UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER DESIGNATED UNDER RULE 11 *BIS*

Before Judges: Erik Møse, presiding
Sergei Alekseevich Egorov
Florence Rita Arrey

Registrar: Adama Dieng

Date: 17 November 2008

THE PROSECUTOR

v.

Jean-Baptiste GATETE

***Case No. ICTR-2000-61-R11*bis**

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

The Prosecution
Hassan Bubacar Jallow
Bongani Majola
Alex Obote-Odora
Richard Karegyesa
George Mugwanya
Inneke Onsea
François Nsanzuwera
Florida Kabasinga

The Defence
Richard Dubé
Isabella Teolis

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as a Chamber designated under Rule 11 *bis*, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Prosecutor's Request for the Referral of the case of Jean-Baptiste Gatete to Rwanda, filed on 28 November 2007;

NOTING the Defence Response, filed on 26 February 2008, and the Prosecution Reply, filed on 20 March 2008;

FURTHER NOTING the *amicus curiae* submissions filed by the Republic of Rwanda on 23 September 2008 and the International Criminal Defence Attorneys Association (ICDAA) on 17 July 2008, as well as the *amicus curiae* brief of Human Rights Watch in the *Kayishema* case, appended to the Defence Response, and various responses to these submissions**;**

HEREBY DECIDES the Request.

INTRODUCTION

1. On 28 November 2007, the Prosecutor submitted a request for referral of the case against Jean-Baptiste Gatete, who was an *Interahamwe* leader in the Byumba and Kibongo prefectures in Rwanda, to the Republic of Rwanda for trial.[1] The Defence responded on 26 February 2008, opposing such referral.[2]

2. On 8 April 2008, the President of the Tribunal designated a Chamber under Rule 11 *bis* of the Rules of Procedure and Evidence, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey.[3]

[1] The Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 28 November 2007 (below referred to as the "Prosecution Request"). Of the four similar transfer requests which have been filed and assigned to Chambers of the Tribunal, decisions has been rendered in three of these cases: *The Prosecutor v. Yussuf Munyakazi*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (Referral Bench), 28 May 2008; *The Prosecutor v. Gaspard Kanyarukiga,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Referral Bench), 6 June 2008; *The Prosecutor v. Idelphonse Hategekimana,* Decision on Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda (Referral Bench), 19 June 2008. Transfer was denied in all cases. The Prosecution lodged appeals against these decisions. The Appeals Chamber has rendered its decision in two of these cases. It upheld the denials, *see The Prosecutor v. Munyakazi,* Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis* (Appeals Chamber), 8 October 2008) (below referred to as the "*Munyakazi* Appeals Chamber Decision"); *The Prosecutor v. Gaspard Kanyarukiga,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (Appeals Chamber), 30 October 2008 (below referred to as the "*Kanyarukiga* Appeals Chamber Decision"). The fourth transfer request pertains to an accused at large: *The Prosecutor v. Fulgence Kayishema,* The Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 11 June 2007.

[2] *Réponse de la Défense à la requête entitulée*: Prosecutor's Request for the Referral of Jean-Baptiste Gatete etc., filed on 26 February 2008 ("Defence Response"). An English translation was filed on 21 April 2008. *See also* Prosecutor's Reply to this Response, 20 March 2008 ("Prosecution Reply"), after having sought an extension of time on 28 February 2008. The Chamber has according to case law discretion to consider late submissions. It has considered the Reply without making a formal decision on the request for extension, which is hence moot.

[3] Order Assigning to Trial Chamber I the Motion for Referral to Rwanda (President), 8 April 2008.

3. Gatete pleaded not guilty to all counts during his initial appearance on 20 September 2002.[4] On 21 April 2005, Trial Chamber I granted leave to file an Amended Indictment.[5] It was filed on 10 May 2005 and is the basis of the present transfer request.[6] Referring to acts allegedly committed in the Byumba and Kibungo prefectures, the Indictment contains six counts: genocide, or in the alternative complicity in genocide, conspiracy to commit genocide, and the crimes against humanity of extermination, murder and rape. Gatete is accused of having acted individually in these crimes or in concert with other members of a joint criminal enterprise.[7]

4. Following applications pursuant to Rule 74 of the Rules, the Chamber granted *amicus curiae* status to the Republic of Rwanda and the International Criminal Defence Attorneys Association (ICDAA).[8] They have provided written submissions on Rwanda's ability to satisfy the requirements of Rule 11 *bis* (C).[9] In addition, the Defence has appended the *amicus curiae* brief filed by Human Rights Watch in the *Kayishema* case to its Response. The parties have further invited the Chamber to consider briefs of some of the *amici* filed in earlier transfer requests, along with the Prosecutor's response to them. The Chamber has done so.[10] However, it denies a Defence request to incorporate as part of its submissions a supplementary report from Human Rights Watch.[11]

---

[4] T. 20 September 2002, pp. 48-50.

[5] Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 21 April 2005.

[6] *The Prosecutor v. Savo Todović*, Decision on Rule 11*bis* Referral (AC), 23 February 2006, para. 14 (a Referral Bench must base its considerations concerning the referral of a case on the operative indictment); *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Milan Lukić Appeal Regarding Referral (AC), 11 July 2007, para. 12.

[7] The Amended Indictment withdrew the counts of direct and public incitement to commit genocide and violations of Article 3 common to the Geneva Conventions and Additional Protocol II, clarified the modes of participation and provided better particulars of the charges against Gatete. The Defence did not oppose the amendments.

[8] Decision on *Amicus Curiae* Request (Republic of Rwanda) (TC), 8 September 2008; Decision on *Amicus Curiae* Requests (Ibuka, Avega and ICDAA) (TC), 30 June 2008. In this latter decision, the Chamber denied *amicus curiae* status to two non-governmental organisations (Ibuka and Avega) but accepted the request of ICDAA, due to its expertise in relation to the requirements needed to ensure that the rights of persons accused of international crimes are adequately protected.

[9] *Amicus Curiae* briefs was filed by ICDAA on 17 July 2008 ("ICDAA Brief"). On the same date, ICDAA sought an extension of time. The Chamber has considered the ICDAA Brief without issuing a formal decision to that effect. The request for extension is therefore moot (*see* similarly footnote 2). The Republic of Rwanda filed its Brief on 23 September 2008 ("Rwanda's Brief"). It addresses the obstacles identified by the Trial Chambers in the recent referral decisions (*see* footnote 1) and seeks to specifically address these concerns (Rwanda's Brief, para. 4). It also indicates its intention to incorporate its previous *amicus* filings by reference (Rwanda's Brief, para. 2). The Chamber has taken account of these submissions, which were extensively considered in the Chamber's referral decision in the *Kanyarukiga* case (*see* footnote 1). Rwanda further requests the Chamber to consider its Brief of 28 July 2008 filed before the Appeals Chamber in the *Munyakazi* case and annexed to Rwanda's Brief as part of the submissions in the Gatete case (below referred to as "Annex 1 to Rwanda's Brief"). The Defence filed its submissions in response to Rwanda's Brief on 30 September 2008, and in turn requested the Chamber to consider the Defence Brief filed before the Appeals Chamber on 4 August 2008 in the *Munyakazi* case ("*Munyakazi's Amicus Curiae* Brief before the Appeals Chamber") to form part of the record. The Chamber has done so.

[10] Defence Response, paras. 115-119 (referring to the *amicus curiae* brief of Human Rights Watch filed in the *Kayishema* case on 3 January 2008 ("HRW Brief")); Prosecution Response, para. 52 (referring to the Prosecutor's Response of 21 January 2008 to Human Rights Watch in the *Kayishema* case ("Prosecution Response to HRW"), and its Response of 7 March 2008 to ICDAA in the *Kanyarukiga* case ("Prosecution Response to ICDAA")).

[11] On 4 September 2008, the Defence sought to supplement its Response by seeking to admit a Human Rights Watch report of July 2008 entitled "Law and Reality" Progress in Judicial Reform in Rwanda", as well as the transcripts from an oral hearing before the Referral Bench in the *Munyakazi* case (*Requête afin d'obtenir la permission de déposer de nouveaux éléments de prevue au soutien de la réponse de l'accusé à la "Prosecutor's*

5. Rwanda supports the Prosecutor's Request. It submits that it is willing and able to accept Gatete's case before a competent court in Rwanda and that he will receive a fair trial there. The Defence, Human Rights Watch and ICDAA oppose transfer. The submissions of the parties and the *amici* are summarised below. They are comprehensive and the Chamber has not found any need for an oral hearing.[12]

DELIBERATIONS

6. Rule 11 *bis* (C) allows a designated Trial Chamber to refer a case to a competent national jurisdiction if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. According to Rule 11 *bis* (A), referral may be ordered to a State (i) in whose territory the crime was committed, or (ii) in which the accused was arrested, or (iii) which has jurisdiction and is willing and adequately prepared to accept the referral.[13]

7. The Prosecution Request is based on Rule 11 *bis* (A)(i), which does not contain any explicit requirement concerning a State's willingness and preparedness to accept a referral. However, it follows from case law that this is implicit in a Rule 11 *bis* (C) analysis.[14] The

---

Request for the referral of the case of Jean-Baptiste Gatete to Rwanda", etc., filed on 4 September 2008 ("Defence Motion")). The Prosecution opposed the Motion, on grounds that Human Rights Watch to date had not sought leave to file an *amicus curiae* brief in this case, and as other parties had therefore not been afforded the opportunity to file responses to these submissions. Further, admission of material in this manner would subvert the usual mechanism for consideration of supplementary submissions by States, organisations or persons under Rule 74. (Prosecutor's Response to Accused's Motion to Admit Additional Evidence, 10 September 2008, para. 4).

The Chamber notes that in the present case, the Prosecution has appended 12 documents to its request, whereas the Defence Response has 19 annexes, one of which contains the Human Rights Watch *amicus curiae* brief filed in relation to the *Kayishema* case (Defence Response, Annex 8). The Chamber has previously denied requests which seek to add additional documents without authorisation from the Chamber under the Rules (*Prosecutor v. Kanyarukiga,* Decision on Defence Motion to Admit Additional Evidence (TC), 19 June 2008, para. 3). The Human Rights Watch report of July 2008 is a general document which in substance endorses the conclusions of the Human Rights Watch *amicus curiae* brief annexed to the Defence Response that already forms part of the file. Furthermore, the Chamber sees no need to add the transcripts from the *Munyakazi* hearing as a document in the present case, as they form part of the Tribunal's record and may be referred to without being formally admitted. Consequently, the Defence Motion is denied it its entirety.

[12] Decision on Defence Motion for Oral Hearing (TC), 27 June 2008. The Chamber notes the oral hearing which took place in *The Prosecutor v. Yussuf Munyakazi* (footnote 1 above), *see* T. 24 April 2008 pp. 1-83.

[13] It is recalled than unlike its ICTY counterpart, Rule 11 *bis* of the ICTR Rules does not require that the Chamber "shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused", *see* ICTY Rule 11 *bis* (C).

[14] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), 1 September 2005, para. 40 relating to the equivalent provisions in the ICTY Rules of Procedure and Evidence ("as a strictly textual matter, Rule 11*bis* (A) does not require that a jurisdiction be "willing and adequately prepared to accept" a transferred case if it was the territory in which the crime was committed … But that is beside the point, because unquestionably a jurisdiction's willingness and capacity to accept a prepared case is an explicit prerequisite for any referral to a domestic jurisdiction … Thus, the "willing and adequately prepared" prong of Rule 11*bis* (A)(iii) of the Rules is implicit also in the Rule 11*bis*(B) analysis"). *See also The Prosecutor v. Mitar Rašević and Savo Todović,* Decision on Savo Todović's Appeal Against Decisions on Referral under Rule 11*bis* (AC), 4 September 2006, para. 88.

Chamber notes that the Republic of Rwanda has stated that it is willing and is prepared to accept Gatete's case for prosecution.[15]

A. Legal Framework

8. The Appeals Chamber has established that a Trial Chamber designated under Rule 11 *bis* must consider whether the State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[16]

(i) Personal Jurisdiction

9. According to the Amended Indictment, Gatete's alleged crimes were committed in Rwanda. Consequently, Rwandan courts have personal jurisdiction over him pursuant to Article 6 of the Rwandan Penal Code.[17]

(ii) Material Jurisdiction

10. The Prosecution and the Republic of Rwanda submit that Rwanda's legal framework criminalises Gatete's conduct in terms identical to the provisions of the ICTR Statute. According to Human Rights Watch, transfer may not be possible due to a potential lack of subject matter jurisdiction.[18]

11. The Chamber is not the competent authority to decide in any binding way which law is to be applied if the case is transferred. This is a matter which would be within the competence of the High Court and the Supreme Court of Rwanda. But the Chamber must be satisfied that there is an adequate legal framework which criminalises Gatete's conduct so that the allegations can be duly tried and determined.[19]

12. Article 1 of Organic Law of 16 March 2007 on the Transfer of Cases ("Transfer Law") states that the law "shall regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda". Article 3 provides that a person whose case is transferred by the ICTR to Rwanda "shall be prosecuted only for crimes falling within the jurisdiction of the Tribunal". The

---

[15] Letter of 16 November 2007 from the Rwandan Prosecutor General to the ICTR Prosecutor (Annex A to the Prosecution Request). The letter also contains assurances that Gatete will be afforded a fair trial and that, if convicted, he will not be subject to the death penalty.

[16] *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11*bis* Appeal (AC), 30 August 2006, para. 9, referring to *The Prosecutor v. Zeljko Mejakić et al*., Decision on Joint Defence Appeal Against Decision on Referral under Rule 11*bis* (AC), 7 April 2006, para. 60. *See* also *The Prosecutor v. Milan Lukić and Sredoje Lukić,* Decision on Referral of Case Pursuant to Rule 11*bis* etc. (Referral Bench), 5 April 2007**,** paras. 44–45; *The Prosecutor v. Rahim Ademi and Mirko Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis* (Referral Bench)*,* 14 September 2005, paras. 32 and 46; *The Prosecutor v. Gojko Janković,* Decision on Referral of Case under Rule 11*bis* (Referral Bench), 22 July 2005, para. 27; *The Prosecutor v. Zeljko Mejakić et al*., Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* (Referral Bench), 20 July 2005, para. 43; *The Prosecutor v. Mitar Rašević and Savo Todović*, Decision on Referral of Case under Rule 11*bis* etc. (Referral Bench), 8 July 2005, para. 34.

[17] Article 6 of the Rwandan Penal Code of 18 August 1977 as subsequently amended, states: "*Toute infraction commise sur le territoire Rwandais par les Rwandais ou des étrangers est punie conformement à la loi Rwandaise, sous réserve de l'immunité diplomatique consacrée par les conventions ou les usages internationaux.*" (Annex D to the Prosecution Request).

[18] Prosecution Request, paras. 18-34; Rwanda's Brief, para. 2; HRW Brief, paras. 18-24; Prosecution Response to HRW, paras. 9-20.

[19] *See* footnote 16.

Transfer Law does not contain any explicit legal definitions of genocide and crimes against humanity.[20]

13. The Prosecution has referred to a law of 1996 concerning the prosecution of genocide and a law of 2004 pertaining to the Gacaca courts.[21] Human Rights Watch argues that the 1996 Genocide Law was abrogated by the 2004 Gacaca Law, and that the latter does not define the crimes of genocide and other violations of international humanitarian law. Therefore, the Chamber "should inquire into this apparent discrepancy and whether there is a complete definitional basis for the relevant crimes in Rwandan law" to support transfer.[22]

14. The Chamber recalls that Article 1 of the 1996 Genocide Law, which was replaced by the 2004 Gacaca Law, provided for criminal proceedings against persons who since 1 October 1990 committed acts constituting

> a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional protocols, as well as in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, the three of which were ratified by Rwanda; or
>
> b) offences set out in the Penal Code which the Public Prosecution Department alleges or the defendant admits were committed in connection with the events surrounding the genocide and crimes against humanity.

This text referred to the definitions of the crimes in the relevant international conventions. However, the 1996 Genocide Law will not be applicable to any cases that may be transferred from the Tribunal to Rwanda.[23]

15. The 2004 Law reorganised the Gacaca courts charged with trying the perpetrators of "the crime of genocide and crimes against humanity" committed between 1 October 1990 and 31 December 1994 (Article 1) and maintained that cases concerning offenders belonging to the so-called "first category" should be heard by the ordinary courts (Article 2). According to Article 51, that category comprises, amongst others, persons who planned, organised and supervised "the genocide or crimes against humanity", together with his or her accomplices. Consequently, both Articles 1 and 51 specifically mention genocide and crimes against humanity but without any explicit definitions.

---

[20] 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 (Annex B to the Prosecution Request).

[21] Organic Law No. 08/96 of 30 August 1996 on the Organisation of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 ("1996 Genocide Law") (Annex C to the Prosecution Request); Organic Law No. 16/ 2004 of 19 June 2004 Establishing the Organisation, Competence, and Functioning of Gacaca Courts ("2004 Gacaca Law").

[22] HRW Brief, paras. 22-23 (noting that Rwandan courts convicted 204 persons for crimes of genocide between January 2005 and September 2007 under the 2004 Gacaca Law and the Penal Code). Human Rights Watch also argues that Law 33/bis/2003 Punishing the Crime of Genocide, Crimes against Humanity and War Crimes ("2003 Law"), which contains very specific definitions in Articles 2 (genocide), 5 (crimes against humanity) and 6 (war crimes) does not seem to have retroactive effect. The Republic of Rwanda has confirmed that the 2003 Law is irrelevant in relation to transferred cases as it is applicable only for crimes that are committed after its entry into force (Rwanda's Brief, para. 26 c).

[23] Article 105 of the 2004 Gacaca Law states that the 1996 Genocide Law, as well as another law establishing Gacaca courts and all previous legal provisions "contrary to this organic law, are hereby abrogated".

16. The Genocide Convention of 1948 as well as the four Geneva Conventions of 1949 and their two Additional Protocols of 1997 were all binding on the Republic of Rwanda in 1994. It has also ratified the Convention of 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[24] According to Article 190 of the Rwandan Constitution of 2003, treaties which Rwanda has ratified are "more binding than organic and ordinary laws".[25] This formulation indicates that the conventions have been incorporated into national law and carry considerable weight.[26]

17. A closer examination confirms the impact of these conventions in Rwandan law. In conformity with the 1968 Convention, Article 13 of the Constitution provides that "the crime of genocide, crimes against humanity and war crimes do not have a period of limitation". As mentioned above, the 1996 Genocide Law contained explicit references to the Genocide Convention, the Geneva Conventions and Protocols, and the 1968 Convention. Furthermore, the preamble of the 2004 Gacaca Law expressly refers to the Genocide Convention and to the 1968 Convention.[27] Rwandan jurisprudence confirms that the ordinary courts have applied the Genocide Convention, the applicable Geneva Convention or the 1968 Convention, depending on the charges, together with the material provisions of its Penal Code and the 1996 Law (which was subsequently replaced by the 2004 Gacaca Law, see para. 14 above).[28]

18. According to the Republic of Rwanda, the 2007 Transfer Law will unambiguously govern cases transferred from the ICTR. That law is not only *lex specialis* but will apply together with other applicable provisions, such as the ICTR Statute, the Penal Code and the 2004 Gacaca Law.[29] The Chamber considers that the formulation in Article 3 of the Transfer Law (providing for prosecution "only for crimes falling within the jurisdiction of the Tribunal") strongly suggests that they will be tried for the crimes as they are defined in Article 2 (genocide) and Article 3 (crimes against humanity) of the ICTR Statute.[30]

---

[24] The Republic of Rwanda ratified or acceded to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide on 16 April 1975; the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War on 5 May 1964; the Additional Protocols to the Geneva Conventions on 19 November 1984; and the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on 16 April 1975 ("1968 Convention").

[25] The Rwandan Constitution, adopted in Referendum of 26 May 2003 (Annex F to the Prosecution Request contains excerpts). Article 190 continues "except in case of non compliance of one of the parties". This proviso appears inapplicable in the present context.

[26] The formulation "more binding than … laws" is not clear but suggests that the conventions carry more weight than ordinary legislation and may prevail in case of a conflict with domestic law. The submissions do not specifically address this issue, which is not decisive to the Chamber's findings.

[27] The preamble reads: "Considering that the crime of genocide and crimes against humanity are provided for by the International Convention of 9 December 1948 relating to repression and punishment of the crime of genocide"; "Considering the Convention of 26 November 1968 on imprescriptibility of war crimes and crimes against humanity". (Some stylistic changes have been made in the available English translation.)

[28] *See*, for instance, *Recueil de jurisprudence contentieux du genocide* (elaborated by *Avocats Sans Frontières* in co-operation with the Supreme Court of Rwanda et al.*)*, Volume V pp. 13 *et seq.* (*Higiro et al.*, judgment of 14 March 2003, Court of First Instance, Butare); Volume VII pp. 41 *et seq.* (*Mbarushimana et al.*, judgment of 7 January 2005, Court of First Instance, Gisenyi); pp. 163 *et seq.* (*Bayingana et al.*, judgment of 29 July 2005, High Court of Cyangugu); pp. 257 *et seq.* (*Ndinkabandi et al.*, judgment of 20 July 2005, Supreme Court, referring to the Genocide Convention, the applicable Geneva Convention and the Convention of 1968).

[29] Rwanda's Brief, para. 2.

[30] The Chamber recalls that neither the Genocide Convention nor the Geneva Conventions and Protocols define crimes against humanity (which prior to the *ad hoc* Tribunals' Statutes had its basis in customary international law). The definition of crimes against humanity in the 1968 Convention is only partial. Neither the parties nor the *amici* have addressed this issue. The Chamber is satisfied that the reference to the ICTR Statute in Article 3 of the Transfer Law (which includes a reference to Article 3 in the ICTR Statute), remedies any lacuna that may

Furthermore, Article 25 of the Transfer Law provides that in the event of an inconsistency between that law and any other law, the Transfer Law shall prevail.[31]

19. Having considered the relevant provisions in the Transfer Law, applicable conventions, Article 190 of the Constitution, legislation as well as domestic case law, the Chamber is satisfied that Rwanda has subject-matter jurisdiction over the crimes alleged against Gatete in the Indictment.

(iii) Temporal Jurisdiction

20. Without referring to any specific provision, the Defence argues that the genocide legislation refers to acts committed from 1 October 1990 without any further limitation in time, and that this is not in conformity with the ICTR Statute.[32] The Chamber recalls that Article 3 of the Transfer Law provides that "notwithstanding the provisions of other laws in Rwanda", persons who are transferred from the Tribunal shall be prosecuted "only" for crimes falling with the jurisdiction of the ICTR. It follows from Articles 1 and 7 of the Statute that the ICTR only has jurisdiction to prosecute acts committed between 1 January and 31 December 1994. The formulation in the Transfer Law indicates that Gatete, if transferred, will not be prosecuted for acts committed before or after this period.

(iv) Modes of Participation

21. Pursuant to Article 6 (1) of the Statute, Gatete is alleged to have planned, instigated, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes. This provision covers both principal perpetrators as well as accomplices. The Prosecution submits that the Republic of Rwanda possesses an adequate legal framework to try Gatete on similar forms of responsibility. Article 89 of the Rwandan Penal Code identifies both principal perpetrators and accomplices to crimes, Article 90 defines the author of crimes, and Article 91 mentions the various forms of complicity to crimes.[33] The Chamber finds the modes of participation in Rwandan law to be similar in substance to those found in Article 6 (1) of the Statute and Tribunal jurisprudence.

(v) Penalties

22. As mentioned above, a Chamber designated under Rule 11 *bis* must satisfy itself that the transfer State has an adequate penalty structure.[34] Article 21 of the Transfer Law states: "Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR." This corresponds to Article 23 of the ICTR Statute and Rule 101 of its Rules. Article 82 of the Rwandan Penal Code directs the court to assess the punishment in view of all circumstances in connection with the crime and to consider

---

exist. Finally, there is no need for the Chamber to consider the legal basis of war crimes (Article 4 of the ICTR Statute) in Rwandan law, as they do not form part of the Indictment against Gatete.

[31] Article 25 of the Transfer Law reads: "In the event of any inconsistency between this Organic Law and any other Law, the provisions of this Organic Law shall prevail" (Annex B to the Prosecution Request).

[32] Defence Response, paras. 82-88. At para. 87, the Defence refers to Rwandan case law that is alleged to demonstrate the tendency before Rwandan courts to refer to events prior to 1994 in entering convictions for the 1994 genocide. The Chamber is not convinced that such case law by the general courts in Rwanda decisive in relation to the system set up under the Transfer Law.

[33] Prosecution Request, paras. 23-26, referring to the Rwandan Penal Code (Annex D to the Prosecution Request). In particular, Article 91 encompasses, amongst other forms, complicity by instigation, complicity by aiding and abetting, and complicity by preparing the means to commit the crime.

[34] Footnote 16 above; Prosecution Request, paras. 27-34.

mitigating factors. Under Article 22 of the Transfer Law, the court shall give credit for the period spent in detention. The Chamber considers that the Rwandan penalty structure addresses the intrinsic gravity of international crimes and conforms to accepted sentencing practices.[35]

23. It follows from Article 4 of the Transfer Law that if the case is transferred, the Rwandan Prosecutor will adapt the Tribunal's Indictment to the Rwandan Code of Criminal Procedure.[36] The Defence argues that there is a risk that the Indictment may be recast upon transfer. This may result in a fresh investigative process and expose Gatete to different charges than under the present Indictment.[37] Further, it will engender significant additional delay.[38]

24. The Chamber considers that national investigations may be required to prepare a transferred case for trial. Furthermore, case law has accepted that an international indictment be adapted to national provisions.[39] The case law also indicates that in order for referral to be denied on the basis of delay, an accused must show that any possible delay as a consequence of referral would be of such nature or extent as to outweigh the propriety of referral.[40] The Chamber is not convinced that Gatete's case will take longer in the case of a referral compared to the situation if he is tried at the Tribunal.

B. Death Penalty

25. According to Rule 11 *bis* (C), the Chamber must satisfy itself that "the death penalty will not be imposed or carried out". This condition for transfer is met. In relation to transferred cases, capital punishment is excluded by Article 21 of the Transfer Law, quoted above (para. 22). The Republic of Rwanda has also abolished the death penalty from its entire legal system.[41] By abolishing capital punishment, it removed one of the impediments to

[35] Submissions concerning solitary confinement will be addressed below, paras. 85-87.
[36] Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request).
[37] Defence Response, paras. 79-81.
[38] Defence Response, paras. 66-74.
[39] *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11*bis* Appeal (AC), 30 August 2006, para. 17 ("The Appeals Chamber agrees with the Prosecution that the concept of a 'case' is broader than any given charge in an indictment", holding that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before the Tribunal); *The Prosecutor v. Radovan Stankovic*, Decision on Referral of Case under Rule 11 *bis* (Referral Bench), 17 May 2005, para. 74, referring to the adaptation of indictments under the Transfer Law of Bosnia and Herzegovina (*see* also paras. 24, 45-46).
[40] *The Prosecutor v. Mejakic et al.,* Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* (Referral Bench), 20 July 2005, para. 116. *See also The Prosecutor v. Stankovic,* Decision on Rule 11*bis* Referral (Referral Bench), 17 May 2005, paras. 73-76 (referring to safeguards under the national law of Bosnia and Herzegovina to protect an accused's right to trial without undue delay, and modalities for ensuring expedited proceedings before national courts). The Chamber recalls that Article 15 of the Transfer Law requires a speedy trial without undue delay (para. 29 below).
[41] Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (Annex E to the Prosecution Request). Article 2 reads: "The death penalty is hereby abolished", whereas Article 3 provides: "In all the legislative texts in force before the [entry into force] of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions".

transfer of cases from the ICTR.[42] Submissions concerning conditions during life imprisonment will be addressed below (paras. 80-87).

C. Fair Trial

(i) General Considerations

26. Rule 11 *bis* (C) requires the Chamber to satisfy itself that "the accused will receive a fair trial in the courts of the State concerned". The Prosecution submits that Rwanda's legal framework includes the fair trial guarantees recognised by the ICTR Statute and human rights conventions. The Defence, Human Rights Watch and ICDAA dispute this.[43]

27. The Chamber recalls that the right to a fair trial follows from several international instruments, including Articles 19 and 20 of the ICTR Statute, Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), and Article 7 of the African Charter on Human and Peoples' Rights (ACHR). The Republic of Rwanda is a party to the ICCPR and the ACHR.[44] It has provided reports to the supervisory bodies under these conventions.[45]

28. At the domestic level, Rwanda has adopted many provisions of relevance to the right to a fair trial. The Constitution contains a separate chapter on human rights which includes fair trial guarantees, such as Articles 11 and 16 (non-discrimination and equality before the law), 15 (right to physical and mental integrity), 18 (deprivation of liberty; information about charges), 19 (presumption of innocence; fair and public hearing; access to court), 20 (non-retroactivity of criminal laws) and 44 (the judiciary as the guardian of rights and freedoms).[46] The legislation also provides protection, such as the Code of Criminal Procedure.

29. With regard to transfer of cases the Chamber observes that Article 13 of the Transfer Law lists the following rights:

---

[42] This was the point made by the ICTR Prosecutor in his address to the Security Council on 15 December 2006 ("Rwanda … is not yet ready in the sense of fulfilling the conditions of transfer, to receive from the ICTR cases of indictees for trial"). ICDAA's submission that the statement referred to the issue of fairness before Rwandan courts (Brief, para. 28) is inaccurate. This follows clearly from the context of the Prosecutor's statement ("The indications are that the death penalty, a major obstacle to the transfer of any case to Rwanda, will be abolished not just in relation to the cases of the ICTR, but across the board. A soon as that is accomplished I shall be requesting the transfer of cases … I hope this can be done in the first half of 2007").

[43] Prosecution Request, paras. 37-75; Defence Response, paras. 4-30; HRW Brief, paras. 12-15; ICDAA Brief, paras. 28-39.

[44] The Republic of Rwanda ratified the ICCPR on 16 April 1975 and the ACHR on 15 July 1983. The Prosecution points out that Rwanda also has accepted scrutiny under the optional program established under the African Union, the New Partnership for Africa's Development review (NEPAD). Among the objectives of this program is the promotion of sustainable development, good governance and human rights (Prosecution Request, para. 74).

[45] The Prosecution argues that the Republic of Rwanda's "compliance action under treaties and programmes mentioned above … enables Rwanda to draw from the expertise of the members of those bodies in an effort to progressively enhance her compliance with human rights obligations, including those in relation to fair trials and due process" (Prosecution Request, para. 75). This is not entirely convincing. Rwanda's third periodic report under Article 40 of the Covenant, which was expected on 10 April 1992, was submitted on 23 July 2007 and has not been examined by the Human Rights Committee. Rwanda has not accepted the Optional Protocol to the ICCPR concerning individual communications. The Chamber does not have available any information about the reports submitted under the ACHR.

[46] Rwandan Constitution of 2003, Title II: "Fundamental Human Rights and the Rights and Duties of the Citizen" (Annex F to the Prosecution Request).

> (1) the accused shall be entitled to a fair and public hearing;
>
> (2) the accused shall be presumed innocent until proved guilty;
>
> (3) the accused shall 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;
>
> (4) the accused shall be given adequate time and facilities to prepare his and her defence;
>
> (5) the accused shall be entitled to a speedy trial without undue delay;
>
> (6) the accused shall be entitled to counsel of his or her choice in any examination. In case he or she has no means to pay, he or she shall be entitled to legal representation;
>
> (7) the accused shall have the right to be tried in his or her presence;
>
> (8) the accused shall have the right to examine, or have a person to examine for him or her the witnesses against him or her;
>
> (9) the accused shall have the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
>
> (10) the accused shall have the right to remain silent and not to be compelled to incriminate himself or herself.[47]

30. This list of rights is supplemented by other provisions in the Transfer Law, such as Articles 5 (lawful arrest and detention), 7 para. 2 (no conviction based solely on written witness statements), 9 para. 2 (right to cross-examination), 14 (protection of witnesses), 15 (status of the Defence), and 23 (conditions of detention). Furthermore, it is recalled that Article 190 of the Constitution states that international conventions are "more binding" than other laws (above, para. 16).

31. The above overview illustrates that the Republic of Rwanda has made notable progress in improving its judicial system.[48] The Chamber accepts that the Rwandan legal framework generally mirrors the right to a fair trial as embodied in Article 20 of the ICTR Statute. However, the issue in the present transfer proceedings is not only whether Rwandan law contains the required guarantees. The Defence, Human Rights Watch and ICDAA argue that there is a gap between judicial theory and practice, especially for prosecutions of persons accused of genocide and other crimes of political importance.[49] They have provided illustrations relating to the general situation in the country, experiences from the ordinary courts, and from the Gacaca jurisdictions. The Prosecution disputes these concerns, considering them speculative, generalised and unsubstantiated.

32. The Chamber recalls that its task under Rule 11 *bis* is to satisfy itself that the accused will receive a fair trial if transferred. Information which the Chamber reasonably feels it

[47] Annex B to the Prosecution Request, which contains the text of Article 13 in Kinyarwanda, English and French. Some minor inconsistencies in the English version have been corrected above.

[48] This is, for instance, the view of Human Rights Watch. In addition to long-standing knowledge of the situation in Rwanda, this non-governmental organisation has been monitoring the judicial system there since 2005 (HRW Brief, paras. 3-4, 17).

[49] *See*, in particular, Defence Response, paras. 3, 28, 32-39 and 49-52; HRW Brief, paras. 12 and 13 ("On their face Rwanda's laws comply with the fair trial provisions of Article 20 of the Statute … Nevertheless, these laws are inconsistently applied"); ICDAA Brief, para. 32 ("Basic principles of fairness … are very often ignored within the Rwandan national judicial system, either in theory or practice, or both").

needs to determine this issue is therefore relevant.[50] This includes experience from proceedings before Rwandan courts. But it is also important to bear in mind that the Prosecution request is based on a specific legal regime, established by Rwanda to facilitate transfer under Rule 11 *bis*. This regime only involves the High Court and the Supreme Court which will conduct proceedings within the framework of the Transfer Law. As no accused at the ICTR has been transferred to Rwanda, there is no practice under this specific regime. Furthermore, the Prosecution has taken steps to ensure international monitoring of transferred trials under Rule 11 *bis* (D)(iv).[51] The task of the Chamber is to determine whether Gatete will receive a fair trial if transferred under these particular circumstances. Below it will examine the specific issues that have been raised.

(ii) Judicial Independence, Impartiality and Capacity

33. According to the Prosecution and Rwanda, the courts and judges are independent and impartial. The Defence disputes this. Human Rights Watch submits that even though judicial independence is guaranteed by law, there is executive interference in practice. ICDAA also questions the independence of the judiciary.[52]

34. The Chamber notes that Rwanda has adopted a legal framework concerning independence and impartiality. The Constitution states that the judiciary is independent and separate from the legislative and executive arms of government, and that it enjoys financial and administrative autonomy (Article 140). Judges hold office for life and shall not be suspended, transferred, or otherwise removed from office (Article 142).[53] The Superior Council of the Judiciary is responsible for the appointment, discipline and removal of judges (Articles 157 and 158).[54] Article 1 of the Code of Criminal Procedure provides for trials by a competent, independent and impartial tribunal established by law.[55] An Ombudsman oversees the judiciary, and a Code of Ethics has been adopted.[56] These guarantees also apply to the High Court and the Supreme Court, which will hear cases under the Transfer Law.

---

[50] *See* similarly (in relation to monitoring) *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), para. 50 ("The question, then, is how much authority the Referral Bench has in satisfying itself that the accused will receive a fair trial. In the view of the Appeals Chamber, the answer is straightforward: whatever information the Referral Bench reasonably feels it needs, and whatever orders is reasonably finds necessary, are within the Referral Bench's authority, so long as they assist the Bench in determining whether the proceedings following the transfer will be fair. The Referral Bench must bear in mind the considerable discretion that the Rule affords the Prosecutor, but always the ultimate inquiry remains the fairness of the trial that the accused will receive").

[51] Below, Section D (paras. 89-94).

[52] Prosecution Request, paras. 47-58; Annex 1 to Rwanda's Brief, paras. 14-16; Defence Response, paras. 48-65 and 89-92; HRW Brief, paras. 49-54; Prosecution Response to HRW, paras. 39-44; ICDAA Brief, paras. 15-21; Prosecution Response to ICDAA, para. 6.

[53] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[54] Detailed provisions about the Superior Council are found in Organic Law No. 02/2004 of 20 March 2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary (Annex K to the Prosecution Request). Furthermore, Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts contains rules about the appointment and removal of judges as well as disciplinary powers.

[55] Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request). *See* similarly Article 64 (1) of Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts: "Courts shall be independent and separate from other state institutions."

[56] Prosecution Request, paras. 56-57. The Code was promulgated pursuant to Law No. 09/2004 of 29 April 2004 Relating to the Code of Ethics for the Judiciary.

35. The Defence and ICDAA argue that there has been a tendency to fill higher positions, also in the judiciary, with Tutsis and exclude Hutus. The Defence also allege that the Rwandan justice system is exclusively concerned with prosecuting Hutu defendants and does not act impartially by investigating and prosecuting crimes committed by all sides. Further, members of the Prosecution and the Bench in Rwanda include individuals who are Tutsi and who may have personally suffered during the genocide. The implication is that the courts may be biased, or that judicial proceedings cannot take place in a sufficiently calm and dispassionate climate.[57] The Chamber has not been provided with any statistical information, neither generally nor in relation to the ethnicity of judges appointed to the High Court and the Supreme Court.[58] But irrespective of the exact composition of those two judicial bodies, the Chamber does not find that these submissions prevent transfer. The acquittal rate in Rwanda in genocide cases is considerable. Many accused of Hutus origin have been acquitted by the ordinary courts, including cases where convictions are overturned on appeal.[59]

36. Human Rights Watch and ICDAA have provided examples to illustrate that there is a gap between law and practice with respect to judicial independence.[60] The Chamber does not underestimate the challenges facing the judiciary, which had to be reconstructed after the genocide in 1994. It also accepts the general observation by an independent expert group, referred to by Human Rights Watch, to the effect that the "concept of judicial independence is relatively new in Rwanda". But although some of the illustrations provided by the *amici* appear well-founded, they are mostly of a general nature and do not focus specifically on the High Court or Supreme Court which will adjudicate cases within the framework of the Transfer Law. For instance, in relation to interviews with 25 high-ranking Rwandan judicial officials stating that the courts were not independent in 2005, 2006 and 2007, there is no information about the basis for their view, which is generally formulated. Other illustrations show that there may have been specific attempts to influence judges but not that the alleged interference was successful.[61]

37. The Defence submits that the High Court will be composed of a single judge (Article 2 of the Transfer Law) and that three judges will constitute the Bench in the Supreme Court. This is different from the situation in the international tribunals, where there are three judges at the first instance level and five on appeal. The Defence argument is that justice offered in Rwanda will be of a lower standard than at the ICTR, because a single judge may be less likely to ensure that competent and reliable justice is dispensed.[62]

---

[57] Defence Response, paras. 48-56, 57-61 (referring to this situation as a "conflict of interests"); ICDAA Brief, paras. 35-37.

[58] The Chamber notes that the official policy of Rwanda seems to avoid public references to ethnicity. *See*, for instance, oral hearing in *The Prosecutor v. Yussuf Munyakazi* (T. 24 April 2007 pp. 55-56) where Counsel for the Republic of Rwanda, in relation to a question from the Bench about the composition of the High Court, answered: "[W]ith due respect, I will not be going into the discussion of ethnic balance. It is against the policy of my country, it is against the constitution of my country, and I will not be doing that." *See also id*., p. 37.

[59] The Chamber does not take a position on the exact percentage of acquittals, which may differ according to whether not only the ordinary courts but also Gacaca proceedings are included in the calculation. It simply observes that the acquittal rate is considerable. Of ten cases reported in Volume VII (2004-2005) of *Recueil de jurisprudence contentieux du genocide* (footnote 27 above), five involved an acquittal of some type. In *The Prosecutor v. Yussuf Munyakazi*, Counsel for the Republic of Rwanda referred to an acquittal rate in his country of "close to 40 per cent" (T. 24 April 2007 p. 31, *see also* pp. 37, 38).

[60] HRW Brief, paras. 49-54 and ICDAA Brief, paras. 15-21. The Briefs also refer to "genocidal ideology" which is considered below (paras. 42, 45-46, 62-63) but has been taken into account also in the present context.

[61] One example is an incident of alleged executive interference with the High Court, mentioned in HRW Brief, para. 53.

[62] Defence Response, paras. 89-92.

38. The Chamber observes that international legal instruments, including human rights conventions, do not require that a trial or an appeal has to be heard by a specific number of judges in order to be fair and independent. The fact that the Bench at the first instance level and on appeal is composed of fewer judges in Rwanda than at the international tribunals clearly does not prevent transfer. Single judge trials take place in many countries on several continents and may include serious cases which can lead to severe punishment. Rwanda has had single judge trials in genocide cases since 2004, and there is no information available that the acquittal rate has been lower in such trials. The Appeals Chamber has also found that the composition of the Rwandan High Court by a single judge is not as such incompatible with the right to a fair trial.[63] The Chamber has no basis for a finding that the situation may be different in a case transferred from the Tribunal.

39. It follows that the Chamber considers some of the concerns mentioned above well-founded. However, having considered them separately and together, it does not find that they constitute a sufficient basis to deny transfer to the judicial bodies under the Transfer Law.

(iii) Presumption of Innocence

40. Article 19 of the Constitution 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".[64] This provision is in conformity with several human rights treaties to which Rwanda is a party, for instance Article 14 (2) of the ICCPR. Article 44 (2) of the Code of Criminal Procedure also provides that "an accused is presumed innocent until proven guilty".[65] The principle is reiterated in Article 13 (2) of the Transfer Law (above, para. 29). Consequently, the presumption of innocence clearly forms part of Rwandan law. The question is whether it is applied in practice.

41. The Defence submits that Rwandan law and practice does not clearly enshrine the presumption of innocence and the Prosecution's burden of proof.[66] Human Rights Watch mentions several illustrations to show that there is a preconceived attitude against genocide suspects. The Prosecution disputes this.[67] As previously mentioned, Article 44 clearly specifies that it is the Prosecution which bears the burden of proof. It also provides that an accused must put forward a defence only once the Prosecution has established a *prima facie* case. The Chamber therefore does not agree with the Defence that this Article contravenes an accused's right to remain silent by imposing an obligation to testify.[68] The Chamber notes that the examples referred to by Human Rights Watch do not include activities before Rwandan courts. One of them is the denial of voting rights to persons in pre-trial detention. This indicates a possible problem with electoral legislation, but does not demonstrate that judges in a trial will disregard the presumption of innocence. Another submission concern "collective punishment", according to which persons living in the vicinity of places where

[63] *Munyakazi* Appeals Chamber Decision, para. 26 (noting further that there was no evidence on the record in that case that single judge trials in Rwanda have been more susceptible to outside interference or pressure, particularly from the Rwandan Government, than previous trials involving panels of judges).
[64] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).
[65] Law No. 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure (Annex G to the Prosecution Request).
[66] Defence Response, paras. 16-30.
[67] Prosecution Request, paras. 38(ii), 69-69; HRW Brief, paras. 16 (a)(ii), 41-48, 111 (b); Prosecution Response to HRW, paras. 4, 37.
[68] Defence Response, paras. 8-14.

survivors have been harassed have been forced to pay fines without any process of law. The Chamber observes that also this example does not involve the judiciary.

42. Reference has been made to statements by officials which purportedly suggest predetermination of guilt. The Chamber recalls that it follows from human rights case law that statements by representatives of authorities may raise issues in relation to the presumption of innocence.[69] One set of utterances refer to the killing by police officers of 20 detainees in May 2007. The Commissioner General is alleged to have made a statement characterising all the suspects that were killed as criminals and terrorist. The Chamber notes that the facts are disputed and that the statement was made by a person outside the judicial hierarchy. Another statement was made by the President of the High Court in connection with a conference in 2006.[70] This statement is not clear and does not express any view on the guilt or innocence of specific persons. The Chamber does not consider that these incidents prevent transfer of Gatete's case to the High Court and makes a similar finding in relation to other statements quoted by Human Rights Watch as well as cases relating to "genocidal ideology" in 2006.[71] It is recalled that many cases tried by Rwandan courts have resulted in acquittals (above, para. 35).

(iv) Right to an Effective Defence

43. Article 14 (3) of the ICCPR, which is incorporated into Rwandan law (above, para. 17) contains the various elements of the right to defend oneself or through legal assistance. The principle is set forth in Article 18 (3) of the Rwandan Constitution.[72] Article 13 of the Transfer Law covers some aspects of this right (above, para. 29). Moreover, Article 15 provides that Defence Counsel shall have the right to enter Rwanda, move freely there, 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.

44. The contested issues are primarily whether these rights will be observed in practice. The Prosecution submits that Rwandan law affords the necessary guarantees. The Defence, HRW and ICDAA argue first, that Gatete, if transferred, may not have counsel available; second, that he may not receive legal aid; third, that the Defence may have problems in respect of travel, investigations and security or face other impediments in discharging its functions; and fourth, that witnesses may not be available or may receive insufficient protection.[73] The Chamber will address these issues separately.

[69] For instance, *Allenet de Ribemont v. France*, Judgment of 10 February 1995, European Court of Human Rights, paras. 32-47.
[70] The statement ("the architects of the genocide literally made everyone a direct or indirect participants") formed part of a paper delivered at a conference in The Hague in December 2006. (HRW Brief, para. 46).
[71] HRW Brief, paras. 47-48.
[72] Article 18 (3) of the Rwandan Constitution reads: "The right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs" (Annex F to the Prosecution Request).
[73] Prosecution Request, paras. 65-66; Defence Response, paras. 31-47; Prosecution Reply, paras. 15-27; ICDAA Brief, paras. 50-53, 71-93.

(a) Availability of Counsel

45. The Prosecution refers to Article 13 (6) of the Transfer Law, according to which the accused is entitled to counsel of his choice. The Defence, Human Rights Watch and ICDAA submit that it may be difficult to ensure that Gatete has legal representation, as lawyers representing persons accused of genocide have faced threats or harassment, and there are few lawyers.[74]

46. It follows from the information provided to the Chamber that there are around 280 Rwandan lawyers in private practice, mostly in Kigali. Even though this is a limited number compared to all genocide accused in the country, the Chamber has no doubt that there will be lawyers available to represent Gatete. It is also possible that lawyers from abroad may be willing to represent such persons.[75] The examples of threats and harassment against Rwandan defence lawyers in connection with cases before ordinary courts do not show that lawyers, from Rwanda or elsewhere, will refuse assignments as Defence Counsel in proceedings under the Transfer Law. Whether a risk of harassment will make it difficult to carry out an efficient defence will be considered separately below under (c).

(b) Legal Aid

47. Article 13 (6) of the Transfer Law provides a legal framework guaranteeing the right to legal aid for indigent accused. The contentious issue is whether this right will be ensured in practice. The Prosecution refers to funds having been set aside. Human Rights Watch, the Defence and ICDAA doubt that they will be made available or be sufficient.[76]

48. The Chamber notes the submissions of the two *amici* that Rwandan authorities have not disbursed funds to provide payment for legal representation of indigent accused in the past, and that the legal aid budget administered by the Rwandan Bar Association is always depleted. However, what matters in the present context, is the situation under the Transfer Law. The Ministry of Justice has made budgetary provisions of approximately $500,000 for 2008 to fund the legal aid scheme in respect of transferred cases.[77] This is a significant amount. It is not for the Chamber to venture into the question whether this amount will be sufficient. It follows from case law that there is no obligation to establish in detail the sufficiency of the funds available as a precondition for referral.[78]

49. Accordingly, the Chamber is satisfied that legal aid will be available if Gatete is transferred. Should there be future financial constraints, it would be a matter for evaluation by the monitoring mechanism (below, D).

---

[74] Prosecution Request, paras. 60, 63-64; Defence Response, paras. 37-44, 46-47; Prosecution Reply, paras. 20-27; HRW Brief 69-74, 84, 111 (c); Prosecution Response to HRW, paras. 53-57; ICDAA Brief, paras. 55-60; Prosecution Response to ICDAA, paras. 17-18.

[75] HRW Brief, paras. 73-74.

[76] Prosecution Request, paras. 63-64; Defence Response, paras. 43-45; HRW Brief, paras. 75-78, 111 (f); Prosecution Response to HRW, paras. 58-60; ICDAA Brief, paras. 45-49, 61-70; Prosecution Response to ICDAA, paras. 13-15.

[77] *See* HRW Brief, para. 76 ($500,000); ICDAA Brief, para. 47 ($468,000).

[78] *Prosecutor v. Radovan Stanković,* Decision on Rule 11 *bis* Referral (AC), 1 September 2005, para. 21 ("Having satisfied itself that the State would supply defence counsel to accused who cannot afford their own representation, and having learned that there is financial support for that representation, the Referral Bench was not obligated in its opinion to itemize the provisions of the BiH budget").

(c) Working Conditions

50. The Defence, Human Rights Watch and ICDAA argue that Rwanda has never facilitated the travel of Defence teams, and has delayed or failed to assist them in their investigations in Rwanda. This is disputed by the Prosecution and the Republic of Rwanda. Further, Defence teams have faced security risks when carrying out their functions in Rwanda.[79]

51. Article 15 (Defence Counsel) of the Transfer Law reads as follows:

> Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties. They shall not be subject to search, seizure, arrest or detention in the performance of their legal duties.
>
> The Defence Counsel and their support staff shall, at their request, be provided with appropriate security and protection.

52. According to this provision, the Defence will be entitled to move into and within Rwanda and carry out their functions without search, seizure or deprivation of liberty, as well as being entitled to security. Without going 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. On the other hand, the examples relate to proceedings before the ordinary courts. Defence teams at the ICTR have been able to work in Rwanda, even though they have encountered some problems.[80] Should such situations occur after transfer under Rule 11 *bis*, the Defence will have an explicit legal basis for bringing the matter to the attention to the High Court or the Supreme Court. These courts will be under a duty to investigate the matter and provide a remedy in order to ensure an efficient defence. If the Defence team is prevented from carrying out its work effectively, this will be a matter for the monitoring mechanism and may lead to revocation of the transfer order. Finally, for the reasons given above (para. 48), the Chamber is not persuaded by the submission that the travel and investigation budget will be insufficient.[81]

53. Other alleged impediments faced by the Defence in connection with its investigations are generally formulated, and the Chamber is not convinced that they prevent transfer. However, the Chamber accepts the submission that many ICTR Defence teams have been unable to obtain documents from Rwandan authorities, or have received them only after considerable time.[82] Similarly, there are examples of Defence counsel having difficulties in

[79] Prosecution Request, paras. 65-66; Defence Response, paras. 46-47; Prosecution Reply, paras. 26-27; HRW Brief, paras. 16 (a)(iii), 79-84, 111 (g) and (h); Prosecution Response to HRW, paras. 53-62; ICDAA Brief, paras. 50-53, 71-84.

[80] The factual circumstances of some of the purported problems are disputed, and the Chamber does not fully accept the description of all events. For instance, Léonidas Nshogoza (ICDAA Brief, para. 73), a lawyer who was then serving as investigator for an ICTR Defence team, was on 11 February 2008 indicted by the ICTR and charged with contempt of court. The descriptions of the incidents involving Defence Counsel Callixte Gakwaya (ICDAA Brief, para. 82) and Defence Minister Marcel Gatsinzi (HRW Brief, para. 82) are also not complete.

[81] ICDAA Brief, paras. 68-69.

[82] HRW Brief, paras. 79, 81; ICDAA Brief, para. 89. One example is judicial antecedents, for instance guilty pleas or judgments involving Prosecution witnesses.

meeting detainees.[83] Such incidents are not in themselves sufficient to prevent transfer under Rule 11 *bis*. However, together with other factors they illustrate that the working conditions for the Defence may be difficult. Together with other factors discussed below under (d), this may have a bearing on the fairness of the trial.

(d) Availability and Protection of Witnesses

54. The Prosecution submits that witnesses will be available and protected under the specific regime established under the Transfer Law. Allegations to the contrary are generalised and unfounded. Human Rights Watch and ICDAA argue that witnesses for persons accused of genocide are reticent to testify because they are afraid of being accused of harbouring "genocidal ideology". Inadequate procedures exist to protect witnesses. Defence witnesses in particular face threats and harassment, and witnesses residing outside Rwanda will be unwilling to testify.[84] Rwanda submits that it has taken substantial steps to ensure the hearing of witnesses and the presentation of evidence, including measures to ensure witness protection and safety.[85]

55. The Chamber recalls that providing physical protection to witnesses and their family members who may be in danger as a result of their testimony may positively influence their availability. This may affect an accused's right to obtain the attendance of witnesses on his behalf and examine them under the same conditions as witnesses against him. Protection of witnesses before, during and after their testimony is therefore important to the fairness of the trial.[86]

56. Article 14 of the Transfer Law states that in cases transferred from the ICTR, the High Court "shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence". Travel to Rwanda of witnesses residing abroad shall be facilitated, and they shall have immunity from search, seizure, arrest or detention. According to Article 145 of the Code of Criminal Procedure, courts may order closed sessions where a public hearing could be detrimental to public order and good morals, and they may take other measures that may reasonably limit the right to a public trial when necessary for the protection of witnesses.[87] Consequently, the Republic of Rwanda has a legal framework for the protection of witnesses and has adopted provisions similar to those in the Tribunal's Rules.

[83] HRW Brief, paras. 79, 81; ICDAA Brief, para. 88. The illustrations in ICDAA Brief, paras. 86 (Defence Counsel followed by government officials during investigations) and 87 (Defence Counsel photographed while interviewing a witness) are worrying. However, such incidents do not appear sufficiently widespread to prevent transfer.

[84] Prosecution Request, paras. 43, 70; Prosecution Reply, paras. 15-19; Rwanda's Brief, paras. 10-11; HRW Brief, paras. 15 (i), 16 (c), (d), (e), 25-40, 83-105, 111 (b), (i), (j) and (k); Prosecution Response to HRW, paras. 4, 21-36, 63-66; ICDAA Brief, paras. 98-124; Prosecution Response to ICDAA, paras. 21-24.

[85] Annex A 1 Rwanda's Brief, paras. 17-21 (contending that the *Munyakazi* Referral Bench erred in failing to take these into account).

[86] *Prosecutor v. Rahim Ademi and Mirko Norac,* Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis* (TC), 14 September 2005, paras. 49-50.

[87] Law No. 13/2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request).

Witnesses in Rwanda

57. Based on interviews, Human Rights Watch points out that the Rwandan provisions concerning witness protection do not appear to be widely known by legal practitioners and judges and hence not applied.[88] The Chamber notes that the interviews were carried out in 2005, 2006 and 2007 and related to a law which was recently adopted - in 2004 – and is applicable in the ordinary courts. Gatete's case, if transferred, will be conducted under the Transfer Law of 2007, which in Article 14 contains explicit and elaborate rules about protection. Lawyers, prosecutors and judges who will be engaged in such proceedings must be expected to know that provision. It will be for the parties to raise concerns, if any, and exhaust the witness protective mechanisms available in those proceedings, which would be monitored in case of transfer (below, D). In the Chamber's view, limited knowledge of witness protection under a previous general system is not a reason to exclude transfer under the specific regime established by the Transfer Law. Finally, the submissions do not show that Rwandan judicial officials will disregard witness protection orders.[89]

58. Human Rights Watch and ICDAA argue that the Rwandan witness protection service will be unable to provide adequate protection, as it lacks resources. The funding has been left to foreign donors, and only 16 staff members serve the entire country.[90] The Chamber observes that about 900 witnesses have been subject to protection since the service was established.[91] This shows that the witness protection service has experience. There are presently four staff members in Kigali, where the transfer proceedings will take place. Capacity does not only depend on the number of employees but also on the priority given to particular cases, based on a concrete evaluation. Finally, a mere risk that future funding may not be available is not a sufficient reason to deny transfer.[92]

59. The Defence, Human Rights Watch and ICDAA refer to instances of threats, harassment and violence against witnesses living in Rwanda. It is argued that following testimony for the defence teams in ordinary courts, witnesses have been accused in Gacaca proceedings. Furthermore, in about ten cases, persons who testified for the Defence before the Tribunal were purportedly arrested, re-arrested, subjected to worse conditions of incarceration or otherwise harassed after returning to Rwanda. The Prosecution disputes the factual description of some of the event, whereas others are sporadic incidents which do not prevent transfer.[93]

60. In the Chamber's view, the submissions show that there have been instances of harassment of witnesses. However, it appears that the large majority of witnesses have

[88] HRW Brief, para. 26 refers to Article 128 of *Loi No. 15/2004 portant modes et administration de la preuve*, which enables Rwandan courts to take measures to protect witnesses who provide information or cooperate with the prosecuting authorities.
[89] A statement by the Rwandan Minister of Justice in 2006 to the effect that witness protection is not appropriate in the Rwandan context (HRW Brief, para. 26) predates the adoption of the Transfer Law. The Chamber's attention has also been drawn to a decision by the Higher Instance Court of Gasabo, which included names of protected witnesses (HRW Brief, para. 28). However, one such decision does not form a basis to conclude that officials will not respect orders to be given under the Transfer Law. (The decision ordered the detention of Leonard Nshogoza, a Defence investigator charged at the ICTR with contempt of court, see footnote 81 above).
[90] HRW Brief, paras. 27 and 85; ICDAA Brief, para. 100.
[91] HRW Brief, para. 85; Prosecution Response to HRW, para. 64.
[92] According to Human Rights Watch, the funding for the first three quarters of 2007 amounted to $132,000 (HRW Brief, para. 85).
[93] Defence Response, paras. 31-36; HRW Brief, paras. 89-109; Prosecution Response to HRW, paras. 67-78; ICDAA Brief, paras. 98-115.

testified without such consequences. Similarly, although some persons who have given evidence before the Tribunal have reported problems, hundreds of Prosecution and Defence witnesses have come from Rwanda and returned without difficulties. Under these circumstances, the Chamber does not find that witnesses will, in general, face risks if they testify in transfer proceedings. This said, no judicial system, be it national or international, can guarantee absolute witness protection.[94] Should incidents occur, it will be for the High Court or the Supreme Court to initiate investigation, clarify the facts and ensure the necessary protection. If this is not done, or if the measures taken are insufficient, it would be a matter for evaluation by the monitoring mechanism (below, D).[95]

61. In this connection, the Chamber has also taken into account that the Rwandan witness protection service is unable to provide protection alone. According to Human Rights Watch and ICDAA, the service has to refer all cases of threats to the local police. The witness protection service forms part of the national prosecutor's office. According to the two *amici*, this makes it unlikely that Defence witnesses will seek the assistance of that service.[96] The Chamber considers that referral of cases by the witness protection service to other institutions, such as the police, does not necessarily mean that the service is inadequate. This said, the link between the witness protection service and the police may, in the Rwandan context, reduce the willingness of some potential Defence witnesses to testify. The fact that the national prosecutor's office is responsible for the protection of all witnesses may also be noted by fearful witnesses. The Appeals Chamber has accepted this reasoning.[97]

62. Witness protection concerns are also related to the issue of "genocidal ideology", which has been extensively referred to in some of the submissions. The Constitution refers to the fight against "the ideology of genocide".[98] Article 13 does not use this concept but states that revisionism, negationism and trivialisation of genocide is punishable by law, and the 2003 Genocide Law prohibits the negation of genocide.[99] This is in itself legitimate and understandable in the Rwandan context. The Chamber recalls that many countries criminalise the denial of the Holocaust, while others prohibit hate speech in general.[100] 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, as they are afraid of being accused of harbouring this ideology.

---

[94] *The Prosecutor v. Gojko Janković,* Decision on Rule 11*bis* Referral (AC), 15 November 2005, para. 49.

[95] Human Rights Watch has referred to specific incidents where allegation of ill-treatment did not lead to investigations (HRW Brief, paras. 90-94). This is certainly a matter of concern. However, the incidents do not reveal a general pattern and does not in the Chamber's view prevent transfer under the specific regime established by the Transfer Law.

[96] HRW Brief, paras. 27, 86, 87; ICDAA, paras. 100-104; Prosecution Response to HRW, para. 65. The two *amici* refer not only to the police but also to "political authorities". It is unclear what is meant by that.

[97] *Munyakazi* Appeals Chamber Decision, para. 38); *Kanyarukiga* Appeals Chamber Decision, para. 27.

[98] Second preambular paragraph and Article 9 (1) of the Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[99] Law No. 33 *bis*/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes. According to Article 4, imprisonment between 10 and 20 years may be imposed on "any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimized it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence".

[100] As pointed out by the Prosecution (Response to HRW, para. 29), it follows from human rights case law that prohibiting negation or revision of the Holocaust does not constitute a violation of freedom of expression under Article 10 of the European Convention of Human Rights and Article 19 of the ICCPR.

63. The material indicates that in several instances, the concept has been given a wide interpretation.[101] There are examples of persons being too afraid to appear as witnesses for persons who allegedly were innocent. On the other hand, many persons living in Rwanda have testified for the Defence in proceedings there. In addition, the Transfer Law provides specific rules and remedies in the field of witness protection (above, para. 56). However, the Chamber cannot exclude that some potential Defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring "genocidal ideology".

64. Taking into account the totality of the factors mentioned above, the Chamber accepts that the Defence may face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. This may affect the fairness of the trial. The Appeals Chamber has accepted this conclusion.[102]

Witnesses Outside Rwanda

65. The Defence, Human Rights Watch and ICDAA dispute that the Defence will be able to obtain witnesses residing outside Rwanda. According to the Prosecution, this fear is unfounded.[103] The Chamber notes Article 14 (2) and (3) of the Transfer Law:

> In the trial of cases transferred from the ICTR, the Prosecutor General of the Republic shall facilitate the witnesses in giving testimony including those living abroad, by the provision of appropriate immigration documents, personal security as well as providing them with medical and psychological assistance.
>
> All witnesses who travel from abroad to Rwanda to testify in the trial of cases referred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials. The High Court of the Republic may establish reasonable conditions towards a witness's right of safety in the country. As such there shall be determination of limitations of movements in the country, duration of stay and travel.

66. This provision provides a legal framework for witnesses residing abroad, including their travel, security, immunity and assistance. The Chamber notes in particular that the witnesses shall have immunity from arrest and detention in connection with testimony in Rwanda. The Republic of Rwanda has submitted that any perceived concerns regarding witnesses living abroad are fully met by this provision, and further provides its assurance that steps will be taken in particular cases that arise to allay concerns and the afford the protection necessary for the obtaining of evidence.[104] However, the Chamber is persuaded by the submissions by the Defence, Human Rights Watch and ICDAA that many Rwandans in the diaspora will be afraid to testify in Rwanda.[105] Experience at the ICTR confirms such fear.

---

[101] HRW Brief, paras. 30-40 and 99 (arguing that the concept has been considered to cover "a broad spectrum of ideas, expression, and conduct, often including those perceived as being in opposition to the policies of the current government" and "questioning the legitimacy of detention of a Hutu"; and mentioning lists of hundreds of persons and organisations considered guilty of holding or disseminating "genocidal ideology", including Care International, BBC and Voice of America).

[102] *Munyakazi* Appeals Chamber Decision, paras. 38 and 45; *Kanyarukiga* Appeals Chamber Decision, paras. 27 and 35.

[103] Defence Brief, paras. 31-36, in particular para. 34; HRW Brief, paras. 38-40, Prosecution Response to HRW, paras. 76-78; 103-105; ICDAA Brief, paras. 116-124.

[104] Annex 1 to Rwanda's Brief, paras. 22-25.

[105] ICDAA Brief, para. 123 ("ICDAA's conclusion, based on its members' experience, is that almost no witness from abroad will be willing to go back to Rwanda in order to testify at the request of a defence team."); HRW

67. Leaving aside how well-founded such fear is, it has to be taken into account when evaluating the availability of Defence witnesses. According to the Gatete Defence, many of its witnesses are in exile and cannot return to Rwanda to testify.[106] It is not unusual at the ICTR that Defence teams to a large extent rely on witnesses outside Rwanda.[107] Even assuming that some of them will testify in Kigali, it will undermine the fairness of a trial there if Gatete is unable to call a sufficient number of witnesses to present an efficient defence.

68. The Chamber has taken into account that Rwanda has several mutual assistance agreements with states in the region and elsewhere in Africa, that agreements have been arranged with other states as part of Rwanda's cooperation with the Tribunal and the conduct of its domestic trials, and that United Nations Security Council Resolution 1503, calling on all states to assist national jurisdictions where cases have been transferred, provides a clear basis for requesting and obtaining cooperation.[108] It notes that the Appeals Chamber has accepted that despite the protection available under Rwandan law, many witnesses residing outside Rwanda would be afraid to testify in Rwanda.[109]

69. The Prosecution and the Republic of Rwanda submit that witnesses residing abroad may be heard by video-link conference, and that the necessary facilities exist in Rwanda.[110] The Chamber accepts that there is such equipment in Rwanda, and that it is available in relation to unwilling, including fearful, witnesses. It is also recalled that there is extensive case-law accepting this procedure, under certain conditions, both in domestic jurisdictions and at the ICTR. In Tribunal case law, genuinely-held fear has been considered as a sufficient reason to hear the testimony of witnesses residing outside Rwanda by video-link instead of requiring their presence in the courtroom.[111]

Brief, para. 38 ("The right to present witnesses is seriously undermined by the fact that many Rwandan witnesses living abroad are unwilling to testify in Rwandan courts"). Quoting a statement by the Minister of Justice in February 2007 about how immunity for witnesses "will be a step towards their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest", Human Right Watch continues (para. 39): "This comment, widely circulated among Rwandans in the diaspora, served only to confirm the fears of many Rwandans that the immunity guaranteed by the transfer law was in fact a falsehood to facilitate their later arrest and forced return to Rwanda".

[106] Defence Response, para. 34 (referring to "dozens" of Defence witnesses still in exile).

[107] *See*, e.g. HRW Brief, para 38 ("One experienced defence lawyer estimated that as many as 90 percent of the witnesses called by his clients and other accused persons reside outside Rwanda.") Leaving aside the exact percentage of Defence witnesses residing abroad in the various trials, the Chamber accepts that it is generally high.

[108] *See* discussion in *Munyakazi* Appeals Chamber Decision, para. 41; *Kanyarukiga* Appeals Chamber Decision, para. 32. *See also The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), para. 26 and *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B (Referral Bench), 5 April 2007, para. 85.

[109] *Munyakazi* Appeals Chamber Decision, para. 40; *Kanyarukiga* Appeals Chamber Decision, para. 31.

[110] Annex 1 to Rwanda's Brief, para. 24 (stating that the High Court has facilities to receive video-link testimony, and that it is envisaged that the jurisprudence and practice of the ICTR will be followed, even though there is no explicit provision in Rwandan law); Prosecution Response to HRW, paras. 66 and 78, quoting *Amicus Curiae* Brief of Rwanda, submitted on 10 January 2008 in the Rule 11 *bis* proceedings in *Prosecutor v. Hategekimana* (p. 7: "Audiovisual recording: There are video-link facilities which will be used to receive testimony of any witness residing abroad who may be unable or unwilling to physically appear in court"); *Prosecutor v. Yussuf Munuyakazi*, T. 24 April 2008 p. 70, where Counsel for Rwanda confirmed that there were no practical or procedural obstacles limiting courts to hear witnesses by video-link.

[111] About fear, *see The Prosecutor v. Bagosora et al.,* Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed Session (TC), 1 November 2006, paras. 2-3; Decision on Video-Conference Testimony of Kabiligi Witnesses YUL-39 and LAX-23 and to Hear Testimony in Closed

70. This said, it would be an unprecedented situation if most or all witnesses for one side were to be heard by video-link. It is preferable that witnesses be heard in court.[112] The testimony of witnesses heard through electronic media runs the risk of being less weighty if the quality of the transmission impairs the court's assessment of the witness. The physical presence of witnesses makes it easier for the bench to assess their credibility, and also for the parties, including the accused, to follow the evidence and the proceedings. Video-link transmission cannot be equated with presence, as there is not the same visual interaction. In relation to key witnesses, the use of video-link may, according to the circumstances, raise concerns.[113]

71. Furthermore, human rights case law has established the principle of equality of arms, which is one aspect of the right to a fair trial. It implies that each party must be afforded a reasonable opportunity to present his or her case – including evidence – under conditions that do not place him or her at a substantial disadvantage vis-à-vis the other party.[114] The hearing of most Prosecution witnesses in the courtroom while most of the Defence witnesses either refuse to give evidence or testify by video-link would not be in conformity with this principle. In the Chamber's view, there is a real risk that this will be the situation, even if the trial is subject to monitoring.

72. The Chamber concludes that it is not satisfied that Gatete will be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial if his case is transferred. This is in conformity with Appeals Chamber jurisprudence.[115]

(v) Double jeopardy

73. According to the Defence and Human Rights Watch, the Rwandan legal system provides no protection against double jeopardy as guaranteed by the ICCPR and the Statute

---

Session (TC), 19 October 2006, paras. 2-5; Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46 (TC), 5 October 2006, paras. 2-6.

[112] This has been a relevant factor in ICTR case law. *See Prosecutor v. Bagosora et al.,* Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 15 (reiterating "the general principle, and the Chamber's strong preference, that most witnesses should be heard in court"); Decision on Testimony by Video-Conference (TC), 20 December 2004, para. 4 (emphasizing "the general principle, articulated in Rule 90 (A), that 'witnesses, shall, in principle, be heard directly by the Chamber'"); Decision on Testimony of Witness Amadou Deme by Video-Link (TC), 29 August 2006, para. 3.

[113] *The Prosecutor v. Zigiranyirazo,* Decision on Interlocutory Appeal (AC), 30 October 2006, para. 19 ("the Appeals Chamber accepts that the Trial Chamber's general concern over its ability to assess the credibility of a key witness is an important interest"). *See also The Prosecutor v. Zejnil Delalic et al.*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference (TC), 28 May 1997, para. 18.

[114] *See*, for instance, the following judgments of the European Court of Human Rights: *Delcourt v. Belgium,* Judgment, 17 January 1970, Series A, No. 11, paras. 27-38, in particular para. 28; *Bönisch v. Austria,* Judgment, 6 May 1995, Series A, No. 92, paras. 28-35, particularly para. 32 (referring to the need for equal treatment as between the hearing of a Prosecution witness and a Defence witness); *Dombo Beheer B.V. v. The Netherlands,* Judgment, 27 October 1993, Series A, No. 274*,* paras. 30-35, in particular para. 33 ("each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent").

[115] *Munyakazi* Appeals Chamber Decision, para. 42; *Kanyarukiga* Appeals Chamber Decision, para. 33. The Appeals Chamber concluded that the Trial Chambers did not err in finding that the availability of video-link facilities is not a completely satisfactory solution to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony. It would be a violation of the principle of the equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person).

(*non bis in idem*). It is argued that the accused confronts pending proceedings both before the Rwandan justice system and the Gacaca jurisdiction. The Prosecution submits that the risk of double jeopardy is unsupported and refers to the Transfer Law.[116]

74. The Chamber recalls that ICCPR Article 14 (7) states that no-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Similarly, it follows from Article 9 (1) of the ICTR Statute that no person "shall be tried before a national court for acts constituting serious violations of international humanitarian law under the Statute for which he or she has already been tried by the Tribunal". Under Rwandan law, however, it follows from the 2004 Gacaca Law that a person may be tried first by an ordinary court and subsequently by a Gacaca jurisdiction. According to Article 93, the Gacaca Courts of Appeal are the only courts competent to review judgments in such cases.[117] Human Rights Watch has provided examples of accused who were first acquitted by an ordinary court and subsequently brought before a Gacaca jurisdiction.

75. It is not the task of the Chamber to assess the general implementation in Rwandan law of the protection against double jeopardy but to determine whether Gatete, if transferred, will be protected against a violation of this principle. The Transfer Law, which according to Article 1 regulates the transfer of cases, establishes the High Court and the Supreme Court as the only courts to hear such cases. Article 2 specifies that the High Court "shall be the competent court to conduct [in] the first instance" cases that are transferred [n]otwithstanding any other law to the contrary". Article 25 states that in the event of any inconsistency between the Transfer Law and another law, the former shall prevail. Finally, Article 13 of the Transfer Law provides that it shall apply without prejudice to other rights ("*sous reserve d'autres droits*") guaranteed in the ICCPR, which includes the prohibition of double jeopardy (above, para. 74). According to Article 190 of the Constitution, international conventions ratified by Rwanda is more binding than other laws (para. 16). In view of these provisions, the Chamber is satisfied that Gatete, if transferred, will not run the risk of double jeopardy.[118]

(vi) Arrest and Conditions of Detention

76. Case law has established that conditions of detention in a national jurisdiction, whether pre- or post-conviction, are a matter that touches upon the fairness of that jurisdiction's criminal justice system.[119] By way of introduction, the Chamber notes that Rwanda has ratified and incorporated several human rights instruments, including the ICCPR, which prohibits unlawful and arbitrary deprivation of liberty (Article 9), requires that all persons deprived of their liberty shall be treated with humanity and respect (Article 10), and outlaws torture and cruel, inhuman or degrading treatment or punishment (Article 7). The

[116] Defence Response, paras. 100-103; Prosecution Reply, para. 46; HRW Brief paras. 15 (b), 55-60, 111 (c); Prosecution Response to HRW, paras. 45-48.
[117] Article 93 of the 2004 Gacaca Law provides: "(1) The judgement can be subject to review only when: (1) the person was acquitted in a judgement passed in the last resort by an ordinary court, but is later found guilty by the Gacaca Court; (2) the person was convicted in a judgement passed by an ordinary court, but is later found innocent by the Gacaca court … The Gacaca Court of Appeal is the only competent Court to review judgements passed under such conditions."
[118] This conclusion means that the Chamber accepts the Prosecution submissions. During the oral hearing in *The Prosecutor v. Munyakazi*, Counsel for Rwanda confirmed that a case dealt with under the Transfer Law cannot be heard by the Gacaca jurisdictions. T. 24 April 2008, p. 66.
[119] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), 1 September 2005, para. 34, as well as Referral Bench practice (*see*, for instance, footnote 121 below).

Constitution establishes the right to physical and mental integrity and provides that no-one shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment (Article 15). The liberty of persons is guaranteed by the State (Article 18).[120]

77. The Defence, Human Rights Watch and ICDAA raise concerns in relation to unlawful detention and inhuman conditions of detention, as well as torture. The Prosecution disputes this. Before considering these issues separately, the Chamber recalls that the ICTY has used the following yardstick to evaluate potential risks confronting an accused if transferred:

> First, the Bench must examine whether any suspicions of threats to the accused's safety are substantiated and based on fact. If so, the Bench must then determine whether the authorities of the state of referral would be able to effectively safeguard the accused against any attacks on his life and limb.[121]

(a) Unlawful and Arbitrary Arrest

78. The Prosecution argues that Gatete will be lawfully detained if transferred. Human Rights Watch and ICDAA express doubts in this regard, referring to examples of lengthy pre-trial detention in Rwanda, even without an arrest warrant, before the ordinary courts and Gacaca jurisdictions.[122] The Chamber recalls that Gatete was arrested on the basis of an international arrest warrant and has been lawfully detained by the ICTR. If transferred, it will be on the basis of the most recent Indictment, issued by the ICTR on 10 May 2005 (above, para. 3). According to Article 5 of the Transfer Law, his arrest and detention in Rwanda shall be regulated in accordance with the Code of Criminal Procedure, which has provisions about appearance before a judge.[123] Consequently, there is an adequate legal framework in place to prevent unlawful and arbitrary detention.

79. The Chamber is well aware of the criticism concerning unlawful and lengthy detention both in respect of Gacaca courts and the ordinary courts. However, Gatete will be detained under the legal regime established by the Transfer Law. Any irregularities or lengthy pre-trial detention may be brought to the attention of the High Court, the Supreme Court and the monitoring mechanism (below, D). Consequently, the Chamber does not find that the risk of unlawful or arbitrary detention prevents his transfer.

(b) Conditions of Detention

80. The Defence, Human Rights Watch and ICDAA submit that it is unclear whether the detention conditions before, during and, in case of a conviction, after trial will comply with the ICCPR and other internationally recognised standards. According to the Prosecution and

---

[120] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).
[121] *The Prosecutor v. Milorad Trbić,* Decision on Referral of Case under Rule 11*bis* with Confidential Annex (Referral Bench), 27 April 2007, para. 40, relying on *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B (Referral Bench), 5 April 2007, para. 64.
[122] Prosecution Request, para. 79; HRW Brief, paras. 16 (f), 106-109, 111 (l); Prosecution Response to HRW, paras. 79-80; ICDAA Brief, paras. 126-137; Prosecution Response to ICDAA, para. 25.
[123] *See* Articles 93-100 of the Code on Criminal Procedure concerning "preventive detention" (Annex G to the Prosecution Request).

the Republic of Rwanda, these fears are unfounded. The conditions of detention will be subject to inspection.[124]

81. Some of the submissions refer to material showing that the general detention conditions in Rwanda are below international standards, for instance due to overcrowding, lack of health care and shortage of food. The issue for the Chamber is whether Gatete will be subjected to such conditions. Article 23 (1) and (2) of the Transfer Law states:

> Any person who is transferred to Rwanda by the ICTR for trial shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43 /173 of 9 December 1998.
>
> The International Committee of the Red Cross or an observer appointed by the President of the ICTR shall have the right to inspect the conditions of detention of persons transferred to Rwanda by the ICTR and held in detention. The International Committee of the Red Cross or the observer appointed by the ICTR shall submit a confidential report based on the findings of these inspections to the Minister of Justice of Rwanda and to the President of the ICTR.[125]

82. This provision institutes a special regime for detainees transferred from the ICTR. The question is how it will be implemented in practice.

83. The Chamber is not persuaded by the concerns regarding the physical conditions of the detention facilities in which Gatete will be placed, should he be transferred. Any remaining problems at the time of transfer can be drawn to the attention of the monitoring mechanism under Rule 11 *bis* (D) (iv) or to inspectors to be appointed under Articles 23 (2) of the Transfer Law.

84. The remaining issue is whether Gatete, if transferred, runs any risk of torture, and cruel, inhuman or degrading treatment or punishment.[126] The Chamber does not consider it likely that such acts will be committed under the special regime established by the Transfer Law. Furthermore, Article 23 (2) provides for inspection by the International Red Cross Committee (ICRC) or an observer appointed by the ICTR President. Should ill-treatment occur, it would also be a matter for the monitoring mechanism under Rule 11 *bis* (D)(iv). This may lead to revocation of any transfer decision under Rule 11 *bis* (F) and (G).

(c) Life Imprisonment with Solitary Confinement

85. The Defence and Human Rights Watch refer to the law which in 2007 abolished capital punishment (the Death Penalty Law) and replaced it with life imprisonment or "life imprisonment with special provision".[127] They argue that Gatete may, if convicted to life imprisonment, risk prolonged solitary confinement in breach of Article 7 of the ICCPR. The Prosecution disputes that the "special provision" clause is applicable under the Transfer Law.

---

[124] Prosecution Request, paras. 79-80; Defence Response, paras. 97-98; HRW Brief, paras. 15 (c), 16 (g), 61-67, 110, 111 (d) and (m); Prosecution Response to HRW, paras. 49-52; ICDAA Brief, paras. 138-146; Prosecution Response to ICDAA, paras. 25-31.

[125] Some minor stylistic changes have been made in the English translation of the text. Furthermore, Article 23 (3) and (4) provide for notification and investigation if an accused dies or escapes from prison.

[126] ICDAA Brief, paras. 147-154.

[127] Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (Annex E to the Prosecution Request). *See* above, para. 25.

Prolonged isolation will therefore not occur. Rwanda has offered assurances that under Rwandan law, no accused transferred to Rwandan courts from the ICTR will be sentenced to a term of life imprisonment with solitary confinement, if convicted.[128]

86. It is common ground that prolonged solitary confinement may constitute a violation of Article 7 of the ICCPR and other instruments prohibiting torture and inhuman and degrading treatment or punishment.[129] The question is whether Gatete, if transferred, may be subjected to such isolation. Article 3 of the law which in 2007 abolished capital punishment, states that the death penalty is substituted "by life imprisonment or life imprisonment with special provision". According to Article 4, the latter means that "a convicted person is kept in isolation". On the other hand, Article 21 of the Transfer Law provides that "life imprisonment" shall be the heaviest penalty, without any reference to imprisonment "with special provision".

87. The Chamber notes that the Transfer Law, which could arguably be seen as *lex specialis* in the field of transfer, states in Article 25 that its provisions shall prevail in the event of any inconsistency with other legislation. On the other hand, the Death Penalty Law, which was adopted a few months after the Transfer Law, is *lex posterior* and provides categorically in Article 9 that "[a]ll legal provisions contrary to this Organic Law are hereby repealed". Although these two laws may be interpreted to the effect that "life imprisonment with special provision" does not apply within the field of application of the Transfer Law, the legal situation is nevertheless unclear. The Chamber finds that there is a risk that Gatete, if transferred and convicted, may be subject to isolation and is therefore not satisfied that he will be protected against isolation. This conforms to case law of the Appeals Chamber.[130]

(vii) Individual Circumstances

88. The Defence invokes Gatete's personal circumstances, pointing out that he would face particular risks to his personal security. Remaining under the ICTR's jurisdiction is necessary to prevent reprisal attacks against him.[131] The Chamber has considered these submissions, but does not find that they prevent transfer of his case.

---

[128] Defence Response, paras. 95-97; HRW Brief, paras. 61-67 (referring to ICCPR Article 7); Prosecution Response to HRW, in particular paras. 49-50; Rwanda's Brief, para. 5 (b), and its Annex 1, paras. 9-13.

[129] The ICCPR Human Rights Committee has adopted General Comment 20, para. 6 ("The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7"). Similar statements have been made in connection with the Committee's consideration of reports from states under Article 40 and individual communications under the Optional Protocol. Under the European Convention on Human Rights, the Court have established similar principles in several cases, for instance *Ramirez Sanchez v. France*, Judgment, 4 July 2006, paras. 120-150, in particular para. 136 ("substantive reasons must be given when a protracted period of solitary confinement is extended") and 145 ("The Court nevertheless wishes to emphasise that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely. Moreover, it is essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement"). In the present case, the parties have not addressed these issues.

[130] *Munyakazi* Appeals Chamber Decision, para. 16-19; *Kanyarukiga* Appeals Chamber Decision, paras. 12-14. The Appeals Chamber found it unclear how these two laws may be interpreted by Rwandan courts. It would be possible for courts in Rwanda to interpret the relevant laws either to hold that life imprisonment with special provision is applicable to transfer cases, or to hold that life imprisonment without special provisions is the maximum punishment. The Trial Chamber adds that the lack of clarity was illustrated during the oral hearing in *The Prosecutor v. Yussuf Munyakazi,* T. 24 April 2008 pp. 63, 66-67, 76-77.

[131] Defence Response, para. 99.

D. Monitoring

89. If the request for transfer is granted, the Prosecutor may, according to Rule 11 *bis* (D)(iv), send observers to monitor the proceedings in Rwandan courts. As mentioned above (in particular paras. 64, 72 and 87), the Chamber has some concerns that prevent transfer. The Chamber will nevertheless address the issue of monitoring, as it has rejected some of the objections against transfer based on the existence of a satisfactory monitoring system.

90. The Prosecutor's request was based on monitoring of national proceedings. The Defence submits that there is no monitoring agreement currently in place between the ICTR Prosecutor and the African Commission on Human and People's Rights. Further, the absence of press and other freedoms in Rwanda precludes the possibility of effective monitoring. ICDAA argues that monitors should not be selected by the Prosecution but by an independent organisation in order to ensure that they represent the interests of all interested parties. It is also of the view that the proposed monitoring process will be insufficient.[132]

91. The Chamber recalls that Rule 11 *bis* (D)(iv) confers a substantial amount of discretion on the Prosecutor in determining whether to send monitors on his behalf and how such monitoring should be conducted.[133] He has approached the African Commission on Human and People's Rights, which has accepted to monitor proceedings in transferred cases.[134] Such an arrangement falls squarely within the Prosecutor's discretion. The Chamber notes that the Commission is an independent organ established under the African Charter on Human and Peoples' Rights and has no reason to doubt that the Commission has the necessary qualifications to monitor trials.

92. Rwandan legislation includes provisions about monitoring. Article 19 of the Transfer Law states that the ICTR Prosecutor shall have the right to designate individuals to observe the progress of transferred cases. The observers shall have access to court proceedings, documents and records relating to the case, as well as access to all places of detention.[135] The Republic of Rwanda has expressed its commitment to facilitating the work of the monitors.[136]

93. According to Rule 11 *bis* (F) and (G), the Prosecutor may, before a transferred person has been found guilty or acquitted by a national court, request the Chamber to revoke the transfer order and make a formal request that the State concerned defer to the competence of the ICTR. In conformity with the duty to co-operate with the Tribunal (Article 28 of the ICTR Statute), the State shall accede to such a request without delay. The counterpart in Rwandan law is Article 20 of the Transfer Law, which provides that an accused shall be promptly surrendered to the ICTR if a transfer order is revoked. The Republic of Rwanda has committed itself to complying with any revocation order.[137]

---

[132] Prosecution Request, paras. 76-80; Defence Response, paras. 105-108; ICDAA Brief, paras. 155-170; Prosecution Response to ICDAA, paras. 39-47.
[133] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11 *Bis* Referral (AC), 1 September 2005, paras. 50, 53, 57.
[134] Letter of 2 June 2006 from the President of the African Commission on Human and People's Rights to the ICTR Prosecutor (Annex M to the Prosecution Request); Prosecution Reply, para. 47 (an agreement is in place and the modalities for its implementation will be worked out as soon as a referral is granted).
[135] Places of detention are not only subject to monitoring under Article 19, but also inspection in pursuance of Article 23 (*see* above para. 81 concerning The International Committee of Red Cross or an observer appointed by the ICTR President.
[136] Rwanda's Brief, para. 5 (d), as well as Annex 1, para. 4 and Annex 2, para. 2.
[137] Rwanda's Brief, para. 5(d).

94. The Chamber considers the suggested monitoring system satisfactory and has taken this into account in its deliberations. This has led to the rejection of some of the objections against transfer. However, monitoring will not, in the Chamber's view, solve the problems relating to availability and protection of witnesses and not eliminate the risk of solitary confinement in case of life imprisonment. The Chamber find support for its conclusions in Appeals Chamber case law.[138]

E. Concluding Remarks

95. The Chamber concludes that the Republic of Rwanda has made notable progress in improving its judicial system. Its legal framework contains satisfactory provisions concerning jurisdiction and criminalises Jean-Baptiste Gatete's alleged conduct. The death penalty has been abolished. However, the Chamber is not satisfied that Gatete will receive a fair trial if transferred to Rwanda. First, it is concerned that he will not be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial. Second, it accepts that the Defence will face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. Third, there is a risk that Gatete, if convicted to life imprisonment there, may risk solitary confinement due to unclear legal provisions in Rwanda.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Request.

Arusha, 17 November 2008.

Erik Møse	Sergei Alekseevich Egorov	Florence Rita Arrey
Presiding Judge	Judge	Judge

[138] *Munyakazi* Appeals Chamber Decision, para. 30; *Kanyarukiga* Appeals Chamber Decision, para. 38.