



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

UNITED
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OR: ENG

REFERRAL PROCEEDINGS PURSUANT TO RULE 11 BIS

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

Registrar: Adama Dieng

Date: 28 June 2012

THE PROSECUTOR

v.

Phénéas MUNYARUGARAMA

Case No. ICTR-02-79-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 13 June 2012 for the Referral of the Case of Phénéas Munyarugarama ("Munyarugarama" or the "Accused") to Rwanda Pursuant to Rule 11 *bis* of the Procedure and Evidence ("Rules") and the subsequent filings of parties;

HEREBY DECIDES the Request.

1. PROCEDURAL HISTORY

1. The current amended indictment ("Indictment") against Munyarugarama was confirmed on 13 June 2012.¹ The Accused remains at large.

2. The present matter began on 22 May 2012, when the Prosecution filed a request that a Trial Chamber be designated to adjudicate an anticipated motion pursuant to Rule 11 *bis* of the Rules, and that duty counsel be appointed to represent the interests of the Accused in the referral proceedings.²

3. On 13 June 2012, the Prosecution filed a request for the referral of the case to Rwanda pursuant to Rule 11 *bis* of the Rules ("Referral Request").³

4. In response to the Prosecution's Referral Request, a Trial Chamber was designated to adjudicate the matter on 14 June 2012.⁴

5. On 15 June 2012, Duty Counsel acknowledged receipt of Munyarugarama's case file.

6. On 26 June 2012, the Duty Counsel filed a submission informing the Chamber that he opposed the transfer.⁵

7. On 27 June 2012, President Vagn Joensen filed an Order reconstituting the Trial Chamber.⁶

¹ *Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-I, Ex Parte Confidential and Under Seal Amended Indictment, 13 June 2012 ("Indictment").

² *Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-R11*bis*, Prosecutor's Request for Designation of a Trial Chamber to Consider the Referral of the Case of Phénéas Munyarugarama to Rwanda Pursuant to Rule 11 *bis* (A) of the Rules of Procedure and Evidence, 22 May 2012.

³ *Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79- R11*bis*, Prosecutor's Request for Designation of a Trial Chamber and Request for the Referral of the Case of Phénéas Munyarugarama to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 13 June 2012 (circulated on 14 June 2012) ("Referral Request").

⁴ *Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79- R11*bis*, Scheduling Order, 14 June 2012.

⁵ *Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-R11*bis*, Duty Counsel Submissions in Response to the Prosecutor's Request for Referral of the Case of Phénéas Munyarugarama to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Evidence and Procedure, 26 June 2012 ("Duty Counsel Submission").

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 the accused allegedly committed 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 Munyarugarama as required by Rule 11 *bis*.¹⁵ It relies upon a

⁶ *Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79- R11bis, Order Reconstituting a Trial Chamber to Consider the Prosecutor's Request for the Referral of Phénéas Munyarugarama's Case to Rwanda, 27 June 2012.

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-AR11bis, 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-R11bis, 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-R11bis, 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-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11 *bis* (TC), 8 October 2008, para. 4 ("*Munyakazi* Referral Decision").

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-AR11bis, Decision on Rule 11 *bis* Appeal (AC), 30 August 2006, para. 9 ("*Bagaragaza* Appeal Decision").

¹³ *Uwinkindi* Appeal Decision, para. 28.

¹⁴ *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2/-AR11bis, Decision on Rule 11 *bis* Referral (AC), 1 September 2005, para. 50 ("*Stanković* Appeal Decision"); *Uwinkindi* Appeal Decision, para. 28.

¹⁵ Referral Request, paras. 21-23.

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

12. Duty Counsel concurs that jurisdiction is not an issue.¹⁷

13. 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.¹⁸ 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. The Chamber finds that these articles contain modes of liability that are adequate to cover the crimes alleged.¹⁹

14. By virtue of his superior responsibility, the Prosecution also charges the Accused pursuant to Article 6 (3).²⁰ The Appeals Chamber has previously found that this mode of liability exists in Rwandan law, particularly under Article 53 of the Organic Law No. 16/2004 of 19 June 2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts, and Organic Law No. 33bis/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes.²¹

15. This Tribunal only has jurisdiction over crimes that occurred between 1 January and 31 December 1994.²² 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.²³ Therefore, the Chamber is satisfied that the Accused will only be tried for those acts occurring in 1994.

¹⁶ Referral Request, para. 15. *See also*, Duty Counsel Submission, para. 6.

¹⁷ Duty Counsel Submission, para. 5.

¹⁸ Indictment, para. 1.

¹⁹ *See Uwinkindi* Referral Decision, para. 19; *Prosecutor v. Ladislas 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"); *Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (TC), 20 June 2012, para. 12 ("*Ryandikayo* Referral Decision"); *Prosecutor v. Aloys Ndimbati*, Case No. ICTR-95-1F-R11bis, Decision on the Prosecutor's Request for the Referral of the Case of Aloys Ndimbati to Rwanda (TC), 25 June 2012, para. 13 ("*Ndimbati* Referral Decision").

²⁰ Indictment, para. 1.

²¹ *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11 bis, Appeals, 4 December 2008, para. 12 ("*Hategekimana* Appeals Decision").

²² *See* Statute Articles 1, 7.

²³ *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008, para. 20 ("*Kanyarukiga* Referral Decision"). *See also*, *Uwinkindi* Referral Decision, paras. 20-21; *Ntaganzwa* Referral Decision, para. 14.

4. FAIR TRIAL RIGHTS

4.1 Presumption of Innocence

16. The Prosecution submits that Rwanda has made the presumption of innocence part of its statutory criminal law. It points to Article 13 (2) of the Transfer Law, Article 19 of Rwanda's Constitution and Article 44 (2) of Rwanda's Code of Criminal Procedure ("RCCP").²⁴

17. Duty Counsel submits that the presumption of innocence in Rwanda can be presumed to "fulfil[] the test of [R]ule 11 *bis*."²⁵

18. 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."²⁶

19. Article 19 of the Constitution of Rwanda provides that every accused person "shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing [...]."²⁷ This provision is in conformity with several human rights treaties to which Rwanda is party, namely, Article 14 (2) of the ICCPR. The fact that this principle is reiterated in Article 44 (2) of the RCCP and Article 13 (2) of the Transfer Law indicates that the presumption of innocence clearly forms part of Rwanda's statutory law.

4.2 Extradition Cases

20. 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."²⁸

21. 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.²⁹ Moreover, the Chamber considers that these cases merely serve to bolster the Prosecution's argument concerning the growing confidence of the international community in Rwanda's ability

²⁴ Referral Request, para. 42.

²⁵ Duty Counsel Submission, para. 8.

²⁶ 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").

²⁷ Referral Request, para. 42. *See also*, Constitution of Rwanda, Article 19.

²⁸ Referral Request, paras. 4-9.

²⁹ 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").

to guarantee a fair trial,³⁰ 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.

4.3 Penalty Structure

22. 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).³¹

23. Duty Counsel agrees that the penalty structure in Rwanda can be presumed to “fulfil[] the test of [R]ule 11 *bis*.”³²

24. 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.³³ The Chamber is satisfied that Rwanda's recent legislative changes have addressed concerns voiced by this Tribunal in earlier Referral Decisions.³⁴

4.4 Conditions of Detention

25. Concerning the specific detention facilities that will accommodate all cases transferred from the ICTR—Mpanga and Kigali prisons—the Prosecution submits that the facilities meet international standards, and notes that “[c]onvicts from the Special Court for Sierra Leone are currently serving their sentences in Mpanga prison [...]”³⁵ It contends that Rwanda's Transfer Law provides further assurance that such conditions of detention will be maintained, as it allows for continued inspections and confidential reports by either the International Committee of Red Cross (“ICRC”) or an observer appointed by the ICTR.³⁶ Lastly, the Prosecution points to the ICTR monitoring mechanisms that have been established in recent Referral Decisions as an additional safeguard.³⁷

26. Duty Counsel submits that the conditions of detention in Rwanda “fulfil[] the test of [R]ule 11 *bis*.”³⁸

³⁰ Referral Request, para. 11.

³¹ Referral Request, para. 32.

³² Duty Counsel Submission, para. 8.

³³ *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.

³⁴ See *Uwinkindi* Referral Decision, para. 49; *Kayishema* Referral Decision (2012), para. 43; *Sikubwabo* Referral Decision, para. 41.

³⁵ Referral Request, paras. 35, 37.

³⁶ Referral Request, para. 38.

³⁷ Referral Request, para. 40.

³⁸ Duty Counsel Submission, para. 8.

27. The conditions of detention speak to the fairness of a country's criminal justice system, and must be in accord with internationally recognised standards.³⁹ 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.⁴⁰

28. 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.

4.5 Availability and Protection of Witnesses

29. The Prosecution submits that issues relating to witness availability and protection found in previous Rule 11 *bis* Decisions have adequately been addressed by Rwanda.⁴¹ 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.⁴² 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."⁴³

30. The Prosecution further contends that previous concerns regarding the fact that the only witness protection program was run by the Prosecutor's office has been addressed by the creation of the Witness Protection Unit ("WPU") under the authority of the judiciary.⁴⁴ 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.⁴⁵

31. In his submission, Duty Counsel contests the assertion that the availability and protection of witnesses fulfil the requirements of Rule 11 *bis*. However, he offers no legal support for this contention, merely stating that "Prosecution witnesses may be in a better position than the

³⁹ 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.

⁴⁰ Transfer Law, Article 23.

⁴¹ Referral Request, para. 44.

⁴² Referral Request, para. 45 (citing to Article 13 of the Transfer Law).

⁴³ Referral Request, para. 45 (citing to Article 14 of the Transfer Law).

⁴⁴ Referral Request, para. 52.

⁴⁵ Referral Request, para. 53.

Defence witnesses.”⁴⁶ He further requests the Chamber to “take into consideration the practical reality on the ground” and that “the making of those policies and legislation is one thing which the extent of compliance is another thing altogether.”⁴⁷

32. 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.”⁴⁸ In the present case, the Chamber recalls previous Rule 11 *bis* cases that denied referral relied upon findings that “witnesses in Rwanda may be unwilling to testify for the defence due to their fear that they may face serious consequences, including prosecution, threats, harassment, torture, arrest or even murder.”⁴⁹

33. 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.

34. 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.⁵⁰

35. 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, nor has the Defence proffered any evidence to the contrary.

4.6 Right to an Effective Defence

36. The Prosecution submits that Rwanda’s legal framework provides for both the protection and realisation of an accused’s right to an effective defence.⁵¹

37. The Prosecution contends that “Rwanda’s Constitution and laws guarantee the right to legal representation before courts of law to all accused persons.”⁵² Specifically, it points to Articles 18 and 19 of the Rwandan Constitution which establish, respectively, that “[...] the right

⁴⁶ Duty Counsel Submission, para. 9.

⁴⁷ Duty Counsel Submission, para. 9.

⁴⁸ Article 20 (4) (e) of the Statute.

⁴⁹ *Uwinkindi* Referral Decision, para. 100 (citing to *Kanyarukiga* Appeal Decision, para. 33); *Ntaganzwa* Referral Decision, para. 38; *Ryandikayo* Referral Decision, para. 42.

⁵⁰ Referral Request, para. 66 (citing to Amended Transfer Law, Article 14 *bis*).

⁵¹ Referral Request, paras. 71-72.

⁵² Referral Request, para. 71.

to defence [is] absolute at all levels and degrees of proceedings before [...] judicial [...] organs[,]"⁵³ and provide for a fair and public hearing "in which all the necessary guarantees for defence have been made available."⁵⁴

38. In addition to such legal guarantees, the Prosecution states that Rwanda also has the actual capacity to provide counsel to Accused transferred from the Tribunal.⁵⁵ Of the 890 lawyers admitted to the Kigali Bar Association ("KBA"), approximately 173 have been practicing for more than 7 years.⁵⁶ Additionally, the Accused may also be represented by a foreign lawyer who has been admitted to practice before Rwandan courts.

39. 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.⁵⁷ 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.⁵⁸

40. Duty Counsel agrees that the right to an effective defence in Rwanda can be presumed to "fulfil[] the test of [R]ule 11 *bis*."⁵⁹

41. 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.

42. 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.⁶⁰ The Chamber is satisfied that this requirement has been met. 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.⁶¹

4.7 Judicial Competence, Independence and Impartiality

43. The Prosecution submits that the Rwandan judiciary is independent and impartial.⁶² To support this claim, it highlights that all judges are qualified and experienced lawyers, enjoy

⁵³ Referral Request, para. 72 (citing to Article 18 of the Rwandan Constitution).

⁵⁴ Referral Request, para. 72 (citing to Article 19 of the Rwandan Constitution).

⁵⁵ Referral Request, paras. 73-74.

⁵⁶ Referral Request, para. 73.

⁵⁷ Referral Request, para. 79.

⁵⁸ Referral Request, para. 81.

⁵⁹ Duty Counsel Submission, para. 8.

⁶⁰ See Referral Request, para. 79.

⁶¹ See *Hategukimana* Referral Decision, para. 55; *Stanković* Appeal Decision, paras. 50-52.

⁶² Referral Request, para. 85.

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.⁶³

44. 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,⁶⁴ and further draws the attention of the Chamber to the qualifications and expertise of the Rwandan judges.⁶⁵

45. In his submission, Duty Counsel implies that no judge in Rwanda is able to hear the case, stating that "any person who is a citizen of Rwanda and qualifies to be a judge today must have either witnessed or experienced or felt the commission of the alleged crimes."⁶⁶ Therefore, Duty Counsel argues, any judge that is a Rwandan citizen necessarily lacks the required impartiality to try cases involving crimes that occurred during 1994.⁶⁷

46. Pursuant to Rule 11 *bis*, the Chamber must be satisfied that the accused will receive a fair trial.⁶⁸ It is the obligation of the State to accord the accused the rights set out in Article 20 of the ICTR Statute.⁶⁹ 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.⁷⁰

47. The criteria that define an independent judiciary are articulated in the Human Rights Committee General Comment No. 32 and include: the procedure and qualification for the appointment of judges, the guarantees relating to their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference.⁷¹

48. 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 judge is involved. It also includes circumstances that would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁷²

⁶³ Referral Request, paras. 85-93.

⁶⁴ Referral Request, para. 98.

⁶⁵ Referral Request, para. 93.

⁶⁶ Duty Counsel Submission, para. 12.

⁶⁷ Duty Counsel Submission, paras. 12-13.

⁶⁸ *Uwinkindi* Referral Decision, para. 15; *Ryandikayo* Referral Decision, para. 60.

⁶⁹ *Uwinkindi* Appeal Decision, para. 22; *Uwinkindi* Referral Decision, para. 17; *Munyakazi* Appeal Decision, para. 4.

⁷⁰ 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.

⁷¹ General Comment No. 32, para. 19.

⁷² *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").

49. 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.⁷³

50. It is well established in Tribunal jurisprudence that there exists a presumption of impartiality which attaches to a judge or a tribunal.⁷⁴ 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.”⁷⁵ 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.⁷⁶ As in *Ndimbati*, *Ryandikayo*, *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.⁷⁷

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

4.8 Conclusion

52. 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.

5. MONITORING AND REVOCATION

5.1 Monitoring

53. 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 he is arrested and transferred to Rwanda.”⁷⁸

54. Duty Counsel offers no submission on this matter.⁷⁹

⁷³ Transfer Law, Articles 2, 13 (1), 16.

⁷⁴ *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.

⁷⁵ *Furundžija* Appeal Judgement, para. 203.

⁷⁶ *Furundžija* Appeal Judgement, para. 197.

⁷⁷ *Ryandikayo* Referral Decision, para. 64; *Ntaganzwa* Referral Decision, para. 72; *Uwinkindi* Referral Decision, para. 166.

⁷⁸ Referral Request, para. 113.

55. 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.

56. 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.

57. 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.

58. 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.⁸⁰ Numerous Referral Chambers and the Appeals Chamber have found Rwanda's legal framework sufficient to ensure an effective monitoring system.⁸¹

59. 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.⁸² In accordance with Article 6 (5) of its Statute, the ICTR branch of the Residual Mechanism shall take over the monitoring of cases referred to national courts by the ICTR.⁸³ Monitoring will continue uninterrupted with the *proviso* that the competence of this Tribunal will pass to the Residual Mechanism on 1 July 2012.⁸⁴

⁷⁹ See Duty Counsel Submission.

⁸⁰ *Stanković* Appeal Decision, para. 52; *Janković* Appeal Decision, paras. 55-57.

⁸¹ *Kanyarukiga* Referral Decision, para. 103; *Kayishema* Referral Decision, para. 54; *Uwinkindi* Referral Decision, para. 209; *Ryandikayo* Referral Decision, para. 72.

⁸² On 1 April 2011, the ICTR Rules Committee presented the revised Rule 11 *bis* and it was adopted by the Chambers Plenary session. The Rule was amended to read as follows:

Rule 11 *bis* :

(D) [...]

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

[...]

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

⁸³ Security Council Resolution 1966, S/Res/1966 (2010).

⁸⁴ See *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, para. 6 ("*Uwinkindi* President's Monitoring Decision").

60. 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.

61. Following the *Ndimbati*, *Ryandikayo*, *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.⁸⁵ The Chamber finds that such arrangements should apply, *mutatis mutandis*, to the case of the Accused, when he is arrested and transferred to Rwanda.

62. 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.”

63. 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.

5.2 Revocation

64. 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.

65. 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.

66. 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

⁸⁵ See *Uwinkindi* President’s Monitoring Decision, Disposition.

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.

6. CONCLUSION

67. 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.

68. 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 six other Referral Chambers have referred similar cases to Rwanda in the preceding months.⁸⁶ 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.

69. 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.

7. 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. Phénéas Munyarugarama* (Case No. ICTR-02-79-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;

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

⁸⁶ See *Ndimbati* Referral Decision; *Ryandikayo* Referral Decision; *Ntaganzwa* Referral Decision; *Kayishema* Referral Decision (2012); *Sikubwabo* Referral Decision; *Uwinkindi* Referral Decision.

Indictment against the Accused and all other appropriate evidentiary material in the possession of the Prosecution;

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

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

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

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

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

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

Done in English, Arusha, 28 June 2012.

Vagn Joensen
Presiding Judge

Florence Rita Arrey
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]