UNITED NATIONS
NATIONS UNIES

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 Andrésia Vaz**
Registrar:	**Mr. Adama Dieng**
Decision of:	**8 October 2008**

THE PROSECUTOR

v.

Yussuf MUNYAKAZI

Case No. ICTR-97-36-R11bis

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

Counsel for Yussuf Munyakazi
Mr. Jwani Timothy Mwaikusa
Ms. Eliane Nyampinga

Office of the Prosecutor
Mr. Hassan Bubacar Jallow
Mr. Bongani Majola
Mr. Alex Obote-Odora
Mr. Richard Karegyesa

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 pursuant to Rule 11*bis*(H) of the Rules of Procedure and Evidence of the Tribunal ("Rules")[1] against a decision of Trial Chamber III denying its request to refer the case of Yussuf Munyakazi ("Munyakazi") to the Republic of Rwanda ("Rwanda") ("Appeal").[2]

I. BACKGROUND

2. Munyakazi is charged with genocide, or alternatively, with complicity in genocide, and extermination as a crime against humanity.[3] On 7 September 2007, the Prosecutor requested the referral of his case to Rwanda pursuant to Rule 11*bis* of the Rules.[4] Munyakazi 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] and held a hearing on the Prosecutor's request on 24 April 2008. On 28 May 2008, the Trial Chamber denied the Prosecutor's request for referral of Munyakazi's case to Rwanda.[8]

3. The Prosecution appealed against the Rule 11*bis* Decision, filing its Notice of Appeal on 12 June 2008 and its Appeal Brief on 27 June 2008. Munyakazi filed his response on 10 July 2008[9]

[1] Prosecutor's Notice of Appeal (Rule 11 *bis* (H)), 12 June 2008 ("Notice of Appeal"); Appeal Brief (Rule 11 *bis* (H)), 27 June 2008 ("Appeal Brief").
[2] Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008 ("Rule 11*bis* Decision").
[3] Amended Indictment, 29 November 2002.
[4] Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11*bis* of the Rules of Procedure and Evidence, 7 September 2007.
[5] Defence Response to the Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 2 October 2007.
[6] Designation of a Trial Chamber for the Referral of Yussuf Munyakazi to Rwanda, 2 October 2007.
[7] Order for Submissions of the Republic of Rwanda as the State Concerned by the Prosecutor's Request for Referral of the Indictment against Yussuf Munyakazi to Rwanda, 9 November 2007; Decision on the Application by the Kigali Bar Association for Leave to Appear as *Amicus Curiae*, 6 December 2007; Decision on the Application by the International Criminal Defence Attorneys Association (ICDAA) for Leave to File a Brief as *Amicus Curiae*, 6 December 2007; Decision on the Request by Human Rights Watch to Appear as *Amicus Curiae*, 10 March 2008.
[8] Rule 11*bis* Decision.
[9] Defence Brief in Response to the Prosecution's Appeal, 10 July 2008 ("Response"). Munyakazi also filed a request for extension of time to file his response, Defence Request for Extension of Time to File Brief in Response to the Prosecutor's Appeal, 14 July 2008 ("Motion for Extension of Time").

and the Prosecution replied on 14 July 2008.[10] The ICDAA and Rwanda both requested leave to file *amicus curiae* briefs.[11] The Appeals Chamber dismissed the ICDAA's request but granted Rwanda leave to file an *amicus curiae* brief.[12] Rwanda filed its brief on 28 July 2008,[13] and Munyakazi responded to it on 4 August 2008.[14]

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. 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 first consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[15] The penalty structure within the state must provide an appropriate punishment for the offences for which the accused is charged,[16] and conditions of detention must accord with internationally recognized standards.[17] The Trial Chamber must also consider whether the accused will receive a fair trial, including whether the accused will be

[10] Prosecutor's Reply to "Defence Brief in Response to the Prosecutor's Appeal", 14 July 2008 ("Reply").
[11] Request of International Criminal Defence Attorneys Association (ICDAA) for Permission to File an *Amicus Curiae* Brief Concerning the Prosecutor's Appeal of the Denial, by Trial Chamber III, of Request for Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11*bis* of the Rules (Rules 74 and 107 of the Rules of Procedure and Evidence), 17 June 2008; Request of the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief Concerning the Prosecutor's Appeal of the Denial by Trial Chamber III, of the Request for Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11 *bis* of the Rules, 30 June 2008.
[12] Decision on Request from the International Criminal Defence Attorneys Association (ICDAA) for Permission to File an *Amicus Curiae* Brief, 15 July 2008; Decision on Request by Rwanda for Permission to File an *Amicus Curiae* Brief, 18 July 2008.
[13] *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 28 July 2008 ("Rwanda *Amicus* Brief").
[14] Defence Response to the *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 4 August 2008 ("Response to *Amicus* Brief"). The Appeals Chamber notes that Munyakazi appended several annexes to his response. These include a HRW report from July 2008 entitled "Law and Reality: Progress in Judicial Reform in Rwanda" ("Report"), an article from the newspaper UMOCO from the issue of 12-27 March 2008, and a letter dated 15 July 2008 from the detainees at the United Nations Detention Facility in Arusha ("UNDF") to the President and Judges of the Tribunal. The Appeals Chamber will not consider this new evidence because it is not part of the record of the case and has not been admitted pursuant to Rule 115 of the Rules. *See Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stanković* Appeal Decision"), para. 37; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal against Decision on Referral under Rule 11bis, 4 July 2006 ("*Ljubičić* Appeal Decision"), para. 40; *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* referral, 15 November 2005 ("*Janković* Appeal Decision"), para. 73. The Appeals Chamber also notes that it declined to admit the same HRW report as additional evidence under Rule 115 of the Rules in another case. *See The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on Request to Admit Evidence of 1 August 2008, 1 September 2008.
[15] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis,* Decision on Rule 11*bis* Appeal, 30 August 2006 ("*Bagaragaza* Appeal Decision"), para. 9; *Prosecutor v. Zeljko Mejakić et al*., Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis, 7 April 2006 ("*Mejakić* Appeal Decision"), para. 60.
[16] *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11bis, 17 May 2005 ("*Stanković* 11*bis* Decision"), para. 32; *Mejakić* Appeal Decision, para. 48; *Ljubičić* Appeal Decision, para. 48.
[17] *Stanković* Appeal Decision, para. 34; *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11*bis*.2, Decision on Savo Todović's Appeals against Decision on Referral under Rule 11bis, 4 September 2006, para. 99.

accorded the rights set out in Article 20 of the Tribunal's Statute ("Statute").[18]

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.[19] 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.[20]

III. PRELIMINARY MATTERS

6. First, the Appeals Chamber must determine whether to grant Munyakazi's request for leave to file his Response late.[21] Under Rule 116(A) of the Rules, the Appeals Chamber may grant a motion for extension of time if good cause is shown, and it may also "recognize, as validly done any act done after the expiry of a time limit".[22] Counsel for Munyakazi submits that although the Appeal Brief was filed on Friday, 27 June 2008, he only received it on Monday, 30 June 2008 due to its late transmission on Friday. Counsel therefore filed his response 10 days after this date.[23] The records indicate that the Appeal Brief was indeed served upon Munyakazi on 30 June 2008.[24] The Appeals Chamber considers that in this instance Munyakazi has shown good cause for the late filing. It therefore recognizes the Response as validly filed and will consider the submissions therein.

7. Second, the Appeals Chamber notes that on 11 August 2008, Rwanda submitted additional

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[18] *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France, 20 November 2007, para. 21; *Stanković* 11*bis* Decision, para. 55; *Prosecutor v. Zeljko Mejakić et al*., Case No. IT-02-65-PT, Decision on Prosecutor's Request for Referral of Case pursuant to Rule 11*bis*, 20 July 2005, para. 68.
[19] *Bagaragaza* Appeal Decision, para. 9. *See also Ljubičić* Appeal Decision, para. 6.
[20] *Bagaragaza* Appeal Decision, para. 9. *See also Ljubičić* Appeal Decision, para. 6.
[21] Munyakazi makes this request both in the Response (*see* para. 2), and also in the Motion for Extension of Time.
[22] *See* Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 5. *See also The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions, 18 June 2008 ("Muvunyi Decision"), para. 4; *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Order Concerning the Filing of the Notice of Appeal, 22 March 2007, p. 3; *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Order Concerning the Filing of the Notice of Appeal, 22 February 2006, p. 3.
[23] Response, para. 2; Motion for Extension of Time, para. 3.
[24] Proof of Service – Arusha, indicating that the Appeal Brief was served upon Munyakazi and his Counsel on 30 June 2008.

confidential material relating to its *Amicus* Brief filed on 28 July 2008.[25] Munyakazi opposed the filing of this material, arguing that as a non-party, Rwanda was not entitled to file it, and that even if it were a party, it would have to apply for leave to present such evidence pursuant to Rule 115 of the Rules. Munyakazi further submitted that allowing the filing of additional documents would cause undue delay in the appeal proceedings.[26] The Appeals Chamber considers that Rwanda was given a time limit in which to file an *amicus curiae* brief and finds that it has not shown good cause for filing the additional material without having sought prior leave to do so. The Appeals Chamber therefore declines to consider this additional material.

IV. GROUND OF APPEAL 1: APPLICABLE PUNISHMENT

8. In its Rule 11*bis* Decision, the Trial Chamber held that it was satisfied that the Abolition of Death Penalty Law abolishes the death penalty, and replaces it in all previous legislative texts with either "life imprisonment" or "life imprisonment with special provisions". Accordingly, the Trial Chamber accepted that the death penalty will not be imposed in Rwanda, and noted that this was consistent with Rule 11*bis*(C) of the Rules.[27]

9. The Trial Chamber recalled the submissions of the Prosecution and Rwanda that the Transfer Law[28] was the applicable law for Rule 11*bis* transfer cases, under which law the highest penalty was life imprisonment. The Trial Chamber further noted Munyakazi's submission that, if convicted, he would in fact be subject to Article 4 of the Abolition of Death Penalty Law,[29] pursuant to which he could face life imprisonment with special provisions, meaning life imprisonment in isolation.[30] The Trial Chamber observed that neither the Prosecution nor Rwanda provided any satisfactory information to rebut the Defence submission on this point,[31] and found, to its concern, that Munyakazi would be subject to life imprisonment in isolation, if convicted in Rwanda.[32]

10. In reaching this conclusion, the Trial Chamber examined which law, and thus which punishment, would apply to Munyakazi if he were convicted in Rwanda. The Trial Chamber

[25] *See* Filing of an Additional Material in the 11*bis* Appeal of Yussuf Munyakazi, 11 August 2008.
[26] *See* Defence Response to the Additional Material Filed in the Rule 11*bis* Appeal, paras. 2-5.
[27] Rule 11*bis* Decision, para. 24.
[28] 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").
[29] Organic Law No. 2007 of 25 July 2007 Relating to the Abolition of the Death Penalty ("Abolition of the Death Penalty Law").
[30] Rule 11*bis* Decision, para. 19.
[31] Rule 11*bis* Decision, paras. 28, 29, 32.

recalled that Article 25 of the Transfer Law provides that that law will prevail over any other laws in the event of inconsistency. The Trial Chamber found that, in any event, there was no inconsistency between the Transfer Law and the Abolition of Death Penalty Law. In this regard, the Trial Chamber noted that Article 3 of the Abolition of Death Penalty Law replaces the death penalty with either "life imprisonment" or "life imprisonment with special provisions",[33] whilst Article 5 provides that "life imprisonment with special provisions" attaches to certain crimes, including genocide, crimes against humanity, torture and murder.[34] Accordingly, the Trial Chamber reasoned, the Abolition of Death Penalty Law does not prescribe a sentence which is inconsistent with the Transfer Law; rather, the Abolition of Death Penalty Law specifies the circumstances in which the sentence of life imprisonment with special provisions applies.[35] Finally, the Trial Chamber noted that, in any event, Article 9 of the Abolition of Death Penalty Law provides that all provisions inconsistent with that law are repealed, thereby repealing the earlier Transfer Law with regard to sentencing.[36]

11. The Trial Chamber then considered that, in light of its finding that Munyakazi, if convicted, would be sentenced to life imprisonment in isolation, it was necessary to examine whether this sentence would be consistent with internationally recognised standards.[37] The Trial Chamber noted that the established jurisprudence and the observations of human rights bodies indicated that imprisonment in isolation is an exceptional measure which, if applied, must be both necessary and proportionate, and incorporate certain minimum safeguards.[38] The Trial Chamber observed that it was not aware of any such safeguards in Rwandan law,[39] and concluded that, in the absence of such safeguards, the penalty structure was inadequate, and referral must be denied.[40]

12. The Prosecution submits that the Trial Chamber erred in law by holding that Rwanda's penalty structure, and, in particular, the possibility of life imprisonment in solitary confinement, does not accord with internationally recognized standards and with the requirements of international law.[41] The Prosecution argues specifically that the Trial Chamber erred in relying on the Abolition

[32] Rule 11*bis* Decision, para. 25. The Appeals Chamber notes that the Trial Chamber was not always consistent in its findings, stating at paragraph 28 that a transferred accused "could" be subject to life imprisonment, while paragraphs 29 and 32 indicate that a transferred accused "would" be subject to life imprisonment.
[33] Rule 11*bis* Decision, paras. 24, 26, fn. 46.
[34] Rule 11*bis* Decision, para. 26.
[35] Rule 11*bis* Decision, para. 26.
[36] Rule 11*bis* Decision, para. 27.
[37] Rule 11*bis* Decision, para. 29.
[38] Rule 11*bis* Decision, para. 30.
[39] Rule 11*bis* Decision, para. 31.
[40] Rule 11*bis* Decision, para. 32.
[41] Notice of Appeal, paras. 1-4; Appeal Brief, paras. 4-16; Reply, paras. 5-8.

of Death Penalty Law, whereas the law applicable to Munyakazi is the Transfer Law.[42] It contends that the two 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.[43] It further submits that the Trial Chamber erred by holding that the Abolition of Death Penalty Law repeals the Transfer Law, arguing that the Abolition of Death Penalty Law expressly identifies the laws it affects, but makes no mention of the Transfer Law, and that, in any event, a subsequent general statute cannot be construed as repealing an earlier *lex specialis*.[44]

13. Munyakazi responds that the Trial Chamber did not err in concluding that the Abolition of Death Penalty Law also applied to transfer cases, and thus that the penalty of life imprisonment in isolation would be applicable to such cases.[45] He submits that the relevance of the Abolition of Death Penalty Law is in relation to sentencing, as the Transfer Law does not prescribe any sentences, and argues that for the offences for which Munyakazi is charged, the sentence is prescribed by the Abolition of Death Penalty Law.[46] He submits that, at the least, the relationship between the two laws is unclear and thus that it would not be contrary to the laws of Rwanda to sentence him to life imprisonment with special provisions, and that the Trial Chamber had no basis on which to hold otherwise.[47]

14. In its *Amicus* Brief, Rwanda submits that because Article 25 of the Transfer Law provides that the provisions of the Transfer Law shall prevail over any other law for transfer cases, and the preamble to the Abolition of Death Penalty Law cites the legislation affected by the law, but does not mention the Transfer Law, the sentence of life imprisonment with no special provisions is the maximum possible punishment for transfer cases.[48] Rwanda also submits that it has prepared a statement stating this to be the scope of the law, and giving the assurance that no person transferred from the Tribunal would be sentenced to solitary confinement in Rwanda. Rwanda submits that this statement can be relied upon by Munyakazi and will be taken into account by Rwandan courts.[49] Rwanda also draws attention to the fact that the Rwandan Supreme Court is currently seized of a constitutional challenge to the provision in the Abolition of Death Penalty Law regarding solitary confinement.[50] Finally, Rwanda submits that in the event that the Appeals Chamber would consider

[42] Notice of Appeal, para. 3; Appeal Brief, paras. 4-16.
[43] Notice of Appeal, para. 3; Appeal Brief, paras. 5-10.
[44] Notice of Appeal, para. 4; Appeal Brief, paras. 4-16.
[45] Response, para. 3.
[46] Response, para. 6.
[47] Response, paras. 9, 10.
[48] Rwanda *Amicus* Brief, para. 10.
[49] Rwanda *Amicus* Brief, para. 11. The statement is appended to the Rwanda *Amicus* Brief as Annex 2.
[50] Rwanda *Amicus* Brief, para. 12, referring to *Tubarimo Aloys v. The Government*, Case. No. RS/INCONST/Pén. 0002/08/CS, 29 August 2008. The decision in this case was in fact rendered on 29 August 2008. The Rwandan Supreme

this an obstacle to transfer, Rwanda would, pursuant to Article 96 of its Constitution, seek an authentic interpretation from Parliament of the Transfer Law and whether solitary confinement was intended for transfer cases, which interpretation would be binding on Rwandan courts.[51]

15. Munyakazi responds that the statement provided by Rwanda is not itself law and does not change the law as enacted by the legislature. He further contends that the statement is evidence that Rwanda could have presented during the referral proceedings but did not, and should therefore not be considered.[52] He submits that the fact that Rwanda felt it necessary to issue this statement is proof that the law is ambiguous, and, as such, that it is possible for a Rwandan court to impose a sentence of life imprisonment with special provisions to a transfer case.[53]

16. The Appeals Chamber considers that it is unclear how these two laws may be interpreted by Rwandan courts. 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. 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 provisions 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.

17. On the other hand, the Abolition of Death Penalty Law was adopted after the Transfer Law, and could be viewed as *lex posterior*. The Abolition of Death Penalty Law could therefore be construed as prevailing over the Transfer Law and thus as allowing the possibility of imposing life imprisonment with isolation in transfer cases. 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. Finally, it would be possible to argue also 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.

18. Thus far, no authoritative interpretation of the relationship between these two laws exists. Rwanda appends a declaration to its *Amicus* Brief to the effect that the Abolition of Death Penalty

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Court declined to consider the constitutionality of Article 4 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.

[51] Rwanda *Amicus* Brief, para. 13.

[52] Response to *Amicus* Brief, para. 3.3.

[53] Response to *Amicus* Brief, para. 3.3.

Law does not and was not intended to govern the Transfer Law in any respect, and providing the assurance that no person transferred from the Tribunal would be sentenced to serve life imprisonment with solitary confinement. While Rwandan courts may take note of this statement, it is not binding on them, and they are free to adopt an alternative interpretation of these laws. Rwanda has also indicated that it can, as a further measure, seek an authentic interpretation of the Transfer Law from Parliament. However, as such an interpretation has not yet been obtained, the Appeals Chamber cannot take this into consideration in assessing whether the Trial Chamber erred in its conclusion about the interpretation of these laws as they currently stand.

19. The Appeals Chamber considers that it is not up to the Trial Chamber to determine how these laws could be interpreted or which law could be applied by Rwandan courts in transfer cases. For the reasons provided above, the Appeals Chamber is of the view that it would be possible for courts in Rwanda to interpret the relevant laws either to hold that life imprisonment with special provisions is applicable to transfer cases, or to hold that life imprisonment without special provisions is the maximum punishment.

20. Since there is genuine ambiguity about which punishment provision would apply to transfer cases, 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, 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 Rules.

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

V. GROUND OF APPEAL 2: JUDICIAL INDEPENDENCE

22. The Trial Chamber held that it was concerned that the trial of Munyakazi for genocide and other serious violations of international law in Rwanda by a single judge in the first instance may violate his right to be tried before an independent tribunal.[54] The Trial Chamber also concluded that despite the procedural safeguards guaranteeing judicial independence in Rwandan law, in practice, sufficient guarantees against outside pressure were lacking.[55] It found that past actions of the Rwandan government, including its interrupted cooperation with the Tribunal following a dismissal of an indictment and release of an appellant, and its negative reaction to foreign judges for indicting former members of the Rwandan Patriotic Front ("RPF") demonstrated that there was a tendency by

[54] Rule 11*bis* Decision, para. 39.
[55] Rule 11*bis* Decision, para. 40.

the government to pressure the judiciary, and that there was a real risk that a single judge would not be able to resist this pressure.[56] The Trial Chamber held that this situation was exacerbated by the fact that a single judge's factual findings cannot be reviewed by the Supreme Court unless there has been a miscarriage of justice.[57]

23. The Prosecution submits that the Trial Chamber erred in law and fact by concluding that Rwanda does not respect the independence of the judiciary and that the composition of the High Court of Rwanda does not accord with the right to be tried by an independent tribunal and the right to a fair trial.[58] It argues that the Trial Chamber erred by concluding that the composition of the High Court by a single judge is incompatible with fair trial guarantees of Munyakazi for violations of international humanitarian law.[59] It also contends that the Trial Chamber's conclusion that a single judge sitting in Rwanda would be particularly susceptible to external pressure is misdirected in law, and that alleged pressure on Rwanda's judiciary was unsupported by the evidence.[60] The Prosecution also submits that the Trial Chamber's conclusion that Rwanda's legal framework lacks sufficient guarantees for judges is misdirected, and that its conclusions in relation to the review power of Rwanda's Supreme Court are erroneous.[61]

24. Munyakazi responds that the Trial Chamber was correct to distinguish between capital cases and genocide cases, and to hold that trial by a single judge in a case of genocide may violate his right to be tried before an independent tribunal.[62] He also contends that the question of whether a trial before a single judge would violate his right to a fair trial must be assessed given the particular circumstances of Rwanda.[63] Munyakazi also submits that the Trial Chamber did consider the statutory provisions guaranteeing the independence of the judiciary, but found that it could not rely on these alone, and provides examples of interference in the judiciary by the Government.[64] He therefore submits that it was not unreasonable for the Trial Chamber to find that there might be a risk of interference in his trial if his case were transferred to Rwanda.[65]

25. In its *Amicus* Brief, Rwanda submits that there are various procedural safeguards in place to

[56] Rule 11*bis* Decision, paras. 40-48, referring to the reaction of the Rwandan government to the decision in *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19, Decision, 3 November 1999 ("*Barayagwiza* Decision"), and its condemnation of Judge Bruguière of France for issuing a report investigating the shooting of President Habyarimana's plane, and Judge Arieu of Spain for issuing an indictment against forty high-ranking RPF officers.
[57] Rule 11*bis* Decision, para. 48.
[58] Notice of Appeal, para. 6; Appeal Brief, paras. 18, 19; Reply, paras. 9-11.
[59] Notice of Appeal, para. 7; Appeal Brief, paras. 18, 19.
[60] Notice of Appeal, paras. 8, 9; Appeal Brief, paras. 20-25.
[61] Notice of Appeal, para. 12; Appeal Brief, paras. 26-29.
[62] Response, para. 15.
[63] Response, para. 16.
[64] Response, paras. 17, 18.

guarantee the independence of its judiciary, and that Rwanda will ensure that its most experienced judges are assigned to the first transfer case.[66] It also draws attention to the findings of the Trial Chambers in the *Kanyarukiga* and *Hategekimana* cases that necessary guarantees are in place for an impartial trial, that the single judge composition of the High Court cannot be a bar to transferring cases and that the conduct of trials in Rwanda to date has not called into question the competence of the Rwandan judiciary and provides no basis to refuse transfers.[67] Munyakazi responds by citing several instances of undue influence on or interference with the judiciary in Rwanda, and submits that these dangers are greatly enhanced in trials for crimes such as genocide.[68]

26. While the Appeals Chamber shares the Trial Chamber's concern about the fact that politically sensitive cases, such as genocide cases, will be tried by a single judge, it is nonetheless not persuaded that the composition of the High Court by a single judge is as such incompatible with Munyakazi's right to a fair trial. The Appeals Chamber recalls that international legal instruments, including human rights conventions, do not require that a trial or appeal be heard by a specific number of judges to be fair and independent.[69] The Appeals Chamber also notes that the Opinion of the Consultative Council of European Judges, which the Trial Chamber cites in support of its finding,[70] is recommendatory only.[71] There is also no evidence on the record in this case that single judge trials in Rwanda, which commenced with judicial reforms in 2004, have been more susceptible to outside interference or pressure, particularly from the Rwandan Government, than previous trials involving panels of judges.

27. The Appeals Chamber also finds that the Trial Chamber erred in considering that Munyakazi's right to a fair trial would be further compromised as a result of the limited review

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[65] Response, para. 18.
[66] *Amicus* Brief, paras. 14, 15.
[67] *Amicus* Brief, para. 16, citing *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 ("*Kanyarukiga* 11*bis* Decision"), paras. 34-42 and *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to the Republic of Rwanda, 6 June 2008 ("*Hategekimana* 11*bis* Decision"), paras. 38-46.
[68] Response to *Amicus* Brief, paras. 4.1-4.3. The Appeals Chamber notes, however, that these examples are derived from the UMOCO article, which the Appeals Chamber has found to be inadmissible in these proceedings. *See supra* fn. 14.
[69] International Covenant on Civil and Political Rights (adopted 19 December, 1966, entered into force 23 March 1976) 999 UNTS 171 ("ICCPR"), Articles 19, 20; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 ("ACHPR"), Article 7. Rwanda ratified the ICCPR on 16 April 1975 and the ACHPR on 15 July 1983.
[70] Rule 11*bis* Decision, para. 47.
[71] Opinion No. 6 (2004) of the Consultative Council of European Judges (CCJE) to the Attention of the Committee of Ministers of Fair Trial Within a Reasonable Time and Judge's Role in Trials Taking into Account Alternative Means of Dispute Settlement, CCJE (2004) OP No. 6, 22-24 November 2004, para. 61, referring to Recommendation No. R (87) 18 of the Committee of Ministers of Member States Concerning the Simplification of Criminal Justice (Adopted by the Committee of Ministers on 17 September 1987 at the 410th Meeting of the Ministers' Deputies), para. III.d.2.

powers of the Supreme Court. Article 16 of the Transfer Law provides that appeals may be heard on an error on a question of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice. This is not an unusual standard of review in appellate proceedings; it is in fact the applicable standard before this Tribunal.[72] There was also no information before the Trial Chamber that would allow it to conclude that the Supreme Court could not re-examine witnesses or make its own findings of fact.

28. Further, the Appeals Chamber finds that the Trial Chamber erred in considering that there was a serious risk of government interference with the judiciary in Rwanda. The Trial Chamber primarily based its conclusion on Rwanda's reaction to Jean-Bosco Barayagwiza's successful appeal concerning the violation of his rights, and the reactions of the Rwandan government to certain indictments issued in Spain and France.[73] However, the Appeals Chamber recalls that the *Barayagwiza* Decision was issued nine years ago. It notes that the Tribunal has since acquitted five persons, and that Rwanda has not suspended its cooperation with the Tribunal as a result of these acquittals. The Appeals Chamber also observes that the Trial Chamber did not take into account the continued cooperation of the Rwandan government with the Tribunal.[74] The Appeals Chamber also considers that the reaction of the Rwandan government to foreign indictments does not necessarily indicate how Rwanda would react to rulings by its own courts, and thus does not constitute a sufficient reason to find that there is a significant risk of interference by the government in transfer cases before the Rwandan High Court and Supreme Court.

29. The only other information referred to by the Trial Chamber in support of its findings relating to the independence of the Rwandan judiciary was the 2007 United States State Department Report cited by the ICDAA in its *amicus curiae* brief.[75] However, this report states only in very

[72] Article 24(1) of the Statute. *See also Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 7, quoting *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 11 (citations omitted) and para. 8, quoting *Prosecutor v. Radislav Krsti}*, Case No. IT-98-33-A, Judgement, para. 40 (citations omitted); *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 5. *See* further *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 21 May 2007, paras. 7, 8; *Prosecutor v. Milomir Staki}*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 8; *Prosecutor v. Mitar Vasiljević* Case No. IT-98-32-A, Judgement, 25 February 2004, para. 6.

[73] Rule 11*bis* Decision, paras. 41-46.

[74] The Prosecutor of the Tribunal indicated to the United Nations Security Council on 17 June 2008 that "Rwanda continues to cooperate effectively with the Tribunal". UN Doc. S/PV.5697, p. 15 and UN Doc. S/PV.5796, p. 11. President Byron also indicated to the United Nations Security Council on 17 June 2008 that "Rwanda has continued to cooperate with the Tribunal by facilitating a steady flow of witnesses from Kigali to Arusha". UN Doc. S/PV.5697, p. 10.

[75] Rule 11*bis* Decision, para. 48, fn. 89, referring to Brief of Amicus Curiae, International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused Yussuf Munyakazi to Rwanda pursuant to Rule 11*bis* of the *Rules of Procedure and Evidence* ("ICDAA *Amicus* Brief"), para. 8, citing Country US State Department's Report on Human Practices – 2006, submitted to the United States Congress by Secretary of State

general terms that there are constraints on judicial independence, and "that government officials had sometimes attempted to influence individual cases, primarily in *gacaca* cases".[76] The Trial Chamber did not cite any other information supporting its findings relating to the independence of the judiciary, and, notably, did not refer to any information demonstrating actual interference by the Rwandan government in any cases before the Rwandan courts. Moreover, other evidence submitted by the *amicus curiae* during the referral proceedings concerning interference with the judiciary primarily involved *gacaca* cases, rather than the High Court or Supreme Court, which will adjudicate the transfer cases, and failed to mention any specific incidents of judicial interference.[77] The Appeals Chamber therefore finds that, based on the record before it, no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the Prosecution's request to transfer Munyakazi to Rwanda.

30. Finally, the Appeals Chamber finds that the Trial Chamber erred in failing to take into account the availability of monitoring and revocation procedures under Rule 11*bis*(D)(iv) and (F) of the Rules.[78] The Appeals Chamber notes that the Prosecution has approached the African Commission on Human and People's Rights ("African Commission"), which has undertaken to monitor the proceedings in transfer cases, and monitors could inform the Prosecutor and the Chamber of any concerns regarding the independence, impartiality or competence of the Rwandan judiciary. The Appeals Chamber notes that the African Commission is an independent organ established under the African Charter on Human and Peoples' Rights and it has no reason to doubt that the African Commission has the necessary qualifications to monitor trials. The Appeals Chamber finds that the Trial Chamber erred in failing to consider this in its assessment.

31. For the foregoing reasons, the Appeals Chamber grants this ground of appeal, and will consider the effect of this in the Conclusion.

Condoleeza Rice, released by the Bureau of Democracy, Human Rights and Labor, March 6, 2007 ("U.S. State Department Report 2007").

[76] ICDAA *Amicus* Brief, para. 8, citing U.S. State Department Report 2007.

[77] The *amicus curiae* brief submitted by HRW refers to interviews with 25 high-ranking Rwandan judicial officials stating that the courts were not independent, but provides no information about the basis for this view, or any cases of actual attempts to interfere with the judiciary. *See* Brief of Human Rights Watch as Amicus Curiae in Opposition to Rule 11*bis* Transfer, 17 March 2008 ("HRW *Amicus* Brief"), para. 51.

[78] *See* Notice of Appeal, paras. 21-24; Appeal Brief, paras. 40-42; Reply, paras. 13, 14, discussed *infra*, para. 46. *See Stanković* Appeal Decision, where the Appeals Chamber held at paragraph 52 that it was satisfied that the monitoring procedures and the revocation mechanism under Rule 11*bis*(F) "was a reasonable variable for the Referral Bench to have included in the Rule 11*bis* equation". *See also Janković* Appeal Decision, paras. 56, 57.

VI. GROUND OF APPEAL 3: AVAILABILITY AND PROTECTION OF WITNESSES

32. The Trial Chamber expressed its concern that under current conditions in Rwanda, despite the guarantees in Rwandan law of the right of Munyakazi to obtain the attendance of, and to examine witnesses for his case under the same conditions as witnesses against him, including provisions for the assistance and protection of witnesses, it was likely that these rights would be violated.[79] The Trial Chamber therefore concluded that it was not convinced that Munyakazi's fair trial right relating to the attendance of witnesses can be guaranteed in Rwanda at present.[80] With respect to witnesses in Rwanda, the Trial Chamber found that Munyakazi would have difficulty in securing witnesses to testify due to their fear of harassment, arrest and detention, or that an indictment would be issued against them.[81] The Trial Chamber also expressed serious concerns about the operation of the Rwandan witness protection program.[82] It therefore found that it would be unlikely that Defence witnesses residing within Rwanda would feel secure enough to testify in transferred cases.[83] The Trial Chamber noted that most Defence witnesses reside outside Rwanda and expressed its concern that they would fear intimidation, threats and arrest.[84] 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, or the cooperation of other states for the purposes of video-link testimony.[85] The Trial Chamber 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.[86]

33. The Prosecution submits that the Trial Chamber erred in both law and fact by holding that under current conditions in Rwanda, Munyakazi's fair trial right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, cannot be guaranteed.[87] The Prosecution contends that the Trial Chamber's conclusion that Munyakazi would experience difficulties in securing witnesses due to their fear of harassment, arrest and detention was generalized and not substantiated by evidence.[88] The Prosecution also submits that the Trial Chamber's conclusions that most of Munyakazi's witnesses would come from

[79] Rule 11*bis* Decision, para. 59.
[80] Rule 11*bis* Decision, para. 66.
[81] Rule 11*bis* Decision, paras. 60, 61.
[82] Rule 11*bis* Decision, para. 62.
[83] Rule 11*bis* Decision, para. 62.
[84] Rule 11*bis* Decision, para. 63.
[85] Rule 11*bis* Decision, para. 64.
[86] Rule 11*bis* Decision, para. 64.
[87] Notice of Appeal, paras. 14-20; Appeal Brief, paras. 30-39; Reply, paras. 10-12.

outside Rwanda and that they are unwilling on reasonable grounds to come to Rwanda to testify were unsubstantiated.[89] It also submits that the Trial Chamber failed to give sufficient weight to Rwanda's legal framework, and argues that it was irrelevant for the Trial Chamber to take account of the alleged absence of steps taken by Rwanda to secure the attendance and/or evidence of witnesses from abroad.[90] The Prosecution further submits that the Trial Chamber erred with respect to its conclusions relating to the inadequacies of Rwanda's witness protection program.[91]

34. Munyakazi responds that the Trial Chamber was entitled to rely on the information contained in the submitted *amicus curiae* briefs, without requiring the *amicus curiae* to bring the persons it interviewed in support of these reports to court for cross-examination.[92] He submits that it was not unreasonable for the Trial Chamber to conclude, based on the evidence submitted by the *amicus curiae* and by Munyakazi, that there are threats to the safety and security of Defence witnesses that would prevent him from receiving a fair trial in Rwanda.[93]

35. In its *Amicus* Brief, Rwanda submits that the Trial Chamber failed to consider the 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.[94] It submits that the Trial Chamber did not consider the extensive reliance placed by the Tribunal on Rwanda and its national witness programme in securing and protecting witnesses for trials before the Tribunal.[95] It also draws attention to Article 14 of the Transfer Law which contains unprecedented provisions for securing the attendance of witnesses from abroad, and submits that Rwanda has taken positive steps to compel witnesses to testify, including mutual assistance arrangements.[96] Rwanda further points to the availability of video-link testimony and witness protection measures for witnesses testifying in Rwanda.[97]

36. Munyakazi responds that while Rwanda may have assisted in facilitating the appearance of Prosecution witnesses before the Tribunal, it has not done so with respect to defence witnesses.[98] He also presents information about defence witnesses who have been harassed upon their return to

[88] Notice of Appeal, para. 17; Appeal Brief, para. 32 .
[89] Notice of Appeal, para. 18; Appeal Brief, para. 33; Reply, para. 12.
[90] Appeal Brief, paras. 34, 35.
[91] Notice of Appeal, para. 19; Appeal Brief, para. 37; Reply, para. 10.
[92] Response, paras. 20-24.
[93] Response, para. 26.
[94] Rwanda *Amicus* Brief, para. 17.
[95] Rwanda *Amicus* Brief, paras. 18-20.
[96] Rwanda *Amicus* Brief, paras. 22, 23.
[97] Rwanda *Amicus* Brief, paras. 24, 25.
[98] Response to *Amicus* Brief, para. 5.1

Rwanda, or forced to flee Rwanda after testifying before the Tribunal.[99] Munyakazi also submits that Rwandans who are living abroad as refugees and constitute the majority of the witnesses expected to testify for his Defence, will not be able to testify in Rwanda without losing their refugee status, and cannot be compelled to testify.[100] He indicates that investigators can verify that the prospective Defence witnesses interviewed both within and outside Rwanda are fearful of testifying for the Defence in Rwanda.[101]

A. Witnesses within Rwanda

37. 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.[102] The Trial Chamber noted with particular concern the submission from HRW that at least eight genocide survivors were murdered in 2007, including persons who had, or intended, to testify in genocide trials.[103] 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.[104] 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".[105] 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 being killed. It therefore finds that the Trial Chamber did not err in concluding that it was unlikely that Defence witnesses would feel secure enough to testify in a transferred case.

38. The Trial Chamber further held that there were concerns with respect to the witness protection program in Rwanda.[106] The Appeals Chamber notes that no judicial system can guarantee absolute witness protection.[107] However, it is not persuaded that the Trial Chamber erred

[99] Response to *Amicus* Brief, paras. 5.2, 5.3.
[100] Response to *Amicus* Brief, para. 5.5.
[101] Response to *Amicus* Brief, para. 5.5.
[102] HRW *Amicus* Brief, paras. 89-102; ICDAA *Amicus* Brief, paras. 83, 85. The Appeals Chamber also notes the case of *Aloys Simba v. The Prosecutor*, where the Trial Chamber found that the Rwandan authorities had interfered with Defence Witness HBK, resulting in his refusal to testify. *See Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, para. 47, referring to *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement, paras. 49-50.
[103] HRW *Amicus* Brief, para. 96.
[104] HRW *Amicus* Brief, para. 37.
[105] Rule 11*bis* Decision, para. 61, referring to HRW *Amicus* Brief, paras. 30-40.
[106] Rule 11*bis* Decision, para. 62.
[107] *Janković* Appeal Decision, para. 49.

in finding that Rwanda's witness protection service currently lacks resources, and is understaffed. The Appeals Chamber agrees with the Prosecution that the fact that the witness protection service is presently administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render the service inadequate. However, it finds that, based on the information before it, the Trial Chamber did not err in finding that witnesses would be afraid to avail themselves of its services for this reason.[108]

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

B. Witnesses outside Rwanda

40. The Appeals Chamber finds that the Trial Chamber did not err in accepting Munyakazi's assertion that most of its witnesses reside outside Rwanda, as this is usual for cases before the Tribunal, and is supported by information from HRW.[109] 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.[110] It therefore finds that the Trial Chamber did not err in concluding, based on information before it, that despite the protections available in Rwandan law, many witnesses residing abroad would fear intimidation and threats.

41. With respect to Rwanda's ability to compel witnesses to testify, the Appeals Chamber notes that Rwanda has several mutual assistance agreements with states in the region and elsewhere in Africa, and that agreements have been arranged with other states as part of Rwanda's cooperation with the Tribunal and in the conduct of its domestic trials.[111] Further, the Appeals Chamber notes

[108] ICDAA *Amicus* Brief, para. 87; HRW *Amicus* Brief, para. 87.
[109] *See* HRW *Amicus* Brief, para. 38. *See also* footnote 16 of the Response, citing the example of *The Prosecutor v. Simeon Nchamihigo*, Case No. ICTR-01-63, where 91% of the defence witnesses came from abroad, *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10**,** where 100% of the defence witnesses came from abroad, and *The Prosecutor v. Samuel Imanishimwe*, Case No. ICTR-97-36, where 100% of the defence witnesses were from abroad.
[110] *See* HRW *Amicus* Brief, para. 104, 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 the immunity for witnesses granted under Article 14 of the Transfer Law, cited in the HRW *Amicus* Brief at para. 39, and quoted by the Trial Chamber in para. 61 of the Rule 11*bis* 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. However, the Appeals Chamber finds that the Trial Chamber referred to this quote out of context, as it cited it to demonstrate that the Government would condone the arrests of witnesses who had testified for the Tribunal after their return to Rwanda. The Minister was in fact speaking about the immunity guaranteed under Article 14 of the Transfer Law to witnesses testifying in transfer cases. Moreover, the Trial Chamber discusses these arrests in the same paragraph as it discusses genocidal ideology, thus implying that defence witnesses who were arrested upon returning to Rwanda after their testimony were arrested for harbouring genocidal ideology. There is no indication that this was the case, and the Minister's statement did not relate to genocidal ideology.
[111] Rwanda *Amicus* Brief, 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,

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.[112] It therefore finds that the Trial Chamber erred in holding that Rwanda had not taken any steps to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states.

42. 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, it 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 to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of 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.[113]

43. Considering the totality of the circumstances, although the Appeals Chamber finds that the Trial Chamber erred in holding that Rwanda had not taken any steps to secure the attendance or evidence of witnesses from abroad, or the cooperation of other states, it dismisses this sub-ground of appeal.

C. Conclusion

44. For the reasons already provided under Ground 2 of this decision,[114] the Appeals Chamber considers that the Trial Chamber erred in not taking into account the monitoring and revocation provisions of Rule 11*bis*(D)(iv) and (F) of the Rules, and the prospect of monitoring by the African Commission, in its assessment of the availability and protection of witnesses.[115] However, the

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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.

[112] 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, paragraph 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.

[113] Rule 11*bis* Decision, para. 65.

[114] *See supra* para. 30. *See also Stanković* Appeal Decision, where the Appeals Chamber held at paragraph 52 that it was satisfied that the monitoring procedures and the revocation mechanism under Rule 11(F) *bis* "was a reasonable variable for the Referral Bench to have included in the Rule 11*bis* equation". *See also Janković* Appeal Decision, paras. 56, 57.

[115] *See Stanković* Appeal Decision, where the Appeals Chamber held at paragraph 52 that it was satisfied that the monitoring procedures and the revocation mechanism under Rule 11(F) *bis* "was a reasonable variable for the Referral Bench to have included in the Rule 11*bis* equation". *See also Janković* Appeal Decision, paras. 56, 57.

Appeals Chamber finds that this failure did not invalidate the Trial Chamber's findings on the availability and protection of witnesses.

45. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in concluding that Munyakazi's right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, cannot be guaranteed at this time in Rwanda. The Appeals Chamber therefore dismisses this ground of appeal.

VII. GROUND OF APPEAL 4: FAILURE TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

46. The Prosecution submits that the Trial Chamber erred in law and fact by not taking into account or not giving sufficient weight to relevant considerations submitted before it, including safeguards in Rwanda's law for the facilitation of the defence, immunity and safe passage for defence counsel and defence witnesses, the monitoring of proceedings in Rwanda by the African Commission, and the redress of revocation of the order of referral under Rule 11*bis*(F) of the Rules in the event of Rwanda's non-compliance with its obligations.[116] Munyakazi responds that the Trial Chamber did consider the safeguards provided under the Rwandan legal system, but still concluded that given the current conditions in Rwanda, they were inadequate to guarantee a fair trial.[117] He contends that the Trial Chamber's omission to refer to the monitoring proceedings and the remedy of revocation provided for in Rule 11*bis*(F) of the Rules were harmless.[118]

47. The Appeals Chamber finds that the Trial Chamber did take into account the safeguards in Rwanda's law for the facilitation of the defence, including immunity and safe passage for defence counsel and witnesses. The Trial Chamber explicitly considered Articles 13 and 14 of the Transfer Law which address the assistance and protection of witnesses, including defence witnesses.[119] The Trial Chamber considered the provisions in Rwandan law relating to measures put into place to facilitate witness protection and safety, but nevertheless came to the conclusion that, under the current conditions in Rwanda, these laws were inadequate to guarantee witness protection.[120] The Trial Chamber did not explicitly consider the provisions of the Transfer Law relating to the immunity and safe passage of defence counsel, but as it made no finding that Munyakazi might not receive a fair trial due to impediments to the Defence ability to travel and conduct investigations,

[116] Notice of Appeal, paras. 21-24; Appeal Brief, paras. 40-42; Reply, paras. 13, 14.
[117] Response, para. 27.
[118] Response, para. 28.
[119] Rule 11*bis* Decision, paras. 53, 54, 59 and fn. 120.
[120] Rule 11*bis* Decision, para. 59.

the Appeals Chamber does not consider that it was required to do so. The Appeals Chamber therefore finds that the Trial Chamber did consider and give adequate weight to the safeguards in Rwandan law for the facilitation of the defence, and therefore did not commit any error in this regard.

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

49. The Appeals Chamber has addressed the failure of the Trial Chamber to consider the monitoring of proceedings in Rwanda by the African Commission, and the redress of revocation of the order of referral under Rule 11*bis*(F) of the Rules in the event of Rwanda's non-compliance with its obligations in its consideration of Grounds 2 and 3.[121]

VIII. CONCLUSION

50. The Appeals Chamber has granted Ground 2 of the Appeal, finding that the Trial Chamber erred in holding that Rwanda does not respect the independence of the judiciary and that the composition of the courts in Rwanda does not accord with the right to be tried by an independent tribunal and the right to a fair trial. However, it has dismissed the remaining grounds of appeal, which relate to fundamental matters concerning whether Munyakazi's right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, can be guaranteed at this time in Rwanda and whether the penalty structure in Rwanda is adequate for the purposes of transfer under Rule 11*bis* of the Rules. Consequently, despite granting Ground 2 of the Appeal, the Appeals Chamber finds that the Trial Chamber did not err in denying the Prosecution's request to refer Munyakazi's case to Rwanda.

IX. DISPOSITION

51. For the foregoing reasons, the Appeals Chamber,

GRANTS Ground 2 of the Appeal;

DISMISSES the remainder of the Appeal; and

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

[121] *See supra* paras. 30, 44.

Judge Fausto Pocar
Presiding

Dated this 8th day of October 2008,
at The Hague, The Netherlands.

[Seal of the Tribunal]