



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

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrézia Vaz

Registrar: Mr. Adama Dieng

Decision of: 30 October 2008

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-R11bis

**DECISION ON THE PROSECUTION'S APPEAL AGAINST DECISION ON
REFERRAL UNDER RULE 11bis**

Counsel for Gaspard Kanyarukiga

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seized of an appeal filed by the Prosecution (“Appeal”)¹ pursuant to Rule 11*bis*(H) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) against a decision by the Trial Chamber designated under Rule 11*bis* of the Rules denying its request to refer the case of Gaspard Kanyarukiga (“Kanyarukiga”) to the Republic of Rwanda (“Rwanda”).²

I. BACKGROUND

2. Kanyarukiga is charged with genocide, or alternatively, with complicity in genocide, and extermination as a crime against humanity.³ On 7 September 2007, the Prosecution requested the referral of his case to Rwanda pursuant to Rule 11*bis* of the Rules.⁴ Kanyarukiga responded on 16 November 2007, opposing the referral.⁵ On 2 October 2007, the President of the Tribunal designated a Chamber under Rule 11*bis* to consider whether to grant the Prosecution’s request for referral.⁶ The Trial Chamber granted leave to Rwanda, the Kigali Bar Association, the International Criminal Defence Attorneys Association (“ICDAA”), and Human Rights Watch (“HRW”) to appear as *amici curiae*.⁷ On 6 June 2008, the Trial Chamber denied the Prosecution’s request for referral of Kanyarukiga’s case to Rwanda.⁸

3. The Prosecution appealed against the Rule 11*bis* Decision, filing its Notice of Appeal on 23 June 2008 and its Appeal Brief on 8 July 2008. Kanyarukiga filed his Response on 18 July 2008,⁹

¹ Prosecutor’s Notice of Appeal (Rule 11*bis* (H)), 23 June 2008 (“Notice of Appeal”); Prosecutor’s Appeal Brief (Rule 11*bis* (H)), 8 July 2008 (“Appeal Brief”).

² Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 6 June 2008 (“Rule 11*bis* Decision”).

³ Amended Indictment, 14 November 2007.

⁴ Prosecutor’s Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence, 7 September 2007.

⁵ *Réponse de la Défense à la requête du Procureur portant transfert de l’Accusé Gaspard Kanyarukiga au Rwanda*, 16 November 2007. See also Prosecutor’s Reply to “*Réponse de la Défense à la requête du Procureur portant transfert de l’Accusé Gaspard Kanyarukiga au Rwanda*”, 5 December 2007.

⁶ Designation of Trial Chamber for the Referral of the Case of Gaspard Kanyarukiga to Rwanda, 2 October 2007.

⁷ Decision on the Request of the Republic of Rwanda for Leave to Appear as *Amicus Curiae*, 9 November 2007; Decision on *Amicus Curiae* Request by the International Criminal Defence Attorneys Association (ICDAA), 22 February 2008; Decision on the *Amicus Curiae* Request by the Kigali Bar Association, 22 February 2008; Decision on Defence Request to Grant *Amicus Curiae* Status to Four Non-Governmental Associations, 22 February 2008; Decision on *Amicus Curiae* Request by Human Rights Watch, 29 February 2008.

⁸ Rule 11*bis* Decision, p. 30.

⁹ Defense Brief in Response to the Prosecutor’s Appeal Brief, 18 July 2008 (“Response”). See also *Corrigendum du mémoire de la Défense en réponse à l’appel interjeté par le Procureur*, 29 July 2008. Kanyarukiga initially filed a response to the Notice of Appeal. See *Réponse de la Défense à la demande du Procureur tendant à solliciter la*

and the Prosecution replied on 22 July 2008.¹⁰ Kanyarukiga filed two motions requesting permission to file additional evidence,¹¹ both of which the Appeals Chamber dismissed on 1 September 2008.¹² Rwanda requested permission to file an *amicus curiae* brief on 11 August 2008,¹³ which the Appeals Chamber granted on 1 September 2008.¹⁴ Rwanda filed its brief on 10 September 2008,¹⁵ and Kanyarukiga responded to it on 15 September 2008.¹⁶

II. APPLICABLE LAW

4. Rule 11*bis* of the Rules allows a designated Trial Chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. In assessing whether a state is competent within the meaning of Rule 11*bis* of the Rules to accept a case from the Tribunal, a designated Trial Chamber must consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.¹⁷ The penalty structure within the state must provide an appropriate punishment for the offences for which the accused is charged,¹⁸ and conditions of detention must accord with internationally recognized standards.¹⁹ The Trial Chamber must also consider whether the accused will receive a fair trial, including whether the accused will

certification d'appel dans l'affaire Procureur c/ Kanyarukiga Gaspard, 27 June 2008. However, the Appeals Chamber declared it invalid. See Order, 9 July 2008. The Appeals Chamber notes that in his Response, Kanyarukiga makes submissions on several issues that were not the subject of the Prosecution's appeal, including the issue of pardon and commutation of sentence (para. 20), the issue of double jeopardy (paras. 21-24) and the issue of trial before a single judge (paras. 42-49). The Prosecution objects that Kanyarukiga's submissions on these issues should be disregarded, given that Kanyarukiga has not filed an appeal, and that these issues are not engaged in the present appeal. The Appeals Chamber agrees and will not consider these submissions.

¹⁰ Prosecutor's Reply to "Mémoire de la Défense en réponse à l'appel du Procureur (Article 11*bis* RPP)", 22 July 2008 ("Reply").

¹¹ Defence Appeal Motion Seeking Leave to Present Additional Evidence (*Rule 115 of the Rules of Procedure and Evidence*), 18 July 2008; Defence Extremely Urgent Addendum to Defence Appeal Motion Seeking Leave to Present Additional Evidence, 1 August 2008.

¹² Decision on Request to Admit Additional Evidence of 18 July 2008, 1 September 2008; Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008.

¹³ Request of the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief Concerning the Prosecutor's Appeal of the Denial by [sic] Trial Chamber of the Request for Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11*bis* of the Rules, 11 August 2008.

¹⁴ Decision on Request from the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief, 1 September 2008. See also Corrigendum, 3 September 2008.

¹⁵ *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 10 September 2008 ("Rwanda *Amicus* Brief").

¹⁶ Defence Response to *Amicus Curiae* Brief on behalf of the Government of Rwanda, 15 September 2008 ("Response to *Amicus* Brief"). The Appeals Chamber notes that Kanyarukiga appended to his response a HRW report from July 2008 entitled "Law and Reality: Progress in Judicial Reform in Rwanda" ("HRW Report"). The Appeals Chamber notes that it previously declined to admit this report as additional evidence under Rule 115 of the Rules. See Decision on Request to Admit Evidence of 1 August 2008, 1 September 2008. It will therefore not consider the HRW Report.

¹⁷ *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecutor's Appeal against Decision on Referral under Rule 11*bis*, 9 October 2008 ("*Munyakazi* Appeal Decision") para. 4, fn. 15, sources cited therein.

¹⁸ *Munyakazi* Appeal Decision, para. 4, fn. 16, sources cited therein.

¹⁹ *Munyakazi* Appeal Decision, para. 4, fn. 17, sources cited therein.

be accorded the rights set out in Article 20 of the Tribunal’s Statute (“Statute”).²⁰

5. The Trial Chamber has the discretion to decide whether to refer a case to a national jurisdiction and the Appeals Chamber will only intervene if the Trial Chamber’s decision was based on a discernible error.²¹ As the Appeals Chamber has previously stated:

An appellant must show that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion, gave weight to irrelevant considerations, failed to give sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion; or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.²²

III. GROUND OF APPEAL 1: APPLICABLE PUNISHMENT

6. In its Rule 11*bis* Decision, the Trial Chamber held that it was satisfied that the death penalty would not be imposed on an accused transferred to Rwanda pursuant to Rule 11*bis* of the Rules, since Article 21 of the Transfer Law²³ excludes capital punishment in relation to referral cases²⁴ and since the Abolition of the Death Penalty Law²⁵ abolishes the death penalty and replaces it with either “life imprisonment” or “life imprisonment with special provisions”.²⁶

7. The Trial Chamber further noted Kanyarukiga’s submission that, if convicted, he would in fact be subject to Article 4 of the Abolition of Death Penalty Law, pursuant to which he could face life imprisonment with special provisions, meaning life imprisonment in isolation. It also recalled the submissions of the Prosecution and Rwanda contesting that punishment of life imprisonment with special provisions is applicable under the Transfer Law.²⁷ The Trial Chamber held that the relationship between the Abolition of Death Penalty Law and the Transfer Law was unclear, and that it was not aware of any jurisprudence in Rwanda concerning the relationship between the two laws.²⁸ It therefore found that although the two laws could be interpreted to the effect that life imprisonment with special provisions does not apply within the field of application of the Transfer Law, there was a risk that Kanyarukiga, if transferred and convicted, might be subject to

²⁰ *Munyakazi* Appeal Decision, para. 4, fn. 18, sources cited therein.

²¹ *Munyakazi* Appeal Decision, para. 5, fn. 19, sources cited therein.

²² *Munyakazi* Appeal Decision, para. 5 citing *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006, para. 9.

²³ Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States (“Transfer Law”).

²⁴ Rule 11*bis* Decision, paras. 22, 25.

²⁵ Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (“Abolition of Death Penalty Law”).

²⁶ Rule 11*bis* Decision, para. 25, fn. 41.

²⁷ Rule 11*bis* Decision, para. 94.

²⁸ Rule 11*bis* Decision, para. 96.

imprisonment in isolation.²⁹

8. The Prosecution submits that the Trial Chamber erred in relying on the Abolition of Death Penalty Law, when the law applicable to Kanyarukiga is the Transfer Law.³⁰ It contends that the two sets of laws set out separate and independent legal regimes, and that the Transfer Law, as the *lex specialis*, is the only law applicable to such cases.³¹ The Prosecution further argues that the Trial Chamber erred in the exercise of its discretion when, having found that it is not the competent authority to decide in any binding way on the application of Rwandan law and that the legal position regarding the application of solitary confinement to the accused is unclear, it failed to conclude that Rwandan courts would interpret Rwandan law in accordance with the fair trial rights of the accused.³²

9. Kanyarukiga responds that the Transfer Law is linked to the Abolition of Death Penalty Law, and that it is the latter law which sets the maximum sentence that can be imposed instead of the death penalty, which is either life imprisonment or life imprisonment with special provisions. He submits that the courts in Rwanda could therefore resort to either option were he to be sentenced to life imprisonment.³³ He contends that the Trial Chamber correctly found that it is unclear which Rwandan law would be applied, and argues that in such a situation the Trial Chamber was correct to deny the request for transfer.³⁴

10. In its *Amicus* Brief, Rwanda submits that because there was no provision for the death penalty in the Transfer Law, life imprisonment with special provisions was not incorporated into the Transfer Law by virtue of Article 3 of the Abolition of Death Penalty Law.³⁵ Rwanda therefore submits that the sentence of life imprisonment with no special provisions is the maximum possible punishment for transfer cases.³⁶ Rwanda also draws attention to the recent Rwandan Supreme Court decision on the constitutionality of the punishment of solitary confinement, although it notes that the Supreme Court declined to consider the constitutionality of Article 4 paragraph 2 of the Abolition of Death Penalty Law, which provides for the penalty of solitary confinement, until such time as legislation which governs the execution of this provision is enacted into law.³⁷ Rwanda

²⁹ Rule 11*bis* Decision, para. 96.

³⁰ Notice of Appeal, para. 2; Appeal Brief, paras. 13-24.

³¹ Notice of Appeal, para. 2; Appeal Brief, paras. 13-24.

³² Notice of Appeal, para. 3; Appeal Brief, paras. 25-32.

³³ Response, paras. 16, 17.

³⁴ Response, paras. 24-26.

³⁵ Rwanda *Amicus* Brief, para. 6.

³⁶ Rwanda *Amicus* Brief, para. 5.

³⁷ Rwanda *Amicus* Brief, paras. 8, 9. *Tubarimo Aloys v. The Government*, Case No. RS/INCONST/Pén. 0002/08/CS, 29 August 2008 (“*Tubarimo Aloys* Decision”). The English translation of the decision is attached to Rwanda’s *Amicus*

further indicates that it has now submitted a formal request to Parliament pursuant to Article 96 of the Rwandan Constitution for an authentic interpretation of the sentencing provisions of the Transfer Law, which interpretation would be binding on Rwandan courts.³⁸

11. Kanyarukiga responds that despite Rwanda's assurances, there has thus far been no legal confirmation that life imprisonment in isolation would not be a punishment applicable to transfer cases, and that the ambiguity about which legal regime applies remains.³⁹ He submits further that the recent Supreme Court case and the letter from the Minister of Internal Security indicate that Rwanda has no intention of abolishing solitary confinement as a penalty.⁴⁰

12. In *Munyakazi*, the Appeals Chamber already ruled that it is unclear how these two laws will be interpreted by the Rwandan courts,⁴¹ which could construe them as either holding that imprisonment with special provisions is applicable to transfer cases, or that life imprisonment without special provisions is the maximum punishment.⁴² There are no reasons to depart from these findings. Indeed, it would be plausible to construe the Transfer Law, which states in Article 25 that its provisions shall prevail in the event of inconsistencies with any other relevant legislation, as the *lex specialis* for transfer cases, and thus as prevailing over the more general Abolition of Death Penalty Law.⁴³ Moreover, as the Abolition of Death Penalty Law sets out the laws that it affects, and does not mention the Transfer Law, a plausible interpretation would be that it does not repeal any provision of the Transfer Law. This interpretation would mean that the maximum punishment that could be imposed by a Rwandan court in a transfer case would be life imprisonment.⁴⁴

13. On the other hand, the Abolition of Death Penalty Law was adopted after the Transfer Law, and could be viewed as *lex posterior*.⁴⁵ The Abolition of Death Penalty Law therefore could be construed as prevailing over the Transfer Law and thus as allowing the possibility of imposing life

Brief as Annex 1. The Supreme Court held that the imposition of periods of solitary confinement is not *per se* unlawful, but must be implemented in accordance with international standards and proper safeguards. Legislation governing the implements of solitary confinement has not yet entered into force. The Supreme Court therefore held that it could not repeal Article 4 paragraph 2 "before the law governing the execution of this sentence [of solitary confinement] comes into force, which will make it clear, whether solitary confinement contravenes the Constitution". See para. 36 of the English translation of the *Tubarimo Aloys* Decision. Rwanda indicates that such legislation is in the process of being enacted, as confirmed in a letter from the Minister of Internal Security, attached to Rwanda's *Amicus* Brief. See Rwanda *Amicus* Brief, para. 9 and Annex 2.

³⁸ Rwanda *Amicus* Brief, para. 7. Rwanda indicates that it is in a position to have this request tabled at the next sitting of Parliament which will commence at the end of September 2008, should this course of action be required.

³⁹ Response to *Amicus* Brief, paras. 13, 30.

⁴⁰ Response, paras. 26, 27.

⁴¹ *Munyakazi* Appeal Decision, para. 16.

⁴² *Munyakazi* Appeal Decision, para. 19.

⁴³ *Munyakazi* Appeal Decision, para. 16.

⁴⁴ *Munyakazi* Appeal Decision, para. 16.

⁴⁵ *Munyakazi* Appeal Decision, para. 17.

imprisonment in isolation in transfer cases.⁴⁶ In addition, although the Abolition of Death Penalty Law does not explicitly mention the Transfer Law, it provides in Article 9 that “all legal provisions contrary to this Organic Law are hereby repealed”, which could be interpreted as including those provisions in the Transfer Law that are inconsistent with it.⁴⁷ Finally, it would be possible to consider that the laws are not in fact inconsistent, and the Abolition of Death Penalty Law could be construed as providing elaboration of the sentencing regime established in the Transfer Law.⁴⁸

14. Thus far, no authoritative interpretation of the relationship between these two laws exists.⁴⁹ Rwanda indicated that it has now sought an authentic interpretation of the Transfer Law from Parliament. However, as such an interpretation has not been issued yet, the Appeals Chamber cannot take this into consideration in assessing whether the Trial Chamber erred in its conclusion about the interpretation of these laws.⁵⁰

15. The Appeals Chamber further recognizes that the punishment of solitary confinement may constitute a violation of international standards if not applied as an exceptional measure which is necessary, proportionate, restricted in time and includes minimum safeguards.⁵¹ However, it observes that there was no information before the Trial Chamber that Rwandan law provides for such safeguards.⁵²

16. Since there is genuine ambiguity about which punishment provision would apply to transfer cases,⁵³ and since, therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases, pursuant to the Abolition of Death Penalty Law,⁵⁴ the Appeals Chamber finds no error in the Trial Chamber’s conclusion that the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11*bis* of the

⁴⁶ *Munyakazi* Appeal Decision, para. 17.

⁴⁷ *Munyakazi* Appeal Decision, para. 17.

⁴⁸ *Munyakazi* Appeal Decision, para. 17.

⁴⁹ *Munyakazi* Appeal Decision, para. 18.

⁵⁰ *Munyakazi* Appeal Decision, para. 18.

⁵¹ See *Ramírez Sanchez v. France*, European Court of Human Rights, Grand Chamber (GC), App. No. 59450/00, Judgement, 4 July 2006, paras. 121, 136, 145; Inter-American Court of Human Rights: *Case of Castillo Petruzzi et al. v. Peru*, Judgement (Merits, Reparations and Costs), 30 May 1999, Series C, No. 52, paras. 194-199; *Case of Miguel Castro-Castro Prison v. Peru*, Judgement, 25 November 2006, Series C, No. 160, para. 315; *Case of García Asto and Ramírez Rojas*, Judgement, November 25 2005, Series C, No. 137, para. 221; *Case of Raxacó Reyes*, Judgement, 15 September 2005, Series C, No. 133, para. 95; *Case of Fermín Ramírez*, Judgement of 20 June 2005, Series C, No. 126, para. 118. Concluding Observations of the Human Rights Committee: Denmark, 31 October 2000, UN Doc. CCPR/CO/70/DNK; UN Committee against Torture (CAT), Conclusions and Recommendations of the Committee against Torture: Japan, 3 August 2007, UN Doc. CAT/C/JPN/CO/1, para. 18. The Trial Chamber noted in the Rule 11*bis* Decision that “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”. The Trial Chamber further found that the parties did not address this issue. See Rule 11*bis* Decision, para. 95 and fn. 130.

⁵² See *Tubarimo Aloys* Decision, *supra* fn. 37.

⁵³ *Munyakazi* Appeal Decision, para. 20.

Rules.

17. In light of the above, the Appeals Chamber dismisses this ground of appeal.

IV. GROUND OF APPEAL 2: RIGHT TO A FAIR TRIAL

18. The Prosecution submits that the Trial Chamber erred in law and fact by holding that under current conditions in Rwanda, Kanyarukiga's right to a fair trial cannot be guaranteed. In particular, it argues that the Trial Chamber erred in finding that the working conditions for the Defence may be difficult, so that, taken together with other factors, this would have a bearing on the fairness of the trial.⁵⁵ It also contends that the Trial Chamber erred in finding that the Defence might face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify, that the Defence will not be able to call witnesses residing outside Rwanda to the extent and in the manner that will ensure a fair trial, and in finding that the monitoring system put in place will not solve the problems relating to availability and protection of witnesses.⁵⁶

A. Working Conditions of the Defence

19. The Trial Chamber observed that while there have been instances of harassment, threats and arrest of lawyers representing accused charged with genocide, these relate to proceedings before the ordinary courts.⁵⁷ The Trial Chamber held that if such situations occur after transfer under Rule 11*bis* of the Rules, the Defence will have an explicit legal basis under Article 15 of the Transfer Law to bring this to the attention of the Rwandan High Court or Supreme Court, and that if the Defence team is prevented from carrying out its work effectively, this would be addressed by the monitoring mechanism and did not prevent the referral from taking place.⁵⁸ While finding that other alleged impediments feared by the Defence were formulated too generally and did not prevent the referral from taking place, the Trial Chamber accepted that many ICTR defence teams have been unable to obtain documents from Rwandan authorities or have received them only after considerable time, and that there are examples of defence counsel having difficulties meeting detainees in Rwanda.⁵⁹ The Trial Chamber held that such incidents are not sufficient in and of themselves to prevent transfer under Rule 11*bis* of the Rules, but that together with other factors, they show that the working conditions for the Defence might be difficult, which might have a

⁵⁴ *Munyakazi* Appeal Decision, para. 20.

⁵⁵ Notice of Appeal, paras. 6, 7; Appeal Brief, paras. 35-41.

⁵⁶ Notice of Appeal, paras. 8-21; Appeal Brief, paras. 42-69.

⁵⁷ Rule 11*bis* Decision, para. 61.

⁵⁸ Rule 11*bis* Decision, para. 61.

⁵⁹ Rule 11*bis* Decision, para. 62.

bearing on the fairness of the trial.⁶⁰

20. The Prosecution submits that the Trial Chamber erred in finding that the factors identified demonstrated that working conditions for the Defence may be difficult. It submits that, as the Trial Chamber found in relation to cases of harassment and threats, the Defence could raise its concerns pertaining to obtaining documents or visiting detainees to the attention of the High Court or Supreme Court, and that if the problems persisted, the remedies of monitoring and revocation would act as safeguards.⁶¹ It also submits that the considerable acquittal rate for genocide cases in Rwanda, which was noted by the Trial Chamber, would suggest that the working conditions in Rwanda are amenable to defence teams.⁶² Neither Rwanda nor Kanyarukiga directly addresses this issue in their briefs.

21. The Appeals Chamber notes that it is unclear how the mechanisms of monitoring and revocation under the Rules would constitute sufficient safeguards for the defence with regard to obtaining documents in a timely manner and visiting detainees. The Appeals Chamber further notes that Article 15 of the Transfer Law, while ensuring Defence Counsel and staff the right to enter and move freely within Rwanda and freedom from search, seizure, arrest or detention in the performance of their legal duties, is silent on the issues of obtaining documents from the Rwandan authorities or visiting detainees. Article 13(4) of the Transfer Law, on the other hand, does provide the right of the Accused to adequate time and facilities to prepare his defence, which could constitute the basis for seeking a remedy before the Rwandan courts. As the Trial Chamber did not make any specific finding that such issues could not be so remedied, however, the Appeals Chamber finds no error in the Trial Chamber's conclusion that defence teams have experienced impediments in obtaining documents from the Rwandan authorities and in meeting witnesses. The Appeals Chamber considers that these obstacles, whilst not sufficient in and of themselves to prevent referral of a case to Rwanda under Rule 11*bis*, do indicate that working conditions for the defence may be difficult in Rwanda, which in turn has a bearing on the fairness of the trial.

22. Accordingly, and in light of the findings below, the Appeals Chamber dismisses this sub-ground of appeal.

⁶⁰ Rule 11*bis* Decision, para. 62.

⁶¹ Appeal Brief, paras. 39, 40.

⁶² Appeal Brief, para. 41.

B. Availability and Protection of Witnesses

1. Witnesses within Rwanda

23. The Trial Chamber held that the submissions before it did not demonstrate that Rwandan judicial officials would disregard witness protection orders, nor that the Rwandan witness protection service would be unable to provide adequate protection due to lack of resources.⁶³ Although it noted that submissions showed that there have been instances of harassment of witnesses, it did not find that witnesses would, in general, face risks by testifying in referral proceedings.⁶⁴ The Trial Chamber observed that the fact that the witness protection service is administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render that service inadequate, but expressed concern that this may reduce the willingness of some potential defence witnesses to avail themselves of its services or to testify.⁶⁵ It also held that it could not exclude that some potential defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring “genocidal ideology”.⁶⁶ Considering the totality of these factors, the Trial Chamber found that Kanyarukiga may face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify, and that this may affect the fairness of the trial.⁶⁷

24. The Prosecution contends that the Trial Chamber’s conclusion that the Defence would experience difficulties in securing witnesses on behalf of Kanyarukiga due to their fear of harassment, arrest and detention was speculative, vague and not substantiated by evidence.⁶⁸ The Prosecution also submits that the considerable acquittal rate noted by the Trial Chamber would suggest that defence witnesses have testified without difficulties.⁶⁹ The Prosecution further submits that the Trial Chamber erred with respect to its conclusions relating to the inadequacies of Rwanda’s witness protection program.⁷⁰ Kanyarukiga responds that the Trial Chamber correctly relied upon the information provided by the *amici curiae*, which demonstrated that he would face problems in calling witnesses to testify on his behalf.⁷¹

25. In its *Amicus* Brief, Rwanda submits that the Trial Chamber failed to consider the

⁶³ Rule 11*bis* Decision, paras. 66, 67.

⁶⁴ Rule 11*bis* Decision, para. 69.

⁶⁵ Rule 11*bis* Decision, para. 70.

⁶⁶ Rule 11*bis* Decision, para. 72.

⁶⁷ Rule 11*bis* Decision, para. 73.

⁶⁸ Notice of Appeal, paras. 8, 12; Appeal Brief, paras. 47, 48.

⁶⁹ Appeal Brief, para. 49.

⁷⁰ Notice of Appeal, paras. 10, 11; Appeal Brief, paras. 44, 45.

⁷¹ Response, paras. 33-35.

substantial steps that it has undertaken to ensure the hearing of witnesses and the presentation of evidence, including measures to ensure witness protection and safety. It submits that these measures and mechanisms have proven effective in practice with ICTR cases in which Rwanda has assisted the Tribunal, and in trials before the Rwandan courts.⁷² Kanyarukiga responds by citing instances in which witnesses have been harassed upon their return to Rwanda or forced to flee Rwanda after testifying before the Tribunal.⁷³

26. The Appeals Chamber considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda, and that witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed.⁷⁴ There was also information before the Trial Chamber of persons who refused, out of fear, to testify in defence of people they knew to be innocent.⁷⁵ The Trial Chamber further noted that some defence witnesses feared that, if they testified, they would be indicted to face trial before the *Gacaca* courts, or accused of adhering to “genocidal ideology”.⁷⁶ The Appeals Chamber observes that the information available to the Trial Chamber demonstrates that regardless of whether their fears are well-founded, witnesses in Rwanda may be unwilling to testify for the Defence as a result of the fear that they may face serious consequences, including threats, harassment, torture, arrest, or even murder.⁷⁷ It therefore finds that the Trial Chamber did not err in concluding that Kanyarukiga might face problems in obtaining witnesses residing in Rwanda because they would be afraid to testify.

27. The Appeals Chamber agrees with the Trial Chamber’s conclusion that the fact that the Rwandan witness protection service is administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render it inadequate.⁷⁸ However, it finds that, based on the information before it,⁷⁹ the Trial Chamber did not err in finding that witnesses would be afraid to avail themselves of its services for these reasons.

⁷² Rwanda *Amicus* Brief, para. 10.

⁷³ Response to *Amicus* Brief, paras. 34, 35. In para. 33 of his Response to the *Amicus* Brief, Kanyarukiga also refers to statements from the HRW Report, which the Appeals Chamber has found to be inadmissible in these proceedings. See Decision on Request to Admit Evidence of 1 August 2008, 1 September 2008.

⁷⁴ Brief of Human Rights Watch as *Amicus Curiae*, in Opposition to Rule 11 *bis* Transfer, 27 February 2008 (“HRW *Amicus* Brief”), paras. 89-102; Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused Gaspard Kanyarukiga to Rwanda pursuant to Rule 11*bis* of the *Rules of Procedure and Evidence* (“ICDAA *Amicus* Brief”), paras. 87, 89. See also *Munyakazi* Appeal Decision, para. 37.

⁷⁵ HRW *Amicus* Brief, para. 37.

⁷⁶ Rule 11*bis* Decision, para. 72, referring to HRW *Amicus* Brief, paras. 30-40.

⁷⁷ See also *Munyakazi* Appeal Decision, para. 37.

⁷⁸ See also *Munyakazi* Appeal Decision, para. 38.

⁷⁹ ICDAA *Amicus* Brief, para. 85; HRW *Amicus* Brief, para. 87.

2. Witnesses outside Rwanda

28. The Trial Chamber noted the provisions of Article 14 of the Transfer Law, and took note of Rwanda's statement that the provisions on safe conduct of witnesses would be observed in all proceedings involving transfer cases.⁸⁰ However, it held that it was persuaded by the submissions of the Defence, HRW and ICDA that many Rwandans in the diaspora will be afraid to testify in Rwanda.⁸¹ It held that as most of Kanyarukiga's witnesses reside outside Rwanda, it would undermine the fairness of the trial if Kanyarukiga would be unable to call a sufficient number of witnesses to present an effective defence.⁸² The Trial Chamber was also concerned that there was no evidence of steps taken by Rwanda to secure the attendance or evidence of witnesses from abroad, such as concluding conventions on mutual assistance.⁸³ It found that in any event, the availability of video-link facilities was not a completely satisfactory solution to obtaining the testimony of witnesses residing outside Rwanda and raised concerns with respect to the principle of equality of arms.⁸⁴ The Trial Chamber therefore concluded that it was not satisfied that Kanyarukiga would be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial if his case were transferred to Rwanda.⁸⁵

29. The Prosecution submits that the Trial Chamber erred in accepting that witnesses residing outside Rwanda will be afraid to testify in Rwanda. It also claims that the Trial Chamber's conclusion that most of Kanyarukiga's witnesses would come from outside Rwanda and that they would be unwilling on reasonable grounds to come to Rwanda to testify is unsubstantiated.⁸⁶ Additionally, it submits that the Trial Chamber failed to give sufficient consideration to Rwanda's legal framework, and argues that it erred by placing undue emphasis on whether Rwanda has powers to enforce mutual cooperation.⁸⁷ Kanyarukiga responds that the Trial Chamber correctly relied upon the information provided by the *amici curiae*, which demonstrated that he would face problems in calling witnesses to testify on his behalf.⁸⁸ Kanyarukiga also submits that the vast majority of his witnesses expressed fear of going to Rwanda to testify.⁸⁹

30. In its *Amicus* Brief, Rwanda submits that the Trial Chamber failed to consider the

⁸⁰ Rule 11*bis* Decision, paras. 74, 75.

⁸¹ Rule 11*bis* Decision, para. 75.

⁸² Rule 11*bis* Decision, para. 76.

⁸³ Rule 11*bis* Decision, para. 77.

⁸⁴ Rule 11*bis* Decision, paras. 78-80.

⁸⁵ Rule 11*bis* Decision, para. 81.

⁸⁶ Notice of Appeal, para. 18; Appeal Brief, para. 33; Reply, para. 12.

⁸⁷ Appeal Brief, paras. 34, 35.

⁸⁸ Response, paras. 33-35.

substantial steps that have been undertaken by Rwanda to ensure the hearing of witnesses, the presentation of evidence as well as the success of its national witness programme in securing and protecting witnesses for trials before the Tribunal.⁹⁰ It also draws attention to the steps Rwanda has taken to ensure that witnesses can be compelled to testify, including its mutual assistance arrangements.⁹¹ Rwanda further points to the availability of video-link testimony as well as witness protection measures for witnesses testifying in Rwanda.⁹²

31. The Appeals Chamber finds that the Trial Chamber did not err in accepting Kanyarukiga's assertion that most of his witnesses reside outside Rwanda, as this is usual for cases before the Tribunal,⁹³ and is supported by information from HRW.⁹⁴ The Appeals Chamber also finds that there was sufficient information before the Trial Chamber that, despite the protections available under Rwandan law, many witnesses residing outside Rwanda would be afraid to testify in Rwanda.⁹⁵ It therefore finds that the Trial Chamber did not err in concluding, based on the information before it, that despite the protections available in Rwandan law, it was not satisfied that Kanyarukiga would be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial if the case were transferred to Rwanda.

32. With respect to Rwanda's ability to compel witnesses to testify, the Appeals Chamber recalls its finding in *Munyakazi* that Rwanda has several mutual assistance agreements with states in the region and elsewhere in Africa, and that agreements have been negotiated with other states as part of Rwanda's cooperation with the Tribunal and in the conduct of its domestic trials.⁹⁶ It therefore finds that the Trial Chamber erred in holding that Rwanda had not taken any steps to

⁸⁹ However, this assertion is based on affidavits of investigators, which the Appeals Chamber declared inadmissible in these proceedings. See Decision on Request to Admit Additional Evidence of 18 July 2008, 1 September 2008.

⁹⁰ Rwanda *Amicus* Brief, para. 10, referring to the *amicus curiae* brief it submitted in *The Prosecutor v. Yussuf Munyakazi. The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 28 July 2008 ("Rwanda *Amicus* Brief (*Munyakazi*)").

⁹¹ Rwanda *Amicus* Brief, para. 10, referring to Rwanda *Amicus* Brief (*Munyakazi*), paras. 22, 23.

⁹² Rwanda *Amicus* Brief, para. 10.

⁹³ *Munyakazi* Appeal Decision, para. 40.

⁹⁴ See HRW *Amicus* Brief, para. 38.

⁹⁵ See HRW *Amicus* Brief, para. 10, indicating that in interviews with two dozen Rwandans living abroad, no one was willing to travel to Rwanda to testify for the defence. See also the statement by the Rwandan Minister of Justice regarding immunity for witnesses granted pursuant to Article 14 of the Transfer Law, cited in the HRW *Amicus* Brief at para. 39, and quoted by the Trial Chamber in fn. 107 of the Rule 11bis Decision. The Appeals Chamber finds that this statement, which according to HRW, was widely circulated in the diaspora, may contribute to the unwillingness of witnesses residing outside of Rwanda to return to Rwanda to testify. See also *Munyakazi* Appeal Decision, para. 40.

⁹⁶ *Munyakazi* Appeal Decision, para. 41. See Rwanda *Amicus* Brief, para. 10, referring to Rwanda *Amicus* Brief (*Munyakazi*), para. 23. Rwanda is a party to the agreement of Mutual Legal Assistance in Criminal Matters of the East Africa Police Chiefs Organisation with many states in the region and elsewhere including Kenya, Uganda, Tanzania, Burundi, Djibouti, Eritrea, Seychelles and Sudan, and has a Mutual Legal Assistance Protocol with states under the Convention Establishing the Economic Community of the Great Lakes Countries (CEPGL). Rwanda has also negotiated an extradition Memorandum of Understanding with the United Kingdom, and it is cooperating with many justice systems including those of New Zealand, Finland, Denmark and Germany.

conclude conventions on mutual assistance in criminal matters that would make it difficult to secure the attendance of witnesses. Further, the Appeals Chamber reiterates that United Nations Security Council Resolution 1503, calling on all states to assist national jurisdictions where cases have been referred, provides a clear basis for requesting and obtaining cooperation.⁹⁷ The Trial Chamber took note of the Resolution, but concluded that it was not convinced that it would be in itself sufficient to ensure the availability of Defence witnesses.⁹⁸ Given the finding made above as to the likely difficulty that Kanyarukiga would face in bringing witnesses outside Rwanda to testify in view of the genuine fear they harbour, the Appeals Chamber agrees with the Trial Chamber.

33. The Appeals Chamber considers that Rwanda has established that video-link facilities are available, and that video-link testimony would likely be authorized in cases where witnesses residing outside Rwanda genuinely fear to testify in person. However, the Appeals Chamber is of the opinion that the Trial Chamber did not err in finding that the availability of video-link facilities is not a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony,⁹⁹ and that 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.¹⁰⁰

34. The Appeals Chamber finds that while the Trial Chamber erred in holding that Rwanda had not taken any steps to conclude conventions on mutual assistance in criminal matters, the totality of circumstances indicate that the Trial Chamber was correct in concluding that Kanyarukiga would still face significant difficulties in securing the attendance of witnesses who reside outside Rwanda to the extent and in a manner which would jeopardize his right to a fair trial.

3. Conclusion

35. The Appeals Chamber therefore finds that, in light of the above, the Trial Chamber did not err in holding, based on the information before it, that if the case were to be transferred to Rwanda, Kanyarukiga might face difficulties in obtaining witnesses residing within Rwanda because they would be afraid to testify, and that he would not be able to call witnesses residing outside Rwanda,

⁹⁷ *Munyakazi* Appeal Decision, para. 41. Security Council Resolution 1503 states at paragraph 1 that the Security Council “[c]alls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR [...]”, S/RES/1503 (2003). See *Stanković* Appeal Decision, para. 26, where the Appeals Chamber approved of the Trial Chamber’s consideration of Security Council Resolution 1503 and interpreted this paragraph of the resolution as implicitly including cooperation with respect to witnesses.

⁹⁸ Rule 11*bis* Decision, fn. 109.

⁹⁹ See also *Munyakazi* Appeal Decision, para. 42.

¹⁰⁰ Rule 11*bis* Decision, paras. 79, 80. See also *Munyakazi* Appeal Decision, para. 42.

to the extent and in a manner that would ensure a fair trial. The Appeals Chamber therefore dismisses this sub-ground of appeal.

C. Monitoring

36. The Prosecution and Rwanda submit that the Trial Chamber erred in failing to give sufficient weight to the monitoring of proceedings in Rwanda by the African Commission on Human and People's Rights ("African Commission") and the remedy of revocation, which they argue sufficiently protect Kanyarukiga's right to a fair trial.¹⁰¹ Kanyarukiga does not address this submission.

37. The Trial Chamber considered the monitoring provisions under Rule 11*bis*(D)(iv) of the Rules, and took note of the fact that the Prosecution had approached the African Commission, which has undertaken to monitor the proceedings in referral cases, and found that it had no reason to doubt that the African Commission had the necessary qualifications to monitor trials.¹⁰² It found that the suggested monitoring system was satisfactory and took it into account in its deliberations to dismiss several of the objections against transfer.¹⁰³ Nonetheless, it held that monitoring would not solve the problems relating to the availability and protection of witnesses.¹⁰⁴ Further, the Trial Chamber considered the remedy of revocation under Rule 11*bis*(F) of the Rules and noted that Article 20 of the Transfer Law obliges Rwanda to promptly surrender an accused to the ICTR if a referral order is revoked.¹⁰⁵

38. The Appeals Chamber finds that the Trial Chamber considered and gave sufficient weight to the information concerning the proposed monitoring system and the remedy of revocation. It further agrees that, while the African Commission indeed has the necessary qualifications to monitor trials,¹⁰⁶ these procedures and remedies would not necessarily solve the current problems related to the availability and protection of witnesses. Furthermore, the Appeals Chamber notes that both the decision to send monitors and the right to request a Trial Chamber to consider revocation lie within the sole discretion of the Prosecution.¹⁰⁷ Therefore, the Accused would not be able himself to trigger the operation of these "remedies". The Appeals Chamber thus finds no error in the Trial Chamber's conclusion in this regard.

¹⁰¹ Notice of Appeal, paras. 20, 21; Appeal Brief, paras. 65-69; Rwanda *Amicus* Brief, para. 11.

¹⁰² Rule 11*bis* Decision, para. 100.

¹⁰³ Rule 11*bis* Decision, para. 103.

¹⁰⁴ Rule 11*bis* Decision, para. 103.

¹⁰⁵ Rule 11*bis* Decision, para. 102.

¹⁰⁶ *Munyakazi* Appeal Decision, para. 30.

¹⁰⁷ Rule 11*bis* (D) (iv) and (F) of the Rules.

39. The Appeals Chamber therefore dismisses this sub-ground of appeal.

V. DISPOSITION

For the foregoing reasons, the Appeals Chamber,

DISMISSES the Appeal; and

UPHOLDS the Trial Chamber's decision to deny the referral of the case to Rwanda.

Done in English and French, the English text being authoritative.

Done this 30th day of October 2008,
at The Hague, The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]