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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED
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REFERRAL PROCEEDINGS PURSUANT TO RULE 11 BIS

Before Judges: Vagn Joensen, *Presiding*
Florence Rita Arrey
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 20 June 2012

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THE PROSECUTOR

v.

RYANDIKAYO

Case No. ICTR-95-IE-R11bis

**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 Vagn Joensen, Presiding, Florence Rita Arrey and Gberdao Gustave Kam;

BEING SEISED OF the Prosecutor's Request of 9 May 2012 for the Referral of the Case of Ryandikayo ("Ryandikayo" or "Accused") to Rwanda Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence ("Rules") and the subsequent filings of parties;

HEREBY DECIDES the Request.

1. PROCEDURAL HISTORY

1. The current amended indictment ("Indictment") against Ryandikayo was confirmed on 8 May 2012.¹ The Accused remains at large.
2. The present matter began on 9 May 2012, when the Prosecution filed a request for the referral of the case to Rwanda pursuant to Rule 11 *bis* of the Rules ("Referral Request").²
3. On 11 May 2012, the Registry appointed Dr. Nelson Merinyo as Duty Counsel ("Duty Counsel" or "Defence") to represent the interests of the fugitive Accused in these referral proceedings.
4. On 23 May 2012, the Duty Counsel filed a motion requesting an extension of time of five months to file his response ("Motion").³
5. On 24 May 2012, the Chamber extended the Duty Counsel's response time to four weeks from the date he effectively received the file.⁴
6. On 13 June 2012, the Duty Counsel filed a submission informing the Chamber that he opposed the transfer.⁵
7. On 18 June 2012, the Prosecution filed a reply to the submission of the Duty Counsel ("Reply").⁶

¹ *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E, Ex Parte Confidential and Under Seal Second Amended Indictment, 8 May 2012 ("Indictment").

² *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Prosecutor's Request for Designation of a Trial Chamber and Request for the Referral of the Case of Ryandikayo to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 9 May 2012 ("Referral Request").

³ *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Defence Motion for Enlargement of Time for Filing of Defence Response to Prosecutor's Request for Referral of the Case of Charles Ryandikayo to Rwanda, 23 May 2012.

⁴ *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Decision on Duty Counsel's Motion for Extension of Time, 24 May 2012 ("Extension of Time Decision").

⁵ *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Defence's Response to Prosecutor's Request for Designation of a Trial Chamber and Request for Referral of the Case of Ryandikayo to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 13 June 2012 ("Defence Submission").

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2. APPLICABLE LAW

8. 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 willing and adequately prepared to accept such a case.⁷ 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.⁸ 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.⁹

9. 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.¹⁰ 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.¹¹

10. The final referral decision is within the discretion of the Trial Chamber.¹² The Prosecution bears the burden of proof to demonstrate that the conditions set out in Rule 11 *bis* are met.¹³ However, the designated Trial Chamber may rely on any orders and information it reasonably deems necessary so long as the information assists in determining whether the proceedings following the transfer will be fair.¹⁴

3. JURISDICTION

11. The Prosecution submits that Rwanda possesses territorial, personal, material and temporal jurisdiction to prosecute Ryandikayo as required by Rule 11 *bis*.¹⁵ It relies upon a letter

⁶ *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Prosecutor's Reply to Defence's Response to Prosecutor's Request for Designation of a Trial Chamber and Request for Referral of the Case of Ryandikayo to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 18 June 2012 ("Reply").

⁷ Rule 11 *bis* (A) of the ICTR Rules of Procedure and Evidence ("ICTR Rules").

⁸ ICTR Rules, 11 *bis* (C).

⁹ *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions (AC), 16 December 2011, para. 22 ("Uwinkindi Appeal Decision"); *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 16 December 2011, para. 17 ("Uwinkindi Referral Decision"); *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on Prosecutor's Request for Referral of the Case to the Republic of Rwanda (AC), 28 May 2008, para. 4 ("Munyakazi Appeal Decision").

¹⁰ *Uwinkindi Appeal Decision*, para. 22; *Uwinkindi Referral Decision*, para. 15; *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11 *bis* (TC), 8 October 2008, para. 4.

¹¹ *Uwinkindi Appeal Decision*, para. 22; *Uwinkindi Referral Decision*, para. 15; *Munyakazi Appeal Decision*, para. 4.

¹² *Uwinkindi Referral Decision*, para. 16; *Munyakazi Appeal Decision*, para. 5; *Prosecutor v. Michael Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11 *bis* Appeal (AC), 30 August 2006, para. 9.

¹³ *Uwinkindi Appeal Decision*, para. 28.

¹⁴ *Uwinkindi Referral Decision*, para. 17; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/21-AR11*bis*, Decision on Rule 11 *bis* Referral (AC), 1 September 2005, para. 50 ("Stanković Appeal Decision"); *Uwinkindi Appeal Decision*, para. 28.

¹⁵ Referral Request, paras. 23-25.

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from the Government of Rwanda dated 28 September 2011 as proof of Rwanda's willingness and readiness to prosecute Ryandikayo for the charged crimes.¹⁶

12. The Indictment charges the Accused pursuant to Article 6 (1) of the Statute with planning, instigating, ordering, committing and otherwise aiding and abetting the planning, preparation or execution of the crimes alleged.¹⁷ Article 6 (1) covers both principal perpetrators and accomplices. This mode of liability is 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 its commission. The material elements of accomplice liability are laid out in Article 91.¹⁸ The Chamber finds that these articles contain modes of liability that are adequate to cover the crimes alleged.¹⁹

13. This Tribunal only has jurisdiction over crimes that occurred between 1 January and 31 December 1994.²⁰ In referring a case, the Chamber must be certain that an accused will not be charged with crimes outside of this 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 jurisdiction in regard to cases transferred by the ICTR.²¹ Therefore, the Chamber is satisfied that the Accused will only be tried for those acts occurring in 1994.

14. The Chamber observes that the Indictment further alleges Ryandikayo's participation in a joint criminal enterprise, a mode of liability implicit in Article 6 (1) of the ICTR Statute.²² The Defence submits that Rwanda cannot try the Accused for participation in a joint criminal enterprise because the concept was not recognised by Rwandan law at the time that the alleged crimes were perpetrated.²³

15. The Prosecution argues that joint criminal enterprise is applicable in Rwandan courts.²⁴ Specifically, the Prosecution points to Article 201 of the Rwandan Constitution permitting the application of customary international law, and argues that joint criminal enterprise was "firmly established" under that body of law in 1994.²⁵ The Prosecution also notes that Rwanda has relied on joint criminal enterprise in several national criminal proceedings, and that the Tribunal has already referred cases charging an accused on a theory of joint criminal enterprise to Rwanda.²⁶

¹⁶ Referral Request, para. 15.

¹⁷ Indictment, para. 1.

¹⁸ Referral Request, para. 27.

¹⁹ See *Uwinkindi* Referral Decision, para. 19; *Prosecutor v. Ladislav Ntaganzwa*, Case No. ICTR-96-9-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (TC), 8 May 2012, para. 12 ("*Ntaganzwa* Referral Decision").

²⁰ See Statute Articles 1, 7.

²¹ *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008, para. 20 ("*Kanyarukiga* Referral Decision"). See also, *Uwinkindi* Referral Decision, paras. 20-21; *Ntaganzwa* Referral Decision, para. 14.

²² Indictment, paras. 1, 20-24, 26, 28-36, 38-39, 40-42, 47, 51-53.

²³ Defence Submission, para. 34.

²⁴ Referral Request, paras. 29-30.

²⁵ Referral Request, para. 29.

²⁶ Referral Request, para. 30.

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16. The Defence is correct in its assertion that the Chamber has not yet determined whether joint criminal enterprise liability is a concept recognised under Rwandan law.²⁷ The Chamber first notes that 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, making it uncertain whether the Accused will ultimately be charged with this form of liability.²⁸

17. Regardless, the Chamber finds that joint criminal enterprise was firmly established under customary international law by 1994, and therefore applicable in Rwandan courts under Article 201 of the Rwandan Constitution.²⁹ The Prosecution has therefore met its burden under Rule 11 *bis*.³⁰ The Chamber also takes note of previous Referral Decisions transferring cases charging an accused on a theory of joint criminal enterprise liability,³¹ and of comparable provisions in the Rwandan Penal Code.³²

4. ALLEGED PROCEDURAL DEFECTS

18. The Defence submits that the Referral Request does not include the full name of the accused, raising the concern whether there is only one person with the name "Ryandikayo" in the whole of Rwanda.³³ The Defence further alleges that the Second Amended Indictment was not attached to the Prosecutor's Referral Request.³⁴

19. The Chamber finds these contentions meritless. First, as explained by the Prosecution's Reply, the Indictment adequately addresses the absence of Ryandikayo's first name,³⁵ and to date, no party, including the Defence, has raised any allegation that Charles Ryandikayo is not the individual described in detail in the Indictment. Second, the Second Amended Indictment

²⁷ Defence Submission, para. 42.

²⁸ *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, Judgement (TC), 31 March 2011, para. 48; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, 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 Ndirabwire*, Case No. ICTR-99-54-T, Decision on Defence Motion for Judgement of Acquittal (TC), 14 October 2010, paras. 19-21.

²⁹ See *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-AR.72A, Decision on Interlocutory Appeal Regarding Application on Joint Criminal Enterprise to the Crime of Genocide (AC), 22 October 2004, para. 6 (citing *Prosecutor v. Dusko Tadić*, IT-94-I-A, Judgement (AC), 15 July 1999, paras. 188, 190-91, 193, 220). See also Reply, paras. 19-23.

³⁰ Reply, para. 21; *Uwinkindi* Appeal Decision, para. 28.

³¹ The indictments in the *Uwinkindi*, *Kanyarukiga* and *Kategekimana* cases where the Trial Chamber granted referral requests, all of them included joint criminal enterprise as a mode of liability. *Uwinkindi* Referral Decision; *Kanyarukiga* Referral Decision; *Prosecutor v. Iddephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda (TC), 19 June 2008 ("*Hategekimana* Referral Decision"). The Appeals Chamber affirmed referral in all cases. *Uwinkindi* Appeal Decision; *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008 ("*Kanyarukiga* Appeal Decision"); *Prosecutor v. Iddephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11bis (AC), 4 December 2008.

³² See Rwandan Penal Code, Articles 89-91, 281-83.

³³ Defence Submission, para. 6.

³⁴ Defence Submission, paras. 7, 11.

³⁵ Indictment, para. 12; Reply, para. 6. See also, *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E, *Ex Parte* and Confidential Supplementary Submissions in the Matter of the Prosecutor's Request for Leave to File an Amended Indictment, 5 April 2012, paras. 6-7.

was served upon the Defence only one day after the Referral Request.³⁶ The Defence acknowledges its receipt of the materials on 18 May 2012, without any mention of the missing Indictment.³⁷ More importantly, the Chamber granted the Defence an extension of four weeks from the date of receipt to file its response.³⁸ The Chamber considers this extension of time to cure any alleged procedural irregularities.

5. ALLEGED VIOLATION OF INTERNATIONAL LAW

20. The Defence submits that Ryandikayo is alleged to have been a senior leader, and is therefore subject to the jurisdiction of the Residual Mechanism under Security Council Resolution 1966 which gives the Mechanism the authority to prosecute the "most senior leaders."³⁹ The Indictment allegations place the Accused among the leaders of the attacks in Kibuye prefecture, and he is charged jointly with the most senior authorities in the prefecture.⁴⁰

21. The Chamber does not consider Ryandikayo to have been one of the "most senior leaders" during the Rwandan genocide. As the Prosecution points out in its Reply, the Chamber must consider the gravity of the offences charged rather than the gravity of the whole of the alleged joint criminal enterprise.⁴¹ 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*.⁴²

22. A 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.⁴³ The Indictment alleges that Ryandikayo was a business man who owned and ran a restaurant and brick factory in Mubuga *secteur*, and was the "right hand man" to Vincent Rutaganira, the *Conseiller* and "most senior authority" in the *secteur*.⁴⁴ In comparison, positions that have been considered too senior for referral at the International Criminal Tribunal for the former Yugoslavia ("ICTY") have included the most senior military commander of the Army of Bosnia and Herzegovina, a far stretch from a restaurant and factory

³⁶ Reply, para. 9.

³⁷ Extension of Time Decision, para. 5.

³⁸ Extension of Time Decision, para. 8.

³⁹ Defence Submission, paras. 28-33.

⁴⁰ Defence Submission, para. 31.

⁴¹ Reply, para. 18; *Prosecutor v. Željko Mejačić*, Case No. IT-02-65-AR11bis.1, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005, para. 24.

⁴² *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11bis, Decision on Rule 11bis Referral (AC), 15 November 2005, para. 19 ("*Janković* Appeal Decision").

⁴³ 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 11bis (AC), 4 September 2006, 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, para. 3 (a commander of a military police battalion); *Prosecutor v. Željko Mejačić*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis, 7 April 2006, 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).

⁴⁴ Indictment, paras. 13-14.

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owner.⁴⁵ Consequently, the Defence's position that Ryandikayo's status precludes transfer is baseless.

6. FAIR TRIAL RIGHTS

6.1 Presumption of Innocence

23. The Prosecution submits that Rwanda has made presumption of innocence part of its statutory criminal law. It points to Article 13 (2) of the Transfer Law, Article 19 of Rwanda's Constitution and Article 44 (2) of Rwanda's Code of Criminal Procedure ("RCCP").⁴⁶ The Defence notes that presumption of innocence is a generally accepted part of an accused's fair trial rights, and does not dispute that the presumption is part of Rwandan law.⁴⁷

24. In 2007, the United Nations Human Rights Committee ("HRC") issued its General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), which concerns the right to equality before courts and to a fair trial. On the issue of presumption of innocence, the General Comment states: "[i]t is a duty for all public authorities to refrain from prejudging a trial, e.g. by abstaining from making public statements affirming the guilt of the accused."⁴⁸

25. Article 19 of the Constitution of Rwanda provides that every accused person "shall be presumed innocent until his or her guilt has been conclusively proven in accordance with the law in a public and fair hearing [...]."⁴⁹ This provision is in conformity with several human rights treaties to which Rwanda is a party, namely, Article 14 (2) of the ICCPR. The fact that this principle is reiterated in Article 44 (2) of the RCCP and Article 13 (2) of the Transfer Law indicates that presumption of innocence clearly forms part of Rwanda's statutory law.

6.2 *Non Bis In Idem*

26. It is undisputed that Ryandikayo 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 convictions by the lower Gacaca courts on the basis that they contravened Article 2 of the Transfer Law, and, by extension, the Tribunal's primacy pursuant to Article 8 (2) of the ICTR Statute.⁵⁰ The Defence responds that the nullification procedure did not bring the case under the auspices of Article 9 (2) (a) and (b) of the ICTR Statute or Article 7 (2) (a) and (b) of the Residual Mechanism, and that

⁴⁵ For examples of positions considered too senior for referral at the ICTY, see *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Motion for Referral of Case Pursuant to Rule 11bis (TC), 9 July 2007, 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, paras. 21-23 (a commander who was one rank below the highest military commander).

⁴⁶ Referral Request, para. 44.

⁴⁷ Defence Submission, para. 50.

⁴⁸ United Nations Human Rights Committee, General Comment No. 32: Article 14 Right to Equality Before Courts and Tribunals and to Fair Trial, CCPR/GC/32, 23 August 2007, para. 30 ("General Comment No. 32").

⁴⁹ Referral Request, para. 44. See also Constitution of Rwanda, Article 19.

⁵⁰ Referral Request, paras. 16-17.

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the nullification of the convictions served to vacate the judgements on jurisdictional grounds only.⁵¹

27. In its Reply, the Prosecution contends that each Referral Chamber that has been confronted with an identical situation has held that trial of the referred case would not violate the principle of *non bis in idem*.⁵² The Prosecution further notes that the referral of this case is not barred by any provision of the Residual Mechanism Statute because that Statute is inapplicable before 1 July 2012.⁵³

28. 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.

29. 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.”⁵⁴

30. The Chamber, following settled precedent, 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*.⁵⁵ Likewise, the Chamber is not satisfied that these prior convictions, which have since been vacated, undermine the Accused’s presumption of innocence as it relates to a prospective trial in Rwanda, or the independence and credibility of the Rwandan judicial system.

6.3 Extradition Cases

31. The Prosecution highlights several recent cases in which international courts such as the European Court of Human Rights and the courts of States such as Norway, Canada and France have concluded that fair trial standards are observed in Rwandan courts, thus “recognizing Rwanda’s capacity and commitment to ensuring that the accused in any referred case will receive a fair trial.”⁵⁶

32. The Chamber notes that a reasoned analysis of two of these cases has already been provided in the *Kayishema* Referral Decision (2012) and the *Sikubwabo* Referral Decision.⁵⁷ Moreover, the Chamber considers that the French and Canadian cases merely serve to bolster the

⁵¹ Defence Submission, paras. 22, 23.

⁵² Reply, paras. 12-13.

⁵³ Reply, para. 15.

⁵⁴ General Comment No. 32, para. 56.

⁵⁵ *Uwinkindi* Referral Request, paras. 29, 30, 35; *Kayishema* Referral Request (2012), paras. 20-22; *Ntaganzwa* Referral Request, paras. 18-21; *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11bis, Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda (TC), 6 June 2012, paras. 58-60 (“*Munyagishari* Referral Decision”).

⁵⁶ Referral Request, paras. 4-9. See also, Reply, para. 24.

⁵⁷ The *Kayishema* and *Sikubwabo* Referral Chambers discussed *NCIS Norway v. Charles Bandora*, and *Ahorugeze v. Sweden*, Judgement, European Court of Human Rights, 27 October 2011. See *Kayishema* Referral Decision (2012), paras. 29-30; *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, 26 March 2012, paras. 27-28 (“*Sikubwabo* Referral Decision”).

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Prosecution's argument concerning the growing confidence of the international community in Rwanda's ability to guarantee a fair trial,⁵⁸ and recalls that this Tribunal is not bound to the decisions of national jurisdictions; thus, it does not deem an in-depth analysis of these two cases to be necessary. However, the Chamber takes note of this seeming "trend" that may be seen in recent international and national decisions, a trend that would appear to be contrary to the Defence's general allegations regarding the persistent violations of human rights in Rwanda.⁵⁹

6.4 Penalty Structure

33. The Prosecution contends that any previous concerns regarding Rwanda's penalty structure, such as the imposition of the death penalty, have been resolved by Rwanda's Abolition of the Death Penalty Law (Organic Law No. 31/2007 of 25 July 2007).⁶⁰ The Defence does not raise any objections.

34. Although not expressly stated in Rule 11 *bis*, the jurisprudence of this Tribunal and the ICTY has established that the State to which a case is referred must provide an appropriate punishment for the offences with which an accused is charged.⁶¹ The Chamber is satisfied that Rwanda's recent legislative changes have addressed concerns voiced by this Tribunal in earlier Referral Decisions.⁶²

6.5 Conditions of Detention

35. Concerning the specific detention facilities that will accommodate all cases transferred from the ICTR—Mpanga and Kigali prisons—the Prosecution submits that the facilities meet international standards.⁶³ It contends that Rwanda's Transfer Law provides further assurance that such conditions of detention will be maintained, as it allows for continued inspections and confidential reports by the International Red Cross or an observer appointed by the ICTR.⁶⁴

36. The Defence does not proffer any evidence to the contrary, only hearsay, including a letter from Léon Mugesera's family, regarding the prison conditions of Mugesera in Rwanda.⁶⁵ The Defence also generally relies on a Human Rights Watch report regarding the Rwandan Government's alleged intolerance towards human rights organizations in support of its assertion that there are "persistent violations of human rights in Rwanda."⁶⁶ The Defence neglects to mention that this report specifically mentions Uwinkindi's transfer to Rwanda, and expresses no concerns regarding this transfer. Moreover, as the Prosecution highlights in its Reply, the report

⁵⁸ Referral Request, paras. 8-9.

⁵⁹ Defence Submission, paras. 57-60.

⁶⁰ Referral Request, para. 33.

⁶¹ *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis* (TC), 17 May 2005; *Bagaragaza* Appeal Decision, para. 9.

⁶² See *Uwinkindi* Referral Decision, para. 49; *Kayishema* Referral Decision (2012), para. 43; *Sikubwabo* Referral Decision, para. 41.

⁶³ Referral Request, paras. 36, 38.

⁶⁴ Referral Request, para. 40.

⁶⁵ Defence Submission, paras. 64-65. See also, Reply, paras. 29-37.

⁶⁶ Defence Submission, paras. 57-60.

begins with the conclusion that "[p]rogress continued in Rwanda in 2011," and makes no mention of fair trial rights in the High Court or Supreme Court of Rwanda.⁶⁷

37. The conditions of detention speak to the fairness of a country's criminal justice system, and must be in accord with internationally recognised standards.⁶⁸ Rwanda's Transfer Law states that any person transferred from this Tribunal to Rwanda shall be detained in accordance with the minimum standards of detention, as adopted by the United Nations General Assembly Resolution 43/173. This law also allows the ICRC or a monitor appointed by this Tribunal to submit a confidential report to the Rwandan Minister of Justice and the ICTR President.⁶⁹

38. The Chamber notes that adequate conditions are guaranteed by the Transfer Law, and expects that the monitoring mechanism will conduct regular visits to ensure that both the detention conditions and the treatment of the Accused, if the referral request is granted, are satisfactory, and that the monitors will immediately report any concerns to the President of the Tribunal or of the International Residual Mechanism, as appropriate. The Chamber believes that this should alleviate the Defence's concerns regarding the mistreatment of prisoners. The Chamber also reiterates the contention in the Prosecution's Reply that Mugesera's case, although subject to Rwanda's Transfer Law, was not subject to the additional conditions for monitoring and revocation applicable to cases referred by this Tribunal under Rule 11 *bis*.⁷⁰

6.6 Availability and Protection of Witnesses

39. The Prosecution submits that issues relating to witness availability and protection found in previous Rule 11 *bis* Decisions have adequately been addressed by Rwanda.⁷¹ Specifically, the Prosecution points out that Article 13 of the Transfer Law has been amended to include immunity for anything said or done in the course of a trial, save for those actions or statements which amount to contempt of court and/or perjury.⁷² Article 14 provides that any witness coming from outside of Rwanda to testify in a referred case shall not be subject to "search, seizures, arrest or detention during their testimony and their travel to and from the trials."⁷³

40. The Prosecution further contends that previous concerns regarding the fact that the only witness protection program was run by the Prosecutor's office have been addressed by the

⁶⁷ Reply, paras. 24-25, 27.

⁶⁸ Conditions of detention in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction's criminal justice system and is an inquiry squarely within the Referral Chamber's mandate. *Stanković Appeal Decision*, para. 34. These internationally recognised standards include: (i) Freedom from torture, or cruel, inhuman or degrading treatment or punishment as contained in Article 5, Universal Declaration of Human Rights; Article 7, ICCPR; Article 5, African Charter on Human and Peoples' Rights ("AChHPR"); Article 16 (1), Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment; Principle 6 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988) ("Body of Principles"); and (ii) all person deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person as contained in Article 10 (1), ICCPR; Article 5, AChHPR; and Principle 1 of the Body of Principles.

⁶⁹ Transfer Law, Article 23.

⁷⁰ Reply, para. 29.

⁷¹ Referral Request, para. 46.

⁷² Referral Request, paras. 46-47.

⁷³ Referral Request, para. 47 (citing to Article 14 of the Transfer Law).

creation of the Witness Protection Unit ("WPU") under the authority of the judiciary.⁷⁴ According to the Prosecutor, the immediate activation of this unit was ordered by Rwanda's Chief Justice upon the Tribunal's decision to transfer Uwinkindi's case to Rwanda.⁷⁵

41. In its submission, the Defence generally speculates that, without citing any evidence, the Prosecution did not demonstrate that Rwanda will cooperate in the protection of defence witnesses.⁷⁶

42. In assessing the availability of, and protection afforded to, witnesses, this Chamber must assess the likelihood that, if his case were transferred to Rwanda, the Accused will be able to "obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."⁷⁷ In the present case, the Chamber recalls that the previous Rule 11 *bis* applications before this Tribunal that were denied relied upon findings that "witnesses in Rwanda may be unwilling to testify for the defence due to their fear that they may face serious consequences, including prosecution, threats, harassment, torture, arrest or even murder."⁷⁸

43. Since the *Kanyarukiga* Appeals Decision, Rwanda has shown itself willing and able to amend its laws to address these concerns. The amendment of Article 13 of the Transfer Law to include immunity for statements made by witnesses at trial as well as the improvement in the operation of the Rwanda Victims and Witness Support Unit ("VWSU" or "WVSU") and the establishment of the WPU are significant steps towards allaying witnesses' fears.

44. Should a witness residing abroad be unwilling to travel to Rwanda to testify, the 2009 amendment to Article 14 of the Transfer Law presents three more ways in addition to providing *viva voce* testimony, that witnesses may give evidence to the relevant High Court in Rwanda. They may provide testimony via deposition in Rwanda, via video-link taken before a judge at trial or in a foreign jurisdiction or via a judge sitting in a foreign jurisdiction.⁷⁹

45. Rule 11 *bis* (D) (ii) provides that the Referral Chamber may order existing protective measures for certain witnesses or victims to remain in force. In addition, in the event of referral, external monitors would oversee these protection programmes. The Referral Chamber would expect the ICTR appointed monitors to regularly meet with defence counsel and WPU and address any concerns in their regular reports to this Tribunal. The Chamber is of the opinion that the issue of protective measures for defence witnesses is *prima facie* guaranteed; and the Defence has proffered no evidence to the contrary with regard to this specific Accused.

6.7 Genocide Ideology

46. Article 13 of Rwanda's constitution states that "[r]evisionism, negationism and

⁷⁴ Referral Request, paras. 51, 54.

⁷⁵ Referral Request, para. 54.

⁷⁶ Defence Submission, para. 70.

⁷⁷ Article 20 (4) (e) of the Statute.

⁷⁸ *Uwinkindi* Referral Decision, para. 100 (citing to *Kanyarukiga* Appeal Decision, para. 33); *Ntaganzwa* Referral Decision, para. 38.

⁷⁹ Referral Request, para. 67 (citing to Amended Transfer Law, Article 14 *bis*).

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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.⁸⁰

47. In the recent *Munyagishari* referral proceedings, the Government of Rwanda stated that after 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.⁸¹ The Government further explained that it aims to undertake amendments to the 2008 Genocide Ideology Law.⁸²

48. The Prosecution, relying on Article 13 of the Transfer Law and Rwanda's efforts to amend the Penal Code, submits that witnesses are protected for the crime of genocide ideology.⁸³ There is no reason to believe Rwanda's judiciary will abdicate its responsibility to fairly and impartially interpret the laws.⁸⁴

49. The Defence contends that these amendments, assuming they are even adopted, may be limited.⁸⁵ Furthermore, the Defence submits that there is no way to assess the impact of these amendments in respect to cases which have already been transferred,⁸⁶ and that the Prosecution has failed to demonstrate that the defence team of the transferred cases will be protected against the application of this law.⁸⁷

50. 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.⁸⁸ However, the Chamber considers Article 13 of the Transfer Law, subject to the conditions discussed in the recent *Munyagishari* Referral Decision, adequate to protect witnesses who may testify in the present case.⁸⁹ The Chamber notes that, as requested by the *Uwinkindi* Referral Chamber,⁹⁰ Rwanda reported to the President of the ICTR on its proposed amendments to the law.⁹¹ It has reduced the applicable sentences for the crime of genocide ideology and eliminated criminal responsibility for minors in the draft Penal Code.⁹² Nonetheless, as the Chamber stated in *Munyagishari*, it expects that Rwanda will continue with its efforts and requests that it submit another report on the ongoing reforms.⁹³ The Chamber expects that if, during 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.

⁸⁰ Law No 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology ("Genocide Ideology Law").

⁸¹ *Munyagishari* Referral Decision, paras. 93-97.

⁸² Report on Genocide Ideology, pp. 2-6.

⁸³ Referral Request, paras. 56-58.

⁸⁴ Referral Request, para. 58.

⁸⁵ Defence Submission, para. 77.

⁸⁶ Defence Submission, para. 79.

⁸⁷ Defence Submission, para. 78.

⁸⁸ *Sikubwabo* Referral Decision, paras. 63-37; *Kayishema* Referral Decision, paras. 65-69; *Uwinkindi* Referral Decision, paras. 94-96.

⁸⁹ *Munyagishari* Referral Decision, paras. 122-25, 128. See also, Reply, para. 42.

⁹⁰ *Uwinkindi* Referral Decision, para. 96.

⁹¹ Report on Genocide Ideology, pp. 2-6.

⁹² *Munyagishari* Referral Decision, para. 97.

⁹³ *Munyagishari* Referral Decision, para. 97.

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6.8 Right to an Effective Defence

51. The Prosecution submits that Rwanda's legal framework provides for both the protection and realisation of an accused's right to an effective defence.⁹⁴ The Defence contends that this right is not guaranteed, as demonstrated by other cases from abroad that have been transferred to Rwanda.⁹⁵

52. 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 free legal assistance shall be assigned where required by the interests of justice, or if the accused has insufficient means to pay. Articles 13 (4) and 13 (6) of the Rwandan Transfer Law repeat these provisions.

53. The Prosecution submits that "Rwanda's Constitution and laws guarantee the right to legal representation before courts of law to all accused persons."⁹⁶ Specifically, it points to Articles 18 and 19 of the Rwandan Constitution which establish, respectively, that "[...] the right to defence [is] absolute at all levels and degrees of proceedings before [...] judicial [...] organs[...]"⁹⁷ and provide for a fair and public hearing "in which all the necessary guarantees for defence have been made available."⁹⁸

54. In addition to such legal guarantees, the Prosecution states that Rwanda also has the actual capacity to provide counsel to the Accused transferred from the Tribunal.⁹⁹ Of the 890 lawyers admitted to the Kigali Bar Association ("KBA"), approximately 173 have been practicing for more than 7 years.¹⁰⁰ Additionally, the Accused may also be represented by a foreign lawyer who has been admitted to practice before Rwandan courts.

55. The Prosecution also submits that Article 13 (6) of the Transfer Law provides a legal framework that guarantees an indigent accused the right to legal aid.¹⁰¹ According to the Prosecution, 92 million Rwandan francs have been provided for legal aid in Rwanda's current budget. The government has also designated an additional 30 million Rwanda francs for ICTR-related issues, which includes offering aid to indigent accused.¹⁰²

56. The Chamber is of the view that the most important factor is Article 13 (6) of the Transfer Law, which entitles an accused to counsel of his choice or legal representation, should he not have the means to pay.¹⁰³ The Chamber is satisfied that this requirement has been met, especially in light of the fact that the Defence has failed to offer any evidence to the contrary, only unsubstantiated and largely irrelevant reports regarding Victoire Ingabire's decision to

⁹⁴ Referral Request, para. 85.

⁹⁵ Defence Submission, paras. 70-71.

⁹⁶ Referral Request, para. 72.

⁹⁷ Referral Request, para. 73 (citing to Article 18 of the Rwandan Constitution).

⁹⁸ Referral Request, para. 73 (citing to Article 19 of the Rwandan Constitution).

⁹⁹ Referral Request, para. 74.

¹⁰⁰ Referral Request, para. 74.

¹⁰¹ Referral Request, para. 80.

¹⁰² Referral Request, para. 82.

¹⁰³ See Referral Request, para. 80.

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boycott the end of her trial.¹⁰⁴ Should there be future financial constraints, the existence of monitors and the possibility of revocation should address any failure by the Rwandan authorities to make counsel available or disburse necessary funds.¹⁰⁵

6.9 Judicial Competence, Independence and Impartiality

57. The Prosecution submits that the Rwandan judiciary is independent and impartial.¹⁰⁶ To support this claim, it highlights that all judges are qualified and experienced lawyers, enjoy security in their tenure, operate in a judicial system that is independent from other government branches and are governed by a strict code of ethics.¹⁰⁷

58. The Prosecution highlights Rwanda's legal framework and its provisions against outside pressure as evidence that the system as a whole is independent and impartial. Additionally, it relies upon the acquittal rate before the High Court in Rwanda,¹⁰⁸ and further draws the attention of the Chamber to the qualifications and expertise of the Rwandan judges.¹⁰⁹

59. The Defence concurs, observing that the "judiciary must be able to act independently and impartially" to ensure a fair trial, but does not provide any evidence to suggest otherwise with regard to the Rwandan judiciary.¹¹⁰

60. Pursuant to Rule 11 *bis*, the Chamber must be satisfied that the accused will receive a fair trial.¹¹¹ It is the obligation of the State to accord the accused the rights set out in Article 20 of the ICTR Statute.¹¹² 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.¹¹³

61. The criteria that define an independent judiciary are articulated in the Human Rights Committee General Comment No. 32 and include the following: 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.¹¹⁴

62. 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 a case, or has financial or proprietary interest in the outcome of a case or it will lead to a promotion of a cause in which the

¹⁰⁴ Reply, paras. 38-40.

¹⁰⁵ See *Hategekimana* Referral Decision, para. 55; *Stanković* Appeal Decision, paras. 50-52.

¹⁰⁶ Referral Request, para. 86.

¹⁰⁷ Referral Request, para. 90.

¹⁰⁸ Referral Request, paras. 99-100.

¹⁰⁹ Referral Request, para. 95.

¹¹⁰ Defence Submission, para. 51.

¹¹¹ *Uwinkindi* Referral Decision, para. 15.

¹¹² *Uwinkindi* Appeal Decision, para. 22; *Uwinkindi* Referral Decision, para. 17; *Munyakazi* Appeal Decision, para. 4.

¹¹³ 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.

¹¹⁴ General Comment No. 32, para. 19.

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judge is involved. It also includes circumstances that would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹¹⁵

63. Articles 2, 13(1) and 16 of the Transfer Law state that the accused is entitled to a fair and public hearing before the High Court at the first instance, and the Supreme Court on appeal.¹¹⁶

64. It is well established in Tribunal jurisprudence that there exists a presumption of impartiality which attaches to a judge or a tribunal.¹¹⁷ The Chamber notes that though absolute neutrality can hardly, if ever, be achieved, in the absence of evidence to the contrary, it must be assumed that judges can “disabuse their minds of any irrelevant personal beliefs or predispositions.”¹¹⁸ The ICTY Appeals Chamber held in *Furundžija* that there is a high threshold to rebut the presumption of impartiality, and partiality must be established on the basis of adequate and reliable evidence.¹¹⁹ As in *Ntaganzwa* and *Uwinkindi*, this Chamber is of the view that as professional judges, Rwandan judges benefit from this presumption of independence and impartiality—a presumption which cannot easily be rebutted.¹²⁰

65. The Chamber finds that the Defence has not rebutted that presumption, and the judges of the Supreme Court and the High Court of Rwanda are capable, experienced and impartial, and that the transfer of the present case to Rwanda would not prejudice the rights of the Accused.

6.10 Conclusion

66. The Referral Chamber expects that the Republic of Rwanda will ensure that the Accused, upon surrender or apprehension, will be expeditiously brought before a judicial authority and, thereafter, will be extended, at a minimum, all the guarantees contained in Article 20 of the Statute and in the ICCPR.

7. MONITORING AND REVOCATION

7.1 Monitoring

67. The Prosecution requests that the Chamber consider “ordering that the monitoring mechanism implemented in *Uwinkindi* apply *mutatis mutandis* in the case of this Accused once

¹¹⁵ *Uwinkindi* Referral Decision, paras. 75, 76; *Prosecutor v. Furundžija*, Case No. IT-97-17/1-A, Judgement (AC), 21 July 2000, para. 203 (“*Furundžija* Appeal Judgement”).

¹¹⁶ Transfer Law, Articles 2, 13 (1), 16.

¹¹⁷ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 48; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001, para. 91; *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges (TC), 25 April 2006, para. 9; *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision by Nzirorera for Disqualification of Trial Judges (TC), 17 May 2004, para. 11; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion for Disqualification of Judge Byron and Stay of Proceedings (TC), 20 February 2009, para. 6.

¹¹⁸ *Furundžija* Appeal Judgement, para. 203.

¹¹⁹ *Furundžija* Appeal Judgement, para. 197.

¹²⁰ *Ntaganzwa* Referral Decision, para. 72; *Uwinkindi* Referral Decision, para. 166. See also, Reply, para. 14.

he is arrested and transferred to Rwanda."¹²¹ In response, the Defence contends that the Prosecution has failed to demonstrate the efficacy of the *Uwinkindi* monitoring mechanism.¹²²

68. In its Reply, the Prosecution responds that the President has already addressed the difficulties that the Registry initially experienced with the implementation of the *Uwinkindi* monitoring mechanism, and that the implementation in previous cases will only enhance the Tribunal's practical monitoring experience.¹²³

69. 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.

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

71. 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.

72. 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.¹²⁴ Numerous Referral Chambers and the Appeals Chamber have found Rwanda's legal framework sufficient to ensure an effective monitoring system.¹²⁵

73. The Chamber considers it to be in the interests of justice to ensure that there is an adequate system of monitoring if this case is to be transferred. 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 referred case and, where the circumstances so warrant, to have the transferred case recalled to this Tribunal.¹²⁶ In accordance with Article 6 (5) of its statute, the ICTR branch of the

¹²¹ Referral Request, para. 113.

¹²² Defence Submission, paras. 80-84.

¹²³ Reply, paras. 45-47.

¹²⁴ *Stanković* Appeal Decision, para. 52; *Janković* Appeal Decision, paras. 55-57.

¹²⁵ *Kanyarukiga* Referral Decision, para. 103; *Kayishema* Referral Decision, para. 54; *Uwinkindi* Referral Decision, para. 209.

¹²⁶ 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

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Residual Mechanism shall take over the monitoring of cases referred to national courts by the ICTR.¹²⁷ Monitoring will continue uninterrupted with the *proviso* that the competence of this Tribunal will pass to the Residual Mechanism on 1 July 2012.¹²⁸

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

75. Following the *Munyagishari*, *Ntaganzwa*, *Kayeshima* and *Sikubwabo* Referral Chambers, the Chamber hereby adopts the Prosecution’s suggestion regarding the appropriate monitoring mechanism. Under the *Uwinkindi* mechanism, the ICTR Legal Staff currently serve as interim monitors while negotiations are ongoing with the African Commission on Human and Peoples’ Rights (“ACHPR”), or, should such discussions prove unsuccessful, another independent organisation will be appointed monitor together with ICTR Legal Staff.¹²⁹ The Chamber finds that such arrangements should apply, *mutatis mutandis*, to the case of the Accused, when he is arrested and transferred to Rwanda.

76. The ICTR branch of the Residual Mechanism shall be responsible for monitoring as of 1 July 2012. Given that the Accused is still at large, his trial would not begin before this date. The Chamber considers its choice of monitoring mechanism to be consistent with the 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.”

77. The Referral Chamber also 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.

7.2 Revocation

78. 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.

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.

¹²⁷ Security Council Resolution 1966, S/Res/1966 (2010).

¹²⁸ President’s Decision in the *Uwinkindi* Case, para. 6.

¹²⁹ See *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75R11*bis*, Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012, Disposition.

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79. 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 the monitor. 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 revocation.

80. The Chamber finds that it is appropriate to direct the Registrar to prepare and finalise a suitable agreement with regard to the monitoring arrangements. 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 President of the Residual Mechanism if these arrangements prove ineffective.

8. CONCLUSION

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

82. This Chamber notes that Rwanda has made material changes in its laws and has indicated its capacity and willingness to prosecute cases referred by this Tribunal. It also notes that five other Referral Chambers have referred similar cases to Rwanda in the preceding months.¹³⁰ This gives the Chamber confidence that the case of the Accused will be prosecuted consistent with international fair trial standards. The Chamber is persuaded to refer this case after receiving assurances that a robust monitoring mechanism will ensure that any material violation of the fair trial rights of the Accused will be brought to the attention of the President of the Tribunal or the President of the International Residual Mechanism, as appropriate, forthwith so that remedial action, including revocation, can be considered by this Tribunal or by the Residual Mechanism.

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

9. DISPOSITION

FOR THE FOREGOING REASONS, THE REFERRAL CHAMBER

PURSUANT to Rule 11 *bis* of the Rules;

GRANTS the Motion;

ORDERS the case of *The Prosecutor v. Ryandikayo* (Case No. ICTR-95-1E-R11*bis*) 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;

¹³⁰ See *Ntaganzwa* Referral Decision; *Kayishema* Referral Decision (2012); *Sikubwabo* Referral Decision; *Uwinkindi* Referral Decision.

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

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

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

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

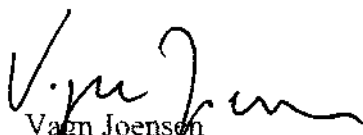
REQUESTS the Registrar, that within 30 days of receiving notice that the Accused has been arrested, in order to allow for the trial in Rwanda to begin, to arrange for the monitoring mechanism as determined suitable in *The Prosecutor v. Jean Uwinkindi*, to become functional;

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

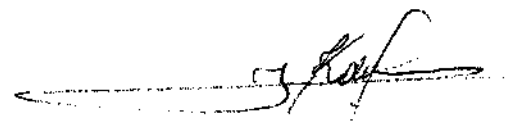
NOTES that upon the conclusion of the mandate of the Tribunal, all obligations of the parties, the monitors and Rwanda will be subject to the directions of the International Residual Mechanism for Criminal Tribunals; and

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

Done in English, Arusha, 20 June 2012.


Vagn Joensen
Presiding Judge


Florence Rita Arrey
Judge


Gberdao Gustave Kam
Judge

