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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 28 May 2008

THE PROSECUTOR

v.

Yussuf MUNYAKAZI

Case No. ICTR-97-36-R11bis

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

Rule 11bis of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hassan Bubacar Jallow
Bongani Majola
Alex Obote-Odora
Richard Karegyesa
George Mugwanya
Inneke Onsea
François Nsanzuwera
Florida Kabasinga

Defence Counsel:
Jwani Timothy Mwaikusa
Eliane Nyampinga

I. INTRODUCTION

1. The Chamber is seised of the Prosecutor's request to refer the case of Yussuf Munyakazi ("Accused") to the Republic of Rwanda ("Rwanda") pursuant to Rule 11*bis* of the International Criminal Tribunal for Rwanda's ("Tribunal") Rules of Procedure and Evidence ("Rules").[1]

2. The Accused is charged with genocide, or alternatively, with complicity in genocide, and extermination as a crime against humanity.[2] The crimes are alleged to have been committed in Cyangugu and Kibuye *préfectures*, within the territory of Rwanda.

3. In the Referral Request of 7 September 2007, the Prosecutor submits that Rwanda has jurisdiction over the Accused and is willing and adequately prepared to accept the Accused's case. The Prosecutor further submits that, as required by Rule 11*bis*, Rwanda possesses a legal framework that criminalises the alleged conduct of the Accused as international crimes, ensures that the death penalty will not be imposed, and guarantees the Accused's fair trial rights.

4. In a response, dated 2 October 2007, Defence Counsel for the Accused objects to the Referral Request on the grounds that, amongst other things, Rwandan law does not provide an adequate legal framework and that the Accused cannot receive a fair trial in Rwanda.[3]

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[1] "Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence", 7 September 2007 ("Referral Request"). Following the Referral Request, the President of the Tribunal designated this Trial Chamber to determine the matter in accordance with Rule 11*bis* on 2 October 2007. *See* "Designation of a Trial Chamber for the Referral of the Case of *Yussuf Munyakazi* to Rwanda", 2 October 2007.

[2] Amended Indictment, 29 November 2002 ("Indictment"). The Accused is charged with individual criminal responsibility under Article 6 (1) of the Statute of the International Tribunal for Rwanda ("Statute") for genocide pursuant to Article 2 (3) (a) or alternatively, complicity in genocide pursuant to Article 2 (3) (e) and extermination as a crime against humanity pursuant to Article 3 (b) of the Statute.

[3] "Defence Response to the Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence", 2 October 2007 ("Defence Response"). On 22 October 2007, the Prosecutor replied to the Defence Response, "Prosecutor's Reply to 'The Defence Response to the Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence', 22 October 2007" ("Prosecutor's Reply").

5. Pursuant to Rule 74, [4] the Chamber has granted leave to Rwanda, the Kigali Bar Association ("KBA"), the International Criminal Defence Attorneys Association ("ICDAA"), and Human Rights Watch ("HRW") to appear as *amicus curiae* and make submissions on specific issues.[5] All *amici* filed written submissions in accordance with the Chamber's orders.[6]

6. A hearing was held on 24 April 2008 ("Referral Hearing") during which the Parties and *amici* had an opportunity to make additional submissions and answer questions from the Chamber.[7]

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

(i) This case is appropriate for transfer to the authorities of another State;[8]

(ii) Rwanda has jurisdiction;[9] and

(iii) Rwanda is an appropriate referral State in that (a) the death penalty will not be imposed and the Accused will receive an appropriate punishment if convicted of the crimes with which he is charged;[10] and (b) the Accused will receive a fair trial.[11]

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

[5] "Order for Submissions of the Republic of Rwanda as the State Concerned by the Prosecutor's Request for Referral of the Indictment against Yussuf Munyakazi to Rwanda", 9 November 2007; "Decision on the Application by the Kigali Bar Association for Leave to Appear as *Amicus Curiae*", 6 December 2007; "Decision on the Application by the International Criminal Defence Attorneys Association (ICDAA) for Leave to File a Brief as *Amicus Curiae*", 6 December 2007; and "Decision on the Request by Human Rights Watch to Appear as *Amicus Curiae*", 10 March 2008.

[6] "*Amicus Curiae* Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11*bis*", 21 December 2007 ("Rwanda's *Amicus* Brief"); "Brief of International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused Yussuf Munyakazi to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence", 4 January 2008 ("ICDAA *Amicus* Brief"); "*Amicus Curiae* Brief of the Kigali Bar Association in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11*bis*", 10 January 2008 ("KBA *Amicus* Brief"); "Brief of Human Rights Watch As *Amicus Curiae* In Opposition to Rule 11*bis* Transfer", 17 March 2008 ("HRW *Amicus* Brief").

[7] "Scheduling Order for a Hearing on Referral of the Case of Yussuf Munyakazi to the Republic of Rwanda", 19 February 2008.

[8] *See* paras. 8 to 14 of this Decision.

[9] Rule 11*bis* (A).

[10] Rule 11*bis* (C) and the Tribunal's jurisprudence to be discussed further at paras. 17 to 32 of this Decision.

[11] Rule 11*bis* (C).

II. APPROPRIATE CASE FOR CONSIDERATION

A. Submissions

8. The Prosecutor submits that selection of a case for referral to the authorities of a State is a matter falling within his discretion.[12]

B. Law

9. The Chamber notes that while the Prosecutor has discretion to select cases for possible transfer to competent national jurisdictions,[13] the Tribunal is mandated under Security Council Resolutions 1503 and 1534 to transfer cases involving *intermediate* and *low-rank* accused to competent national jurisdictions.[14]

10. According to prior jurisprudence on referrals, "*intermediate*" and "*low-rank*" accused include:[15] a sub-commander of the military police and one of the main paramilitary leaders in Foča;[16] a prison administrator;[17] a commander of a military police

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[12] Prosecutor's Reply, para. 14, in which the Prosecutor submits that this is a matter falling within his discretion pursuant to Rule 11*bis* (B), which bestows upon him a "specific role" in initiating referral proceedings.

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

[14] Eighth *Preambular* Paragraph of Security Council Resolution 1503: "*Urging* the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy)", Resolution 1503 (2003), S/RES/1504 (2003), 23 August 2003. See also para. 6 of Security Council Resolution 1534 "*Requests* each Tribunal to provide the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments; ..."

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

[16] *See Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11*bis*.2, "Decision on Rule 11*bis* Referral", 15 November 2005, paras. 4, 11, 19, 20. (Note that this was the basis of the first ground of his appeal: rejected).

[17] *See Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11*bis*.2, "Decision on Savo Todović's Appeals against Decisions on Referral under Rule 11*bis*", 4 September 2006, ("*Todović* Appeal") paras. 9, 17-22. (Note that this was the basis of the first ground of his appeal of the referral: rejected.)

battalion including a formation known as "the jokers",[18] four Bosnian Serb authorities involved in a joint criminal enterprise in two detention camps,[19] a soldier;[20] and a *préfet* in Rwanda.[21] Positions considered too senior for referral have included: the most senior commander of the Army of Bosnia and Herzegovina;[22] a paramilitary leader;[23] a commander involved in peace negotiations who was one rank below the highest military command.[24]

C. Discussion

11. In determining whether the referral of the case is appropriate, the Chamber will therefore evaluate the level of responsibility of the Accused, considering only those facts alleged in the Indictment.[25]

12. The Accused is alleged to have been a wealthy businessman, a commercial farmer, and a leader of the Bugurama MRND militia ("Bugurama *Interahamwe*").[26] He is charged with genocide, or, alternatively, with complicity in genocide, and extermination as a crime against humanity.[27] Specifically, it is alleged that the Accused:

(i) delivered weapons, uniforms, and boots to the *Interahamwe*;

(ii) incited hatred against Tutsis at the Hotel Ituze in Kamembe, Cyangugu *préfecture*;

(iii) instigated the killing of Tutsis at Kabusunzu in Bugarama;

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[18] *See Prosecutor v. Paško Ljubičjć,* Case No. IT-00-41-AR11*bis*.1, "Decision on Appeal against Decision on Referral under Rule 11*bis*", 4 July 2006, ("*Ljubičjć* Appeal") para. 3 (appealed, but not on this ground).

[19] *See Prosecutor v. Zeljko Mejakić et al.,* Case No. IT-02-65-AR11*bis*.1, "Decision on Joint Defence Appeal against Decision on Referral under Rule 11*bis*", 7 April 2006, ("*Mejakić* Appeal"), paras. 3, 4, 18-26. (Note that this was the basis of the Appellants' second ground of appeal: rejected.)

[20] *See Prosecutor v. Radovan Stanković,* Case No. IT-96-23/2-AR11*bis*.1, "Decision on Rule 11*bis* Referral", 1 September 2005, ("*Stanković* Appeal"), para. 3 (appealed, but not on this ground).

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

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

[23] *See Prosecutor v. Milan Lukić,* Case No. IT-98-32/1-AR11*bis*.1, "Decision on Milan Lukić's Appeal Regarding Referral", 11 July 2007, paras. 18-26. (Note that this was the basis of the third and fourth grounds of his appeal, which were accepted, his referral was revoked)

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

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

[26] Indictment, para. 4.

[27] Indictment, Counts 1 and 2.

(iv) at Leonard Bamenyayundi's house in Gisuma *Commune*, Cyangugu *préfecture*, planned to kill all the displaced Tutsis gathered at Nyarushishi Refugee Camp, and was present at Nyarushishi to execute the plan the following day;

(v) with the Bugarama *Interahamwe*, attacked Tutsi civilians who had sought refuge at Cyangugu Cathedral; and

(vi) attacked and killed Tutsi civilians who sought refuge at three parishes in Cyangugu *préfecture,* and in Bisesero in Kibuye *préfecture*.[28]

13. The Chamber notes that the Accused had neither a rank of any military significance, nor had any official political role. He was an *Interahamwe* leader, whose role was largely limited to Cyangugu *préfecture*. The Accused's level of responsibility is 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.[29]

D. Conclusion

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

III. REFERRAL TO RWANDA

A. Jurisdiction

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

> "If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:
> (i) in whose territory the crime was committed; or
> (ii) in which the accused was arrested; or
> (iii) having jurisdiction and being willing and adequately prepared to accept such a case'
> so that those authorities should forthwith refer the case to the appropriate court for trial within that State."

[28] Indictment, paras. 7.1 to 7.6 and 8.1 to 8.5.
[29] *See Bucyibaruta* Referral.

16. It is not disputed that Rwanda has jurisdiction as the State in whose territory the crimes were committed pursuant to Rule 11*bis* (A) (i). Where a Chamber finds that any one of the three grounds in Rule 11*bis* (A) is established, it can proceed to determine, pursuant to Rule 11*bis* (C), whether the Accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.[30]

B. Penalty Structure

A. Submissions

i. Non-Imposition of Death Penalty

17. The Prosecutor submits that Rwanda has enacted legislation abolishing the death penalty.[31] The Defence responds that the Rwandan Code of Criminal Procedure retains certain provisions for the death penalty.[32] The Prosecutor replies that the provision for life imprisonment in the Rwandan law governing the transfer of cases from the Tribunal, supersedes any prior legislative provisions.[33]

ii. Applicable Punishment

18. The Prosecutor submits that the Transfer Law provides for a penalty structure identical to that enshrined in the Tribunal's Statute and Rules.[34] The Prosecutor refers to Article 21 of the Transfer Law which states that life imprisonment shall be the heaviest penalty for an Accused transferred from the Tribunal to Rwanda.[35]

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

[31] Article 3 of Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty ("Death Penalty Law") states: "In all legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided for by this Organic Law." *See* Referral Request, para. 27.

[32] Articles 212-217 of the Law No. 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure ("Rwandan Code of Criminal Procedure"). *See* Defence Response, para. 5.4.

[33] Article 1 of the Organic Law No. 11/2007 of 16 March 2007, Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States ("Transfer Law") states that it shall "regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda." Article 21 states that life imprisonment will be the highest penalty. *See* Prosecutor's Reply, para. 24.

[34] Referral Request, para. 28.

[35] Referral Request, para. 26.

19. In response, the Defence refers to Article 4 of the Death Penalty Law which states that life imprisonment with special provisions is imprisonment in isolation.[36]

B. Law

20. In order to refer the Accused's case, the Chamber must satisfy itself that the death penalty will not be imposed.[37]

21. Furthermore, although not expressly provided for in Rule 11*bis*, pursuant to the jurisprudence of the Tribunal and the ICTY, the penalty structure within a State to which an indictment may be referred must provide an appropriate punishment for the offences with which the Accused is currently charged.[38] Moreover, conditions of detention, a matter which touches upon the fairness of a jurisdiction's criminal justice system, must accord with internationally recognised standards.[39]

22. Specifically with regard to imprisonment in isolation or solitary confinement, although the prohibition of contact with other prisoners for security, disciplinary or protective reasons may be necessary, human rights bodies have consistently held that imprisonment in isolation is an undesirable penalty and should be used only in exceptional circumstances and for limited periods.[40] Furthermore, protracted periods of

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

[37] Rule 11*bis* (C).

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

[39] The Chamber recalls that conditions of detention in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction's criminal justice system and is an inquiry squarely within the Chamber's mandate. *See Stanković* Appeal, para. 34, and *Todović* Appeal, para. 99. These internationally recognised standards include: (i) Freedom from torture, or cruel, inhuman or degrading treatment or punishment as contained in Article 5, Universal Declaration of Human Rights ("UDHR"); Article 7, International Covenant on Civil and Political Rights ("ICCPR"); Article 5, African Charter on Human and People's Rights ("ACHPR"); Article 16 (1), Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"); and Principle 6 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988) ("Body of Principles"); and (ii) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person as contained in Article 10 (1), ICCPR; Article 5, ACHPR; and Principle 1 of the Body of Principles.

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

solitary confinement may amount to acts violating human rights standards.[41] Therefore, solitary confinement is an exceptional punishment and where implemented, should be as short as possible. Where it is prolonged, the detainee should be informed in writing of the substantive reasons for such measures in order to avoid any risk of arbitrariness,[42] and be afforded the right to independent judicial review of the merits and reasons for the prolonged solitary confinement.[43] Arrangements for solitary confinement should also be reviewed in order to provide prisoners with a wider range of activities and ensuring appropriate human contact.[44]

23. Therefore, States must ensure that where individuals are imprisoned in isolation, effective safeguards are in place to guarantee that such isolation is consistent with the right to humane treatment and respects the inherent dignity of the person.[45]

C. Discussion

i. Non-Imposition of the Death Penalty

24. The Death Penalty Law abolishes the death penalty, and replaces it in all previous legislative texts with life imprisonment or "life imprisonment with special provisions."[46]

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[41] HRC, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994), para. 6. Further, in assessing whether solitary confinement will amount to a violation of an individual's right to humane treatment which respects his or her inherent dignity, human rights bodies have considered factors such as the duration of the isolation and its physical and mental effects. *See Achutan and Amnesty International v. Malawi*, African Commission on Human and People's Rights (ACommHR), Comm. No.s 64/92, 68/92, and 78/92 (1995), para. 7; *Lorse and others v. The Netherlands* (ECtHR), App. No. 52750/99), 4 February 2003, para. 63; *Matthew v. The Netherlands* (ECtHR) App. No. 24919/03), 29 September 2005, paras. 200 and 201; and *Ramirez Sanchez v. France*, para. 117.

[42] *Matthew v. The Netherlands*, para. 199 and *Ramirez Sanchez v. France*, para. 139.

[43] The ECtHR has held that where a detainee was held in solitary confinement for a period of eight years, in view of the length of that period, a rigorous examination was necessary to determine: whether it was justified; whether the measures taken were necessary and proportionate compared to the available alternatives; what safeguards were afforded the applicant; and what measures were taken by the authorities to ensure that the applicant's physical and mental condition was compatible with his solitary confinement. *See Ramirez Sanchez v. France*, paras. 145 and 146. The HRC has found that detention in solitary confinement for a period of 13 years was considered to be a measure of such gravity and of such fundamental impact on the individual in question that it required the most serious and detailed justification. *See Yong-Joo Kong v Republic of Korea*, U.N. Doc. CCPR/C/78/D/878/1999, 23 July 2003, para. 7.3.

[44] *G.B. v. Bulgaria* (ECtHR), App. No. 42346/98, 11 March 2004, para. 84 and *Matthew v. The Netherlands*, para. 199.

[45] *G.B. v. Bulgaria*. para. 84 and *Lorse and others v. The Netherlands*, paras. 62 and 63.

[46] Article 3 of the Death Penalty Law provides that in all legislative texts, the death penalty is substituted with imprisonment or life imprisonment with special provisions. Further, Article 21 of the Transfer Law provides that life imprisonment is the highest penalty that can be imposed for cases referred to Rwanda by the Tribunal. The Referral Bench shall consider "life imprisonment with special provisions." *See* paras. 25 to 31.

Accordingly, the death penalty provisions in the Rwandan Code of Criminal Procedure,[47] or any other legislation, are no longer applicable. Thus, the Chamber is satisfied that, in line with Rule 11*bis* (C), the death penalty will not be imposed in Rwanda.

ii. Applicable Punishment

25. However, the Chamber is concerned that life imprisonment in the Accused's case would mean life imprisonment in isolation.[48]

26. The Death Penalty Law, dated 25 July 2007, came into force after the Transfer Law, dated 16 March 2007. Article 25 of the Transfer Law states:

> "In the event of any inconsistency between the Organic Law and any other Law, the provisions of this Organic Law shall prevail."

In the Chamber's view, there is no inconsistency between the Transfer Law and the Death Penalty Law. The latter states that the death penalty is replaced with life imprisonment and provides two categories of life imprisonment, namely: (i) life imprisonment; and (ii) life imprisonment with special provisions. Article 5 of the Death Penalty Law further details that the crimes of torture, murder, genocide and crimes against humanity are amongst those crimes attracting a sentence of "life imprisonment with special provisions." Therefore, the Death Penalty Law does not prescribe a sentence that is inconsistent with the Transfer Law, but rather provides further guidance on the sentence of life imprisonment and states when it is applicable.

27. In any event, the Death Penalty Law repeals the earlier law in respect of sentencing as Article 9 states:

> "All legal provisions contrary to this Organic Law are hereby repealed."

28. The Chamber therefore considers that pursuant to the Death Penalty Law, the Accused, if transferred and convicted of the crimes charged, could be subject to the sentence of life imprisonment with special provisions.[49]

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[47] As referred to by the Defence, *see* supra para. 17.

[48] Although the Chamber has been informed by the Prosecutor and Rwanda that the relevant law applicable to the Accused, if transferred, is the Transfer Law which provides that the highest penalty that can be imposed is life imprisonment, neither the Prosecutor, nor the Rwanda, satisfactorily responded to the Defence submission that this means life imprisonment in isolation.

[49] Pursuant to Articles 3, 4 and 5 of the Death Penalty Law.

iii. Does the Applicable Punishment Accord with International Standards?

29. The Chamber heard submissions that conditions of detention in Rwanda accord with international standards.[50] Notwithstanding such submissions, pursuant to the Death Penalty Law, the Accused would be sentenced to life imprisonment in isolation if convicted of the crimes charged. The Chamber must therefore consider whether such a sentence, which impacts upon detention conditions, accords with internationally recognised standards.

30. In view of the established jurisprudence and observations of Human Rights bodies, the Chamber considers that, where provided for in domestic law, imprisonment in isolation should be an exceptional punishment, applicable only where necessary and proportionate, and include the following minimum safeguards:

(i) Prior to imposition of such punishment, an assessment of the prisoner to determine whether imprisonment in isolation is a necessary and proportionate punishment;

(ii) A right of review by a judicial body to determine whether continued isolation remains necessary and proportionate; and

(iii) Arrangements aimed at providing a range of activities to ensure appropriate human contact and mental and physical stimulation.

31. The Chamber is not aware of any such safeguards in Rwandan law.

D. Conclusion

32. The Chamber finds that although the death penalty would not be imposed in Rwanda, thereby satisfying one of the requirements in Rule 11*bis* (C), the applicable sentence in the Accused's case, if convicted, would be life imprisonment in isolation. The Chamber considers that without the aforementioned safeguards, the current penalty structure is not adequate, as required by the jurisprudence of the ICTY and the Tribunal,

[50] The Prosecutor refers to Article 23 of the Transfer Law which provides that any person transferred to Rwanda by the Tribunal shall 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 ("Body of Principles"). *See* Prosecutor's Reply, para. 27. Further, Rwanda submits that convicts transferred from the Tribunal or other jurisdictions shall be detained in a new prison built to international standards. *See* Rwanda's *Amicus* Brief, paras. 30 and 31. During the Referral Hearing, the Rwandan Government's representative provided a further description of the detention facilities and informed the Chamber that imprisonment would be "under the conditions agreed upon by the ICTR Registry on the management of the prison." *See* T. 24 April 2008, p. 77.

thus precluding referral to Rwanda. The Chamber will next address areas where it considers the Accused's fair trial rights will not be guaranteed if referred to Rwanda.

C. Fair Trial Guarantees

1. Independence of the Judiciary

A. Submissions

i. Parties

33. The Defence submits that international standards of fair trial require that persons accused of serious crimes under international humanitarian law appear before a panel of three judges in the first instance and before five judges at the appellate level.[51] The Defence further argues that it is "both absurd and unacceptable that a single judge be allowed to give rulings on accusations related to serious violations of International Law, such as genocide, crimes against humanity and war crimes."[52]

34. The Prosecutor replies that Rule 11*bis* does not envisage the transfer or imposition of the Tribunal's judicial structures to the referral State, but rather the transfer of a case so it can be prosecuted in the judicial system of that referral State.[53] The Prosecutor submits that criminal trials presided over by a single judge are widely used in national systems and a court presided over by a single judge can provide a fair trial.[54]

ii. Rwanda

35. Rwanda confirms that the proceedings will be presided over by a single judge in the first instance,[55] as are capital cases before the High Courts of Kenya, Tanzania, Uganda, the Republic of South Africa, Botswana and Zambia.[56] Rwanda submits that this

[51] Defence Response, para 7.5.
[52] *Ibid.*, para 7.4.
[53] Prosecutor's Reply, para 37.
[54] *Ibid.*, para 38.
[55] Article 2, Transfer Law.
[56] Rwanda's *Amicus* Brief, footnote 17, page 10. Rwanda submitted that this court structure was adopted following a comparative study of common and civil law systems in East, Central and Southern Africa which showed that trials of capital cases before the High Courts of many of these countries went before a single judge.

system was adopted given its inherent efficiency, and that it does not impair or otherwise impede the accused's right to a fair trial.[57]

B. Law

36. Article 20 of the Tribunal's Statute guarantees the right to a fair and public hearing.[58] This right encompasses the right to be tried before an independent and impartial tribunal as reflected in major human rights instruments,[59] and international criminal jurisprudence.[60] The criteria of independence and impartiality are distinct yet interrelated. The Chamber will focus on independence in this Decision as it considers that this criterion may be violated as a result of the reasons set out below, if the Accused is tried by a single judge in Rwanda.[61]

37. An "independent" tribunal must be independent of the executive, the parties and the legislature.[62] The criteria encompassing judicial independence includes: the manner of appointment of its members and their term of office; the existence of guarantees against outside pressures; and the appearance of independence.[63]

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[57] *Ibid*, para 37.

[58] Article 20 (2) of the Tribunal Statute states that "...the accused shall be entitled to a fair and public hearing..."

[59] Article 14 (1) of ICCPR provides that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article. 6 (1) of the ECHR protects the right to a fair trial and provides *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article. 7 (1) (d) of the ACHPR provides that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal." *See also*, Human Rights Committee General Comment 32 and Principles 1 and 2, UN Basic Principles on the Independence of the Judiciary.

[60] *See Prosecutor v Furundzija*, Case No, IT-95-17/1-A, 21 July 2000, ("*Furundzija* Appeal"), para. 177, footnote 239, where the Appeals Chamber held that under Article 21 (2) of the Statute of the ICTY, (which is identical to Article 20 (2) of the Statute of the ICTR) the accused is entitled to "a fair and public hearing" in the determination of the charges against him.

[61] For a thorough discussion of the elements constituting impartiality, *see* the *Furundzija* Appeal, from para. 181.

[62] European Commission on Human Rights, *Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v Italy*, App. No 8603/79., 18 December 1980, p. 212.

[63] The European Court of Human Rights has the most developed jurisprudence in this area and has consistently held that "in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of the appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence." *See Findlay v UK*, 25 February 1997, 24 EHRR 221 at para. 73; *Bryan v United Kingdom*, 22 November 1995, Series A, No.335-A; (1996) 21 EHRR 342 at para. 37; *Langborger v Sweden*, 22 June 1989, Series A, No.155; (1990) 12 EHRR 416, para. 32; *Campbell and Fell v UK*, June 28, 1984 (1985) 7 EHRR 165, para. 78; European Commission on Human Rights, *Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v Italy*, App No 8603/79., 18 December 1980, p. 212.

C. Discussion

38. The Chamber recalls that Rwanda adopted its system of a High Court with a single judge following a comparative study which revealed that trials of capital cases before many of the High Courts of East, Central and Southern Africa are tried before a single judge. However, the Chamber is of the view that capital cases may be distinguished from cases involving serious violations of international law, including genocide. Consequently, equating the two is inappropriate.

39. Indeed, the Chamber is concerned that the trial of the Accused for genocide and other serious violations of international law in Rwanda by a single judge in the first instance may violate his right to be tried before an independent tribunal.

40. Although Rwanda has ratified international treaties guaranteeing the right to be tried before an independent tribunal,[64] and included this right in the Transfer Law,[65] the Chamber is of the view that sufficient guarantees against outside pressures are lacking in Rwanda. The Chamber finds that, while Rwandan legislation enshrines the principle of judicial independence, which by definition includes guarantees against outside pressures,[66] the practice has been somewhat troubling. In particular, the Chamber notes the Rwandan Government's interrupted cooperation with the Tribunal following a dismissal of an indictment and release of an Appellant,[67] as well as its negative reaction to foreign judges for indicting former members of the Rwandan Patriotic Front ("RPF").[68] The Chamber is concerned that these actions by the Rwandan Government, as will be explained in more detail below, show a tendency to pressure the judiciary, a pressure against which a judge sitting alone would be particularly susceptible.

[64] Rwanda acceded to the ICCPR on 16 April 1975, *see* U.N. Doc CCPR/C/2/Rev.4, *see also*, http://www2.ohchr.org/english/bodies/ratification/4.htm and to the ACHPR on 15 July 1983, *see* http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf.
[65] Article 13 (1) of the Transfer Law. In addition, Article 19 of The Constitution of the Republic of Rwanda guarantees that "Every person accused of a crime shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public, and *fair hearing*..."(emphasis added).
[66] *See* for example, Article 140 of the Rwandan Constitution; Article 64 of the Organic Law No 7 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts.
[67] *See Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, AC, *Decision*, 3 November 1999.
[68] See paras. 42 - 45.

i. Rwandan Government's Reaction to Tribunal Decisions

41. Following Jean-Bosco Barayagwiza's successful appeal concerning the violation of his rights,[69] the Rwandan Government barred the Tribunal Prosecutor, Carla del Ponte, from her Kigali office, and denied permission to leave the country to sixteen witnesses scheduled to testify in the trial of Bagilishema at the Tribunal.[70] Months later, Prosecutor del Ponte stated that the Rwandan Government had "reacted very seriously in a tough manner", and that "after the decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed..." Given Rwanda's reaction, she therefore urged the Tribunal to reconsider the dismissal of the indictment.[71] Her comments were quoted in the Appeals Chamber's Decision.[72]

ii. Rwandan Government's Condemnation of Foreign Judges

42. The Rwandan Government has also condemned foreign judges for adverse decisions. For example, the French Judge, Jean-Louis Bruguière, investigated the

[69] *See Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, AC, *Decision*, 3 November 1999.

[70] *See* quote below from *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, AC, "Decision: Prosecutor's Request for Review or Reconsideration", 31 March 2000, Declaration of Judge Raphael Nieto-Navia, para. 2. Also cited in the ICDAA *Amicus*, page 6, footnote 7.

[71] As she stated, "Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda" (see following footnote for full citation).

[72] *See Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, AC, "Decision: Prosecutor's Request for Review or Reconsideration", 31 March 2000, Declaration of Judge Raphael Nieto-Navia, para. 2, in which Judge Nieto-Navia quoted pleadings of the Prosecutor, Carla del Ponte, including:

> "Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant with the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who was unable to go to her office in Kigali. It was the Prosecutor who could not be received by the Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed & it was the trial of Bagilishima which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this Court. In other words, they were not allowed to leave the territory of Rwanda. [...] However, your Honours, due account has to be taken of that fact. Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, *judex naturalis*. Otherwise I am afraid, as we say in Italian, *possiamo chiudere la baracca*. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner..."

responsibility for shooting down of President Habyarimana's plane on 6 April 1994. Judge Bruguière's report was made public on 17 November 2006, and he subsequently urged the French *Procureur de la Républicue* to issue international arrest warrants against former RPF members, and, considering the immunity of Head of States, indirectly deferred to the United Nations Secretary-General to take appropriate measures to prosecute the current President of Rwanda, Paul Kagame.[73]

43. The Rwandan Government reacted swiftly, issuing an official reaction,[74] which strongly criticised the report,[75] as well as Judge Bruguière personally.[76] The Government appeared to equate Bruguière with the French Government, referring to Bruguière's report and subsequent call for indictments as part of "a long term French Plot to destabilise the Government of the Republic of Rwanda",[77] and "naked bullying and misuse of power by a Permanent member of the Security Council [France]",[78] concluding that the "Government of the Republic of Rwanda has a historic duty to resist this attempt by France to desecrate the memory of millions of Rwandans who died."[79]

44. The official Government statement rejected Judge Bruguière's conclusions outright, stating that "Rwanda owes it to the world to refuse this perversion of Justice",[80] and that "this criminal attempt to distort history should be dismissed with the contempt it deserves",[81] expressing that they were "indignant that this French Judge is allowed to

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[73] See www.rwanda-info.net/media/document/Rapport_Bruguiere_Rwanda.pdf

[74] A copy of the "Rwanda Governments' Reaction to Judge Brugeire's Indictment Saga" can be found at http://www.rwandagateway.org/IMG/pdf/bruguiere_2_-2.pdf Note that http://www.rwandagateway.org/ describes its website on the "about us" section as "Rwanda Development Gateway (RDG) is a project of the Government of Rwanda run under the National University of Rwanda (NUR). The RDG is implementing a Program to set up a National Portal as platform for information sharing. The Portal represents a one-stop-shop for information on Rwanda and the country's web interface to the rest of the world."

[75] The Government referred to Judge Bruguière's Report as "a thinly veiled political attack on the Government under the veneer of a judicial process" (p. 2), which "identify[ied] victims of his hate political views under the guise of a judicial process" (p. 42).

[76] The Government referred to Judge Bruguière as "a dangerous person" (p. 42), "a shameless Judge to the legal profession" (p. 42), "no more than a genocide denier/revisionist and mouth piece of genocide" (p. 38), "the conduit for the perversion of Justice" (p. 9), who had a "sadistic mindset [to] find the RFP "guilty" and condemn them" (p. 21).

[77] *Ibid.*, *see* page 2.

[78] *Ibid.*, *see* page 43.

[79] *Ibid.*, *see* page 3.

[80] *Ibid.*, *see* page 2.

[81] *Ibid.*, *see* page 38.

propagate to the entire world one of the basic tenets in genocide revisionist literature with impunity..."[82]

45. Judge Fernando Andreu of Spain has also faced condemnation from Rwanda. During the Referral Hearing, the HRW representative stated that "when the Spanish indictment was issued against forty high-ranking RPF officers, the national assembly passed a resolution asking for that Spanish judge to indeed be prosecuted for negating the genocide."[83] The Rwandan Government representative at the Referral Hearing denied this, stating that "there is no such thing as a resolution by Rwandan Parliament to prosecute a Spanish judge."[84] However, the Rwandan Government's sponsored website posted an article, dated 6 March 2008, stating that the Lower House of the Rwandan Parliament asked the Rwandan Minister of Justice, Tharcisse Karugarama, to prosecute Spanish Judge Fernando Andreu Merelles for negationism of a genocide.[85]

46. Accordingly, the Chamber finds that, although safeguards against outside pressures are provided under Rwandan law, past practice suggests such safeguards are not guaranteed in reality. Indeed, past practice causes the Chamber serious concern about whether the Accused will be tried by a court system that is free from outside pressure. The Chamber's concern is compounded by the fact that a Rwandan judge will be sitting alone and will therefore, be more susceptible to outside interference or pressure, especially from the executive. The Chamber considers that it is too much to expect of one individual to be able to resist the pressure of a State whose past practice has shown interference with judicial decisions.

47. Linked to this situation, the Chamber further wishes to emphasise its concern that the factual findings in such serious matters will be based on the conclusion of a single judge, in a context where the Supreme Court composed of three judges cannot re-examine witnesses or make its own factual findings. According to the Transfer Law, the Supreme Court can only consider errors of fact where there has been a miscarriage of

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[82] *Ibid.*, *see* page 41.
[83] *See* T. 24 April 2008, p. 64. *See also* HRW's "Further Submissions as *Amicus Curiae* in Response to Queries from the Chamber", 24 April 2008, para. 25.
[84] *See* T. 24 April 2008, p. 77.
[85] The article was published on the Government of Rwanda's project website (run under the National University of Rwanda), at http://www.rwandagateway.org/article.php3?id_article=8269.

justice,[86] and can only order the High Court to review a case in very limited circumstances.[87] In this regard, the Chamber refers to an Opinion of the Consultative Council of European Judges which states that in criminal cases:

> "a single judge should be used 'wherever the seriousness of the offence allows'. But, in serious cases involving the liberty of the subject, the collegiality of fact-finding provided by a panel of three or more judges, whether lay or professional, is an important safeguard against decisions influenced by one person's prejudices or idiosyncratic views."[88]

In the Chamber's view, the safeguard of a panel of three or more judges is even more crucial in cases of serious violations of international law, especially where the trial takes place within the territory where the crime or crimes occurred.

D. Conclusion

48. In light of the past actions of the Rwandan Government, the Chamber is not convinced that Rwanda respects the independence of the judiciary. The Chamber is concerned that this situation may lead to direct or indirect pressure being exerted on judges to produce judgements in line with the wishes of the Rwandan Government.[89] The Chamber believes that there is a real risk that that a single judge will not be able to resist any such pressure. This situation is exacerbated by the fact that a single judge's factual findings cannot be reviewed by the Supreme Court unless there has been a miscarriage of justice.

49. The Chamber is of the view that this danger would be substantially reduced if the trial were conducted by a panel of three or more judges. However, at present, this is not the case in Rwanda. Accordingly, the Chamber finds that the composition of the High

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[86] Article 16, Transfer Law.

[87] Article 17, Transfer Law and Article 180 of the Rwandan Code of Criminal Procedure. Article 180 provides that a case may be reviewed if: (i) after a person is convicted of homicide, evidence is discovered indicating that the alleged victim was not killed; (ii) after a person is convicted of an offence, a judgment is discovered which punishes another person for the same offence and indicates the innocence of either one of the convicted persons; (iii) a witness is subsequently found to have given false testimony; or (iv) new evidence is discovered indicating the convicted person's innocence.

[88] Referring to Recommendation No. R (87) 18, paragraph D.2. *See* Opinion No.6, Consultative Council of European Judges, 20 April 2005, para 6.

[89] In this regard see ICDAA *Amicus* Brief, para. 8, citing the US State Department Report 2007 "The constitution and law provide for an independent judiciary, and the judiciary operated in most cases without government interference; however, there were constraints on judicial independence. Government officials sometimes attempted to influence individual cases, primarily in gacaca cases.", available at http://www.state.gov/g/drl/rls/hrrpt/2007/100499.htm

Court does not accord with the right to be tried by an independent tribunal, and the right to a fair trial, thus precluding referral of this case to Rwanda.

2. Witness Availability and Protection

A. Submissions

i. Parties

50. The Prosecutor submits that Rwanda's Transfer Law includes measures to facilitate witnesses' testimony,[90] and to provide witness protection.[91]

51. The Defence responds that, contrary to what is stipulated under Rwandan law, "the reality which prevails on the ground in Rwanda" is different.[92] Those who wish to testify for someone accused of genocide are subjected to harassment, and, if they persist, risk being subjected to violence and assassination.[93] The Defence points out that the Tribunal's Registrar has recognised this danger, in *Karemera and others*.[94]

52. The Prosecutor replies that the allegations of witness intimidation are unsubstantiated.[95]

ii. Amici

53. Rwanda cites the same legislation as the Prosecutor regarding the facilitation of witness testimonies and the protection of witnesses.[96] Rwanda adds that an inter-institutional mechanism has been created to enhance the security and safety of

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[90] *See* the Prosecutor's Request, para. 64, which cites Article 14 of the Transfer Law.
[91] *Ibid.*, para. 42, which cites Article 14 of the Transfer Law.
[92] Defence Response, para. 11.9.
[93] *Ibid.*, paras. 11.9, 11.10, which refer to Annex D of the Defence Response, a letter from the ADAD President to the Tribunal's President. The Defence provides two examples of alleged intimidations of defence witnesses within Rwanda in the cases of *Ntabakuze* (Defence Response, para. 8.7), and *Renzaho* (Defence Response, para. 8.8).
[94] *Ibid.*, para. 11.10, *Prosecutor v. Karemera and others*, Case No. ICTR-98-44-T, Registrar's Submissions under Rule 33 (B) of the Rules on Joseph Nzirorera's Motion to hold Trial Sessions in Rwanda, 4 May 2005, ss 9-10. The Registrar strongly objected to a request that trial sessions in Rwanda, on the ground that it would be dangerous for the security of protected witnesses to testify within the community where they are accused of having committing crimes.
[95] Prosecutor's Reply, para. 56.
[96] Rwanda's *Amicus* Brief, para. 28. Pursuant to Article 14 of the Transfer Law, the Court issues an order for any specific protective measures in a manner similar to Rules 53, 69 and 75 of the Tribunal's Rules. Under Article 14, the Prosecutor General is bound to facilitate and support witnesses, including those living abroad.

witnesses,[97] and that there are video-link facilities for witnesses abroad who are unable or unwilling to physically appear before Rwandan courts.[98]

54. The KBA confirms that the Rwandan Government has instituted a witness protection unit.[99] Regarding witnesses from abroad, KBA states that the Public Prosecutor's Office will facilitate witness testimony by providing appropriate immigration documents, personal security and medical and psychological assistance.[100]

55. The ICDAA submits that most Rwandan witnesses believe that the Rwandan authorities breach the protective measures.[101] The ICDAA further submits that it is "extremely unlikely" that Defence witnesses will feel secure enough to testify in transferred cases, given that allegations of witness intimidation are referred to local political authorities and police.[102] It states that Defence witnesses in Rwanda risk being rejected by their community, mistreated, arrested, detained, beaten and even tortured,[103] and point to allegations of recent killings of witnesses in Rwanda.[104] Many witnesses also fear that their appearance will lead to their indictment, as has happened in numerous Gacaca trials.[105] The ICDAA concludes that "almost no witnesses from abroad will be willing to go back to Rwanda in order to testify,"[106] as the Rwandan authorities would be unable to provide services even remotely comparable to those service provided by the Tribunal for witnesses from abroad.[107]

56. In recent interviews, HRW found that various lawyers and judges identified that one of the most serious obstacles to fair trial proceedings in Rwanda to be obtaining testimonies of Defence witnesses.[108] It submits that witnesses have faced threats,

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[97] *Ibid.*, para. 29. This inter-institutional mechanism is coordinated by the Prosecutor General's office, involving the National Police (Criminal Investigation), Public Prosecution, and Local Authorities and Prisons Services.
[98] *Ibid.*, para. 29.
[99] KBA *Amicus* Brief, paras. 18 and 19. KBA states that witness security is ensured by the High Court, the Public Prosecutor's Office, and by Rwandan security forces.
[100] *Ibid.*, para. 20.
[101] ICDAA *Amicus* Brief, para. 82.
[102] *Ibid.*, paras. 80 and 87.
[103] *Ibid.*, para. 83
[104] *Ibid.*, para. 85. The ICDAA states that one of the witnesses in the *Sezirahiga* trial, Madame Esperance Uwantege, was killed in Rwanda. The ICDAA also refers to a Report of the US State Department, dealt with further at para. 60 of this Decision.
[105] *Ibid.*, para. 84.
[106] *Ibid.*, para. 95.
[107] *Ibid.*, paras. 91 and 92.
[108] HRW *Amicus* Brief, para. 29. Interviews conducted over 2005, 2006 and 2007.

mistreatment including torture, and in some cases, murder.[109] HRW has documented approximately ten cases where persons who testified for the Defence before the Tribunal were subsequently arrested, re-arrested, subjected to worse conditions of incarceration or harassed after returning to Rwanda.[110] There are also reports of Defence witnesses being detained or intimidated by police or local authorities as a result of their testimonies in Gacaca proceedings.[111] HRW documented four recent cases of persons who refused, out of fear, to testify in defence of persons whom they knew to be innocent of charges against them.[112] Witnesses also fear being accused of crimes if they come forward to testify.[113]

57. HRW further submits that the witness protection service is understaffed, and that witnesses will be unlikely to use the service, given how it is administered.[114] HRW reports that almost all Defence witnesses reside outside Rwanda,[115] and that no witnesses interviewed were willing to return to Rwanda to give testimony.[116] Finally, HRW has no knowledge of any mechanisms in Rwanda to facilitate safe travel for witnesses from abroad.[117]

B. Law

58. As reflected in Article 20 (4) (e) of the Tribunal's Statute, the Accused has the right to obtain the attendance of, and to examine witnesses for his case under the same

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

[110] *Ibid.*, para. 97.

[111] *Ibid.*, para. 102.

[112] HRW *Amicus* Brief, para. 37. These four incidents occurred between 3 November 2007 and 3 January 2008.

[113] *Ibid.*, paras. 30 to 40.

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

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

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

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

conditions as witnesses against him.[118] This right encompasses the issues of witness availability and protection.[119]

C. Discussion

59. Despite Rwanda's legislated guarantees of the aforementioned right, including provision for the assistance and protection of witnesses,[120] the Chamber shares the concerns expressed by the Defence, the ICDAA and HRW, that, under the current conditions in Rwanda, it is likely that these rights would likely be violated.

i. Witnesses Inside Rwanda

60. The Chamber has a number of concerns regarding witnesses within Rwanda, the first and foremost being their safety. The Chamber shares the concerns of ICDAA and HRW, as detailed above, regarding the difficulty the Accused would have in securing Defence witnesses to testify on his behalf because of their fears of harassment, arrest and detention.[121] Specifically, the Chamber is concerned about the reports of murdered witnesses. HRW reported that at least eight genocide survivors were murdered in 2007

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

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

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

[121] *See*, supra paras. 55 and 56.

and in some cases, the killings were related to testimonies that the survivors provided or intended to provide in genocide prosecutions.[122] In this regard, the Chamber notes a US State Department Report which states that:

> "...during the year unidentified individuals *killed* several witnesses to the genocide throughout the country *to prevent testimony* ... According to genocide survivor organizations, individuals *killed between 12 and 20 genocide survivors* during the year. (...) there were *328 incidents of violence involving gacaca trials* during the year, and *threats against genocide witnesses hampered the gacaca process*..." (Emphasis added.)[123]

61. Furthermore, many witnesses fear their appearance will lead to an indictment being issued against them, as has happened in numerous Gacaca trials.[124] Defence witnesses may fear being accused of "genocidal ideology", a term mentioned in the Rwandan Constitution but undefined under Rwandan law. The term has been used by Government officials to encompass a broad spectrum of ideas, expressions and conduct, including those perceived as being in opposition to the policies of the current Government. For example, according to the 2006 Rwandan Senate report, questioning the legitimacy of the detention of a Hutu is one manifestation of "genocidal ideology." In several cases documented by HRW, witnesses who appeared for the defence at the Tribunal, were arrested after their return to Rwanda.[125] The Government would appear to condone these arrests, for example, in February 2007, the Rwandan Minister of Justice, Tharcisse Karugarama, was quoted as saying:

> We have nothing to lose [by granting immunity] if anything, we have everything to gain, by these people turning up, it will be a step toward their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest.[126]

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[122] HRW *Amicus* Brief, para. 96.
[123] ICDAA *Amicus* Brief, para. 85. *See* US State Department's Report on Human Rights Practices – 2006, submitted to the US Congress by the Secretary of State, Condoleezza Rice, released by the Bureau of Democracy, Human Rights, and Labor, on 6 March 2007. The Report contains a separate section on Rwanda. *See* section on Arbitrary or Unlawful Deprivation of Life.
[124] *Ibid.*, para. 84. *See also* HRW *Amicus* Brief, paras. 30 to 40.
[125] HRW *Amicus* Brief, paras. 30 to 40.
[126] *Ibid.*, para. 39. This comment was in a response to Senate criticism of immunity for witnesses coming from outside Rwanda. During the Referral Hearing, following a question from Judge Muthoga regarding this statement, the Rwandan Government's representative said that the statement was from a newspaper report and did not reflect the exact words that were mentioned and was taken out of context. However, the Chamber notes that the Rwandan Government's representative did not deny that the statement was made. *See* T. 24 April 2008, p. 57.