



**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: 4 December 2008

THE PROSECUTOR

v.

Ildephonse HATEGEKIMANA

Case No. ICTR-00-55B-R11bis

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

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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* denying its request to refer the case of Ildephonse Hategekimana (“Hategekimana”) to the Republic of Rwanda (“Rwanda”).²

I. BACKGROUND

2. Hategekimana is charged with genocide, or alternatively with complicity in genocide, and with murder and rape as crimes against humanity.³ On 7 September 2007, the Prosecution requested the referral of Hategekimana’s case to Rwanda pursuant to Rule 11*bis* of the Rules.⁴ Hategekimana responded on 19 December 2007, opposing the referral.⁵ On 2 October 2007, the President of the Tribunal designated a Chamber under Rule 11*bis* of the Rules (“Trial Chamber”) to consider whether to grant the Prosecution’s request for referral.⁶ The Trial Chamber granted leave to Rwanda, the International Criminal Defence Attorneys Association (“ICDAA”), the *Association des Avocats de la Défense* and Human Rights Watch (“HRW”) to appear as *amici curiae*.⁷ On 19 June 2008, the Trial Chamber issued the impugned Rule 11*bis* Decision, in which it denied the Prosecution’s request for referral of Hategekimana’s case to Rwanda.⁸

3. The Prosecution appealed the Rule 11*bis* Decision, filing its Notice of Appeal on 30 June 2008 and its Appeal Brief on 14 July 2008. On 7 July 2008, Hategekimana filed a motion

¹ Prosecution’s Notice of Appeal (Rule 11 *bis* (H)), 30 June 2008 (“Notice of Appeal”); Prosecutor’s Appellant’s Brief (Rule 11 *bis* (H)), 14 July 2008 (“Appeal Brief”).

² Decision on Prosecutor’s Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, *Rule 11 bis of the Rules of Procedure and Evidence*, 19 June 2008 (“Rule 11*bis* Decision”).

³ Amended Indictment, 1 October 2007.

⁴ Prosecutor’s Request for the Referral of the Case of Idelphonse [*sic*] Hategekimana to Rwanda Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence, 7 September 2007 (“Referral Request”).

⁵ *Réponse de la Défense à: Prosecutor’s Request for the Referral of the Case of Idelphonse [*sic*] Hategekimana to Rwanda Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence*, 19 December 2007. *See also* Prosecutor’s Reply to the Defence’s Response to the Prosecutor’s Request for the Referral of the Case of Hategekimana to Rwanda, 11 January 2008.

⁶ Designation of Trial Chamber for the Referral of the Case of Idelphonse [*sic*] Hategekimana to Rwanda, 2 October 2007.

⁷ Decision on Requests by the Republic of Rwanda, the Kigali Bar Association, the ICDAA, and ADAD for Leave to Appeal and Make Submissions as *Amici Curiae*, 4 December 2007; Decision on *Amicus* Requests and Pending Defence Motions and Order for Further Submissions, 20 March 2008.

⁸ Rule 11*bis* Decision, Disposition.

requesting service of procedural documents in French and an extension of time to respond to the Notice of Appeal⁹ which the Appeals Chamber granted on 24 July 2008.¹⁰ On 6 August 2008, Hategekimana filed a motion for clarification of the calculation of time limits for filing a response to the Appeal Brief,¹¹ which the Appeals Chamber dismissed as moot on 25 August 2008.¹² Hategekimana filed his response to the Appeal Brief on 1 September 2008.¹³ The Prosecution did not reply. Hategekimana filed a Notice of Cross-Appeal on 15 August 2008¹⁴ and a Cross-Appeal on 15 September 2008. The Appeals Chamber rejected the Cross-Appeal as it was filed out of time.¹⁵ On 3 September 2008, Hategekimana filed a motion requesting permission to file additional evidence¹⁶ and the Prosecution responded on 12 September 2008.¹⁷ The Appeals Chamber dismissed Hategekimana's request on 2 October 2008.¹⁸ On 6 October 2008, Rwanda requested permission to file an *amicus curiae* brief.¹⁹ Hategekimana responded on 27 October 2008, opposing the request.²⁰ The Appeals Chamber granted Rwanda's request on 30 October 2008²¹ and Rwanda filed its brief on 10 November 2008.²² Hategekimana responded to it on 26 November 2008.²³

II. APPLICABLE LAW

4. Rule 11*bis* of the Rules allows a designated Trial Chamber to refer a case to a competent

⁹ Defence Motion for Service of Procedural Documents in French and for a Time Limit to Respond to the Prosecutor's Notice of Appeal of 30 June 2008, 7 July 2008.

¹⁰ Decision on Motion for Translation and Extension of Time, 24 July 2008.

¹¹ Defence Motion to Clarify Computation of the Time Limit to Respond to the Prosecutor's Notice of Appeal of 30 June 2008, 6 August 2008.

¹² Decision on Request for Clarification of Time Limits, 25 August 2008.

¹³ Defence Response to Prosecutor's Appellant's Brief (Rule 11 *bis* (H) of the Rules), 1 September 2008 ("Response"). The Appeals Chamber notes that several of the submissions in the Response cover issues that were not the subject of the Appeal, and mirrored those in the *Mémoire d'appel incident de la Défense*, 15 September 2008 ("Cross-Appeal"). See Response, paras. 8-13.

¹⁴ *Requête aux fins d'appel incident de la Défense*, 15 August 2008 ("Notice of Cross-Appeal").

¹⁵ Hategekimana filed a motion for extension of time in which to file his Cross-Appeal Brief. See Defence Motion for Extension of Time to File the Brief in Support of its Notice of Cross-Appeal, 1 September 2008. However, the Appeals Chamber dismissed this motion and rejected the Cross-Appeal. See Decision on a Request for an Extension of Time to File a Cross-Appeal, 16 September 2008.

¹⁶ *Requête de la Défense en dépôt de moyens de preuve supplémentaires (Article 115 du Règlement de procédure et de preuve)*, 3 September 2008.

¹⁷ *Réponse du Procureur à la «Requête de la Défense en dépôt de moyens de preuve supplémentaires (Article 115 du Règlement de procédure et de preuve)»*, 12 September 2008.

¹⁸ Decision on Request to Admit Additional Evidence, 2 October 2008.

¹⁹ 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 II of the Request for Referral of the Case of Ildephonse Hategekimana to Rwanda Pursuant to Rule 11*bis* of the Rules (Rules 74 and 107 of the Rules of Procedure and Evidence), 6 October 2008.

²⁰ *Réponse de la Défense à la Requête intitulée* "Request of the Republic of Rwanda for permission to file an *amicus curiae* brief concerning the prosecutor's Fsicg appeal of the denial by trial Fsicg Chamber III of the request for referral of Ildephonse Hategekimana to Rwanda pursuant to rule Fsicg 11 *bis* of the Rules (Rules 74 and 107 of the Rules of Procedure and Evidence)", 27 October 2008.

²¹ Decision on Request from the Republic of Rwanda for Permission to file an *Amicus Curiae* Brief, 30 October 2008.

²² *Amicus Curiae* Brief on Behalf of the Government of Rwanda, 10 November 2008 ("Rwanda *Amicus* Brief").

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.²⁴ The penalty structure within the State must provide an appropriate punishment for the offences for which the accused is charged,²⁵ and conditions of detention must accord with internationally recognized standards.²⁶ The Trial Chamber must also consider whether the accused will receive a fair trial, including whether the accused will be accorded the rights set out in Article 20 of the Tribunal's Statute ("Statute").²⁷

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.²⁸ 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.²⁹

III. GROUND OF APPEAL 1: COMMAND RESPONSIBILITY

6. The Prosecution submits that the Trial Chamber erred in law by (1) concluding that Rwandan law does not "criminalize" command responsibility; and (2) denying referral on this basis.³⁰

²³ *Réponse de la Défense à Amicus Curiae* Brief on Behalf of the Government of Rwanda of 10 November 2008, 26 November 2008 ("Response to *Amicus* Brief").

²⁴ *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecutor's Appeal against Decision on Referral under Rule 11*bis*, 30 October 2008 ("*Kanyarukiga* Appeal Decision"), para. 4, fn. 17, citing *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, and sources cited therein.

²⁵ *Kanyarukiga* Appeal Decision, para. 4, fn. 18, citing *Munyakazi* Appeal Decision, para. 4, fn. 16, and sources cited therein.

²⁶ *Kanyarukiga* Appeal Decision, para. 4, fn. 19, citing *Munyakazi* Appeal Decision, para. 4, fn. 17, and sources cited therein.

²⁷ *Kanyarukiga* Appeal Decision, para. 4, fn. 20, citing *Munyakazi* Appeal Decision, para. 4, fn. 18, and sources cited therein.

²⁸ *Kanyarukiga* Appeal Decision, para. 5, fn. 21, citing *Munyakazi* Appeal Decision, para. 5, fn. 19, and sources cited therein.

²⁹ *Kanyarukiga* Appeal Decision, para. 5, fn. 22, citing *Munyakazi* Appeal Decision, para. 5; see also *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006, para. 9.

³⁰ Notice of Appeal, para. 2; Appeal Brief, paras. 12-14.

7. The Trial Chamber noted that, in making their submissions, both Rwanda and the Prosecution failed to address whether command responsibility is recognized as a mode of criminal liability under Rwandan law, and that it would “proceed on the assumption that Rwandan law does not recognize command responsibility or did not do so at the time relevant to the Amended Indictment”, although it was satisfied that individual criminal responsibility under Article 6(1) of the Statute was adequately covered under Rwandan law.³¹ The Trial Chamber observed that the Amended Indictment was structured in such a way that Hategekimana was allegedly responsible both as an individual and as a superior under Articles 6(1) and 6(3) of the Statute for the same material facts.³² The Trial Chamber considered that:

Under such circumstances, Mr. Hategekimana will go free in Rwanda if the evidence does not show that he planned, ordered, instigated, committed, or aided and abetted the alleged crimes, even if it does show such involvement on the part of his proven subordinates and that Mr. Hategekimana knew or had reason to know of their actions. Given the importance of command responsibility to the Amended Indictment, the Trial Chamber is not satisfied that there is an adequate legal framework under Rwandan law which criminalizes Mr. Hategekimana’s alleged conduct.³³

Accordingly, the Trial Chamber found that referral of Hategekimana’s case was not justified on the basis that it was “not satisfied that Rwanda’s legal framework criminalizes command responsibility.”³⁴

8. The Prosecution submits that the Trial Chamber erred in failing to consider its entire submission, including appendices to the Referral Request. It points out that Article 3 of the Organic Law No. 08/96 of 30 August 1996 (“Genocide Law”),³⁵ contained in Appendix C of its Referral Request, “criminalizes” command responsibility,³⁶ as do two other laws.³⁷ In this respect the

³¹ Rule 11*bis* Decision, paras. 18-19.

³² Rule 11*bis* Decision, para. 19.

³³ Rule 11*bis* Decision, para. 19. The Trial Chamber also stated that, “in so finding, it did not consider persuasive for the instant case the approach” of the Trial Chamber in the case of *The Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, 14 September 2005, paras. 38-46. See para. 19, fn. 26.

³⁴ Rule 11*bis* Decision, para. 78(i).

³⁵ Organic Law No. 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990.

³⁶ Notice of Appeal, para. 4; Appeal Brief, para. 15.

³⁷ Notice of Appeal, paras. 5, 6 referring to Organic Law No. 33*bis*/2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, of 6 September 2003, (“Organic Law No. 33*bis*/2003”) Article 18 which provides, *inter alia*: “The fact that any of such crimes provided for by this law has been committed by a subordinate shall not exempt the authority which is his or her superior from his or her criminal liability if he or she knew or had reasons to know that the subordinate was preparing to commit that act or had committed it and that the authority superior in hierarchy has not taken the necessary and reasonable measures to prevent the said act from being committed or to punish their perpetrators, and to inform the relevant authorities.”; Organic Law No. 16/2004 of 19 June 2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts, (“Gacaca Law”) Article 53 which provides: “The fact that any of the acts aimed at by this organic law has been committed by a subordinate, does not free his or her superior from his or her criminal responsibility if he or she knew or could have known that his or her subordinate was getting ready to commit this act or had done it, and that the superior has not taken necessary and

Prosecution argues that the Trial Chamber ought to have been aware of Article 53 of the *Gacaca* Law, since it was mentioned by the Trial Chamber elsewhere in its Rule 11*bis* Decision.³⁸ It further submits that the Trial Chamber should have invited the Prosecution and Rwanda to make further submissions on the issue, before denying referral on this basis.³⁹

9. The Prosecution submits that the Trial Chamber abused its discretion and misdirected itself in basing its refusal to refer Hategekimana's case on its lack of knowledge of any provisions under Rwandan Law "criminalizing" command responsibility.⁴⁰ It argues that neither Rule 11*bis* of the Rules, nor the jurisprudence of this Tribunal or the ICTY, requires that the laws of the referral State cover all modes of participation pleaded in the indictment, and that it is sufficient that Rwanda adequately criminalizes the crimes charged as international crimes rather than ordinary crimes.⁴¹ It further submits that the applicable mode of participation could still be addressed during the adaptation phase of the indictment.⁴²

10. Hategekimana responds that the Genocide Law was repealed by the *Gacaca* Law and that, therefore, the Genocide Law had no legal effect at the time the Prosecution seized the Trial Chamber of the Referral Request.⁴³ He argues that, since neither the *Gacaca* Law nor the Organic Law No. 33*bis*/2003 formed part of the trial record, the Prosecution cannot rely on them now.⁴⁴ He rejects the Prosecution's submission that the Appeals Chamber may infer that the Trial Chamber was seized of the *Gacaca* Law since it referred to it in its Rule 11*bis* Decision.⁴⁵ Hategekimana further contends that, although the criminal responsibility of a commander derives from the acts of his or her subordinates, this responsibility is nonetheless individual, and the Trial Chamber is therefore justified in considering the existence of command responsibility under Rwandan law when determining whether to refer his case.⁴⁶

11. In its *Amicus* Brief, Rwanda submits that command responsibility was included under Article 3 of the Genocide Law, which covered the period of crimes alleged in the present case in similar terms as prescribed under Article 6(3) of the Statute.⁴⁷ Rwanda explains that, although this

reasonable measures to punish the authors or prevent that the mentioned act be not committed when he or she had means."

³⁸ Notice of Appeal, para. 6; Appeal Brief, para. 17, citing Rule 11*bis* Decision, paras. 15, 17 and 74.

³⁹ Appeal Brief, para. 18.

⁴⁰ Notice of Appeal, para. 2; Appeal Brief, para. 19.

⁴¹ Appeal Brief, para. 20.

⁴² Appeal Brief, para. 19.

⁴³ Response, paras. 18, 19, 26, 27.

⁴⁴ Response, paras. 20-26.

⁴⁵ Response, para. 23.

⁴⁶ Response, paras. 31, 32.

⁴⁷ Rwanda *Amicus* Brief, para. 8.

law was replaced by the *Gacaca* Law, the provision on command responsibility was retained in Article 53 of the *Gacaca* Law, which remains in force and which covers the period of crimes alleged against Hategekimana.⁴⁸ Hategekimana responds that Rwanda's submission adds nothing to the submissions he has already made on this issue and that Rwanda should have highlighted the existence of the command responsibility provision of the *Gacaca* Law in the proceedings before the Trial Chamber.⁴⁹

12. In light of Rwanda's submissions, the Appeals Chamber is satisfied that command responsibility is recognized under Rwandan law, in particular the *Gacaca* Law and the Organic Law No. 33*bis*/2003, and that the Trial Chamber therefore erred in assuming that Rwandan law does not recognize command responsibility, or that it did not do so at the time relevant to the Amended Indictment. Hategekimana's submission that the Genocide Law had no legal effect at the time when the Trial Chamber was seized of the Referral Request is thus of limited utility, since it was open to the Trial Chamber to consider Article 53 of the *Gacaca* Law and the Organic Law No. 33*bis*/2003. Accordingly, the Appeals Chamber finds that the Trial Chamber, which was aware of the *Gacaca* Law⁵⁰ and had information before it as to the existence of the Organic Law No. 33*bis*/2003,⁵¹ erred in failing to consider these laws when making its findings on this issue. The Appeals Chamber further notes that the Trial Chamber held that it was not satisfied that Rwanda's legal framework "criminalizes command responsibility"⁵² and that it was "not satisfied that there is an adequate legal framework under Rwandan law which criminalizes Mr. Hategekimana's alleged conduct."⁵³ The Appeals Chamber finds the Trial Chamber's holdings in this respect to be somewhat confusing, in that they could be interpreted as characterizing command responsibility as a "crime" rather than as a mode of individual criminal responsibility incurred by a superior for failure to prevent or punish certain criminal acts, as enumerated in the Statute, which were committed by his or her subordinates.

13. The Appeals Chamber accordingly grants this ground of appeal.

⁴⁸ Rwanda *Amicus* Brief, para. 9. Rwanda also notes that "Article 53 of the *Gacaca* Law remains unaffected" by the Organic Law No. 13/2008 of 19 May 2007, which modified aspects of the *Gacaca* Law. See Rwanda *Amicus* Brief, para. 9, fn. 15.

⁴⁹ Response to *Amicus* Brief, paras. 29-33.

⁵⁰ Rule 11*bis* Decision, paras. 15, 17, 72, 74. See also para. 65.

⁵¹ HRW *Amicus* Brief, paras. 22, 32.

⁵² Rule 11*bis* Decision, para. 78(i).

⁵³ Rule 11*bis* Decision, para. 19.

IV. GROUND OF APPEAL 2: AVAILABILITY AND PROTECTION OF WITNESSES

14. The Prosecution submits that the Trial Chamber erred in law and in fact in holding that Hategekimana will not obtain the attendance and examination of Defence witnesses under the same conditions as witnesses against him.⁵⁴

15. Recalling the submissions of Hategekimana, HRW and ICDA, ⁵⁵ the Trial Chamber found 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 threats, harassment, arrest or accusations of harbouring ‘genocidal ideology’”.⁵⁶ It further considered that Hategekimana’s submissions and experience at the Tribunal confirmed that many Defence witnesses residing abroad have claimed refugee status, which effectively prevents them from returning to Rwanda to testify.⁵⁷ The Trial Chamber also noted that it was unaware of Rwanda’s participation in any agreements on mutual assistance which would ensure the attendance of witnesses living abroad at trials taking place in Rwanda, and found that Hategekimana “may therefore face difficulties securing the attendance of witnesses living abroad.”⁵⁸

16. The Trial Chamber acknowledged that both the Prosecution and Rwanda offered video-link as a solution to securing the testimony of Defence witnesses residing abroad, but it was not aware of any Rwandan law that addressed the weight to be attached to video-link testimony or the circumstances under which it would be authorized.⁵⁹ The Trial Chamber recalled that video-link testimony may be given less weight in proceedings before the Tribunal, and may not be appropriate for key witnesses, and concluded that “hearing most defence witnesses in a case by video-link after hearing witnesses for the Prosecution in court may violate Mr Hategekimana’s right to a fair trial”.⁶⁰

17. The Prosecution contends that the Trial Chamber abused its discretion and erred in law by relying on generalized and unsupported allegations and opinions from Hategekimana and *amici curiae* that Defence witnesses living both inside and outside Rwanda would be afraid to testify for fear that they would face threats, harassment, arrest or accusations of harbouring “genocidal

⁵⁴ Notice of Appeal, para. 9; Appeal Brief, para. 29.

⁵⁵ Rule 11bis Decision, paras. 63-66.

⁵⁶ Rule 11bis Decision, para. 67.

⁵⁷ Rule 11bis Decision, para. 68.

⁵⁸ Rule 11bis Decision, para. 69.

⁵⁹ Rule 11bis Decision, para. 70.

⁶⁰ Rule 11bis Decision, para. 70. *See also* para. 71.

ideology” without first satisfying itself that Hategekimana’s fears were supported by evidence.⁶¹ It further submits that the Trial Chamber failed to give proper weight to mechanisms available under Rwandan law to facilitate or if necessary enforce the attendance of witnesses living in Rwanda and abroad, including protective measures available under Article 14 of the Transfer Law,⁶² Rwanda’s witness protection service, and legal mechanisms designed to enforce the attendance of witnesses,⁶³ and that there is no evidence that other countries would be unwilling to cooperate with Rwanda in securing the testimony of witnesses residing outside Rwanda.⁶⁴ The Prosecution further argues that the Trial Chamber abused its discretion in finding that hearing “most” Defence witnesses by video-link may violate Hategekimana’s right to a fair trial, without knowing exactly how many Defence witnesses would in fact testify via video-link.⁶⁵

18. Hategekimana responds that the Prosecution’s submissions plainly contradict the reality of the Rwandan justice system⁶⁶ and that, where there is even the slightest doubt that witness safety issues will impact on fair trial of the defendant, this doubt must operate to his benefit.⁶⁷ He further argues that the current laws do not in fact provide sufficient guarantees against possible reprisal from the Rwandan authorities for those witnesses who reside abroad and return to Rwanda to testify and that he is willing to present further additional evidence in support of his submissions on this issue to the Appeals Chamber.⁶⁸ Hategekimana also cites statements made by the Rwandan Minister of Justice which, he contends, demonstrate that the Rwandan authorities will not ensure the protection and attendance of Defence witnesses living abroad.⁶⁹

19. In its *Amicus* Brief, Rwanda submits that the measures which it has adopted to ensure witness availability and protection fully comply with the requirements of Rule 11*bis* of the Rules, and reflect its genuine commitment to addressing this issue.⁷⁰ Rwanda points out that the Appeals Chamber has not required it to take any specific further measures in order to receive transfer cases.⁷¹ It argues that the fears which some potential witnesses may have of travelling to Rwanda, utilizing its witness services, or running afoul of its genocide ideology laws, do not provide a proper

⁶¹ Notice of Appeal, paras. 7-12; Appeal Brief, paras. 29-36, 46-48.

⁶² 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”).

⁶³ Appeal Brief, paras. 38-42, 52-56.

⁶⁴ Appeal Brief, para. 56.

⁶⁵ Appeal Brief, para. 49.

⁶⁶ Response, paras. 37-43, 46-47.

⁶⁷ Response, paras. 44-45.

⁶⁸ Response, para. 49.

⁶⁹ Response, paras. 55-57.

⁷⁰ Rwanda *Amicus* Brief, para. 4.

⁷¹ Rwanda *Amicus* Brief, para. 5.

basis to refuse the transfer of cases to Rwanda.⁷² Rwanda submits that its authorities could address such matters if they were informed of the particular witnesses who did not wish to testify and their reasons for not wanting to do so.⁷³ In addition, Rwanda notes that this Tribunal has already recognized that its laws prohibiting the negation of genocide are understandable,⁷⁴ and that, in any event, these laws were never intended to apply to witnesses involved in transfer cases and that assurances to this effect can be given to any witness as needed.⁷⁵ Rwanda further submits that there is a close working relationship between the Rwandan authorities and the Tribunal's witness protection service which should allay the fears of potential witnesses, and that technical assistance on witness protection issues can be sought from the Tribunal pursuant to Article 18 of the Transfer Law, if required.⁷⁶

20. Hategekimana responds that Rwanda's submissions lack objectivity and are in fact a response to the Appeals Chamber's findings in the *Munyakazi* and *Kanyarukiga* cases, which are not relevant to the current proceedings.⁷⁷ Hategekimana also argues that, in reality, video-link would need to be utilized for Defence witnesses much more often than Rwanda's submissions suggest.⁷⁸

A. Witnesses within Rwanda

21. The Appeals Chamber considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda, and that defence witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed.⁷⁹ The Trial Chamber noted that HRW, ICDA and Hategekimana provided examples of witnesses who had been threatened or harassed after testifying before the Tribunal as well as ordinary and *Gacaca* courts in Rwanda.⁸⁰ It also noted that some witnesses were arrested or

⁷² Rwanda *Amicus* Brief, paras. 5, 7.

⁷³ Rwanda *Amicus* Brief, para. 7.

⁷⁴ Rwanda *Amicus* Brief, para. 7(c), citing *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008, para. 71.

⁷⁵ Rwanda *Amicus* Brief, para. 7(c).

⁷⁶ Rwanda *Amicus* Brief, para. 7(d).

⁷⁷ Response to *Amicus* Brief, paras. 17-18, 25-26.

⁷⁸ Response to *Amicus* Brief, paras. 21-24.

⁷⁹ Request for Permission to Appear as *Amicus Curiae* Pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence on behalf of Human Rights Watch, 27 February 2008, paras. 89-94, 97-102 ("HRW *Amicus* Brief"); Further Submissions as *Amicus Curiae* in Response to Queries from the Chamber on Behalf of Human Rights Watch, 10 April 2008, paras. 7-11 ("HRW Further Submissions"); Brief of *Amicus Curiae* International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of Idelphonse [*sic*] Hategekimana to Rwanda Pursuant to Rule 11bis of the Rules of Procedure and Evidence, 4 April 2008, paras. 100-126, 131 ("ICDAA *Amicus* Brief"). See also *Kanyarukiga* Appeal Decision, para. 26; *Munyakazi* Appeal Decision, para. 37.

⁸⁰ Rule 11bis Decision, para. 63.

accused in *Gacaca* proceedings in Rwanda after testifying⁸¹ and that, according to HRW, some witnesses were afraid to testify for fear of prosecution under Rwandan laws concerning genocidal ideology.⁸²

22. 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 prosecution, threats, harassment, torture, arrest, or even murder.⁸³ The Appeals Chamber considers that it was therefore not necessary for the Trial Chamber to satisfy itself that individual Defence witnesses in this particular case are reluctant to testify for these reasons. It consequently finds that the Trial Chamber did not err in concluding that witnesses in Rwanda may be unwilling to testify for the Defence.

23. The Appeals Chamber further considers that in making its finding on the availability of witnesses, the Trial Chamber did take into account the safeguards in Rwandan law to facilitate or if necessary enforce the attendance of witnesses living in Rwanda and abroad, including immunity and safe passage for defence witnesses. The Trial Chamber explicitly considered Article 14 of the Transfer Law which deals with the assistance and protection of witnesses, including defence witnesses.⁸⁴

B. Witnesses outside Rwanda

24. As indicated above, the Appeals Chamber finds that the Trial Chamber did explicitly consider the provisions of Rwandan law relating to measures put into place to facilitate witness protection and safety, including Article 14 of the Transfer Law.⁸⁵ The Appeals Chamber further finds that the Trial Chamber did not err in accepting Hategekimana's assertion that most of his witnesses reside outside Rwanda, as this is usual for cases before the Tribunal.⁸⁶ The Trial Chamber also expressly referred to the submissions from HRW in finding that witnesses residing outside Rwanda may be unwilling to travel to Rwanda to testify,⁸⁷ and that some Defence witnesses may be

⁸¹ Rule 11*bis* Decision, paras. 63, 65.

⁸² Rule 11*bis* Decision, para. 66, citing HRW Further Submissions, paras. 22-25. *See also* Rule 11*bis* Decision, para. 63.

⁸³ Rule 11*bis* Decision, para. 67; ICDA *Amicus* Brief, paras. 100-126, 131; HRW *Amicus* Brief, paras. 89-94, 97-102; HRW Further Submissions, paras. 7-11. *See also* *Munyakazi* Appeal Decision, para. 37; *Kanyarukiga* Appeal Decision, para. 26.

⁸⁴ Rule 11*bis* Decision, para. 62.

⁸⁵ *See supra* para. 22.

⁸⁶ *See* *Munyakazi* Appeal Decision, para. 40; *Kanyarukiga* Appeal Decision, para. 31.

⁸⁷ Rule 11*bis* Decision, para. 68, citing HRW *Amicus* Brief, paras. 38-40.

prevented from returning to Rwanda to testify, as a consequence of their refugee status.⁸⁸ The Appeals Chamber 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, Hategekimana may face difficulties in obtaining the testimony of witnesses living outside Rwanda.

25. With respect to Rwanda's ability to compel witnesses to testify, the Appeals Chamber, recalling its findings in *Munyakazi* and *Kanyarukiga*, and noting Rwanda's submissions in this case, finds 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.⁸⁹ 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.⁹⁰ It therefore finds that the Trial Chamber erred in holding that Rwanda had not taken any steps to conclude conventions on mutual assistance in criminal matters, or to secure the attendance or evidence of witnesses from abroad.

26. 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.⁹¹ The Appeals Chamber further notes Rwanda's submission that this procedure is intended to be an exceptional measure and that the possibility also exists for evidence to be taken abroad.⁹² 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,⁹³ and that it would be a

⁸⁸ Rule 11bis Decision, para. 68.

⁸⁹ *Munyakazi* Appeal Decision, para. 41; *Kanyarukiga* Appeal Decision, para. 32. See also Rwanda *Amicus* Brief, para. 7(a).

⁹⁰ *Munyakazi* Appeal Decision, para. 41; *Kanyarukiga* Appeal Decision, para. 32. 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.

⁹¹ See also *Munyakazi* Appeal Decision, para. 42; *Kanyarukiga* Appeal Decision, para. 33.

⁹² Rwanda *Amicus* Brief, para. 7(b).

⁹³ Rule 11bis Decision, para. 70. See also *Munyakazi* Appeal Decision, para. 42; *Kanyarukiga* Appeal Decision, para. 33.

violation of the principle of equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person.⁹⁴

C. Monitoring

27. The Prosecution submits that the Trial Chamber erred in law and in fact by failing to give equal weight to the monitoring and revocation mechanisms available under Rwandan law as a means to deal with the availability of witnesses, despite doing so elsewhere in the Rule 11*bis* Decision in regard to other issues.⁹⁵ Hategekimana responds that the prospect of trial monitoring and possible revocation does not guarantee that his fair trial rights will be respected.⁹⁶ He argues that the Rwandan authorities could impede any monitoring processes or decide to not comply with a revocation decision, and that, in any event, the revocation procedure will be difficult or impossible to invoke after the end of the Tribunal's mandate.⁹⁷

28. In its *Amicus* Brief, Rwanda submits that although monitoring mechanisms obviously cannot solve issues of witness availability, they can be utilized in the event that the Rwandan courts or national authorities fail to provide an appropriate remedy in practice.⁹⁸ Rwanda points out that the Appeals Chamber has recognized that there is no reason to doubt the qualifications and impartiality of the African Commission to monitor the trials,⁹⁹ nor is there any basis to find that the African Commission or the Prosecution of the ICTR would not bring any fair trial issues which may arise to the attention of the Trial Chamber.¹⁰⁰ Rwanda submits that, should the Appeals Chamber consider it necessary for Hategekimana to raise such matters directly with the Trial Chamber, the Tribunal could amend Rule 11*bis* of the Rules to enable Hategekimana to do so.¹⁰¹

29. The Appeals Chamber notes that the Trial Chamber considered the possible safeguard mechanisms of monitoring and revocation available in Rwanda in the context of other issues in its decision,¹⁰² but did not consider these procedures in the context of assessing the availability and protection of witnesses. It accordingly finds that the Trial Chamber erred in failing to consider whether these mechanisms would provide an adequate remedy to deal with the issue of availability

⁹⁴ Rule 11*bis* Decision, para. 70. See also *Munyakazi* Appeal Decision, para. 42; *Kanyarukiga* Appeal Decision, para. 33.

⁹⁵ Notice of Appeal, para. 13; Appeal Brief, para. 57, citing Rule 11*bis* Decision, paras. 45, 55, 60, 71. See also Appeal Brief, paras. 56, 58-59.

⁹⁶ Response, para. 60.

⁹⁷ Response, paras. 61-64.

⁹⁸ Rwanda *Amicus* Brief, para. 7(e).

⁹⁹ Rwanda *Amicus* Brief, para. 7(e), citing *Kanyarukiga* Appeal Decision, para. 38.

¹⁰⁰ Rwanda *Amicus* Brief, para. 7(e).

¹⁰¹ Rwanda *Amicus* Brief, para. 7(e).

¹⁰² See Rule 11*bis* Decision, paras. 45, 55, 60.

and protection of witnesses. However, the Appeals Chamber reiterates its finding in *Kanyarukiga* that, while the African Commission indeed has the necessary qualifications to monitor trials,¹⁰³ these procedures and remedies would not necessarily solve the current problems related to the availability and protection of witnesses.¹⁰⁴ 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.¹⁰⁵ Therefore, Hategekimana would not be able to trigger the operation of these “remedies”.¹⁰⁶ In light of the foregoing, the Appeals Chamber finds that this omission did not invalidate the Trial Chamber’s findings on the availability and protection of witnesses.

D. Conclusion

30. The Appeals Chamber finds that the Trial Chamber erred in (1) holding that Rwanda had not taken any steps to conclude agreements on mutual assistance in criminal matters or to secure the attendance or evidence of witnesses from abroad; and (2) failing to give the appropriate weight to the availability of monitoring and revocation mechanisms as a means to deal with the availability of witnesses. However, in light of the Appeals Chamber’s findings¹⁰⁷ that the Trial Chamber did not err in finding that Hategekimana may face difficulties in securing the attendance of witnesses who reside inside and outside Rwanda, to the extent and in a manner which would jeopardize his right to a fair trial,¹⁰⁸ the Appeals Chamber does not consider that these errors invalidate the Trial Chamber’s overall findings on the availability and protection of witnesses. The Appeals Chamber therefore dismisses this ground of appeal.

V. GROUND OF APPEAL 3: APPLICABLE PUNISHMENT

31. The Prosecution submits that the Trial Chamber committed discernible errors in law when it concluded that, pursuant to Rwandan law, Hategekimana may face life imprisonment in isolation without adequate safeguards, in violation of his right not to be subjected to cruel, inhumane and degrading treatment. Specifically, it submits that the Trial Chamber erred in law in finding (1) that the Abolition of Death Penalty Law¹⁰⁹ does not apply to persons transferred to Rwanda pursuant to Rule 11*bis* of the Rules; and (2) that Hategekimana will not be subjected to life imprisonment with

¹⁰³ *Munyakazi* Appeal Decision, para. 30; *Kanyarukiga* Appeal Decision, para. 38.

¹⁰⁴ *Kanyarukiga* Appeal Decision, para. 38.

¹⁰⁵ Rule 11*bis* (D) (iv) and (F) of the Rules. *See also Kanyarukiga* Appeal Decision, para. 38.

¹⁰⁶ *Kanyarukiga* Appeal Decision, para. 38.

¹⁰⁷ *See supra* paras. 22, 24.

¹⁰⁸ *See* Rule 11*bis* Decision, paras. 71, 78(ii).

special provisions, as his trial will be governed by the Transfer Law, which specifically provides for only life imprisonment as the maximum penalty.¹¹⁰

32. In regard to Hategekimana's submission that he may be subjected to life imprisonment with special provisions, the Trial Chamber stated that it was unaware of any Rwandan jurisprudence on the relationship between the Abolition of Death Penalty Law and the Transfer Law, and considered that it was not for the Trial Chamber to determine how these laws may be applied by the Rwandan courts.¹¹¹ It further noted the possibility that the Abolition of Death Penalty Law would override the Transfer Law, on the principle that a latter statute removes the effect of a prior statute where they are "irredeemably" inconsistent.¹¹² The possibility therefore existed, the Trial Chamber concluded, that Rwandan courts would apply the Abolition of Death Penalty Law to Hategekimana, meaning that he could be subjected to life imprisonment with special provisions.¹¹³

33. The Trial Chamber further observed that certain human rights bodies hold the position that imprisonment in isolation should be applied only in exceptional circumstances for limited periods, and that safeguards should be in place to ensure that the application of such a penalty is not abused.¹¹⁴ It noted that Rwanda's Abolition of Death Penalty Law appears to permit solitary confinement in isolation for twenty years or more without such safeguards, and that it "was not aware of any safeguards elsewhere in Rwandan law."¹¹⁵ The Trial Chamber concluded that referral was not justified, since it was "possible that, pursuant to Rwandan law, Hategekimana may face life imprisonment in isolation without adequate safeguards in violation of his right not to be subjected to cruel, inhuman or degrading punishment."¹¹⁶

34. The Prosecution contends that the Trial Chamber's findings are based on an erroneous interpretation of the governing law regarding the applicable penalty structure for referral cases.¹¹⁷ It argues that the wording of the Abolition of Death Penalty Law demonstrates that it is intended to substitute the death penalty provisions in the laws cited in its preamble with life imprisonment or life imprisonment with special provisions.¹¹⁸ It contends that the Abolition of Death Penalty Law was therefore not intended to regulate the Transfer Law, since (1) the latter law was not mentioned

¹⁰⁹ Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty ("Abolition of Death Penalty Law").

¹¹⁰ Notice of Appeal, paras. 15-18; Appeal Brief, paras. 63, 64.

¹¹¹ Rule 11*bis* Decision, para. 23.

¹¹² Rule 11*bis* Decision, para. 23.

¹¹³ Rule 11*bis* Decision, para. 23.

¹¹⁴ Rule 11*bis* Decision, para. 25.

¹¹⁵ Rule 11*bis* Decision, para. 25.

¹¹⁶ Rule 11*bis* Decision, para. 78(iii).

¹¹⁷ Notice of Appeal, para. 15; Appeal Brief, para. 65.

in the said preamble, and (2) the Transfer Law provides for the maximum penalty of life imprisonment and does not contain a death penalty provision, and therefore lays outside the scope of the laws affected by the Abolition of Death Penalty Law.¹¹⁹ It submits that the fact that Hategekimana therefore would be subject to a more favourable sentencing regime does not affect his fair trial rights and therefore should not be an obstacle to referral.¹²⁰

35. The Prosecution further submits that the Trial Chamber's findings misapplied the general principle of *lex posterior derogate priori*, since the Transfer Law is *lex specialis* and was not expressly repealed or in conflict with the Abolition of Death Penalty Law.¹²¹ It argues that even if such a conflict existed between the two laws, the Trial Chamber should have applied Article 25 of the Transfer Law, which provides that the Transfer Law will prevail in the event of any inconsistency.¹²² The Prosecution further argues that the Trial Chamber committed a discernible error by construing the Transfer Law and the Abolition of Death Penalty Law together when they are in fact two separate legal regimes, and misdirected itself as to the sentencing regime applicable to Hategekimana.¹²³ It submits that the Transfer Law provides a special regime for persons transferred to Rwanda, which is favourable to them and consistent with international standards, and under which life imprisonment is the heaviest penalty.¹²⁴

36. Hategekimana responds that the Prosecution's submissions on applicable punishment are misguided¹²⁵ and that the Prosecution has already implicitly admitted the possibility that life imprisonment with special provisions could be imposed on him.¹²⁶ He further submits that there is a real possibility that his indictment would be amended after he is transferred to Rwanda, and that he could be subject to a range of other laws, including the Penal Code and the *Gacaca* Law.¹²⁷ He notes that the Trial Chamber's decision acknowledges the potential applicability of the Abolition of Death Penalty Law, meaning that the penalty of life imprisonment under the Transfer Law is therefore not the maximum penalty which could apply to him, and it would be open to the Rwandan

¹¹⁸ Appeal Brief, paras. 66-69.

¹¹⁹ Appeal Brief, paras. 66-71.

¹²⁰ Appeal Brief, para. 72.

¹²¹ Notice of Appeal, para. 17; Appeal Brief, para. 73.

¹²² Notice of Appeal, para. 17; Appeal Brief, para. 74.

¹²³ Notice of Appeal, para. 16; Appeal Brief, para. 75.

¹²⁴ Appeal Brief, paras. 77-83.

¹²⁵ Response, para. 67.

¹²⁶ Response, paras. 70, 71, citing Prosecutor's Reply to the Defence's Response to the Prosecutor's Request for Referral of the Case of Hategekimana to Rwanda, 11 January 2008, paras. 20, 21, in which the Prosecution quotes from Article 3 of the Abolition of Death Penalty Law, and submits that "Fign any case, the distinction between these two potential sentences does not provide any basis for denying transfer of the case. In neither case would the Accused face the death penalty, and contrary to the Accused's position, in neither case would the Accused be deprived of any rights to which he would otherwise be entitled."

¹²⁷ Response, paras. 68, 69.

courts to apply either law.¹²⁸ He further contends that Rwanda's ratification and enactment of its international obligations, and the possibility of revocation of the trial, are not sufficient to establish that his referral should occur, and that the Prosecution was obliged, yet failed, to establish that these theoretical safeguards would actually be implemented.¹²⁹

37. In its *Amicus* Brief, Rwanda points out that its Parliament has recently passed a new law which modifies the Abolition of Death Penalty Law.¹³⁰ Rwanda submits that pursuant to Article 1 of this law, life imprisonment with special provisions, which includes solitary confinement, shall not apply to cases transferred from the Tribunal to Rwanda under the Transfer Law.¹³¹ Article 1 states:

Life imprisonment with special provision as provided for by paragraph one of this article shall not apply to cases transferred to Rwanda from the International Criminal Tribunal for Rwanda and from other States in accordance with the provisions of the Transfer Law....

Hategekimana responds that (1) this draft law lacks any of the usual *indicia* of reliability;¹³² (2) that the Appeals Chamber cannot in any event rely on it since the law has not yet entered into force¹³³ and is not retroactive;¹³⁴ (3) the Appeals Chamber cannot consider this law, since it may only adjudicate on the correctness of the Trial Chamber's decision based on the information which was available to it at the time of making its decision;¹³⁵ and (4) the mere fact that this law could be enacted so quickly illustrates the instability of Rwanda's legislative system, and that there is a risk that Rwanda could modify this law again, once he was transferred to Rwanda.¹³⁶

38. The Appeals Chamber considers that, should this new law enter into force in its current form, the ambiguity as to the applicable punishment for transfer cases which it noted in the *Munyakazi* and *Kanyarukiga* decisions¹³⁷ would be resolved. However, there is no information before the Appeals Chamber to indicate that this law has entered into force. The Appeals Chamber is therefore unable to conclude that the ambiguity as to the applicable punishment under Rwandan law for transfer cases has been resolved. Accordingly, the Appeals Chamber finds no error in the

¹²⁸ Response, paras. 72-74.

¹²⁹ Response, paras. 75-77.

¹³⁰ See Rwanda *Amicus* Brief, para. 2 fn. 3. The Appeals Chamber notes Rwanda's statement therein that this law has not yet officially entered into force. See also Annex 1.

¹³¹ Rwanda *Amicus* Brief, para. 2.

¹³² Response to *Amicus* Brief, para. 10(a).

¹³³ Response to *Amicus* Brief, para. 10(b).

¹³⁴ Response to *Amicus* Brief, para. 10(d).

¹³⁵ Response to *Amicus* Brief, paras. 9, 10(c).

¹³⁶ Response to *Amicus* Brief, paras. 13-14.

¹³⁷ See *Munyakazi* Appeal Decision, paras. 16-20; *Kanyarukiga* Appeal Decision, paras. 12-16. See also *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-R11bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008, para. 87.

Trial Chamber's conclusion that under Rwanda's current legal framework, Hategekimana may face life imprisonment in isolation without adequate safeguards, in violation of his right not to be subjected to cruel, inhumane and degrading treatment.¹³⁸ The Appeals Chamber therefore dismisses this ground of appeal.

VI. CONCLUSION

39. The Appeals Chamber has granted Ground 1 of the Appeal, finding that the Trial Chamber erred in proceeding on the assumption that Rwandan law does not recognize command responsibility as a mode of criminal liability. However, the Appeals Chamber has dismissed Ground 2 of the Appeal, notwithstanding its finding that the Trial Chamber did err in (1) holding that Rwanda had not taken any steps to conclude agreements on mutual assistance in criminal matters, or to secure the attendance or evidence of witnesses from abroad;¹³⁹ and (2) failing to consider the availability of monitoring and revocation mechanisms in the context of assessing the availability and protection of witnesses.¹⁴⁰ Further, the Appeals Chamber has dismissed Ground 3 of the Appeal on the basis that it is unable to conclude that the penalty structure in Rwanda will be adequate for the purposes of referral under Rule 11*bis* of the Rules, since there is no information before it to confirm that the draft law to which Rwanda refers has entered into force, and that the ambiguities regarding the applicable punishment for transfer cases are therefore resolved.

40. The Appeals Chamber acknowledges the steps which Rwanda has recently taken to clarify the issue of the applicable penalty for transfer cases. However, the Appeals Chamber notes its finding under Ground 2 that the Trial Chamber did not err in concluding that Hategekimana'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 finds that the Prosecution has not shown that the Trial Chamber abused its discretion in denying the request to transfer Hategekimana's case to Rwanda on the basis that, under the present circumstances, it was not satisfied that he would receive a fair trial in that country.

¹³⁸ See *Tubarimo Aloys v. The Government*, Case. No. RS/INCONST/Pén. 0002/08/CS, 29 August 2008, para. 36 of the English translation of the Decision. 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 implementation 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 also *Kanyarukiga* Appeal Decision, para. 15.

¹³⁹ See *supra* paras. 25, 30.

¹⁴⁰ See *supra* paras. 29, 30.

VII. DISPOSITION

41. For the foregoing reasons, the Appeals Chamber,

GRANTS Ground 1 of the Appeal;

DISMISSES Grounds 2 and 3 of 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.

Judge Fausto Pocar
Presiding

Dated this 4th day of December 2008,
at The Hague, The Netherlands.

[Seal of the Tribunal]