International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

REFERRAL PROCEEDINGS PURSUANT TO RULE 11 BIS

Before Judges: Vagn Joensen, Presiding
Lee Gacuiga Muthoga
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 26 March 2012

THE PROSECUTOR

v.

Charles SIKUBWABO

Case No. ICTR-95-1D-R11bis

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

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

Office of the Prosecutor:
Hassan Bubacar Jallow
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Counsel for the Fugitive Accused:
Jean Chrysostome Nkurunziza (Duty Counsel)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as a Chamber designated under Rule 11 *bis*, composed of Judges Vagn Joensen, Presiding, Lee Muthoga and Gberdao Gustave Kam;

BEING SEISED OF the Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda Pursuant to Rule 11 *bis* of the Procedure and Evidence ("Rules"), made on 4 November 2010, and the subsequent filings of parties;

FURTHER NOTING the *amici curiae* submissions filed by the Republic of Rwanda and the International Criminal Defence Attorneys Association on 19 and 18 April 2011, respectively, as well as responses to the submissions;

HEREBY DECIDES the Request.

1. INTRODUCTION

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

> Rule 11 *bis*: Referral of the Indictment to another court
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> (A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:
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> (i) in whose territory the crime was committed; or
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> (ii) in which the accused was arrested; or
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> (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.
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> (B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.
>
> (C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.
>
> (D) When an order is issued pursuant to this Rule:
>
> (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
>
> (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
>
> (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate, and, in particular, the material supporting the indictment;
>
> (iv) the Prosecutor may, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The

observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.

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

2. PROCEDURAL HISTORY

2. The Prosecution filed the current amended indictment against Charles Sikubwabo on 20 October 2000, charging him with Genocide, or, in the alternative Complicity in Genocide, as well as Conspiracy to Commit Genocide and Crimes against Humanity.[1] The Accused is still at large.

3. The present matter began on 4 November 2010, when the Prosecution filed a request for the referral of the case to Rwanda pursuant to Rule 11 *bis* of the Rules ("Referral Request").[2]

4. On 17 January 2011, the Referral Chamber issued a Scheduling Order, in which it deferred its decision on the matter until a final decision was made in the case of *The Prosecutor v. Uwinkindi* or the Accused was arrested, whichever occurred first.[3] In the interim, the Chamber admitted the International Criminal Defence Attorneys Association ("ICDAA") and the Government of the Republic of Rwanda ("GoR") as *Amici Curiae*.[4] ICDAA and GoR filed their *Amicus Curiae* Briefs on 18 April and 19 April 2011, respectively.[5]

5. The *Uwinkindi* Referral Chamber issued its decision on the transfer of Jean Uwinkindi on 28 June 2011.[6]

6. On 27 July 2011, the Chamber ordered the Registrar to appoint a Duty Counsel to represent the interests of Sikubwabo.[7]

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[1] *The Prosecutor v. Ntakirutimana et al*., Case No. ICTR-96-10-I, Indictment, 20 October 2000 ("Indictment"); *See also*, *The Prosecutor v. Charles Sikubwabo*, Case Nos. ICTR-95-1D-I and ICTR-96-10-I, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010 ("Referral Request"), Annex A.

[2] *See* Referral Request.

[3] *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Scheduling Order, 17 January 2011.

[4] *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Decision on the International Criminal Defence Attorneys Association for Leave to Appear as *Amicus Curiae*, and Invitation to the Republic of Rwanda to File Submissions, 18 February 2011.

[5] *The Prosecutor v Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, International Criminal Defence Attorneys Association (ICDAA) Amicus Curiae Brief, 18 April 2011 ("ICDAA Brief"); *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, *Amicus Curiae* Brief for the Republic of Rwanda in Support of the Prosecutor's Application for Referral Pursuant to Rule 11 *bis*, 19 April 2011 ("GoR Brief").

[6] *The Prosecutor v. Jean Uwinkindi*, ICTR-2001-75-R11*bis*, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 ("*Uwinkindi* Referral Decision").

[7] *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Order for the Assignment of Counsel, 27 July 2011.

7. On 16 December 2011, the Appeals Chamber upheld the *Uwinkindi* Referral Chamber's Decision of 28 June 2011.[8] On 27 December 2011, this Referral Chamber issued a Scheduling Order for the Resumption of Referral Proceedings in the present case, and invited the submissions of all parties.[9]

8. The ICDAA and GoR did not have any additional submissions to supplement their April 2011 briefs in the *Uwinkindi* case.[10]

9. On 21 February 2012, the Duty Counsel filed a submission informing the Chamber that he did not oppose the transfer.[11]

3. APPLICABLE LAW

9. Rule 11 *bis* and the jurisprudence of this Tribunal allow a designated Referral Chamber to order the referral of a case to a State that has jurisdiction over the charged crimes and is willing to prosecute and adequately prepared to accept the case,[12] provided that the Chamber is satisfied that the State has a legal system and penalty structure that conform to international human rights standards.[13] That is, the accused will receive a fair trial and the death penalty will not be imposed.[14]

10. The final decision on whether to refer a case is within the discretion of the Referral Chamber.[15] In so determining, the Chamber may consider whatever information it reasonably deems to assist in determining whether the trial, if transferred, will be fair.[16]

11. Article 20 of the Statute provides guidance as to the rights that must be observed in order to ensure that the accused is given a fair trial.[17] It states that:

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[8] *The Prosecutor v. Jean Uwinkindi*, ICTR-2001-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions (AC), 16 December 2011 ("*Uwinkindi* Appeal Decision").
[9] *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Scheduling Order for the Resumption of Referral Proceedings, 27 December 2011.
[10] *See The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Response of International Criminal Defence Attorneys Association (ICDAA) to Scheduling Order Dated 27 December 2011 Concerning the Resumption of Proceedings, 16 January 2012. GoR provided no additional submissions.
[11] *The Prosecutor v. Charles Sikubwabo*, Case NO. ICTR-95-1D-R11bis, Memorandum of Duty Counsel, 21 February 2012. [Although the Duty Counsel conceded the Prosecutor's Request for Referral, the Chamber would have been better assisted if the Duty Counsel had articulated detailed reasons for his concession.]
[12] *The Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11 *bis* Appeal (AC), 30 August 2006, para. 8 ("*Bagaragaza* Appeal Decision").
[13] *Bagaragaza* Appeal Decision, para. 9 (citing to *The Prosecutor v. Mejakic et al.*, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis* (AC), 7 April 2006, para. 60 ("*Mejakic et al.* Appeal Decision")).
[14] Rule 11*bis* (C).
[15] *Bagaragaza* Appeal Decision, para. 9.
[16] *Uwinkindi* Appeal Decision, para. 16 (citing to *The Prosecutor v. Radovan Stankovic*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral (AC), 1 September 2005, para. 50 ("*Stankovic* Appeal Decision").
[17] *Uwinkindi* Appeal Decision, para. 17 (citing to *Prosecutor v. Yusuf Munyakazi*, Case No. ICTR-96-37-R11bis, Decision on the Prosecution's Appeal Against Decision on Rule 11 *bis* (AC), para. 4 ("*Munyakazi* Appeal Decision")).

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

4. JURISDICTION

12. The Prosecution submits that Rwanda possesses territorial, personal, material and temporal jurisdiction to prosecute Sikubwabo as required by Rule 11 *bis*.[18] It relies upon a letter from GoR dated 3 November 2010 as proof of Rwanda's willingness and readiness to prosecute Sikubwabo for the charged crimes.[19]

13. The Amended Indictment charges the Accused pursuant to Article 6 (1) of the Statute with planning, instigating, ordering, committing or otherwise aiding and abetting the planning, preparation or execution of the crimes alleged.[20] Article 6 (1) of the Statute covers both principal perpetrators and accomplices. This mode of liability may be found in Articles 89-91 of the Rwandan Penal Code. Article 89 identifies both principal perpetrators and accomplices. Article 90 defines the author of a crime as someone who has executed the crime or has directly cooperated in the commission of the crime. The material elements of accomplice liability are laid out in Article 91.[21] The Chamber finds that these articles contain modes of liability that are adequate to cover the crimes alleged, pursuant to Article 6 (1) of the Statute.[22]

[18] Referral Request, para. 9 (i).
[19] Referral Request, para. 4. *See also* Referral Request Annex B (letter from GoR).
[20] Indictment, para. 5, "Charges".
[21] Referral Request, para. 19, Annex F (Articles 89-91 of the Rwandan Penal Code) ("Penal Code").
[22] *See Uwinkindi* Referral Decision, para. 19.

14. This Tribunal only has jurisdiction over crimes that occurred between 1 January and 31 December 1994.[23] In referring a case to a national jurisdiction, the Chamber must be certain that an accused will not be charged with crimes committed outside this time period. In 2008, the *Kanyarukiga* Referral Chamber found that, although the temporal jurisdiction for domestic genocide trials extended to 1990, Organic Law No. 11/2007 of 16 March 2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States ("Transfer Law")[24] appropriately narrowed this jurisdiction in regards to any case transferred to Rwanda by the ICTR. Therefore, the Accused will only be tried for those acts occurring in 1994.[25]

5. FAIR TRIAL

5.1 Presumption of Innocence

15. The Prosecution submits that Rwanda has made the presumption of innocence part of its statutory criminal law. It points to Article 13 (2) of the Transfer Law, Article 19 of Rwanda's Constitution[26] and Article 44 (2) of Rwanda's Code of Criminal Procedure ("RCCP").[27] It also cites two previous referral decisions, arguing that previous Referral Chambers, in "considering submissions from the Defence and *amicus curiae*[,] held that there was nothing to show that the [A]ccused will not be presumed innocent in practice."[28]

16. In 2007, the United Nations Human Rights Committee ("HRC") issued its General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), which concerns the right to equality before courts and to a fair trial. On the particular issue of presumption of innocence, the General Comment states: "[i]t is a duty for all public authorities to refrain from prejudging a trial, e.g. by abstaining from making public statements affirming the guilt of the accused […] The media should avoid news coverage undermining the presumption of innocence."[29]

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[23] *See* Statute Articles 1, 7.
[24] *See* Referral Request, Annex C (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, Official Gazette of the Republic of Rwanda, 16 March 2007. ("Transfer Law")).
[25] *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 6 June 2008, para. 20 ("*Kanyarukiga* Referral Decision"). *See also Uwinkindi* Referral Decision, paras. 20-21.
[26] *See* Referral Request, Annex E ((i) Constitution of the Republic of Rwanda of 4 June 2003 (as amended in 2003, 2005, 2008) ("Constitution of Rwanda (2008)") and (ii) Amendment Nr. 04 of 17 June 2010 of the Constitution of the Republic of Rwanda of 4 June 2003 as amended to date, Official Gazette of Rwanda, 17 June 2010) ("Constitution of Rwanda (2010)").
[27] *See* Referral Request, Annex F (Rwanda Code of Criminal Procedure) ("RCCP").
[28] Referral Request, para. 95 (citing *Kanyarukiga* Referral Decision, paras. 44-45; *Prosecution v. Gatete*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 17 November 2008, paras. 41-42 ("*Gatete* Referral Decision"); *The Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda (TC), 19 June 2008, paras. 48-52 ("*Hategekimana* Referral Decision").)
[29] United Nations Human Rights Committee, General Comment No. 32: Article 14 Right to Equality Before Courts and Tribunal and to Fair Trial, CCPR/GC/32, 23 August 2007, para. 30 ("General Comment No. 32").

17. Article 19 of the Constitution of Rwanda provides that every accused person "shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing in which all the necessary guarantees for defence have been made available."[30] This provision is in conformity with several human rights treaties to which Rwanda is party, namely, Article 14 (2) of the ICCPR. The fact that this principle is reiterated in Article 44 (2) of the RCCP and Article 13 (2) of the Transfer Law indicates that the presumption of innocence clearly forms part of Rwanda's statutory law.

5.2 *Non Bis in Idem*

18. In its Referral Request, the Prosecution submits that this issue was already decided in the *Kanyarukiga* and *Gatete* Rule 11 *bis* Decisions in 2008, which found that any accused, if transferred to Rwanda, would not run the risk of double jeopardy.[31] Additionally, the Prosecution contends that any concerns that may have been present in previous decisions regarding the possibility of an accused being tried in a *Gacaca* court after being tried in ordinary courts are allayed by the amendment to Article 93 of the 2004 *Gacaca* Law.[32] It contends that "[p]ursuant to that amendment, the last appellate *Gacaca* court is mandated to review cases determined by *Gacaca* courts, and not ordinary or military courts. Cases determined at a last appellate level by an ordinary or military court are only reviewed by that ordinary or military court."[33]

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

20. General Comment No. 32 states that "[t]he prohibition [against double jeopardy] is not at issue if a higher court quashes a conviction and orders a retrial."[34] While the *Uwinkindi* Referral Chamber noted with concern that "despite a legal framework enshrined in Rwandan law that protects accused persons from double jeopardy, this right may sometimes be violated due to lack of effective communication between the relevant judicial authorities [,]"[35] it ultimately concluded that, "proceedings in a single case do not provide conclusive evidence for the lack of impartiality of the entire Rwandan Judiciary."[36] This Chamber concurs.

5.3 Article 59 of the Rwandan Code of Criminal Procedure ("RCCP")

21. None of the parties or *amici* have provided submissions on this provision. However, for the sake of ensuring that all aspects of the Accused's right to a fair trial are examined, the Chamber will, *proprio motu*, examine Article 59 of the RCCP, as the *Uwinkindi* Referral Chamber raised particular concerns regarding it.

[30] Constitution of Rwanda, Article 19.
[31] Referral Request, para. 106.
[32] Referral Request, para. 107.
[33] Referral Request, para. 107.
[34] General Comment No. 32, para. 56.
[35] *Uwinkindi* Referral Decision, para. 33.
[36] *Uwinkindi* Referral Decision, para. 35.

22. Article 59 of the RCCP reads as follows:

> Persons against whom the Prosecution has evidence to suspect that they were involved in the commission of an offence cannot be heard as witnesses.[37]

23. The *Uwinkindi* Referral Chamber considered this provision of the RCCP to be problematic for several reasons. First, the provision is not clear as to whether it would even permit the Accused to testify in his own defence. Second, this provision violates the principle of the presumption of innocence, discussed above, as it allows the exclusion of a witness's evidence on the suspicion of the prosecutor rather than any actual legal ground. Third, there is no indication in the law that the presiding judge may override the prosecutor's indications that a witness may have participated in such an offence. Fourth, the type of "offence" that might warrant exclusion of a witness is not specified. Fifth, because a prosecutor might apply this provision in an arbitrary manner, it could have a chilling impact on defence witnesses' willingness to testify. Finally, in addition to the possibility of this article being detrimental to the interests of the defence, it might also affect the interests of the prosecution, as many of the cases prosecuted before this Tribunal have relied to varying extents on the testimony of accomplice witnesses.

24. However, the Chamber notes that Article 13 (9) of the Transfer Law guarantees the right of the accused to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him or her, and that Article 25 of the Transfer Law states that in the event of an inconsistency between the Transfer Law and any other law, the provisions of the Transfer Law will prevail. Therefore, the Chamber is confident that Article 59 of the RCCP will not be applied in any transferred case.

5.4 Extradition Cases

25. In *Uwinkindi*, the Defence pointed to several examples of extradition requests made by Rwanda that had been refused, due to the likelihood that the accused's fair trial rights would not be respected.[38] ICDAA puts forth this argument in the present case.[39]

26. The *Uwinkindi* Referral Chamber found that the cited cases did not allow it to conclude that the reasons the extradition requests were denied were clearly based on fair trial issues. Moreover, it recalled that this Tribunal is not bound by the decisions of national jurisdictions, and highlighted the differences between referral proceedings before an international court and extradition requests based on a bi-lateral agreement between two States.[40]

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[37] RCCP, Article 59.
[38] *See Uwinkindi* Referral Decision, para. 41.
[39] *See* ICDAA Brief, paras. 104-111. ICDAA directs the Chamber's attention to the 29 October 2008 dismissal of a request for extradition from a Toulouse Court of Appeal; the 4 November 2008 release by German Courts of an individual for which Rwanda had requested extradition; the 20 February 2009 refusal of Finland because fair trial rights could not be guaranteed; the April 2009 U.K. cases holding the same thing, the 1 July 2009 refusal of Switzerland; and the 15 September 2010 Versailles Court of Appeal Decision that released a Rwandan medical practitioner despite the fact that there was an international arrest warrant issued by Rwanda.
[40] *See* Uwinkindi Referral Decision, paras. 42-43.

27. Since the time of the Referral Chamber's Decision, there have been several instances where national or regional courts have upheld extradition orders to Rwanda. The first of these was *NCIS Norway v. Charles Bandora* ("*Bandora*"), delivered by the Oslo District Court on 11 July 2011.[41] In *Bandora*, the District Court held that extraditing the accused to Rwanda would not violate the fair trial standards as embodied in Article 6 of the European Convention on Human Rights ("ECHR").[42] Additionally, the Court found that it was not likely that he would be subjected to torture, in contravention of Article 3 of the ECHR.[43] To arrive at this decision, the Court assessed the changes Rwanda had made to its legal system[44] as well as the guarantee made by GoR that Bandora would receive a fair trial and the possibility for observers to follow the trial.[45] It further stated, "[…] the Court must base its decision on the assumption that Mr. Bandora will be given a fair trial in Rwanda, and that there are at least no 'objective indications' or any real risk of this not being the case."[46]

28. In October 2011, the European Court of Human Rights ("ECtHPR") issued its judgement in the case of *Ahorugeze v. Sweden*.[47] Ahorugeze was a Rwandan citizen who had been granted refugee status and had taken up permanent residence in Denmark.[48] On a trip to Stockholm, he was arrested by the Swedish authorities after they received information from Rwanda that Ahorugeze was in Sweden and was wanted in Rwanda for crimes relating to the 1994 genocide.[49] The case went to the Swedish Supreme Court in 2009, where the court held that "the evidence at hand did not give reason to believe that [Ahorugeze] would be subjected to torture or inhuman or

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[41] *See* Report by Government of Rwanda, 19 August 2011 ("GoR Report"), Exhibit B (*NCIS Norway v. Charles Bandora* ("*Bandora*")).

[42] *Bandora*, p. 14. Article 6 of the European Convention on Human Rights ("ECHR") states:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[43] *Bandora*, p. 14. Article 3 of the ECHR provides, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[44] *Bandora*, p. 11.

[45] *Bandora*, p. 12.

[46] *Bandora*, p. 12.

[47] *Ahorugeze v. Sweden*, Judgement, European Court of Human Rights, 27 October 2011 ("*Ahorugeze*").

[48] *Ahorugeze*, para. 9.

[49] *Ahorugeze*, para. 12.

degrading treatment contrary to Article 3 of the [ECHR]."[50] The court also found that extraditing Ahorugeze would not be contrary to Article 6 of the ECHR because Ahorugeze did not show that there were substantial grounds to believe he would suffer a "flagrant denial of justice."[51] It noted the number of recent improvements made to Rwandan laws, particularly in the area of its witness protection programme and the possibility to hear testimony from witnesses not present in Rwanda.[52] In its deliberations, the ECtHR examined the Rule 11 *bis* decisions made by the ICTR, more recent practice of States regarding Rwanda's requests for extradition, recent amendments made to the Rwandan legal system and this Tribunal's Referral Decision of 28 June 2011.[53] The ECtHR observed that one of the primary concerns of national courts and the ICTR in its 2008 Rule 11 *bis* Decisions was the ability of the defence to bring witnesses to testify in Rwanda. Thus, in order to determine whether Ahorugeze's Article 6 rights would be violated, the ECtHR examined the amendments made to Rwanda's Transfer Law, the new Witness Protection Unit ("WPU") under the Rwandan judiciary and anecdotal evidence from Dutch and Norwegian investigators stating that they were able to conduct interviews with witnesses without interference from Rwandan officials.[54] The ECtHR could find "no reason to conclude that the applicant's ability to adduce witness testimony and have such evidence examined by the courts in Rwanda would be circumscribed in a manner inconsistent with […] [the rights of the accused]."[55]

29. Given these recent findings by national and international courts, and based on the evidence before it, the Referral Chamber cannot conclude that it is the general practice of States to deny Rwandan extradition requests for fear that the individual will suffer grave human rights violations.

5.5 Trial *In Absentia*

30. The Chamber recalls that it requested the ICDAA and GoR, as *amici curiae*, to address the possibility that Sikubwabo was never apprehended, and whether or not the Accused might be tried *in absentia*.

31. In its *Amicus* Brief, the GoR assures the Chamber that, if the present case is transferred to Rwanda, Sikubwabo will not run the risk of being tried *in absentia* if he is not apprehended.[56]

32. The ICDAA did not submit any arguments as to this point.[57]

33. The Chamber notes that trials *in absentia* are not completely prohibited in the Rwandan legal system.[58] Though most of the focus of these *in absentia* rulings has been on the *Gacaca*

[50] *Ahorugeze*, para. 19.
[51] *Ahorugeze*, para. 19.
[52] *Ahorugeze*, paras. 19, 21.
[53] *Ahorugeze*, paras. 34-35 (Amendments to Rwanda's Transfer Law). paras. 44-49 (2008 ICTR Referral Decisions); paras. 51-61 (Decision of 28 June 2011 in *Uwinkindi*); paras. 62-75 (recent national decisions).
[54] *Ahorugeze*, paras. 117-122.
[55] *Ahorugeze*, para. 123.
[56] GoR Brief, paras. 4-6.
[57] ICDAA Brief, para. 84.
[58] *See* GoR Brief, para. 5.

courts, the RCCP allows for trials *in absentia* to take place, under certain conditions, in ordinary courts as well.[59]

34. However, the Chamber observes that Article 13 (7) of the Transfer Law mirrors Article 20 (4) of the Statute, stating that "the accused shall have the right to be tried in his or her presence."[60] This provision has been interpreted as to require the physical presence of the accused.[61] The Transfer Law is both the *lex posterior* and the *lex specialis* with respect to cases transferred to Rwanda by the ICTR. Additionally, Article 25 explicitly provides that, in the case of any inconsistency between the Transfer Law (as modified by the Organic Law in 2009) and any other law, such as the RCCP, the terms of the Transfer Law will prevail.[62]

35. Considering the above submissions, the Chamber believes the provisions of the Transfer Law adequately ensure that the Accused will not be tried *in absentia*.

6. PENALTY STRUCTURE

6.1 Submissions

36. The Prosecution contends that Rwanda has resolved the "ambiguity concerning the applicable punishment that the Judges had previously found to exist between the *Transfer Law* and the *Abolition of the Death Penalty Law*."[63] By abolishing the death penalty and removing the possibility that an accused, if convicted, would fact life imprisonment in isolation, the Prosecution argues that Rwanda has addressed all previous concerns and now has an adequate penalty structure.[64]

37. Neither Rwanda nor ICDAA make any submissions on this particular point.

6.2 Applicable Law

38. It is not disputed that the death penalty was abolished in Rwanda pursuant to Organic Law No. 31/2007 or 25 July 2007, or that the penalty of life imprisonment with special conditions is no longer a possible penalty for transfer cases.[65]

[59] RCCP, Articles 196-204; GoR Brief, para. 5. Additionally, the GoR notes, "[i]n the event of a conviction *in absentia*, an accused is entitled upon arrest to the setting aside of his judgement and trial *de novo*." GoR Brief, para. 5, fn. 7.
[60] *See* Transfer Law. *See also* GoR Brief, para. 4.
[61] *See The Prosecutor v. Édourad Karemera et. al*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal concerning his Right to be Present at Trial, 5 October 2007, para. 11.
[62] GoR Brief, para. 5.
[63] Referral Request, para. 30.
[64] Referral Request, paras. 33, 36.
[65] Referral Request, Annex G (Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of Rwanda, 1 December 2008) ("Abolition of Death Penalty Law").

6.3 Discussion

39. Although not expressly stated in Rule 11 *bis*, the jurisprudence of this Tribunal and the International Criminal Tribunal for the former Yugoslavia ("ICTY") has established that the State to which a case is referred must provide an appropriate punishment for the offences with which an accused is charged.[66]

40. Organic Law No. 31/2007, enacted 25 July 2007, abolished the death penalty in Rwanda.[67] Additionally, the punishment of life imprisonment with special provisions (*i.e.*, in isolation) will not be applied to cases transferred from the ICTR or from other States, in accordance with the Transfer Law.[68]

41. Article 21 of Rwanda's Transfer Law is consistent with Rule 101 of the Rules, which allows for a maximum penalty of life imprisonment. Article 82 of the Rwandan Penal Code allows for consideration of individual circumstances of a convicted person when determining his or her sentence. Article 22 of the Transfer Law states that convicted persons will be given credit for time spent in custody. These provisions are consistent with this Tribunal's Rules on sentencing.[69]

6.4 Conclusion

42. The Chamber finds that the current penalty structure of Rwanda is adequate and in line with the jurisprudence of this Tribunal, as it no longer allows for the imposition of the death penalty or life imprisonment in isolation. Moreover, the Chamber is satisfied that the ambiguities which existed in previous Rule 11 *bis* applications regarding the nature and scope of the sentence for the accused persons in cases referred to Rwanda have been adequately addressed by Rwanda.

7. CONDITIONS OF DETENTION

7.1 Submissions

43. The Prosecution points to Article 23 of the Transfer Law to demonstrate that, if transferred to Rwanda, the Accused will be detained in conditions that comply with international human rights standards. Additionally, the Prosecutor highlights that this article "enshrines a right by the International Committee of the Red Cross ["ICRC"], or an observer appointed by the ICTR, 'to inspect the conditions of detention of persons transferred to Rwanda by the ICTR and held in detention'."[70]

44. According to the Prosecution, the law also provides that, "[i]n the event an accused dies or escapes from detention […] Rwanda will immediately notify the President of the ICTR […]

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[66] *The Prosecutor v. Stankovic*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis* (TC), 17 May 2005 ("*Stankovic* Trial Decision"); *Bagaragaza* Appeal Decision, para. 9.
[67] Abolition of the Death Penalty Law.
[68] Transfer Law.
[69] *See* Penal Code; Transfer Law, Articles 21-22; Rule 101 (B) & (C) of the Rules.
[70] Referral Request, para. 109.

[and] it will also immediately conduct an investigation and submit a report to the President of the ICTR."[71]

45. 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 the facilities in Mpanga are currently serving convicts from the Special Court for Sierra Leone."[72]

46. Supporting the position of the Prosecution, Rwanda submits that the rights afforded to prisoners under Rwandan law are, in all material respects, identical to those recognised under prevailing international standards.[73]

47. ICDAA does not comment on Rwanda's detention standards in its Brief.

7.2 Applicable Law

48. The conditions of detention speak to the fairness of a country's criminal justice system, and must be in accord with internationally recognised standards.[74] Rwanda's Transfer Law states that any person transferred from this Tribunal to Rwanda shall be detained in accordance with the minimum standards of detention, as adopted by the United Nations General Assembly Resolution 43/173. This law also allows the ICRC or a monitor appointed by this Tribunal to submit a confidential report based on the findings of these inspections to the Rwandan Minister of Justice and the ICTR President.[75]

7.3 Discussion

49. The Chamber recalls that the *Kanyarukiga* Referral chamber found that "during trial, the accused would be detained in a custom-built remand facility at the Kigali Central Prison."[76]

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[71] Referral Request, para. 109.

[72] Referral Request, para. 110 (citing to Memorandum of Understanding between The Special Court for Sierra Leone and The Government of the Republic of Rwanda, 2 October 2009).

[73] For duplicate submission, GoR relies upon its brief as submitted in *Uwinkindi* (GoR Brief, para. 2). *See The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, *Amicus Curiae* Brief for the Republic of Rwanda in Support of the Prosecutor's Application for Referral pursuant to Rule 11 *bis*, 18 February 2011, para. 70 ("*Uwinkindi* GoR Brief").

[74] 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. *Stankovic* 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.

[75] Transfer Law, Article 23(citing the Body of Principles which guarantees the same standards both upon transfer and after conviction).

[76] *Uwinkindi* GoR Brief, para. 106.

50. The Chamber notes that adequate detention conditions are guaranteed by the Transfer Law, and considers that any submissions that the conditions will be inadequate in practice are, at this junction, purely speculative. The Chamber expects that the monitoring mechanism will conduct regular prison visits to ensure that both the detention conditions and the treatment of the Accused in detention are satisfactory, and that the monitors will immediately report any concerns to the Prosecutor and the President of the Tribunal.

8. AVAILABILITY AND PROTECTION OF WITNESSES

8.1 Witness Availability

8.1.1 *Submissions*

51. The Prosecution submits that issues relating to witness availability and protection found in previous Rule 11 *bis* motions have adequately been addressed by Rwanda.[77] Specifically as to the area of witness availability, the Prosecution points out that Article 13 of the Transfer Law has been amended to include immunity for anything said or done in the course of a trial,[78] and 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.[79] In addition, Article 14 of the Transfer Law allows for testimony to be taken by deposition or video-link for witnesses residing outside of Rwanda.[80]

52. Additionally, it contends, this Tribunal's previous concerns regarding the fact that the only witness protection program was run by the Prosecutor's office has been addressed by the WPU's creation under the authority of the judiciary, specifically within the Supreme Court and High Court.[81]

53. The Prosecution notes that, between 2005 and 2010, 357 witnesses from Rwanda have testified for the Defence and 424 have testified for the Prosecution. The ICTR's Witness and Victims Support Section ("WVSS") records indicate that many witnesses who returned to Rwanda did not raise any subsequent security concerns.[82] The Prosecution contends that these statistics indicate that witnesses would be able to testify for the Defence in cases transferred to Rwanda without suffering any negative consequences.[83] Additionally, the Prosecution points to the mandate of the High Court and Supreme Court of Rwanda to ensure witness protection, and initiate investigations into any incidents. It contends that, should the High Court and Supreme Court fail to carry out this mandate, the monitoring and revocation procedures under Rule 11 *bis* may be invoked by the parties.[84]

[77] Referral Request, paras. 37, 39.
[78] Referral Request, para. 40. *See also*, Transfer Law, Article 13.
[79] Referral Request, para. 40.
[80] Referral Request, para. 39.
[81] Referral Request, para. 39.
[82] Referral Request, Annex M (WVSS Data 2005-2010).
[83] Referral Request, para. 56.
[84] Referral Request, para. 53.

54. Lastly, the Prosecution points to the number of genocide cases that have been tried by the High Court and Supreme Court of Rwanda, arguing that a large number of cases have been adjudicated, with witnesses testifying in Rwandan courts for both low and high-ranking civilian leaders and military officials, without facing threats or negative consequences as a result.[85]

55. In its submission, GoR emphasises that it has concluded several mutual assistance agreements with states in the region and elsewhere as part of its cooperation with the Tribunal and the conduct of its domestic trials. Additionally, GoR notes that, pursuant to United Nations Security Council Resolution No. 1503, all States are called upon to assist national jurisdictions where cases have been referred. This Resolution provides a basis for Rwanda to request and obtain cooperation in order to secure the attendance or evidence of witnesses from abroad.[86]

56. In 2008, the ICDAA filed an *Amicus Curiae* Brief in *The Prosecutor v. Fulgence Kayishema*.[87] It relies upon many of the same arguments and facts in the case at bar. It supplements such submissions with its 2011 *Uwinkindi Amicus* Brief, in which it contends that an accused will not receive a fair trial until Rwanda is open to criticism and establishes a positive record of freedom of press, speech, thought and association. The failure of Rwanda to do so means witnesses will be unwilling to travel to Rwanda to testify, or, if they are already in Rwanda, they simply will not agree to testify in domestic courts.[88]

8.1.2 *Discussion*

8.1.2.1 Potential Witnesses and Protective Measures

57. It is not the role of the Referral Chamber to determine whether the fears expressed by the individual affiants are legitimate, reasonable or well-founded. This Chamber is simply concerned with assessing the likelihood that 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" if this case were to be transferred to Rwanda.

8.1.2.2 Minister of Justice and the Fugitive Unit

58. The *Uwinkindi* Referral Chamber noted with concern the statement of the incumbent Minister of Justice when he was discussing the Transfer Law in the Rwandan Senate in 2007. He stated:

> 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 forward to their being captured. They will

[85] Referral Request, para. 54; *Uwinkindi* GoR Brief, paras. 116-119. The High Court heard 21 genocide cases between 2006 and 2008, while the Supreme Court handled 61 such cases. (*See* Referral Request, para. 89; *Uwinkindi* GoR Brief, para. 123).
[86] *Uwinkindi* GoR Brief, paras. 40-45.
[87] *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA), Concerning the Request for Referral of the Accused to Rwanda Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence, 3 January 2008 ("ICDAA 2008 Brief").
[88] ICDAA Brief, paras. 30.

> sign affidavits on which their current address will be shown and that would at any other time lead to their arrest.[89]

59. Although the Chamber notes that Rwandans residing abroad may be responsible for genocide related crimes, the Chamber nevertheless considers that the Minister's statement, taken together with the fact that the Genocide Fugitive Tracking Unit is responsible for coordinating the travel arrangements of witnesses, may give rise to the concerns of those witnesses who fear being accused of genocide in connection with their testimony for the defence. However, the *Uwinkindi* Referral Chamber found that the witness' fears of being falsely accused of genocide, in connection with their testimony was "premature[,] taking into consideration the amendments made to Article 13 of the Transfer law, granting witnesses immunity in regard to their testimony."[90] This Chamber concurs.

8.1.2.3 Witness Immunities and Transfer Law

60. Article 14 of the Transfer Law provides that:

> All witnesses 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 the trials.

61. On 26 May 2009, Article 13 of the Transfer Law was amended to include a second immunity provision stipulating that:

> Without prejudice to the relevant laws on contempt of court and perjury, no persons shall be criminally liable for anything said or done in the course of a trial.

62. This Chamber, like the Referral Chamber in *Uwinkindi*, views this amendment as a positive development. It provides counsel and witnesses living in Rwanda with additional protection. Witnesses living abroad were already protected to a significant extent by the immunities existing in the 2007 Transfer Law; however, the most recent amendment further shields them from prosecution relating to their testimony after they leave the country.

8.1.2.4 Genocide Ideology

63. The Prosecutor submits that Article 13 of the Transfer Law (as modified in 2009) adequately addresses the concerns of previous Referral Chambers in regards to Rwanda's enforcement of its genocide ideology laws by providing that "'[w]ithout prejudice to the relevant laws on contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial'."[91]

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[89] *Uwinkindi* Referral Decision, para. 86 (citing to *The Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (TC), 28 May 2008, para. 61 ("*Munyakazi* Referral Decision").

[90] *Uwinkindi* Referral Decision, para. 88.

[91] Referral Request, para. 49, Annex D (Organic Law No. 03/2009/OL modifying and complementing Organic Law No. 11/2007 of 16/3/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and Other States, Official Gazette of the Republic of Rwanda, 26 May 2009) ("Amended Transfer Law").

64. In its *Amicus* Brief, ICDAA supports its criticism of Rwanda's genocide ideology laws by relaying the story of the May 2010 arrest of American law professor and ICTR defence attorney Peter Erlinder.[92] According to the ICDAA, Professor Erlinder's arrest and subsequent events "may instill a certain fear in foreign lawyers who are considering defence work at the ICTR, not to say, in Rwanda."[93] This fear is certainly not lessened, it argues, by the 11 June 2010 remark made by the GoR, stating, "'[i]t is important to alert the public on this deliberate confusion by the defence lawyers. Rwandans will not sit back and watch as the history of Genocide is being distorted. We will prosecute them aggressively'."[94] In response to the Prosecution's assertion that Article 13 of the Transfer Law as amended in 2009 has addressed this problem, the ICDAA responds that a Rwandan court:

> will still be able to curtail certain lines of defence, or evidence put forth, if it deems [it] to be offensive or in violation of Genocide Ideology laws. Immunity may shield defence counsel from prosecution for *Genocide Ideology*, however, if counsel or a witness says or does anything which a court deems in violation of genocide ideology laws, it appears that the defence or defence witnesses remain potentially exposed to criminal contempt proceedings.[95]

65. Article 13 of the Rwandan Constitution criminalises "revisionism, negationism and trivialization of genocide." In addition to this constitutional prohibition, a number of related laws limiting free speech are in force in Rwanda.[96] As stated by previous Referral Chambers, such provisions are legitimate and understandable in the Rwandan context. Many countries have criminalised the denial of the Holocaust, while others prohibit hate speech in general.[97] In the present case, it is argued that an expansive interpretation and application of the prohibition of "genocidal ideology" will lead to defence witnesses not being willing to testify out of fear of being accused of harbouring this ideology. In *Uwinkindi,* Rwanda acknowledged that there may be ambiguity in the law on genocidal ideology and that the law was being evaluated. The *Uwinkindi* Referral Chamber requested GoR to "inform the ICTR President about the studies carried out on the law, and any measures taken to amend it before the Accused's trial begins in Rwanda."[98] Rwanda filed a report with the President of this Tribunal concerning the ongoing

[92] ICDAA Brief, paras. 48-51.
[93] ICDAA Brief, para. 50.
[94] ICDAA Brief, para. 51.
[95] ICDAA Brief, para. 52.
[96] Law No. 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology; Law No. 33 bis/2003 of 06/09/2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes; Law No. 47/2001 of 18/12/2001 On Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism ("Genocide Ideology Law").
[97] ECHR, Article 10; ICCPR, Article 19. As pointed out by the Prosecution in the course of the *Uwinkindi* transfer proceedings, it follows from human rights case law emanating from the ECHR and ICCPR that prohibiting negation or revision of the Holocaust does not constitute a violation of freedom of expression. *See The Prosecutor v. Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor's Consolidated Response to: (1) Defence Response to the Prosecutor's Request for the Referral of the Case of Jean Uwinkindi to Rwanda Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence; (2) *Amicus Curiae* Brief of Human Rights Watch in Opposition to Rule 11 *bis* Transfer; (3) *Amicus Curiae* Brief of the International Association of Democratic Lawyers (IADL) Pursuant to Rule 74 (Rules of Procedure and Evidence); and (4) International Criminal Defence Attorneys Association (ICDAA) *Amicus Curiae* Brief, 20 April 2011 ("*Uwinkindi* Prosecution Response").
[98] *Uwinkindi* Referral Decision, para. 95.

amendments proposed to its Genocide Ideology law on 19 August 2011.[99] Proposed amendments to the law focused on four main categories: "(1) establishing a more direct nexus between the law's legitimate purposes and its scope; (2) clarifying potentially vague or overbroad terminology; (3) specifically identifying prohibited conduct and imposing an intent element; and (4) reformulating the sentence structure."[100] The Chamber finds the first three categories of particular relevance to the case at bar.

66. In its 19 August Report, GoR states that the draft legislation will provide clearer definitions in regards to terms such as "genocide ideology" and the "genocide committed in Rwanda."[101] In addition, the draft law "would define the substantive elements of the crimes of approval of genocide committed in Rwanda (Article 3), denial of genocide committed in Rwanda (Article 4), and incitement of genocide (Article 5)."[102]

67. The amendment perhaps most relevant to the case at hand is the new Draft Article 6, which will include "new defences or safe harbours for persons who establish that their 'acts were in good faith and/or in the public interest, and [not intended] to promote genocide ideology'," or the person can establish that "'he/she intended to disseminate knowledge or information about the history of Rwanda."[103] GoR contends, and the Chamber tends to agree, that "[t]hese proposed defences are supplemented by the broad immunity conferred on witnesses and members of defence teams by Article 13 of Rwanda's Transfer Law. Read together […] [these two provisions] render moot any alleged fears of witness intimidation."[104]

8.1.2.5 Witnesses Within Rwanda

68. The Prosecution argues that the large number of witnesses who have testified before this Tribunal and returned to Rwanda without incident indicates that "witnesses from within Rwanda would […] be able to testify for the Defence in cases transferred from this Tribunal without suffering any consequences as a result of testifying."[105] It asserts that "[i]f any instances of harassment are reported, Rwanda's system has the capacity to appropriately respond to them. In addition, the High Court and Supreme Court have the mandate to initiate investigations into any incidents and ensure witness protection."[106] Lastly, the Prosecution submits that should concerns regarding the protection of witnesses inside Rwanda arise, the monitoring and revocation mechanism would be equipped to handle such a situation.[107]

69. In support of its contention that witnesses from Rwanda have nothing to fear by testifying for the defence in such genocide trials, GoR points to the fact that numerous genocide trials have been held in Rwanda and that defence witnesses have participated in these cases without issue. The Chamber recalls the finding of the *Uwinkindi* Referral Chamber "that, based on the

[99] *See* GoR Report, Exhibit C (Draft Genocide Ideology Law with proposed amendments).
[100] GoR Report, p. 3.
[101] GoR Report, pp. 4-5.
[102] GoR Report, p. 5.
[103] GoR Report, p. 6 (quoting Article 6 of Draft Law, Exhibit C, pp. 12-13).
[104] GoR Report, p. 6.
[105] Referral Request, para. 56.
[106] Referral Request, para. 53.
[107] Referral Request, para. 53.

information provided by Rwanda on the 36 genocide trials in Rwanda, the number of defence witnesses was fewer than the number of prosecution witnesses […] [T]his alone does not indicate the lack of fair trial for the Accused."[108] Additionally, the *Uwinkindi* Referral Chamber observed that in several of the genocide cases tried in Rwanda, the accused opted to represent themselves, and that "[t]his could be an explanation for the low number of defence witnesses secured to testify since such self-representing accused may have lacked the skills and resources required to secure, prepare and present witnesses in their defence."[109]

70. The Chamber recalls that previous Rule 11 *bis* cases, in denying the Prosecutor's Request for Referral, relied upon its finding 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."[110] However, the Chamber echoes the findings of the *Uwinkindi* Referral Chamber that:

> the defence in most [genocide] cases [tried in the High Court of Rwanda] was able to secure the attendance of witnesses even without the safeguards available to cases transferred from the Tribunal. It is logical to assume that with the amendments made to the laws regarding witness immunity, the creation of a new witness protection programme, and the safeguards imposed by the Chamber on Rwanda, the Appeals Chamber's finding that witnesses may be unwilling to testify is no longer a compelling reason for denying referral.[111]

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

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

73. The Chamber reiterates the findings of the *Uwinkindi* Referral Chamber in regards to addressing the subjective fears of witnesses:

> [T]he subjective fear of witnesses to testify cannot be addressed without implementing adequate legal safeguards to allay such fears. Where laws can neutralise the reasonable fears of individuals, the Chamber is of the opinion that they must be implemented and

[108] *Uwinkindi* Referral Decision, para. 97 (internal citations omitted).
[109] *Uwinkindi* Referral Decision, para. 98.
[110] *Uwinkindi* Referral Decision, para. 100 (citing to *Kanyarukiga* Appeals Decision, para. 33).
[111] *Uwinkindi* Referral Decision, para. 100.

> revised as needed. It is the considered opinion of this Chamber that it is impossible to evaluate the effectiveness of a reasonable law in the abstract. Accordingly, the relevant Rwandan laws must be given a chance to operate before being held to be defective.

74. Finally, the Chamber notes that witnesses residing in Rwanda are obligated to appear to give evidence when summoned. Thus, either party's efforts to secure witness testimony may be enforced by an order for compulsory apprehension of a witness pursuant to Article 50 of the RCCP.[112] This direct, domestic enforcement mechanism exists regardless of whether or not the witness is at risk of arrest for personal criminal activity. To the extent that defence witnesses residing in Rwanda may fail to appear because of a perceived risk of arrest, the issue may be entirely hypothetical. Any disadvantage to the Accused by virtue of this national procedure, which reflects a generally accepted direct means of enforcement for ensuring the presence of any witness at trial, cannot be properly regarded as prejudicial to the right of the Accused to a fair trial.

8.1.2.6 Witnesses Outside Rwanda

75. Recalling the concerns of previous Rule 11 *bis* proceedings, namely, that "many witnesses may be afraid to testify in Rwanda out of fear for intimidation and threats,"[113] the Prosecution asserts that the amendment of the Transfer Law in 2009, as well as the fact that Rwanda has concluded conventions on mutual assistance in criminal matters with several States adequately address any reservations prior Referral Chambers might have had.[114] In particular, the Prosecution points to the additional forms of taking evidence that have been incorporated into the Transfer Law.[115]

76. The ICDAA maintains that there has been no significant change in the willingness of defence witnesses residing outside of Rwanda to enter the country for the purpose of testifying on behalf of an accused *génocidaire*.[116] They submit that the witnesses' "main concern is that the Rwandan authorities will become aware of their identity and place of residence outside Rwanda."[117]

77. The fact that many defence witnesses reside outside of Rwanda does not undermine *per se* the Accused's right to a fair trial. Rwanda has made several efforts to enable such testimony to be secured, such as setting up and using video-link facilities at the Supreme Court, as well as several alternative methods by which testimony may be given.

78. The Chamber recalls the finding of the *Hategekimana* Referral Chamber that "the Defence claims and ICTR experience confirms that many Defence witnesses residing outside Rwanda have claimed refugee status, and thus there may be legal obstacles preventing them from

[112] RCCP, Article 50.
[113] Referral Request, para. 57 (citing *Munyakazi* Appeal Decision, paras. 40-43; *Kanyarukiga* Appeals Decision, paras. 31-34; *Hategekimana* Appeals Decision, paras. 24-26).
[114] *See* Referral Request, paras. 58-59.
[115] Referral Request, paras. 57, 60-62.
[116] ICDAA Brief, paras. 23, 27.
[117] ICDAA Brief, para. 27.

returning to Rwanda."[118] However, the Chamber notes that Rwanda has taken specific and concrete steps to amend the law to secure the attendance, or at the very least, the evidence, of witnesses from abroad. One such example is the fact that Rwanda has mutual assistance agreements with several States in the region and elsewhere in Africa, and has arranged such agreements with other States as part of its continued cooperation with the Tribunal for the conduct of domestic trials.

8.1.2.7 Alternative Means of Testifying

79. 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.[119]

80. At the outset, the Chamber must note that the use of any of these alternative methods is not a right guaranteed to the Accused (or any other party). These procedures are intended to act as an exception to the general rule of *viva voce* testimony before the court, and whether to provide for any of these measures remains within the sole discretion of the trial court.[120] The governing law does not specify whether or not an adverse party may make submissions on a request to use such alternative means, nor does it provide criteria to serve as guidance to a judge in making his or her decision on such a request. The law is also silent as to whether such a decision may be appealed, and under what conditions.

81. In regards to the alternative means of providing testimony via video-link, the Appeals Chamber has previously held that "the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of equality of arms if the majority of defence witnesses would testify via video-link while the majority of Prosecution witnesses would testify in person."[121] However, in regards to witnesses residing outside of Rwanda, the Chamber notes that Article 14 of the Transfer Law provides two means in addition to video-link by which witnesses may provide testimony—via deposition in Rwanda or in a foreign jurisdiction, taken by a Presiding Officer, magistrate, or other judicial officer appointed for that purpose; or before a judge sitting in a foreign jurisdiction for the purpose of recording such testimony.

82. Additionally, Rwanda previously expressed its intention to introduce new legislation that would allow the panel for any case referred by this Tribunal to Rwanda to include judges from

[118] *The Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda (TC), 19 June 2008, para. 68 ("*Hategekimana* Referral Decision").
[119] Amended Transfer Law, Article 14 *bis*.
[120] Amended Transfer Law, Article 14 *bis* (stating that alternatives are available "where a witness is unable or for good reason unwilling to physically appear before the High Court to give testimony").
[121] *Munyakazi* Appeal Decision, para. 42; *Kanyarukiga* Appeal Decision, para. 33; *Hategekimana* Appeal Decision, para. 26.

foreign or international courts. In its August 2011 Report to the ICTR President, Rwanda included the draft provision, which enjoys broad support in the Rwandan Parliament, stating:

> [T]he President of the Supreme Court may […] in the interest of justice and for the purpose of consistency of the judgements rendered in Rwanda with those rendered in foreign countries when dealing with similar issues, on his or her initiative or at the request of the Accused person, the Accused's counsel or the Rwandan or foreign Prosecution authorities, seek the cooperation from the United Nations Organization (*sic*), from any other international organization (*sic*) or from a foreign country by requesting that judges from other countries be sent to assist the Rwandan judges in trying cases whose referral to Rwanda is being sought and which are related to international and cross-border crimes committed in the territory of Rwanda or abroad […][122]

8.2 Rwanda's Witness Protection Programme

8.2.1 *Submissions*

83. The Prosecution submits that the VWSU, established in 2006, was created to serve both prosecution and defence witnesses, with the objective of assisting and protecting witnesses in order to ensure their physical and mental health and well being before, during and after trial. The staff of the VWSU—sociologists, psychologists and lawyers—provide the witnesses with the following: emotional and psychological support, such as trauma counselling; security, including responding to threats and preventing the disclosure of witnesses' identities; and safe houses where witnesses may stay during their testimonies or in instances where their physical security is at risk. To ensure protective orders and address any threats against witnesses, the VWSU cooperates with local authorities, Courts, National Police, Rwanda Defence Forces and the National Security Service. [123]

84. The Prosecution further submits that, because of the organisation and policies described above, "the VWSU […] has access to all the relevant authorities to facilitate its work thereby enabling it to function competently and effectively in the protection of its witnesses."[124] It supports this contention by citing to statistics which show that, between 2006 and 2009, the VWSU assisted 265 Defence witnesses and 738 Prosecution witnesses.[125]

85. In addition to the VWSU, the Prosecution argues that the concerns of previous Rule 11 *bis* Referral Chambers have been addressed by the creation of the WPU, which is established under the Judiciary.[126] According to the Prosecution, "[t]he WPU informs witnesses about their rights and the ways to exercise them, and it also ensures that all protective measures issued by the Courts are implemented."[127] The two units (VWSU and WPU) work together "to ensure that all witnesses have access to witness protection services when they need it."[128] This not only

[122] GoR Report, pp. 9-10.
[123] Referral Request, para. 43.
[124] Referral Request, para. 43.
[125] Referral Request, para. 44.
[126] Referral Request, paras. 45, 48.
[127] Referral Request, para. 45.
[128] Referral Request, para. 46.

allows Defence witnesses to have a choice of which witness protection service they utilise, but also ensures that regardless of the unit they choose, they will be provided with adequate and effective protection.[129]

86. The ICDAA contends that the existing WVSU "does not adequately protect defence witnesses,"[130] and "there is no evidence that a single defence witness has ever benefited from protection measures in Rwanda."[131] It compares Rwanda's WVSU to the ICTR's WVSS, noting that while the ICTR-WVSS operates on a security/preventative basis, Rwanda's WVSU primarily operates on a response-oriented basis, meaning that the bulk of witness protection comes after a report of witness intimidation or other safety concerns has been filed.[132] Moreover, the ICDAA submits, the description of the program provided by GoR "does not indicate how and what information needs to get to WVSS (*sic*) in order to trigger a response."[133]

87. The ICDAA further contends that the WVSU does not adequately protect defence witnesses because it "is independent of the court system[,] leaving the decisions on protection measures, if any, to the Prosecutor's General's Office."[134] This means that "defence witnesses are precluded from obtaining court-ordered witness protection" and "[t]hus, in practice, there is no means by which [a] defence witness can *independently* obtain witness protection."[135] The fact that "prospective defence witnesses would automatically know that the authorities had their identifying information" would make them even more reluctant to testify.[136] Lastly, the ICDAA points to the fact that the WVSU is funded almost entirely by foreign aid, which has decreased substantially since 2008.[137]

88. In regards to the WPU, the ICDAA submits that it cannot be said to be an adequate alternative at the moment because it is "'not yet fully operational'" and the number of ambiguities in Rwanda's description of it make "it exceedingly difficult to conceive how such a program is intended to function."[138] It argues that the creation of the WPU "will have no impact whatsoever on the *status quo*"[139] and the fact that it is required to cooperate with the WVSU means that it will forfeit "any independence it might have gained through its creation within the registries of the High Court and that of the Supreme Court."[140]

[129] Referral Request, para. 46.
[130] ICDAA Brief, para. 60.
[131] ICDAA Brief, para. 61.
[132] ICDAA Brief, para. 63.
[133] ICDAA Brief, para. 63.
[134] ICDAA Brief, para. 64.
[135] ICDAA Brief, paras. 65-65 (emphasis in original).
[136] ICDAA Brief, para. 65.
[137] ICDAA Brief, para. 66.
[138] ICDAA Brief, para. 70.
[139] ICDAA Brief, para. 72.
[140] ICDAA Brief, para. 72.

8.2.2 *Discussion*

89. As a preliminary matter, the Chamber notes that the fact that no judicial system can guarantee absolute witness protection is not disputed.[141]

90. The *Uwinkindi* Referral Chamber noted the improvement of the Rwandan VWSU over the past two years, stating that it has seen an increase in staff size, funding and awareness raising programmes.[142] Prior Referral Chambers have held that while the funding and personnel issues faced by the witness protection service may suggest that it faces challenges, they do not show that it is ineffective.[143] It should be noted however, that while statistics are provided on the number of witnesses VWSU has assisted,[144] its report is not explicit with respect to the manner in which it addresses the security concerns of witnesses.

91. The ICDAA has expressed concern over the fact that the VWSU is administered by the Office of the Prosecutor General. However, it has previously been held by the Appeals Chamber that "the fact that the Rwandan witness protection service is administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render it inadequate [...] [or mean that] witnesses would be afraid to avail themselves of its services for these reasons."[145]

92. Rwanda has taken steps toward the creation of an additional witness protection unit under the auspices of the judiciary, WPU. The Chamber observes that this step may go some distance in guaranteeing that witness safety will be monitored directly by the Rwandan judiciary. The Chamber is mindful that the defence witnesses would have to apply to the Office of the Prosecutor General for assistance of WPU but notes that the protection service under WPU would be ultimately administered by the Judiciary. Nevertheless, the Chamber is of the view that as WPU has only been established to assist witnesses in transferred cases, of which there have been none, the Chamber cannot evaluate its terms of reference or its effectiveness. The Prosecution submits that the mission of the WPU "is to receive, listen to and guide witnesses, as well as record their requests […] [it] also informs witnesses about their rights and the ways to exercise them, and it also ensures that all protective measures issued by the courts are implemented."[146] WPU, in the Chamber's opinion and expectation, should remain under the judiciary as this would provide a guarantee that the witnesses' safety would be monitored directly by the judges.

8.2.3 *Conclusion*

93. Rule 11 *bis* (D) (ii) provides that the Referral Chamber may order existing protective measure for certain witnesses or victims to remain in force. In addition, in the event of referral,

[141] *The Prosecutor v. Jankovic*, Case No. IT-96-23-2-AR11bis.2, Decision on Rule 11 *bis* Referral (AC), 15 Novemer 2005, para. 49. *See also*, *Kanyarukiga* Referral Decision, para. 69; *Gatete* Referral Decision, para. 60; *Hategekimana* Referral Decision, para. 64; *Munyakazi* Appeal Decision, para. 38.
[142] *Uwinkindi* Referral Decision, para. 129.
[143] *Hategekimana* Referral Decision, para. 64.
[144] *See* Referral Request, para. 44.
[145] *Munyakazi* Referral Decision, para. 38; *Kanyarukiga* Appeal Decision, para. 27.
[146] Referral Request, para. 45.

external monitors would oversee these witnesses' protection programmes. The Referral Chamber would expect that the ICTR appointed monitors meet with defence counsel and WPU on a regular basis and address the concerns raised in their regular reports to this Tribunal. The Chamber concludes that the potential reluctance of witnesses to avail the services of the WPU is speculative at this time. The Chamber is of the opinion that the issue of protective measures for defence witnesses is *prima facie* guaranteed ensuring a likely fair trial of the Accused.

9. RIGHT TO AN EFFECTIVE DEFENCE

9.1 Competence, Capacity and Availability

9.1.1 *Submissions*

94. The Prosecution submits that Rwanda's legal framework provides for both the protection and realisation of an accused's right to an effective defence.[147]

95. The ICDAA submits that a number of obstacles stand in the way of the realisation of the right of an accused to an effective defence. For instance, it submits that the Rwandan legal system has neither the human capacity nor the financial ability to offer effective assistance to accused persons and their defence teams.[148] Additionally, it contends that the government continues to interfere in the working conditions of defence counsel and staff.[149]

9.1.2 *Applicable Law*

96. Article 14 (3) of the ICCPR recognises and protects the right to a fair trial, including the right of accused persons to defend themselves through the counsel of their choice and the right to have adequate time and facilities for the preparation of their defence.[150] This principle is enshrined in the Rwandan Constitution and under various provisions of the Transfer Law. Article 18 (3) of the Constitution states that "the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision-making organs."[151] Article 13 of the Transfer law mirrors the fair trial guarantees under ICCPR and extends the right to a counsel of choice to an accused person in a case transferred by the Tribunal. The right to legal representation is still observed where an accused has no means to pay.[152] The Transfer Law also extends protection to counsel working on transferred cases. Article 15 of the Transfer Law provides that defence counsel will have the right to enter Rwanda, move freely, and not be subject to search, seizure, arrest or detention in the performance of their legal duties. The security and protection of defence counsel and their support staff is also guaranteed under Article 15. Moreover, the 2009 amendment to Article 13 of the Transfer Law provides immunity "for

[147] Referral Request, para. 95.
[148] ICDAA Brief, paras. 7-11.
[149] ICDAA Brief, para. 41.
[150] Rwanda acceded to ICCPR on 16 April 1975. Status of Ratification, Reservations and Declarations, ICCPR.
[151] Constitution of Rwanda, Article 18. Article 19 also provides: "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 in which all the necessary guarantees for defence have been made available."
[152] Transfer Law, Article 13 (6).

anything said or done in the course of a trial" with the exception of contempt of court and perjury.[153] This offers broad protections to counsel working on transferred cases.

9.1.3 *Availability of Counsel*

97. The Prosecution relies upon Articles 13 (6) and 15 of the Transfer Law in its submission that the Rwandan legal framework entitles the Accused to the counsel of his choice and guarantees that the Defence team will be able to effectively carry out its work. It also refers to Article 64 of the RCCP, which entitles the defence counsel to access the Prosecution's files as well as to communicate with the accused.

98. GoR submits that there are currently 686 attorneys admitted to its bar, up from 280 in 2008, with one-third of them having more than 5 years of experience, including defending accused in genocide cases.[154] Additionally, it submits that its allowance of foreign attorneys to be admitted to practice before its courts, from countries such as the United States, Canada, Uganda and Cameroon, further increase the legal representation options available to an accused.[155]

99. In regards to effective legal representation, the ICDAA submits that there are not enough lawyers to adequately provide for a guaranteed right to counsel.[156] However, it does not address the fact that the number of attorneys in Rwanda has increased dramatically since it submitted its brief in *Kayishema* in 2008.

100. The Chamber recalls that the admission of foreign attorneys to the Rwandan Bar does not, in and of itself, create a foolproof safeguard for the Accused, who may be indigent and unable to afford foreign counsel. However, in examining whether or not an effective right to counsel exists, the Chamber is of the view that the most important factor is Article 13 (6) of the Transfer law, which entitles an accused to counsel of his choice or legal representation, should he not have the means to pay for such. While the Chamber welcomes Rwanda's decision to permit foreign lawyers to practice before its courts, it is not for the Referral Chamber to decide whether Rwandan or foreign lawyers would most effectively represent the Accused. The Chamber accepts that the level of funding available to the Defence may be lower than that provided at this Tribunal. However, Rule 11 *bis* does not require an objective level of funding; it simply requires that the Accused be afforded equality of arms. In this regard, the Chamber is satisfied that this requirement has been met. Additionally, it is not necessary for the Chamber to require proof to support GoR's submission that sufficient funds are available to try the case properly. Should Rwanda fail to ensure the fair trial rights of the Accused and guarantee the equality of arms between the parties, the case may be revoked by this Tribunal under Rule 11 *bis*.

[153] *See* Amended Transfer Law.
[154] *Uwinkindi* GoR Brief, paras. 8-9.
[155] *Uwinkindi* GoR Brief, paras. 14-15.
[156] *See* ICDAA Brief, para. 6; ICDAA 2008 Brief, para. 40.

9.1.4 *Legal Aid*

101. The Prosecution and Rwanda submit that Article 13 (6) of the Transfer Law provides a legal framework that guarantees an indigent accused the right to legal aid. Notwithstanding this guarantee, Rwanda has established several legal aid programmes, for which it has made a budgetary provision of 100 million Rwandan Francs to fund legal aid for cases transferred from this Tribunal.[157]

102. In its *Amicus* Brief, the ICDAA maintains, as it did in 2008, "that within Rwanda's legal system[,] financial support to indigent persons accused of genocide was generally not available."[158] It concedes that Rwanda has passed laws that create the right to counsel for indigent persons accused of genocide, but contends that "these laws are of little consequence since they are inapplicable in practice."[159] It argues that money for legal aid is not allocated to a case, but goes to pay the salaries of staff who "handle all the legal aid requests and cases, for both civil and criminal matters, for the entire country."[160]

103. This Chamber observes that in the Rule 11 *bis* Decisions in *Gatete* and *Kanyarukiga*, the Referral Chambers asserted that they were not in a position to inquire into the sufficiency of available funds.[161] Both of these Referral Chambers relied upon jurisprudence from *Stankovic*, concluding: "there is no obligation to establish in detail the sufficiency of the funds available as a precondition for referral."[162] This Chamber does not see it as necessary to verify the availability of funds for legal aid at the domestic level. First, the Chamber trusts that the Prosecution and Rwanda have provided sufficient budgetary allocation for legal aid to the Accused in good faith. Second, the Chamber will not lightly intervene in the domestic jurisdiction of Rwanda, and considers that it is not obliged to either scrutinise Rwanda's budget or verify its disbursal.

104. Accordingly, this Chamber is satisfied that the Accused will have access to legal aid if transferred. Should there be future financial constraints, the existence of monitors and the possibility of revocation of the Accused's referral should address any failure by the Rwandan authorities to make counsel available or disburse funds necessary for legal aid and to ensure the Accused's fair trial rights.[163]

9.2 Working Conditions

9.2.1 *Submissions*

105. The Prosecution recalls previous Rule 11 *bis* Decisions where Referral Chambers found that while a monitoring mechanism in and of itself might be sufficient to address any situations where defence teams were prevented from carrying out their work effectively, due to harassment,

[157] *Uwinkindi* GoR Brief, para. 24; Referral Request, paras. 104-105.
[158] *See* ICDAA Brief, para. 7.
[159] ICDAA Brief, para. 8.
[160] ICDAA Brief, para. 8.
[161] *Kanyarukiga* Referral Decision, para. 57; *Gatete* Referral Decision, para. 48.
[162] *Stankovic* Appeal Decision, para. 21.
[163] *See Hategekimana* Referral Decision, para. 55; *Stankovic*, Appeal Decision, paras. 50-52.

threats or arrests,[164] the difficulties defence teams had in obtaining documents and visiting detainees, when taken together with other factors, could adversely affect the fairness of the trial and the rights of the accused.[165] Nevertheless, the Prosecution submits that Rwanda has sufficiently addressed these problems, and, should any problems occur, the Transfer Law and the monitoring and revocation mechanisms create adequate safeguards to ensure that the Accused is afforded a fair trial. The Prosecution points to several cases, such as *Munyakazi*, *Ntawukulilya*, *Setako*, *Nchamihigo*, *Renzaho*, *Rukundo*, *Zigiranyirazo*, *Bikindi* and *Muhimana*, in which defence teams did not report to the ICTR any instances of non-cooperation or other impediments to obtaining assistance while in Rwanda. Additionally, the Prosecution argues that a large number of Rwandese nationals who are currently assigned to defence teams here at the Tribunal reside in Rwanda and have experienced no difficulties in conducting their work.[166]

106. The ICDAA submits that, since 2008, "a series of highly disturbing cases involving allegations of intimidation and interference" have characterised the working conditions of defence teams in Rwanda.[167] It recalls the 2007 case of ICTR defence investigator Léonidas Nshogoza, who was arrested and detained while in Rwanda for supposedly attempting to corrupt an ICTR witness and for minimising genocide. His detention lasted for four months.[168] It also submits that the lack of funding or any sort of budget for defence teams for travel and investigations, [169] as well as the fact that it "has not seen evidence to suggest that the Rwandan Government allocates funds or has adopted/maintained a best practices system to ensure security for the defence teams in genocide cases,"[170] prevent the Accused from receiving a fair trial.

107. The Referral Chamber recognises the continued cooperation of the GoR with the Tribunal. The cooperation of the Rwandan judicial authorities does not, however, preclude the Chamber from addressing the submissions on the working conditions of the defence.

9.2.2 *Legal Framework*

108. According to Article 15 of the Transfer Law, the Defence will be entitled to security and the right to enter and move within Rwanda, and to carry out their functions without threat of search, seizure or deprivation of liberty. According to Article 2 of the Transfer Law, apart from contempt and perjury "no person shall be criminally liable for anything said or done in the course of a trial."[171]

9.2.3 *Immunities and Work of Tribunal Defence Teams in Rwanda*

[164] *See* Referral Request, para. 63 (citing to *Hategekimana* Referral Decision, paras. 58-60; *Kanyarukiga* Referral Decision, para. 61; *Gatete* Referral Decision, para. 52).
[165] *See* Referral Request, para. 63 (citing to *Kanyarukiga* Referral Decision, para. 62; *Gatete* Referral Decision, para. 53; *Kanyarukiga* Appeal Decision, paras. 21-22).
[166] Referral Request, paras. 63-70.
[167] ICDAA Brief, para. 41.
[168] ICDAA 2008 Brief, para. 55.
[169] ICDAA 2008 Brief, para. 53.
[170] ICDAA Brief, para. 16.
[171] Transfer Law, Article 2.

109. Having considered the applicable legal framework, the Chamber will address several cases raised by the ICDAA which it considers particularly relevant to the subject at hand. The arrest and detention of ICTR defence counsel Peter Erlinder in May 2010 is the most recent incident raised by the ICDAA. GoR asserts that "there is not a single case where a defence team member or witness has been charged with a crime under Article 13 for acts or words relating to the investigation or trial of a criminal case."[172] According to GoR, Erlinder's arrest is not considered to be an exception because legal proceedings against him have been terminated.[173] This Chamber shares the *Uwinkindi* Referral Chamber's view "that immunity granted to defence counsel should prevent them from being prosecuted for statements linked to their activities as defence counsel."[174]

110. The ICDAA also raises the case of Léonidas Nshogoza, a defence investigator at this Tribunal. It is alleged that Nshogoza was subject to double jeopardy despite the protections and safeguards found in Rwanda's legal framework.[175] In 2007, the ICTR investigated Nshogoza after allegations were made that he tried to bribe a prosecution witness in order to change his testimony. Despite the ongoing investigation and proceedings against Nshogoza at the Tribunal, the primacy of the Tribunal as found in Article 8 (2) of the Statute and the functional immunity granted to Nshogoza as a defence investigator, Rwanda arrested Nshogoza and detained him for the remainder of the Defence case in *Rukundo*, a case on which he was working at the time.[176] The Tribunal was informed by the Rwandan Prosecutor General that Nshogoza had been detained "'on charges of having attempted to convince a witness to change his statements in favour of the defendant, as well as spreading genocide ideology'."[177]

111. Not long after Nshogoza was released from prison, the *Gacaca* district coordinator from his native region requested local *Gacaca* judges to open a file on him. In mid-December 2007, the *Gacaca* judges assembled a file that charged Nshogoza with the murder of his sister's children. According to ICDAA, a judge, a local government official and several community members believed the case to be unfounded. Nshogoza was tried *in absentia*, but was acquitted of the counts by both the local court as well as the appellate chamber.[178] Nshogoza was acquitted by the ICTR on three counts of contempt related to possible witness interference, but was convicted on one count of violating a witness protection order. Despite the fact that the ICTR allegations were the same as those allegations in Rwanda, and several attempts were made to have them withdrawn on the basis of *non bis in idem*, the criminal proceedings against him remain pending.[179]

112. While the Prosecution has not filed a reply in the present case, as the *amici* submissions are the same as those submitted in *Uwinkindi*, the Chamber concludes that were such a reply to have been submitted in this case, it would have contained the same arguments. In *Uwinkindi*, the

[172] *Uwinkindi* GoR Brief, para. 55.
[173] *Uwinkindi* GoR Brief, para. 55.
[174] *Uwinkindi* Referral Decision, para. 154.
[175] ICDAA Brief, paras. 53-57.
[176] ICDAA Brief, para. 54.
[177] ICDAA Brief, para. 55.
[178] ICDAA Brief, para. 56.
[179] ICDAA Brief, para. 57.

Prosecution contended that the charges against Nshogoza were not intended to and did not "amount to harassment or retaliation of defence team members."[180]

113. The Chamber notes that while the evidence shows that defence teams at the Tribunal have generally been able to work in Rwanda, there is also evidence showing that they have encountered problems. Without going further into the factual circumstances of the various alleged incidents, the Chamber accepts that there have been instances of harassment, threats or even arrest of lawyers for accused charged with genocide. However, as previous Referral Chambers and the Appeals Chamber have concluded, should such situations occur after transfer under Rule 11 *bis*, a legal basis exists under which the Defence may bring the matter to the attention of the High Court or the Supreme Court. These Courts, consequently, will be under a duty to investigate the matter and provide a remedy in order to ensure an efficient defence. Ultimately, if the Defence team is prevented from carrying out its work effectively, the monitoring mechanism may address this matter, and, if warranted, the referral may be revoked.[181]

114. The Chamber does not consider that other alleged impediments faced by defence teams prevent transfer. The guarantees offered by the Transfer Law have not been tested yet. However, the Chamber notes that the *Uwinkindi* Referral Chamber reiterated that examples provided by the Defence and *amici* in *Uwinkindi* showed that the working conditions for the Defence may be difficult, which may have a chilling effect on potential Defence team members.[182]

115. The Chamber notes that ICDAA points to an "unnecessary intrusive government procedure" imposed on defence teams seeking to obtain *Gacaca* documents.[183] The Appeals Chamber has held that it is unclear how the monitoring and revocation mechanisms under the Rules would constitute sufficient safeguards for the defence with regard to obtaining documents in a timely manner.[184] However, this Chamber reiterates the *Uwinkindi* Referral Chamber in its finding "that such incidents considered alone or in conjunction with factors that illustrate that the working conditions of the Defence may be difficult are not in themselves sufficient to prevent transfer under Rule 11 *bis*."[185]

9.3 Accused's Line of Defence

116. If apprehended, should Sikubwabo desire to advance a "politically sensitive defence,"[186] this Chamber concurs with the findings of the *Uwinkindi* Referral Chamber [187] - that there exists a presumption of impartiality that attaches to a judge or a tribunal,[188] deriving from the judges'

[180] *Uwinkindi* Prosecution Response, para. 80. *See also Uwinkindi* Referral Decision, para. 158.
[181] *Gatete* Referral Decision, para. 52; *Hategekimana* Referral Decision, para. 60; *Kanyarukiga* Referral Decision, para. 61.
[182] *Uwinkindi* Referral Decision, para. 160.
[183] ICDAA Brief, paras. 45-46
[184] *Kanyarukiga* Appeal Decision, para. 21.
[185] *Uwinkindi* Referral Decision, para. 161.
[186] *See Uwinkindi* Referral Decision, para. 162.
[187] *See Uwinkindi* Referral Decision, paras. 162-165.
[188] *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 para. 48 ("*Nahimana* Appeal Judgement"); *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001, para. 91; *The Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of

oath of office as well as the qualification for their appointment. 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."[189] The ICTY Appeals Chamber held in *Furundzija* that there is a high threshold that must be reached in order to rebut the presumption of impartiality, and partiality must be established on the basis of adequate and reliable evidence.[190] As in *Uwinkindi*, this Chamber is of the view that as professional judges, Rwandan judges benefit from this presumption of independence and impartiality—a presumption which cannot easily be rebutted.[191]

117. Additionally, the transfer, if granted, will be governed by the provisions of the Transfer Law. The Chamber recalls that Article 13 of the Transfer Law was amended in 2009 to explicitly state that "no person shall be criminally liable for anything said or done in the course of a trial."[192] The ICDAA contention that this immunity may be circumvented by a Rwandan judge or chamber by resorting to the use of the contempt exception, at this point, is merely speculative.[193]

118. The Chamber reiterates and expects that if in the course of the trial in Rwanda the Accused, his counsel or any witnesses on his behalf make a statement amounting to a denial of the genocide, he or she shall not be prosecuted for contempt or perjury. The Chamber considers that this will allay the fears posed to potential witnesses by Article 13 of the Transfer Law.

10. JUDICIAL COMPETENCE, INDEPENDENCE AND IMPARTIALITY

10.1 Applicable International Law

119. The Prosecution and GoR submit that the Rwandan judiciary is independent and impartial.[194] ICDAA submits that, due to the current political climate in Rwanda, the GoR cannot guarantee that the Accused will be tried by a fair, independent and impartial court.[195]

120. Article 20 (2) of the Statute and Article 13 (1) of the 2009 Transfer Law guarantee the right to a fair and public hearing.[196] This right encompasses the right to be tried before an independent and impartial tribunal, as reflected in major human rights instruments[197] and

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Judges (TC), 25 April 2006, para. 9; *The Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision by Nzirorera for Disqualification of Trial Judges (TC), 17 May 2004, para. 11; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings (TC), 20 February 2009, para. 6.

[189] *The Prosecutor v. Furundzija*, Case No. IT-97-17/1-A, Judgement (AC), 21 July 2000, para. 203 ("*Furundzija* Appeal Judgement").

[190] *Furundzija* Appeal Judgement, para. 197.

[191] *Uwinkindi* Referral Decision, para. 166.

[192] Amended Transfer Law, Article 13.

[193] *See* ICDAA Brief, para. 52.

[194] GoR *Uwinkindi* Brief, paras. 110-111; Referral Request, para. 75.

[195] ICDAA Brief, paras. 86-95.

[196] Statute, Article 20 (2); Amended Transfer Law, Article 13 (1).

[197] ICCPR, Article 14 (1) (providing that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); ECHR, Article 6 (1) (protecting the right to a fair trial and providing *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and

international criminal jurisprudence.[198] The criteria of independence and impartiality are distinct yet interrelated.

121. Article 14 (1) of the ICCPR states: "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[199]

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

> The requirement of independence refers, in particular, to the procedure and qualification for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term in office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. […] States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political interference in their decision making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension, and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[200]

123. An independent tribunal must be independent of the country's executive, the legislature and the parties to a case.[201] The criteria encompassing judicial independence include: the manner in which members of the judiciary are appointed and their terms of office, as well as the existence of guarantees against outside pressures and the appearance of independence.[202]

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

> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> i. A Judge is a party to the case or has a financial or proprietary interest in the outcome of a case, or if the judge's decision will lead to the promotion of a

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impartial tribunal established by law."); AChHPR, Article 7 (1) (providing that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal." The AChHPR "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" recognises "General Principles Applicable to All Legal Proceedings," among them a fair and public hearing, independent and impartial tribunal).

[198] *Furundzija* Appeal Judgement, para. 177, fn 239 (holding that under Article 21 (2) of the Statute of the ICTY, which is identical to Article 20 (2) of the Statute of the ICTR, the accused is entitled to "a fair and public hearing" in the determination of the charges against him).

[199] Article 14 (1) of the ICCPR.

[200] General Comment No. 32, para. 19.

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

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

cause in which he or she is involved, together with one of the parties. Under these circumstances a Judge's disqualification from the case is automatic; or

ii. The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

125. In expanding on the second branch of the appearance of bias, the Appeals Chamber noted that the reasonable person must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that judges swear to uphold.[203]

10.2 Rwandan Legal Framework

10.2.1 *Competence and Qualifications of Judges*

126. The Prosecution submits that the judges of the High Court and Supreme Court of Rwanda are qualified and experienced lawyers. It further indicates that Rwanda has engaged in programmes reinforcing the competencies and skills of the judges.[204] The ICDAA does not contest this fact.

127. The Chamber is satisfied that judges of the Supreme Court and the High Court of Rwanda are qualified and experienced and that they have the necessary skills to handle the case at issue if transferred.

10.2.2 *Security of Tenure for Judges*

10.2.2.1 Submissions

128. Both GoR and the Prosecution submit that, pursuant to Articles 8 and 14 of the Law on the Supreme Court and Articles 24 and 79 of the Law on the Statutes for Judges and other Judicial Personnel, the Presidents and Vice-Presidents of those courts are appointed for a determinate amount of time, and that all other judges enjoy the security of tenure for life or until the age of retirement.[205]

129. The ICDAA raises concern regarding the amendments to Article 142 of the Rwandan Constitution. Particularly, that the 2008 amendment removed the provision that made judges "*inamovibles*," making them "subject to 'evaluation' according to constitutionally unspecified standards."[206] It further submits that the 2010 amendment removed the protection of a determinate time in office for the general judiciary, providing it only to the Presidents and Vice

[203] *Furundžija* Appeal Judgement, paras. 181-215.
[204] Referral Request, paras. 83, 85.
[205] Referral Request, para. 79; Annexes N (Law No. 06 bis/2004 of 14 April 2004 on the Statutes for Judges and other Judicial Personnel, Official Gazette of the Republic of Rwanda, 15 May 2004 ("Law on the Statutes for Judges and other Judicial Personnel")) and P (Organic Law Nr. 1/2004 of 29 January 2004 establishing the Organisation, Functioning and Jurisdiction of the Supreme Court, Official Gazette of the Republic of Rwanda, 1 February 2004 (as modified in 2005 and 2006) ("Law on the Supreme Court")); *Uwinkindi* GoR Brief, para. 111.
[206] ICDAA Brief, paras. 86-87.

Presidents of the courts.[207] These amendments, it contends make it "difficult to take the Constitution's requirement…that these same judges exercise their judicial functions 'independently from any other power or authority' at face value."[208] Moreover, it argues, this "[t]rading [of] a strong protection for tenure of judges for a much weaker one…bodes ill for judicial independence. At the very least, it suggests that the independence of the Rwandan judiciary is neither enshrined in nor protected by the relevant current Constitutional provision or by the law implement these provisions."[209]

10.2.2.2 Discussion

130. The Chamber notes that Rwandan law concerning the tenure of judges shows a certain evolution. Under Article 142 of the 2003 Rwandan Constitution, all judges held their offices for life.[210] In 2008, this article was amended, and the provision regarding judicial tenure for life was removed. Instead, the President and Vice President of the Supreme Court are appointed for an eight-year non-renewable term, while the President and Vice President of the High Court are appointed for a five year term that may renewed once. All other judges are appointed for a "determinate term of office that may be renewable by the High Council of the Judiciary in accordance with the provision of the law relating to their status, following their evaluation."[211] No further changes were made to this article in the recent 2010 amendments.

131. Several other Rwandan laws relate to the tenure of the judiciary. Article 24 of the law on the Statutes for Judges and other Judicial Personnel states that "Judges who have been confirmed in their posts are irremovable."[212] The Law Establishing the Organisation, Functioning and Jurisdiction of the Supreme Court states, in Article 8, "[t]he tenure of office of Supreme Court judges is not of fixed duration."[213] However, the 2008 Constitution and its amendments supersede such subordinate legislation as the provisions mentioned above.

132. Given the 2008 amendment of Article 142 of the Rwandan Constitution, the Chamber is of the view that Rwanda no longer ensures life tenure for its judges. However, the Chamber notes that the renewal of terms of office is in the hands of a judicial body which is independent of the executive and legislature.

10.3 Rwandan Judiciary in Practice

133. According to the Transfer Law, the Rwandan High Court and Supreme Court are required to handle any cases transferred from this Tribunal to Rwanda.[214] The Chamber finds that the Rwandan legal framework ensures the independence and impartiality of the judiciary. For instance, Article 140 of the Rwandan Constitution affirms that the judiciary is independent and

[207] ICDAA Brief, paras. 88-90.
[208] ICDAA Brief, para. 94.
[209] ICDAA Brief, para. 94.
[210] *Kanyarukiga* Referral Decision, para. 35; *Gatete* Referral Decision, para. 34; *Hategekimana* Referral Decision, para. 38. *See also* ICDAA Brief, para. 86.
[211] Constitution of Rwanda (2008).
[212] Law on Statute for Judges and other Judicial Personnel.
[213] Law on the Supreme Court.
[214] Referral Request, paras. 73, 75; Transfer Law; Amended Transfer Law.

separate from the legislative and executive branches of the government, and enjoys financial and administrative autonomy. The Super Council of the Judiciary is responsible for the appointment, promotion or removal of judges.[215] The appointment and removal of the President and Vice President of the Supreme Court are regulated by different, specific provisions.[216]

134. The 2004 Law on the Statutes for Judges and other Judicial Personnel provides that judges are to be fully independent in discharging their activities, and in the exercise of their duties, are subject only to the law. This law also reiterates that judges are to be fully independent of the legislative and executive powers.[217] Additionally, the Chamber observes that the judiciary includes an oversight mechanism in the form of an ombudsman and a code of ethics.[218]

135. In addition to the provisions above, the Transfer Law guarantees the same rights to an accused as those provided by Article 20 of the Statute, except the right of an accused "to defend himself or herself in person."[219] The Amended Transfer law also offers the President of the Court the option of having complex or important cases ruled by a quorum of three or more judges rather than one judge.[220]

136. While the Rwandan Constitution establishes that *Gacaca* courts are an integral part of the Rwandan judiciary, the Chamber is mindful that *Gacaca* courts were established to address unique circumstances and that they therefore function in a distinctive manner. It further recalls that in the event that the transfer is granted, the Accused will be tried by a High Court.

10.3.1 *Submissions*

137. 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 on the acquittal rate before the High Court in Rwanda, the number of High Court judgements reversed on appeal and the continuous cooperation of the GoR with this Tribunal. It

[215] Constitution (2008), Articles 157-158; Constitution (2010), Article 40.
[216] *See* Constitution of Rwanda (2008), Article 147; Constitution of Rwanda (2010), Article 34.
[217] Laws on Statutes for Judges and other Judicial Personnel, Article 32.
[218] Referral Request, paras. 86-87, Referral Request, paras. 85-86, Annex O (Organic Law Nr. 02/2004 of 20 March 2004 determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary, Official Gazette of the Republic of Rwanda, 23 March 2004 ("Law on High Council of the Judiciary")), Annex Q (Article 19 of Organic Law Nr. 51/2008 of 9 September 2008 Determining the Organisation, Functioning and Jurisdiction of Courts, Official Gazette of the Republic of Rwanda, 10 September 2008 ("Law on Organisation, Functioning and Jurisdiction of Courts"), Annex S (Law No. 09/2004 of 29 April 2004 relating to the Code of Ethics for the Judiciary, Official Gazette of the Republic of Rwanda, 1 June 2004 ("Code of Ethics"). *See also* Constitution of Rwanda (2008); Law on Statutes for Judges and other Judicial Personnel; Law on the Supreme Court.
[219] Transfer Law; Amended Transfer Law. Article 20 of the 2009 Transfer Law provides that"…the accused person in the case transferred by ICTR to Rwanda shall be guaranteed the following rights: 1) a fair and public hearing; 2) presumption of innocent until proven guilty; 3) to be informed promptly and in detail…of the nature and the cause of the charge against him; 4) adequate time and facilities to prepare his/her defense; 5) a speedy trial without undue delay; 6) entitlement to counsel of his/her choice in any examination. In case he/she has no means to pay, he/she shall be entitled to legal representation; 7) the right tot remain silent and not to be compelled to incriminate him/herself; 8) the right to be tried in his/her presence; 9) to examine, or have a person to examine on his/her behalf the witnesses against him/her; 10) to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her…."
[220] Referral Request, para. 94. *See also* Amended Transfer Law, Article 1.

further draws the attention of the Chamber to the qualifications and expertise of the Rwandan judges.[221]

138. As regards the acquittal rate, the Prosecution submits that it shows that no bias exists on the part of Rwandan judges.[222] Rwanda submits that in 2008, the High Court was seized of 283 criminal trials, with slightly over 200 of these cases resulting in conviction and the remainder in acquittal. It further submits that the acquittal rate is "tangible proof that persons tried before the High Court are ensured a fair trial before an impartial and independent judge." Lastly, it submits that the rate of affirmation or reversal of High Court judgements by the Supreme Court is another reliable indicator of the independence of its judiciary.[223]

139. In respect to genocide cases specifically, GoR notes that the High Court presided over 36 genocide cases between 2006 and 2010, while the Supreme Court heard 61 appeals or other post-conviction proceedings in genocide cases between 2006 and 2008.[224]

140. The ICDAA does not make any submissions regarding the actual practice of independence by the Rwandan judiciary. However, even considering its submissions in *Uwinkindi*, the Chamber is not convinced that the evidence of actual practice shows that the Accused will not have a fair trial. Moreover, the Chamber notes that any transferred case will be closely monitored, and regular reports will be given to the President of the Tribunal. If there is a report that the fair trial rights of the Accused have not been respected the Tribunal or, if applicable, the Residual Mechanism, may invoke the revocation clause under Rule 11 *bis* and recall the case from Rwanda.

11. MONITORING AND REVOCATION

11.1 Monitoring

11.1.1 *Submissions*

141. The Prosecution argues that the monitoring and revocation mechanisms "provide additional oversight for ensuring a fair trial of the Accused in Rwanda."[225]

142. Relying upon its submissions in the 2008 Rule 11 *bis* proceedings in *The Prosecutor v. Kayishema*, a position which has not changed, the ICDAA states that the monitoring process "provides a sufficient guarantee that defence interests will be protected according to international human rights standards" but does not believe that any monitoring mechanism could possibly be "effective and efficient…in a country where there is such restricted freedom of speech and freedom of press."[226] It reiterates this position in its submission in the present case, concluding

[221] Referral Request, paras. 73-95. *See also Uwinkindi* GoR Brief, paras. 117-128.
[222] Referral Request, paras. 74, 91.
[223] *Uwinkindi* GoR Brief, paras. 118-120, according to Rwanda, from 2006 to 2009, the Supreme Court has reversed between 17 and 18% of convictions.
[224] *Uwinkindi* GoR Brief, para. 123.
[225] Referral Request, para. 113.
[226] ICDAA *Kayishema* Brief, paras. 133-134.

that it is more likely that Rwanda would censor such monitors rather than actually accepting "to have the Rwandan proceedings subject to international scrutiny."[227]

11.1.2 *Applicable Law*

143. In 2011, Rule 11 *bis* (D) (iv), which had 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.

144. 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.

145. In determining the monitoring mechanism that should be put in place in the case at bar, the Chamber notes that negotiations with the African Commission on Human and Peoples' Rights (ACHPR) to serve as monitors in *Uwinkindi* have so far proved unsuccessful.[228] In light of the fact that this matter is still pending before the President of the Tribunal,[229] the Chamber will not order the appointment of the ACHPR as the monitor in the Acused's trial; rather, it defers to the final disposition regarding a suitable monitoring mechanism reached in *Uwinkindi*, holding that such mechanism and arrangements shall apply *mutatis mutandis* in the case of Charles Sikubwabo.

11.1.3 *Discussion*

146. The Chamber considers it to be in the interests of justice to ensure that there is an adequate system of monitoring in place if this case is to be transferred to Rwanda. In fashioning such a mechanism, it is important that any system of monitoring the fairness of the trial should be cognizant of and responsive to genuine concerns raised by the Defence, as well as by the Prosecution. Under Rule 11 *bis*, as amended in 2011, the Referral Chamber, as well as the Tribunal's Prosecutor, has the ongoing capacity to monitor a case which it has referred to a national jurisdiction and, where the circumstances so warrant, to have the transferred case recalled to this Tribunal.[230]

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[227] ICDAA Brief, para. 85.

[228] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Confidential Registrar's Submission Regarding the Transfer of the Accused to the Republic of Rwanda and the Monitoring Agreement, 13 February 2012.

[229] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Order to Stay the Transfer of Jean Uwinkindi Pending the Establishment of a Suitable Monitoring Mechanism, 24 February 2012.

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

> Rule 11 *bis* :
>
> (D) […]
>
> (iv) the Prosecutor and, if the Trial Chamber so orders, the Registrar shall send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.
>
> […]

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

148. The Referral Chamber recognises and reiterates the importance of the continued cooperation of the GoR with this Tribunal.[231] It expects Rwanda to facilitate and assist the monitors in their monitoring activities.

11.1.4 *Tribunal's Monitoring*

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

11.1.5 *Residual Mechanism's Monitoring*

150. Article 6 (4) of the Statute of the Residual Mechanism reads as follows: "The Mechanism shall monitor the cases referred to national courts by the ICTY, ICTR, and those referred in accordance with this Article, with the assistance of international and regional organizations and bodies." The ICTR branch of the Residual Mechanism is scheduled to commence functioning on 1 July 2012.[232]

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

11.2 Revocation

152. 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

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

[231] Referral Request, paras. 74-94; GoR Brief, paras. 117-128.

[232] United Nations Security Council Resolution 1966 (2010), 22 December 2010.

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, the Referral Chamber will only consider the revocation mechanism as a remedy of last resort. Thus, while it does constitute a safeguard, it is not a panacea.

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

154. In *Stanković*, the ICTY Appeals Chamber determined that the judges have inherent authority to issue orders which are reasonably related to the task before them and that this power emanates from the exercise of their judicial function.[233] The Appeals Chamber reasoned that the Prosecution's discretion to send monitors cannot derogate from the Referral Chamber's inherent authority to do so pursuant to Rule 11 *bis* of the Rules.

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

12. CONCLUSION

156. Upon assessment of the submissions of the parties and the *amici curiae*, the Chamber has concluded that the case of this Accused should be referred to the authorities of the Republic of Rwanda for his prosecution before the competent national court for charges brought against him by the Prosecutor in the Indictment. In so deciding, the Chamber is cognizant that it is taking a view contrary to the views taken about two years ago by Referral Chambers of this Tribunal where upon assessment of the facts before them, they concluded that those cases should not be referred to Rwanda.

157. This Chamber notes that, in the intervening period, Rwanda has made material changes in its laws and has indicated its capacity and willingness to prosecute cases referred by this Tribunal. This gives the Referral Chamber confidence that the case of the Accused, if referred, will be prosecuted consistent with internationally recognised fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments. The Referral Chamber is persuaded to refer this case after receiving assurances that a robust monitoring mechanism will ensure that any material violation of the fair trial rights of this Accused will be brought to the attention of the President of the Tribunal forthwith so that remedial action, including revocation, can be considered by this Tribunal, or if applicable, by the Residual Mechanism.

[233] *Stanković* Appeal Decision, para. 51.

158. The Referral Chamber is cognizant of the strong opposition mounted by the defence in other cases and certain *amici curiae* to the referral of cases to Rwanda. The Chamber, however, considers that the issues that concerned the previous Referral Chambers, in particular, the availability of witnesses and their protection, have been addressed to some satisfaction by Rwanda in the intervening period and that any referral with robust monitoring would be able to address concerns that defence counsel and the *amici* have expressed.

159. 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 in its filings about its good faith, capacity and willingness to enforce the highest standards of international justice in the referred cases.

13. DISPOSITION

FOR THE FOREGOING REASONS, THE REFERRAL CHAMBER

PURSUANT to Rule 11 *bis* of the Rules;

GRANTS the Motion;

ORDERS the case of *The Prosecutor v. Charles Sikubwabo* (Case No. ICTR-95-1D-R11bis) to be referred to the authorities of the Republic of Rwanda, so that those authorities should forthwith refer the case to the High Court of Rwanda for an expeditious trial;

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

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

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

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

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

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

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

Arusha, 26 March 2012.

Vagn Joensen Presiding Judge	Lee Gacuiga Muthoga Judge	For and on behalf of Gberdao Gustave Kam Judge

[Seal of the Tribunal]

Judge Muthoga appends a Separate and Concurring Opinion.

14. SEPARATE AND CONCURRING OPINION OF JUDGE LEE GACUIGA MUTHOGA

1. I have had the opportunity to read the Decision of the Majority on the Prosecutor's Request for Referral of the case of Charles Sikubwabo to the Republic of Rwanda.

2. For reasons different from those set out in the Majority Decision, I agree that the Prosecutor's Request for the Referral of the case of Charles Sikubwabo ought to be granted and that it is proper that the case be referred to the authorities of the Republic of Rwanda as provided in Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence.

3. I also agree with the disposition contained in the Majority Decision, except that I would not order the Rwandan authorities to forthwith or at any time refer the case to the High Court of Rwanda for an expeditious trial, nor would I request the Republic of Rwanda to, upon apprehension and arrest of the Accused Charles Sikubwabo or at any other time, inform this Tribunal or the International Residual Mechanism for the Criminal Tribunals, nor would I give any directions concerning or in relation to his trial.

4. Similarly, I would not give the directions and order consequent upon the apprehension and arrest of the Accused as the Majority does in the last four paragraphs of its Decision.

5. I set out below, the approach I consider appropriate in a case, such as the present one, where the Prosecutor seeks to refer the case of an Accused who is not in the custody of the Tribunal and the reasons supporting such approach and findings.

6. The power to determine whether a case should be referred to the authorities of a State falling within the ambit of Rule 11*bis* (A), namely 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, is conferred on a Trial Chamber appointed by the President of the Tribunal for that purpose, once an indictment has been confirmed.

7. The initial joint indictment against Charles Sikubwabo and seven other persons was confirmed by Judge Navanethem Pillay on 28 November 1995.[234] On 6 May 1996, Judge

[234] *The Prosecutor v. Clément Kayishema, Ignace Bagilishema, Charles Sikubwabo, Aloys Ndimbati, Vincent Rutaganira, Mika Muhimana, Ryandikayo and Obed Ruzindana*, Case No. ICTR-95-1-I, Decision of the Review of the Indictment, 28 November 1995.

Pillay granted the Prosecutor's request for leave to amend the indictment and confirmed the first amended indictment.[235] On 21 June 1996, Judge T. H. Khan reviewed and confirmed the materials supporting the indictment in respect of Sikubwabo.[236] The current amended indictment against Charles Sikubwabo was filed on 20 October 2000.[237] In December 2010, the President of the Tribunal designated this Trial Chamber pursuant to Rule 11*bis* (A) to determine this matter.

8. In his Request for Referral, the Prosecutor has indicated that the Accused is not and has never been in the custody of the Tribunal. He has neither surrendered to, nor been arrested by, this Tribunal.

9. In its representation, the Republic of Rwanda has intimated that it is not presently aware of the whereabouts of the Accused. Sikubwabo has not been the subject of a deferral as provided for by Rules 9 and 10 of the Rules of Procedure and Evidence of this Tribunal. This is despite the fact that an investigation and trial *in absentia* were undertaken in the Republic of Rwanda.

10. Not having come into the custody of the Tribunal and his present whereabouts being unknown to the Prosecutor or the Republic of Rwanda, the Accused cannot be said to have acquired a legitimate expectation to be tried by or under the Rules of this Tribunal.

11. Accordingly, the Republic of Rwanda, being the State in whose territory the crimes the Accused is alleged to have committed were committed, is as rightfully entitled to try him as is this Tribunal.

12. The Prosecutor of this Tribunal having, by his referral application indicated that he no longer wishes to prosecute the Accused, the Republic of Rwanda becomes principally entitled to prosecute him in accordance with any rules and procedures that apply to the prosecution of persons accused of committing crimes within the territorial jurisdiction of the Republic of Rwanda.

13. The Majority has spent considerable time in examining whether the conditions for referral of a case to the authorities of a State have been met in this case. I do not consider that it falls to a Trial Chamber to consider whether such conditions have been met where, as here, the Accused is at large and no State, other than Rwanda, has staked a claim to try the case.

[235] *The Prosecutor v. Clément Kayishema, Ignace Bagilishema, Charles Sikubwabo and Aloys Ndimbati, Vincent Rutaganira, Mika Muhimana, Ryandikayo and Obed Ruzindana*, Case No. ICTR-95-1-I, Order: In the Matter of an Application by the Prosecutor for Leave to Amend the Indictment and Order, Granted on 28 November 1995, 6 May 1996. [See the First Amended Indictment, previously filed with the Registry on 29 April 1996.]
[236] *In the Matter of Charles Sikubwabo*, Case No. ICTR-96-10-I, Decision on the Review of the Indictment, 21 June 1996.
[237] *The Prosecutor v. Elizaphan Ntakirutimana, Gerard Ntakirutimana and Charles Sikubwabo*, Case No. ICTR-96-10-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2000.

14. Accordingly, I have not found it necessary to express my views upon those findings in the Majority Decision. Suffice it to say that, on a number of those findings, I would have held different opinions from that of the Majority.

15. I desist from expressing my views on those findings in this separate and concurring opinion.

Done at Arusha on 26 March 2012, in English

Lee Gacuiga Muthoga
Judge