, the Ministry of Justice has already committed to paying 147.6 million Rwandan francs to support the provision of domestic legal aid services in 2012.<sup>289</sup> Although intended to primarily fund assistance to minors, the KBA is not prevented from using it to provide services to vulnerable persons including indigent adults. Following the the referral of the *Uwinkindi* case, the government increased the budget by 118 million Rwandan francs for the period between January and June 2012.<sup>290</sup> The budget is reviewed every six months, enabling the provision of additional funds if necessary.<sup>291</sup>

153. The Chamber recalls that it is not obligated to itemise the provisions of Rwanda's budget once it has learned that there is financial support for that representation.<sup>292</sup> The factual assertions of the Defence fail to rebut the affidavits of the Minister of Justice and the Secretary-General of the Supreme Court. The Chamber considers these assurances that appropriate funding will be provided in good faith. It is encouraged by the provision of an

<sup>285</sup> ICTR Directive on the Assignment of Defence Counsel, 14 March 2008, Articles 6, 9.

<sup>286</sup> Response, paras. 126-131; *Annex 20*, African Commission on Human and Peoples' Rights, 47<sup>th</sup> Ordinary Session, 12 to 26 May 2010, Banjul, Gambia, Concluding Observations and Recommendations on the Ninth and Tenth Periodic Reports of the Republic of Rwanda, para. 38; *Annex 37*, ICTR Press Release. Motion, *Annex M*, KBA Brief in the *Uwinkindi* case, paras. 28, 29; *Annex O*, Affidavit of Tharcisse Karugama, Minister of Justice and Attorney General, 15 February 2011 ("Karugama Affidavit"), para. 2. KBA Brief, *Annex I*, Court Assistance and Representation contract, Article 1.

<sup>287</sup> Reply, para. 166; KBA Brief, para. 16; Motion, *Annex M*, KBA Brief in the *Uwinkindi* case, paras. 29, 30.

<sup>288</sup> Motion, para. 69; Motion, *Annex O*, Karugama Affidavit, paras. 2, 3.

<sup>289</sup> Motion, para. 69; KBA Brief, para. 26.

<sup>290</sup> Reply, *Annex H*, Gahongayire Affidavit, para. 2; T. 12 April 2012, pp. 5, 6.

<sup>291</sup> Reply, paras. 161-164; *Annex H*, Gahongayire Affidavit, para. 2. Motion, *Annex O*, Karugama Affidavit; KBA Brief, paras. 25-28.

<sup>292</sup> *Uwinkindi* Appeal Decision, para. 71.

additional 118 million Rwandan francs designated specifically for transfer cases for the period between January and June 2012 in reaction to the referral of the *Uwinkindi* case.<sup>293</sup> This conclusion is mindful of the unique challenges presented in this case, and, in particular, the existence of prospective witnesses outside of Rwanda. Should Rwanda fail to provide sufficient funding so as to infringe on the fair trial rights of the Accused, the case is subject to revocation in accordance with Rule 11 *bis* (F).

#### 10.2.4 Legal Aid: Other

154. The Defence submits that the Accused's case is too complex to be dealt with by *pro bono* lawyers.<sup>294</sup> Additionally, as noted by the HRC, and in contradiction to GoR claims, very few Rwandan lawyers provide legal assistance to indigent accused in practice.<sup>295</sup> The Prosecution, relying on the KBA's submissions, emphasises that the KBA has over 890 members, all of whom are obligated by Rwandan law to comply when assigned to provide legal aid.<sup>296</sup> During the past five years, the KBA has provided legal assistance to approximately 4090 accused persons.<sup>297</sup>

155. The Chamber considers the Defence assertion that the Accused's case is too complex for *pro bono* lawyers to be baseless speculation. The record indicates that many Rwandan lawyers have previous experience in genocide cases.

156. The Chamber considers the HRC report insufficient to substantiate the assertions of the Defence. It explicitly states that Rwanda did not present any detailed factual information or statistics to the committee. Furthermore, it does not provide a source for its assertion that Rwandan lawyers fail to provide legal assistance to indigent accused. The report does not specify the type of trial and categories of accused who have not been provided with legal aid.

157. The Chamber welcomes the establishment of legal aid centres and awareness raising programmes by the Rwandan government, and the provision of legal aid services by non-governmental organisations as a positive move towards ensuring the right to free legal assistance for all in Rwanda.<sup>298</sup> Relying in good faith on the assertions and statistics of the KBA, and Article 56 of the Law Establishing the Bar in Rwanda, the Chamber is confident that the Accused will receive adequate legal representation in practice so as to ensure a fair trial. The Accused's representation shall be subject to monitoring, as well as the supervision of the Rwandan judiciary and the KBA. The Chamber considers that should the Accused's representation fall short of ensuring his right to a fair trial, remedial measures are available to address this in Rwanda.<sup>299</sup> If insufficient efforts are made, this will be subject to the review of the independent monitor and revocation in accordance with Rule 11 *bis* (F).

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<sup>293</sup> T. 12 April 2012, pp. 5,6.

<sup>294</sup> Response, para. 132; Motion, *Annex M*, KBA Brief in the *Uwinkindi* case, para. 29.

<sup>295</sup> Response, para. 133; *Annex 22*, Consideration of the Report Submitted by State Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Rwanda, CCPR/C/RWA/CO/3, 7 May 2009 (Report CCPR/C/RWA/CO/3), para. 8.

<sup>296</sup> Law Establishing a Bar in Rwanda, Article 56.

<sup>297</sup> Reply, paras. 165-169.

<sup>298</sup> KBA Brief, paras. 29-31.

<sup>299</sup> Law Establishing a Bar in Rwanda, Article 56.

### 10.2.5 Interference

158. The Prosecution notes that defence counsel are protected by Article 15 of the Transfer Law and submits that they perform their work without interference. This is factually evidenced by Rwanda's demonstrated record of cooperation with defence teams from the ICTR and other jurisdictions, the practical experiences of the KBA, the absence of arrests of defence counsel and the fact that Peter Erlinder was arrested for private commentary unprotected by the immunities afforded him as defence for an accused before the Tribunal.<sup>300</sup> Should there be threats or harassment, the Defence has a legal basis to bring the matter before the High Court or Supreme Court, who are then obligated to investigate the matter and provide a remedy.<sup>301</sup>

159. Both the Defence and the IADL letter contend that defence lawyers working on sensitive cases in Rwanda are neither free or independent,<sup>302</sup> citing reports by Amnesty International,<sup>303</sup> Human Rights Watch,<sup>304</sup> comments by the Rwandan representative to the Security Council,<sup>305</sup> and two examples of ICTR Defence lawyers being specifically targeted for their work, including Peter Erlinder.<sup>306</sup>

160. Articles 2 and 15 of the Transfer Law provide adequate protections for defence counsel and their support staff.<sup>307</sup> The Chamber notes that should interference occur, 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.

161. The Chamber observes that the Amnesty International and Human Rights Watch reports raise concerns about the crime of genocide ideology and the worries of Defence lawyers;<sup>308</sup> however, these reports were published prior to the first referral by the ICTR and prior to the enactment of legislative amendments to the Criminal Code. Moreover, both reports state that improvements have since been made.<sup>309</sup>

162. The Defence and IADL have failed to adduce any evidence, aside from speculation, that the arrest of Peter Erlinder and the comments made against Christopher Black were motivated by their work as ICTR defence counsel. The Chamber recalls that the Appeals

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<sup>300</sup> Motion, paras. 64, 65; KBA Brief, paras. 31-43; Reply, paras. 171-176.

<sup>301</sup> Motion, para. 66.

<sup>302</sup> Response paras. 135-156; IADL Resolution, p. 490.

<sup>303</sup> Response para. 136; *Annex 31*, Amnesty International, "Safer to Stay Silent", p. 31.

<sup>304</sup> Response, para. 136; *Annex 33*, Human Rights Watch, Presentation for EPU, Rwanda, July 2010.

<sup>305</sup> IADL Resolution, p. 490.

<sup>306</sup> Response, para. 135; *Annex 38*, "ICTR Defence Lawyers Brainwashed", New Times, 16 June 2010; *Annex 39*, "Kigali provides assurance that Mr. Erlinder's case is not related to his work", Hirondelle News Agency, 2 June 2010; *Annex 40*, "Conseil national des Barreaux demande la liberation du professeur Peter Erlinder, avocat", Press Release, 31 May 2010; *Annex 41*, German Bar Association Calls for Action Against Peter Erlinder's Arrest, 5 June 2010.

<sup>307</sup> *Uwinkindi* Appeal Decision, para. 71.

<sup>308</sup> Response, *Annex 33*, Human Rights Watch, Presentation for EPU, Rwanda, July 2010, paras.4-8; *Annex 31*, Amnesty International Report "Safer to Stay Silent", pp. 11- 13, 15, 19.

<sup>309</sup> Response, *Annex 33*, Human Rights Watch, Presentation for EPU, Rwanda, July 2010, paras. 2,8, 26-27; *Annex 31*, Amnesty International Report "Safer to Stay Silent", pp. 5, 33.



Chamber concluded that one document that formed the basis of the Rwandan government's investigation against Mr. Erlinder was related to his work. However, the GoR affirmed that all legal action based on it was promptly ceased.<sup>310</sup> Nonetheless, the Chamber recognises that such actions, in addition to comments by high-profile persons such as the Security Council representative, can create the perception of an antagonistic atmosphere for Defence teams. Despite this, the Defence has failed to adduce sufficient factual evidence that defence teams in Rwanda face harassment and intimidation, particularly in light of the immunities and protections now provided in Articles 2 and 15 of the Transfer Law.

#### 10.2.6 Internal Order Modifying the Rules and Regulations of the Supreme Court

163. The Chamber considers Order No. 19/2011 of March 2011 Modifying the Internal Rules and Regulation of the Supreme Court ("the Order") raised in the Defence addendum and highlighted in the Prosecution reply to be an internal matter that does not significantly impact the Accused's fair trial rights.

164. The Defence submits that a letter from the KBA to the President of the Supreme Court critiquing the Order demonstrates that the Rwandan judiciary does not respect fair trial principles and discredits the KBA's *amicus curiae* brief. Specifically, the letter states that the Supreme Court has abused its power by imposing sanctions on defence lawyers, thereby creating an inequality of arms and violating fair trial principles.<sup>311</sup> This position, however, is contrary to the KBA's position in its *amicus curiae* brief that conditions for a fair trial exist and that Rwandan lawyers work without interference.

165. The Chamber understands that at the time of the Defence submission, it had not seen the Order and stated that it had not yet been published.<sup>312</sup> Therefore, its submissions did not specify the reasons behind the alleged sanctions against defence teams. In contrast, the Prosecution had access to the Order prior to its reply.<sup>313</sup>

166. The Prosecution, relying on an affidavit from the President of the KBA, replies that the Order has the legitimate purpose of streamlining and regulating court proceedings.<sup>314</sup> The letter cited by the Defence was a response by the KBA in conformity with its role of advocating for its membership. Moreover, it received an audience with the Supreme Court. The Supreme Court addressed the KBA's primary concern that the Order disproportionately imposed pre-trial sanctions on defence counsel by explaining that the sanctions are applicable to both the prosecution and defence for failing to comply with various orders and court deadlines. The Prosecution submits that the ICTR Chambers possess the same powers.<sup>315</sup>

167. The Chamber considers it within the role of the KBA to challenge actions and decisions by both the judiciary, including the President of the Supreme Court, and the

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<sup>310</sup> *Théoneste Bagosora et al. v. Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Injunction Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010, paras. 10, 28. Reply, para. 173. Motion, *Annex J*, GoR Brief in the *Uwinkindi* case, para. 55.



Rwandan government in order to safeguard fair trial rights and working conditions for Rwandan lawyers. Their complaint does not undermine the credibility of their filings in this proceeding. Indeed, it reflects the KBA's active monitoring and advocacy on the right of its constituents. The fact that their letter led to direct discussions with the judiciary further demonstrates a positive environment where challenges to judicial positions are an accepted practice and dealt with constructively.

168. The Chamber relies in good faith on the affidavit of the President of the KBA asserting that he considers the Order to be well-intentioned and that the Supreme Court reacted positively to their concerns. Furthermore, he is unaware of any negative effects that it has had on the functioning of lawyers and the rights of their clients or of the actual implementation of any of the proposed sanctions.<sup>316</sup> Consequently, the Chamber does not consider the order to be an abrogation of the Accused's right to an effective defence.

### 10.2.7 Conclusion

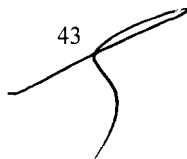
169. The Chamber recalls that the *Uwinkindi*, *Kayishema*, *Sikubwabo* and *Ntaganzwa* Referral Chambers, and the *Uwinkindi* Appeals Chamber were satisfied that the right to an effective defence exists in Rwanda.<sup>317</sup>

170. The Chamber is confident that an adequately funded legal aid system will afford the Accused, who has been declared indigent, with legal assistance without payment by qualified, competent and experienced lawyers. Should the Accused's indigent status change, the Chamber is satisfied that the temporary accreditation measures permitted by Rwanda will protect his right to the counsel of his choice. Nonetheless, the Chamber conditions the transfer of the Accused on a written guarantee from the President of the KBA to the President of the Tribunal of the Residual Mechanism that the Accused will be assigned a defence lawyer with previous international experience. It will be within the discretion of the President of this Tribunal or the Residual Mechanism to determine whether this has been sufficiently established. In relation to the alleged difficult working conditions, the Chamber concludes that Rwandan law contains appropriate protections and remedies in accordance with international law. Should Munyagishari's defence team be prevented from carrying out its work effectively, the case is subject to revocation in accordance with Rule 11 *bis* (F).

171. Accordingly, the Chamber is satisfied that Munyagishari's right to an effective defence will be secured in Rwanda.

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<sup>317</sup> *Ntaganzwa* Referral Decision, paras. 50-58; *Sikubwabo* Referral Decision, paras. 96-118; *Kayishema* Referral Decision, paras. 98-120; *Uwinkindi* Referral Decision, paras. 135-161; *Uwinkindi* Appeal Decision, paras. 71-72.



## 11. JUDICIAL COMPETENCE, INDEPENDENCE AND IMPARTIALITY

### 11.1 Applicable Law

#### 11.1.1 International Law

172. Pursuant to Rule 11 *bis*, the Referral Chamber must be satisfied that the accused will receive a fair trial.<sup>318</sup> In considering whether the accused will receive a fair trial, it is the obligation of the State to accord the accused the rights set out in Article 20 of the ICTR Statute.<sup>319</sup> Article 20(2) of the ICTR Statute states that the accused is entitled to a fair and public hearing. This includes adjudication by an independent and impartial judiciary.<sup>320</sup> The criteria of independence and impartiality are distinct yet interrelated.<sup>321</sup>

173. The criteria that define an independent judiciary are articulated in the Human Rights Committee General Comment No. 32 and include: the procedure and qualification for the appointment of judges, the guarantees relating to their security of tenure, 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.<sup>322</sup>

174. The absence of impartiality has been defined by the ICTY Appeals Chamber as the existence of actual bias or an unacceptable appearance of bias. Circumstances that give rise to an unacceptable appearance of bias include when a judge is a party to the case, or has a financial or proprietary interest in the outcome of the case or it will lead to a promotion of a cause in which the judge is involved. It also includes circumstances that would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>323</sup>

#### 11.1.2 Rwandan Law

175. Articles 2, 13(1) and 16 of the Transfer Law state that the accused shall be entitled to a fair and public hearing before the High Court at the first instance, and the Supreme Court on appeal.<sup>324</sup>

### 11.2 Submissions

176. The Prosecution submits that the High Court and Supreme Court of Rwanda are independent, impartial and competent courts. Rwanda's legal framework provides for an

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<sup>318</sup> *Uwinkindi* Referral Decision, para. 15.

<sup>319</sup> *Uwinkindi* Appeal Decision, para. 22; *Uwinkindi* Referral Decision, para. 17; *Munyakazi* Appeal Decision, para. 4.

<sup>320</sup> See ICCPR, Article 14(1); European Convention on Human Rights ("ECHR"), adopted 10 December 1948 (as amended on 1 June 2010), Article 6 (1); American Convention on Human Rights, adopted 22 November 1969, Article 8 (1); Universal Declaration of Human Rights, adopted 10 December 1948, Article 10.

<sup>321</sup> *Uwinkindi* Referral Decision, para. 75.

<sup>322</sup> General Comment No. 32.

<sup>323</sup> *Uwinkindi* Referral Decision, paras. 75, 76; *Prosecutor v. Furundžija*, Case No. IT-95-17-A, Judgement (AC), 21 July 2000 ("*Furundžija* Appeal Judgement"), paras. 181-215.

<sup>324</sup> Transfer Law, Articles 2, 13(1), 16.

independent judiciary that is separate from the other branches of government<sup>325</sup> and enjoys fiscal and administrative autonomy. The Judges enjoy tenure of office,<sup>326</sup> and their appointment, discipline and removal are reserved to the judiciary through its independent High Council.<sup>327</sup> The judiciary is governed by a Code of Ethics and the judiciary's own Ombudsman oversees its functions.<sup>328</sup> New legislation permits the appointment of international judges to the bench of any referred cases and a quorum of three or more judges to complex cases.<sup>329</sup>

177. The Prosecution adduced various statistics as factual evidence that the legal framework functions in practice. From 2005-2010, only 4.6 % of all registrars and 1.4 % of judges were removed from office on charges related to official misconduct, including corruption. None of these registrars or judges were members of the High Court or Supreme Court.<sup>330</sup> It emphasises that Rwanda's judiciary is competent and experienced in handling genocide cases concerning both low and high ranking military and civilian personnel. From 2006-2010, the High Court presided over 36 genocide cases and from 2006-2008, the Supreme Court handled 61 appeals or other post-conviction proceedings in genocide cases.<sup>331</sup>

178. The Defence does not appear to dispute that Rwanda's legal framework provides for an independent and impartial jury. Rather, it submits that Rwanda cannot guarantee the independence and impartiality of the justice system due to external influences and corruption. The Defence questions the potential impact of the amendments to the Constitution and new legislation on the appointment of international judges.<sup>332</sup> These unsupported submissions fail to undermine the existing framework that clearly establishes and supports an independent judiciary.

### 11.2.1 Rwanda's Acceptance Letter

179. The Defence argues that the letter from the Prosecutor General of Rwanda to the Chief Prosecutor of the ICTR affirming that Rwanda is willing and adequately prepared to accept the case demonstrates a lack of judicial independence because it states that the "Government of Rwanda" is ready to conduct the trial. Furthermore, it is the Rwandan NPPA, which has opposing interests to the Defence that attests that the trial will be conducted in accordance with fair trial standards.<sup>333</sup>

<sup>325</sup> Rwandan Constitution, Article 142.

<sup>326</sup> Rwandan Constitution, Article 142.

<sup>327</sup> Reply, para. 201; Rwandan Constitution, Articles 157, 158; Organic Law No. 0212004 of 20 March 2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary, Official Gazette of the Republic of Rwanda, 23 March 2004 (as modified in 2006) Articles 30-46, 70-78 ("Law on the High Council of the Judiciary").

<sup>328</sup> Motion, para. 73.

<sup>329</sup> Motion, para. 85; Transfer Law, Article 2; GoR Brief, *Annex A*, Draft Organic Law Establishing the Organisation, Functioning and Jurisdiction of the Supreme Court, Article 13(2).

<sup>330</sup> Motion, para. 78.

<sup>331</sup> Motion, para. 82; *Annex Q*, Affidavit of Olivier Rukundakuvuga, Chief Registrar of the Supreme Court of Rwanda, 17 February 2011, para. 123 ("Rukundakuvuga Affidavit").

<sup>332</sup> Response, para. 145.

<sup>333</sup> Response, paras. 137-139; *Annex F*, Letter from the Government of Rwanda, dated 28 September 2011.





180. The Prosecution disputes that the letter exhibits interference by the Rwandan government in judicial proceedings and argues that it simply references the fact that constructive steps have been taken to prepare for trial. The NPPA is the body responsible for the investigation and prosecution of crimes and falls under the Ministry of Justice.<sup>334</sup>

181. It is beyond dispute, that the Government of Rwanda has taken steps to ready itself for the trial of transferred accused, including legislative changes and budgetary provisions. The Chamber is not convinced that the letter demonstrates a lack of judicial independence. It reflects the preparedness of the NPPA to prosecute the case in light of its position that Rwandan judiciary is an acceptable venue for the trial.

### 11.2.2 Allegations of Corruption and External Influence

182. Relying on the *Uwinkindi* Referral Decision, the Prosecution submits that claims of corruption in the judiciary are unsubstantiated and notes that Rwanda has taken significant steps to address corruption. Rwandan judges benefit from the same presumption of independence and impartiality that the Tribunal extends to its own judges.<sup>335</sup> Other Referral Chambers have found such claims to be of a general nature and not focused on the High Court and Supreme Court. The High Court had an acquittal rate of 30% in 2008.<sup>336</sup>

183. The Defence responds that genocide cases are particularly susceptible to outside pressure as evidenced by the open and public critique of ICTR and ICC decisions by high-ranking Rwandan authorities.<sup>337</sup> In support of the Defence, the IADL alleges that according to the former Prosecutor General and Vice President of the Supreme Court, the Rwandan judiciary is not independent from the RPF. It is used as a tool of oppression of government opponents as illustrated by the trial of Victoria Ingabire.<sup>338</sup>

184. The Prosecution contends that such allegations are insufficient to rebut the presumption of independence and impartiality applicable to Rwandan judges. Victoria Ingabire is alleged to have financially supported the FDLR, a group wanted by the ICC. Moreover, the IADL has failed to explain how alleged judicial misconduct in the *Ingabire* trial might affect the case of the Accused. It argues that the Appeals Chamber has noted that other cases do not necessarily reflect the conditions of trial or charges that the Accused will face. Monitoring and revocation will also act as safeguards.<sup>339</sup>

185. The Chamber recognises that Rwandan judges benefit from the same presumption of impartiality that attaches to the judges of the ICTR.<sup>340</sup> The presumption cannot be easily

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<sup>334</sup> Reply, paras. 193, 194; Motion, *Annex F*, Letter from the Government of Rwanda, dated 28 September 2011.

<sup>335</sup> Motion, para. 83.

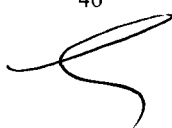
<sup>336</sup> Motion, para. 84; *Annex Q*, Rukundakuvuga Affidavit, para. 8; GoR Brief, para 7.

<sup>337</sup> Response, para. 140; *Annex 43*, "Rwanda: International Justice System is a Flop- Kagame", All Africa, 15 April 2011; *Annex 44*, "Online Reactions to Reduced Sentence for Genocide Mastermind", Global Voices Rwanda, 17 December 2011; *Annex 46*, "Rwanda: Ngoga Faults ICC over Mbarushimana Release", All Africa, 17 December 2011.

<sup>338</sup> IADL Resolution, p. 491.

<sup>339</sup> Reply, paras. 199, 200.

<sup>340</sup> *Uwinkindi* Referral Decision, para. 166.



rebutted.<sup>341</sup> 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>342</sup> Therefore, it is for the appellant doubting the impartiality of a judge to adduce reliable and sufficient evidence to rebut this presumption of impartiality.<sup>343</sup> The Chamber considers that the Defence has not presented *prima facie* evidence of information of corruption within the Rwandan judiciary. Its position as it relates to the trial of Victoria Ingabire is also unsubstantiated.

186. The Chamber reiterates that judges are trained and experienced professionals considered capable of separating comments made by public officials from evidence presented in the courtroom.<sup>344</sup> The evidence of public critique adduced by the Defence and IADL pertains to public authorities and does not include statements made by judges. Accordingly, the Chamber considers it insufficient to rebut the presumption of independence and impartiality.

187. The Chamber recalls that it is required to consider whether the Accused will face a fair trial in Rwanda. It further recalls that individual cases of external influence and corruption are insufficient to prove partiality unless evidence is adduced suggesting the cases are similar to that of the Accused.<sup>345</sup> The IADL has failed to suggest why the Ingabire case is similar to that of the Accused. Furthermore, its allegations regarding the former Prosecutor General and Vice President of the Supreme Court are unsubstantiated. Accordingly, the Chamber is not persuaded that the Accused will face trial before a non-independent and partial bench as a consequence of corruption and external influence.

### 11.2.3 The Tenure of Judges

188. The Defence, referencing the *Uwinkindi* Referral Chamber decision, disputes that Rwandan judges have life tenure. It submits that the amendments to the Constitution will negatively influence the Rwandan justice system.<sup>346</sup> The Prosecution asserts that Article 24 of the Law on the Statutes for Judges and Article 8 of the Law of the Supreme Court guarantee life tenure for judges and argues that determinate terms are only applicable to judges serving in administrative positions.<sup>347</sup>

189. The Chamber notes that Article 142 of the Constitution was amended in 2008 and 2010 and no longer explicitly guarantees life tenure for Rwandan judges.<sup>348</sup> It recalls that the *Uwinkindi*, *Kayishema* and *Sikubwabo* Referral Chambers concluded that based on this

<sup>341</sup> *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement (AC), 30 November 2006, para. 41; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1, Judgement (AC), para. 55; *Akayesu* Appeal Judgement, para. 91; *Prosecutor v. Čelebići*, Case No. IT-96-21-A, Judgement (AC), 20 February 2011, para. 707 (“*Čelebići* Appeal Judgement”); *Furundžija* Appeal Judgement, paras. 196-197.

<sup>342</sup> *Furundžija* Appeal Judgement, para. 197.

<sup>343</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 48; *Prosecutor v. Semanza*, Judgement, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 13; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 45; *Akayesu* Appeal Judgement, para. 91; *Čelebići* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, para. 197.

<sup>344</sup> See Section 6.1.

<sup>345</sup> *Uwinkindi* Referral Decision, para. 75.

<sup>346</sup> Response, para. 142.

<sup>347</sup> Reply, para. 201; T. 12 April 2012, pp. 7, 8.

<sup>348</sup> See Rwandan Constitution, Article 142.

amendment, Rwandan law no longer ensures life tenure for Rwandan judges.<sup>349</sup> Nonetheless, all three Referral Chambers and the Appeals Chamber in *Uwinkindi* concluded that the Rwandan judiciary was sufficiently independent to conduct a fair trial.

190. The Chamber observes that Article 24 of the Law on the Statutes for Judges states that “[j]udges who have been confirmed in their posts are irremovable”. Article 8 of the Law Establishing the Supreme Court states: “[t]he tenure of office of Supreme Court judges is not of fixed duration. Judges are removable only by their voluntary retirement, resignation, or impeachment for serious misconduct”. The Vice President and President of the High Court may only be removed on account of bad conduct, incompetence, or serious professional misconduct.<sup>350</sup> Article 142 of the Constitution further elucidates the terms for judges serving as administrative heads of the judiciary.

191. The Chamber notes that “serious misconduct”, “bad conduct”, “incompetence” and “serious professional misconduct” are undefined in the legislation; however, it observes that the provisions detailing the removal of judges contained within the Law on the High Council of the Judiciary and the Law on Statutes for Judges, vests the power to remove judges within the judiciary itself. The judiciary is independent from the executive and the legislature.<sup>351</sup>

192. The Chamber finds that Article 24 of the Law on the Statutes for Judges and Article 8 of the Law Establishing the Supreme Court provide sufficient tenure so as to ensure that the Accused shall receive a fair trial in Rwanda. Although these provisions are modified by others that provide the Superior Council of the Judiciary with the power to administer discipline, cease the duty of, dismiss and expel judges in the Superior Council of the Judiciary,<sup>352</sup> it is the Chamber’s view that such modifications serve to ensure the fairness of proceedings and the integrity of the Rwandan judiciary. They do not compromise the Accused’s right to a fair trial.

#### 11.2.4 The Appointment of International Judges

193. The Defence contends that the legislative changes permitting the appointment of international judges to the bench of any referred cases are too vague to be applied because the conditions, modalities, status of the judges and source of funding are unknown. Furthermore, the publication date of the law has not been stated.<sup>353</sup> Although the Accused may request the appointment of an international judge, the power of appointment is vested in the President of the Supreme Court and it is therefore not guaranteed that such a request will be honoured.<sup>354</sup>

194. The GoR and the Prosecution, relying on affidavit of Anne Gahongayire, Secretary General of the Supreme Court, replies, that concern about the inapplicability of the law is

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<sup>349</sup> *Uwinkindi* Referral Decision, para. 183.

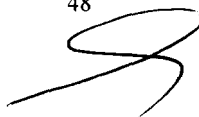
<sup>350</sup> Organic Law No. 51/2008 of 9 September 2008 Determining the Organisation, Functioning and Jurisdiction of Courts, Article 19.

<sup>351</sup> Organic Law No. 0212004 of 20 March 2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary, 23 March 2004 (as modified in 2006), Articles 12, 21-28 (“Law on High Council of the Judiciary”); Law No. 06bis/2004 of 14 April 2004 on the Statutes for Judges and other Judicial Personnel, Articles 30-46; 70-78 (“Law on Statutes for Judges and other Judicial Personnel”).

<sup>352</sup> Law on High Council of the Judiciary, Article 13, para. 2.

<sup>353</sup> Response, para. 141.

<sup>354</sup> Response, paras. 141-143.



unfounded and speculative.<sup>355</sup> Rwanda has previously used foreign judges in commercial courts.<sup>356</sup> Once suitable judges have been identified following necessary consultations, the judges would be appointed by the President of the Supreme Court and enjoy the same status as Rwandan judges as far as judicial powers are concerned. Funds would be available to meet their salaries.<sup>357</sup> The legislation is newly adopted and only awaits formal publication in Rwanda's Official Gazette.<sup>358</sup>

195. In light of the submissions of the GoR and the Prosecution, the Chamber considers the Defence submissions unsubstantiated. The Chamber notes that the relevant legislation has not yet been published in the Official Gazette and further notes the Defence concerns regarding its practical implementation. However, it recalls that previous Referral Chambers as well as the Appeals Chamber have approved transfer without the existence of such provisions. In the Chamber's view, the appointment of international judges is not an essential element of an independent and impartial judiciary or necessary to ensure the fairness of proceedings. Nonetheless, it considers the measures as a welcome move to further safeguard the trial rights of the Accused and support the legislation already in place.

### 11.3 Conclusion

196. The Chamber recalls that the *Ntaganzwa*, *Uwinkindi*, *Kayishema* and *Sikubwabo* Referral Chambers, and the *Uwinkindi* Appeals Chamber concluded that the Rwandan judiciary was sufficiently impartial and independent to provide a fair trial.<sup>359</sup>

197. Following an analysis of the Rwandan legal framework applicable to the judiciary, the Chamber concludes that it is consonant with international fair trial standards. It offers clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of judiciary and disciplinary sanctions taken against them. Furthermore, it welcomes the legislative amendments permitting the appointment of international judges and a quorum of three judges as a positive step towards further strengthening and maintaining the independence and impartiality of the judiciary in relation to transferred cases.

198. On the basis of the factual evidence adduced by the Prosecution, the Chamber is satisfied that the judges of the High Court and Supreme Court of Rwanda are competent, qualified and experienced. The Chamber concludes that the evidence of corruption, external influence and politicised trials adduced by the Defence and IADL is insufficient to rebut the presumption of independence and impartiality attached to Rwandan judges. To the extent such presumptions are later rebutted, independent monitoring will be in place to review any alleged failings and the case is subject to revocation in accordance with Rule 11 *bis* (F).

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<sup>355</sup> Reply, para. 202; GoR Brief, para. 5; *Annex A*, Draft Organic Law on Establishing the Functioning and Jurisdiction of the Supreme Court, Article 13, para. 2

<sup>356</sup> Prosecution Reply, para. 202; *Annex H*, Gahongayire affidavit.

<sup>357</sup> Reply, *Annex H*, Gahongayire affidavit.

<sup>358</sup> GoR Brief, para. 5; *Annex A*, Draft organic Law on Establishing the Functioning and Jurisdiction of the Supreme Court, Article 13, para. 2

<sup>359</sup> *Ntaganzwa* Referral Decision, paras. 73-74; *Sikubwabo* Referral Decision, para. 140; *Kayishema* Referral Decision, paras. 129, 135-146, 142; *Uwinkindi* Referral Decision, paras. 183, 185, 187, 196, 26; *Uwinkindi* Appeal Decision, para. 75.



199. Accordingly, the Chamber is satisfied that if transferred to Rwanda, the Accused will face trial before an independent and impartial judiciary.

## 12. MONITORING AND REVOCATION

### 12.1 Applicable Law

200. 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.

201. 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 ICTR Statute.

202. Article 19 of the Transfer Law permits monitors to observe proceedings in court, documents and places of detention. Article 20 provides protections for such monitors.

203. Article 6(5) of the Statute of the International Residual Mechanism for Criminal Tribunals states that the mechanism shall monitor cases referred to national courts by the ICTY, the ICTR and those referred in accordance with this Article, with the assistance of international and regional organisations and bodies.

### 12.2 Submissions

204. The Prosecution submits that the monitoring and revocation system provided by Rule 11 *bis* will provide an additional safeguard for ensuring the Accused's right to a fair trial in Rwanda. Rwanda's legal framework provides for the successful implementation of an effective monitoring system, including protection for monitors and access to court proceedings, documents, records and all places of detention.<sup>360</sup>

205. The Defence argues that the monitoring regime is not guaranteed and that the monitoring mechanism is inappropriate for the following reasons: the ACHPR has no prior experience monitoring cases in Rwanda; the Registry has no funds to finance the mechanism; the ACHPR will monitor at the expense of the Tribunal; there is no agreement between the Registry and ACHPR; Rwanda has not adapted its law, which only accommodates observers sent by the ICTR Prosecutor; monitoring by the ACHPR may deprive the Accused of the right to a supranational appeal under its charter, and defence lawyers would be more effective as monitors.<sup>361</sup>

206. The Prosecution responds that the defence submission that no suitable monitoring mechanism can be put in place for the *Uwinkindi* or future referred cases is premature. It maintains that the ACHPR is a suitable monitor for this case. The Prosecution further highlights that alternative monitoring mechanisms could also provide a safeguard of the

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<sup>360</sup> Motion, paras. 86, 91, 94.

<sup>361</sup> Response, paras. 154, 155, 158-160; Transfer Law, Article 19.

Accused's fair trial rights, and argues that monitors appointed by the Chamber would be afforded protection and facilitation in Rwanda.<sup>362</sup>

### 12.3 Discussion

207. The *Uwinkindi* Appeal decision held that in adjudicating a referral application, the Trial Chamber can satisfy itself that an accused will receive a fair trial on the basis, *inter alia*, of the monitoring and revocation mechanism.<sup>363</sup> Five Referral Chambers and the Appeals Chamber have found Rwanda's legal framework sufficient to ensure an effective monitoring system.<sup>364</sup> The Chamber notes, however, that changes to the monitoring mechanism were made subsequent to the filing of the briefs of the parties.

208. 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 cognisant 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, have 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>365</sup> In accordance with Article 6(5) of its statute, the ICTR branch of the Residual Mechanism shall take over the monitoring of cases referred to national courts by the ICTR with the assistance of international and regional organisations and bodies.<sup>366</sup> Monitoring will continue uninterrupted with the *proviso* that the competence of this Tribunal will pass to the Residual Mechanism on 1 July 2012.<sup>367</sup>

209. 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." The Chamber is aware that there is no provision in the Transfer Law that would allow for

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<sup>362</sup> Reply, paras. 206-220, 221; T. 12 April 2012, p. 4.

<sup>363</sup> *Stanković* Appeal Decision, para. 52; *Janković* Appeal Decision, paras. 55-57.

<sup>364</sup> *Kanyarukiga* Referral Decision, para. 103; *Gatete* Referral Decision, para. 94; *Kayishema* Referral Decision, para. 54, *Uwinkindi* Referral Decision, para. 209

<sup>365</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) [...]

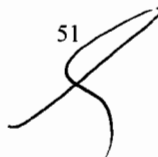
(iv) *Prosecutor* and, if the Trial Chamber so orders, the Registrar shall send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to *Prosecutor*, or through the Registrar to the President.

[...]

(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 *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>366</sup> Security Council Resolution 1966, S/Res/1966 (2010).

<sup>367</sup> President's Decision in the *Uwinkindi* Case, para. 6.



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; therefore, Rwanda has had little time to amend the Transfer Law accordingly. Notwithstanding, the Chamber notes that the Rwandan government signed a checklist in affirming its agreement to provide staff sent by the ICTR to monitor the *Uwinkindi* trial with diplomatic status and immunities, access to detention facilities, victims and witnesses and the right to conduct investigations.<sup>368</sup> 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 any difficulty accessing relevant persons, proceedings or documents during the proceedings arises. The Referral Chamber expects Rwanda to provide monitors with access to the court proceedings, documents, records and locations, including any detention facility where the Accused would be detained.

210. The Chamber recalls that the ACHPR, an independent organ established under the African Charter on Human and Peoples' Rights was selected by the *Uwinkindi* Referral Chamber to monitor *Uwinkindi*'s trial. The Chamber considered it a "trustworthy agency" to monitor the proceedings in Rwanda on the basis of its previous experiences and mandate.<sup>369</sup> The ACHPR is still the organisation of first choice to assist as Chambers' monitor and the President has stated that every effort should be made by the Registrar to conclude an agreement with the ACHPR before undertaking further negotiation with any other organisations.<sup>370</sup> The Chamber notes that it is highly unlikely that the Accused would be deprived of his right to appeal to the ACHPR should he suffer an unfair trial. Complaints are inadmissible under Article 56 of the ACHPR Statute where local mechanisms have not been exhausted, and, crucially, when the issue is already being settled by an international body.<sup>371</sup> It is unlikely that the Accused would appeal to the ACHPR since the ICTR has the power to revoke the case for trial by the Residual Mechanism should he be deprived of his fair trial rights.<sup>372</sup>

211. On 5 April 2012, the President of the Tribunal issued a decision instructing the appointment of two ICTR legal staff as interim monitors, while negotiations are ongoing with the ACHPR or another suitable organisation. On 19 April 2012, Jean Uwinkindi was transferred to Rwanda.<sup>373</sup> His trial is currently monitored by the appointed ICTR legal staff.

212. The Chamber does not consider the current situation ideal. While it recognises that the current monitoring mechanism implemented for the *Uwinkindi* case is a further guarantee that transferred accused will receive a fair trial in Rwanda or that the case will be revoked if not, it is persuaded that the Accused's rights in the present case would be best safeguarded by a monitoring mechanism composed of an independent organisation. It recalls that the Registrar is continuing negotiations with the ACHPR, an organisation that the Chamber believes appropriately qualified to monitor the present case. Notwithstanding, the Chamber emphasises that should those negotiations prove unsuccessful, it is equally confident that the

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<sup>368</sup> *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-1, Registrar's Submissions in Response to the Trial Chamber's Order of 24 February 2012, 16 March 2012 ("Registrar's Submissions"), Annex B.

<sup>369</sup> *Uwinkindi* Referral Decision, paras. 210-213, 219; *Uwinkindi* Appeal Decision, para. 77.

<sup>370</sup> President's Decision in the *Uwinkindi* Case, para. 17.

<sup>371</sup> Statute of the ACHPR, Articles 56(5), 56(7).

<sup>372</sup> ICTR Rules, Article 11 *bis* (D).

<sup>373</sup> President's Decision in the *Uwinkindi* Case, Disposition.

organisations listed by the Registrar in its Rule 33(B) submissions may prove effective alternatives.<sup>374</sup>

213. The ICTR branch of the Residual Mechanism shall be responsible for monitoring as of the 1 July 2012. The Chamber notes that the Accused shall likely be transferred to Rwanda after this date. The Chamber considers its choice of monitoring mechanism to be consistent with the explicit requirement in Article 6(5) of its Statute that the “[Residual] Mechanism shall monitor cases referred to national courts... with the assistance of international and regional organisations and bodies”.

214. Accordingly, the Chamber orders that an independent organisation be appointed as monitor either instead of, or in addition to, the ICTR legal staff who are currently acting as the Tribunal’s monitors of transfer cases in Rwanda before or as soon as practicable after the transfer of the Accused to Rwanda.

215. The Referral Chamber recognises and reiterates the importance of the continued cooperation of Rwanda with this Tribunal. It expects Rwanda to facilitate and assist the monitors in their monitoring activities.

#### 12.4 Revocation

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

217. Having said that, the Chamber is cognisant 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 transfer case.

218. The Chamber finds that it is appropriate to direct the Registrar to prepare and finalise a suitable agreement with regard to the arrangements concerning the Tribunal’s independent monitoring. The Chamber further directs the Registrar to work closely with the monitors of this case and to seek further directions from the President of this Tribunal or of the Residual Mechanism if arrangements for monitoring should prove ineffective.

#### 12.5 Conclusion

219. Upon consideration of the submissions of the parties and the *amici curiae*, the Chamber has concluded that the case of this Accused should be referred to the authorities of

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<sup>374</sup> Registrar’s Submissions, *Confidential Annexes C, D, E, F*.



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the Republic of Rwanda for his prosecution before the competent national court for charges brought against him by the Prosecutor in the Indictment.

220. This Chamber notes that in recent years, Rwanda has made material changes in its laws and has indicated its capacity and willingness to prosecute cases referred by this Tribunal. This gives the Referral Chamber confidence that the case of the Accused, if referred, will be prosecuted consistent with internationally recognised fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments. Notwithstanding, the Referral Chamber emphasises that it is persuaded to refer this case only subject to the conditions that an independent organisation is appointed as monitor before, or shortly after the transfer of the Accused; the President of the Kigali Bar Association confirms to the President of the Tribunal that the Accused will be assigned a lawyer with previous international experience and the Prosecutor General of Rwanda provides a written assurance satisfying the President of the Tribunal or the Residual Mechanism that witnesses who testify in the present case and who are then compelled to testify in subsequent domestic genocide cases shall not risk prosecution that would otherwise be prohibited by the Transfer Law as an indirect consequence of appearing as witnesses in this transfer case.

221. The Referral Chamber is cognisant of the strong opposition mounted by the Defence to the proposed referral. The Chamber, however, considers that the issues that concerned the previous Referral Chambers, in particular, the availability of witnesses and their protection, have been addressed to some satisfaction by Rwanda in the intervening period and that any referral with robust monitoring would be able to address concerns that the Defence has expressed.

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

### 13. DISPOSITION

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

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

**GRANTS** the Motion;

**ORDERS** the case of *Prosecutor v. Bernard Munyagishari* (Case No. ICTR-2005-89-I) 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, subject to the fulfillment of the following conditions:

1. A written guarantee by the President of the Kigali Bar Association to the President of this Tribunal or the Residual Mechanism, that the Accused, should he remain indigent, will be assigned a lawyer with previous international experience. It shall be



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within the discretion of the President of this Tribunal or the Residual Mechanism to determine whether prospective counsel has sufficient international experience.<sup>375</sup>

2. A binding concession in writing from the Prosecutor General of Rwanda to the President of this Tribunal or the Residual Mechanism that joint criminal enterprise shall not be included as a mode of liability pursued against the Accused.
3. A written and binding assurance by the Prosecutor General of Rwanda to the President of this Tribunal or the Residual Mechanism:
  - that Articles 54 and 55 of the Code of Criminal Procedure *could* not be used to compel witnesses testifying in the transfer case to testify in a subsequent domestic case on the basis of their evidence in the transfer case; or
  - that Articles 54 and 55 of the Code of Criminal Procedure *would* not be used to compel witnesses testifying in the transfer case to testify in a subsequent domestic case on the basis of their evidence in the transfer case ; or
  - that any witnesses who testify in the transfer case and who may be then compelled to testify in subsequent domestic cases pursuant to Articles 54 and 55 of the Code of Criminal Procedure shall also be granted the same immunities contained within Article 13 of the Transfer Law while participating in such domestic cases.
4. The appointment of an independent organisation as monitor either instead of, or in addition to, the ICTR legal staff who are currently acting as the Tribunal's monitors before or as soon as practicable after the transfer of the Accused to Rwanda.

**FURTHER ORDERS** the independent organisation conducting monitoring to do so in accordance with the modalities detailed in paragraphs 24-34 of the President's Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, in the *Prosecutor v. Uwinkindi*;<sup>376</sup>

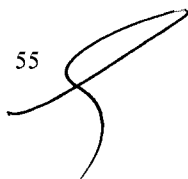
**ORDERS** the Prosecutor and the Defence to cooperate with the independent organisation to ensure monitoring and reporting on the proceedings of this case. If arrangements for monitoring and reporting should prove ineffective, the parties and/or the Registrar may seek further directions from the President of this Tribunal or the Residual Mechanism;

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

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<sup>375</sup> Motion, *Annex M*: KBA Brief in the *Uwinkindi* Case, *Annex 1*: Rule 88 *Ordre des Avocats*, Barreau de Kigali, *règlement d'ordre intérieur*.

<sup>376</sup> See President's Decision in the *Uwinkindi* Case.



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

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

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

**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 and subject to the abovementioned conditions fulfilled, the material supporting the Indictment against the Accused and all other appropriate evidentiary material in the possession of the Prosecution;

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

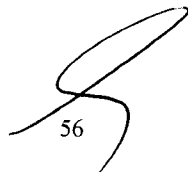
**DECLARES** that it would be open to the Accused to draw to the attention of the President of the Tribunal or the Residual Mechanism details of any perceived violation of the conditions of referral by the Republic of Rwanda and to seek consequential orders including revocation of referral;

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

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

**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; and

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

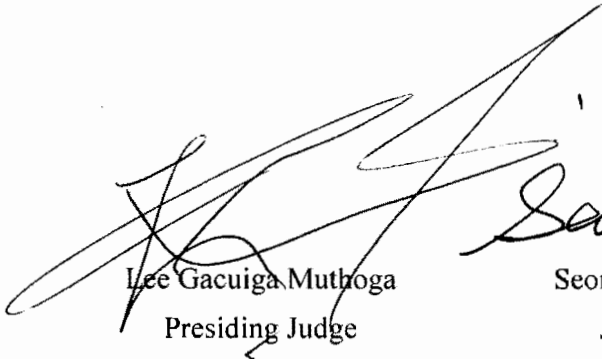


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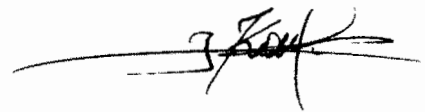
Arusha, 6 June 2012, done in English



Lee Gacuiga Muthoga  
Presiding Judge



Seon Ki Park  
Judge



Gberdao Gustave Kam  
Judge

[Seal of the Tribunal]

