

ICTR-97-36-R11bis  
28-5-2008  
(736-711)

736  
-#m



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

OR: ENG

**TRIAL CHAMBER III**

**Before:** Judge Inés M. Weinberg de Roca, Presiding  
Judge Lee Gacuga Muthoga  
Judge Robert Fremr

**Registrar:** Adama Dieng

**Date:** 28 May 2008

JUDICIAL REGISTRY ARCHIVES  
28-05-2008  
2008 MAY 28 P 5:39  
[Signature]

**THE PROSECUTOR**

v.

**Yussuf MUNYAKAZI**

*Case No. ICTR-97-36-R11bis*

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

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

**Office of the Prosecutor:**

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

**Defence Counsel:**

Jwani Timothy Mwaikusa  
Eliane Nyampinga

[Handwritten signature]

## I. INTRODUCTION

1. The Chamber is seised of the Prosecutor's request to refer the case of Yussuf Munyakazi ("Accused") to the Republic of Rwanda ("Rwanda") pursuant to Rule 11*bis* of the International Criminal Tribunal for Rwanda's ("Tribunal") Rules of Procedure and Evidence ("Rules").<sup>1</sup>

2. The Accused is charged with genocide, or alternatively, with complicity in genocide, and extermination as a crime against humanity.<sup>2</sup> The crimes are alleged to have been committed in Cyangugu and Kibuye *préfectures*, within the territory of Rwanda.

3. In the Referral Request of 7 September 2007, the Prosecutor submits that Rwanda has jurisdiction over the Accused and is willing and adequately prepared to accept the Accused's case. The Prosecutor further submits that, as required by Rule 11*bis*, Rwanda possesses a legal framework that criminalises the alleged conduct of the Accused as international crimes, ensures that the death penalty will not be imposed, and guarantees the Accused's fair trial rights.

4. In a response, dated 2 October 2007, Defence Counsel for the Accused objects to the Referral Request on the grounds that, amongst other things, Rwandan law does not provide an adequate legal framework and that the Accused cannot receive a fair trial in Rwanda.<sup>3</sup>

---

<sup>1</sup> "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", 7 September 2007 ("Referral Request"). Following the Referral Request, the President of the Tribunal designated this Trial Chamber to determine the matter in accordance with Rule 11*bis* on 2 October 2007. See "Designation of a Trial Chamber for the Referral of the Case of Yussuf Munyakazi to Rwanda", 2 October 2007.

<sup>2</sup> Amended Indictment, 29 November 2002 ("Indictment"). The Accused is charged with individual criminal responsibility under Article 6 (1) of the Statute of the International Tribunal for Rwanda ("Statute") for genocide pursuant to Article 2 (3) (a) or alternatively, complicity in genocide pursuant to Article 2 (3) (e) and extermination as a crime against humanity pursuant to Article 3 (b) of the Statute.

<sup>3</sup> "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 ("Defence Response"). On 22 October 2007, the Prosecutor replied to the Defence Response, "Prosecutor's Reply to 'The 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', 22 October 2007" ("Prosecutor's Reply").

5. Pursuant to Rule 74,<sup>4</sup> the Chamber has granted leave to Rwanda, the Kigali Bar Association ("KBA"), the International Criminal Defence Attorneys Association ("ICDAA"), and Human Rights Watch ("HRW") to appear as *amicus curiae* and make submissions on specific issues.<sup>5</sup> All *amici* filed written submissions in accordance with the Chamber's orders.<sup>6</sup>

6. A hearing was held on 24 April 2008 ("Referral Hearing") during which the Parties and *amici* had an opportunity to make additional submissions and answer questions from the Chamber.<sup>7</sup>

7. In deciding whether to refer this case to Rwanda, the Chamber will examine whether:

- (i) This case is appropriate for transfer to the authorities of another State;<sup>8</sup>
- (ii) Rwanda has jurisdiction;<sup>9</sup> and
- (iii) Rwanda is an appropriate referral State in that (a) the death penalty will not be imposed and the Accused will receive an appropriate punishment if convicted of the crimes with which he is charged;<sup>10</sup> and (b) the Accused will receive a fair trial.<sup>11</sup>

<sup>4</sup> Rule 74 states: "A Referral Bench may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organisation or person to appear before it and make submissions on any issue specified by the Referral Bench."

<sup>5</sup> "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; and "Decision on the Request by Human Rights Watch to Appear as *Amicus Curiae*", 10 March 2008.

<sup>6</sup> "*Amicus Curiae* Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11bis", 21 December 2007 ("Rwanda's *Amicus* Brief"); "Brief of International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused Yussuf Munyakazi to Rwanda Pursuant to Rule 11bis of the Rules of Procedure and Evidence", 4 January 2008 ("ICDAA *Amicus* Brief"); "*Amicus Curiae* Brief of the Kigali Bar Association in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11bis", 10 January 2008 ("KBA *Amicus* Brief"); "Brief of Human Rights Watch As *Amicus Curiae* In Opposition to Rule 11bis Transfer", 17 March 2008 ("HRW *Amicus* Brief").

<sup>7</sup> "Scheduling Order for a Hearing on Referral of the Case of Yussuf Munyakazi to the Republic of Rwanda", 19 February 2008.

<sup>8</sup> See paras. 8 to 14 of this Decision.

<sup>9</sup> Rule 11bis (A).

<sup>10</sup> Rule 11bis (C) and the Tribunal's jurisprudence to be discussed further at paras. 17 to 32 of this Decision.

<sup>11</sup> Rule 11bis (C).

## II. APPROPRIATE CASE FOR CONSIDERATION

### A. Submissions

8. The Prosecutor submits that selection of a case for referral to the authorities of a State is a matter falling within his discretion.<sup>12</sup>

### B. Law

9. The Chamber notes that while the Prosecutor has discretion to select cases for possible transfer to competent national jurisdictions,<sup>13</sup> the Tribunal is mandated under Security Council Resolutions 1503 and 1534 to transfer cases involving *intermediate* and *low-rank* accused to competent national jurisdictions.<sup>14</sup>

10. According to prior jurisprudence on referrals, "*intermediate*" and "*low-rank*" accused include:<sup>15</sup> a sub-commander of the military police and one of the main paramilitary leaders in Foča;<sup>16</sup> a prison administrator;<sup>17</sup> a commander of a military police

<sup>12</sup> Prosecutor's Reply, para. 14, in which the Prosecutor submits that this is a matter falling within his discretion pursuant to Rule 11bis (B), which bestows upon him a "specific role" in initiating referral proceedings.

<sup>13</sup> See *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT, "Decision on Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment under Rule 11bis", 30 June 2005, para. 14; and Security Council resolution 1534 (2004) which "Calls on the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions..." Resolution 1534 (2004), S/RES/1534 (2004), 26 March 2004, para. 4.

<sup>14</sup> Eighth Preambular Paragraph of Security Council Resolution 1503: "Urging the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy)", Resolution 1503 (2003), S/RES/1504 (2003), 23 August 2003. See also para. 6 of Security Council Resolution 1534 "Requests each Tribunal to provide the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments; ..."

<sup>15</sup> Rule 11bis (C) of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Statute states: In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council Resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.

<sup>16</sup> See *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11bis.2, "Decision on Rule 11bis Referral", 15 November 2005, paras. 4, 11, 19, 20. (Note that this was the basis of the first ground of his appeal: rejected).

<sup>17</sup> See *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11bis.2, "Decision on Savo Todović's Appeals against Decisions on Referral under Rule 11bis", 4 September 2006, ("Todović Appeal") paras. 9, 17-22. (Note that this was the basis of the first ground of his appeal of the referral: rejected.)

battalion including a formation known as "the jokers",<sup>18</sup> four Bosnian Serb authorities involved in a joint criminal enterprise in two detention camps,<sup>19</sup> a soldier;<sup>20</sup> and a *préfet* in Rwanda.<sup>21</sup> Positions considered too senior for referral have included: the most senior commander of the Army of Bosnia and Herzegovina;<sup>22</sup> a paramilitary leader;<sup>23</sup> a commander involved in peace negotiations who was one rank below the highest military command.<sup>24</sup>

### C. Discussion

11. In determining whether the referral of the case is appropriate, the Chamber will therefore evaluate the level of responsibility of the Accused, considering only those facts alleged in the Indictment.<sup>25</sup>

12. The Accused is alleged to have been a wealthy businessman, a commercial farmer, and a leader of the Bugurama MRND militia ("Bugurama *Interahamwe*").<sup>26</sup> He is charged with genocide, or, alternatively, with complicity in genocide, and extermination as a crime against humanity.<sup>27</sup> Specifically, it is alleged that the Accused:

- (i) delivered weapons, uniforms, and boots to the *Interahamwe*;
- (ii) incited hatred against Tutsis at the Hotel Ituze in Kamembe, Cyangugu *préfecture*;
- (iii) instigated the killing of Tutsis at Kabusunzu in Bugarama;

<sup>18</sup> See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, "Decision on Appeal against Decision on Referral under Rule 11bis", 4 July 2006, ("*Ljubičić* Appeal") para. 3 (appealed, but not on this ground).

<sup>19</sup> See *Prosecutor v. Zeljko Mejković et al.*, Case No. IT-02-65-AR11bis.1, "Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis", 7 April 2006, ("*Mejković* Appeal"), paras. 3, 4, 18-26. (Note that this was the basis of the Appellants' second ground of appeal: rejected.)

<sup>20</sup> See *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, "Decision on Rule 11bis Referral", 1 September 2005, ("*Stanković* Appeal"), para. 3 (appealed, but not on this ground).

<sup>21</sup> See *Prosecutor v. Bucyibaruta*, Case No. ICTR-2005-85-I, "Décision Relative a la Requête du Procureur Aux Fins de Renvoi de L'Acte D'Accusation Contre Laurent Bucyibaruta Aux Autorités Francais", 20 November 2007 ("*Bucyibaruta* Referral").

<sup>22</sup> See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, "Decision on Motion for Referral of Case Pursuant to Rule 11bis", 9 July 2007, paras. 11, 20-26 (This was the basis of the denial of the Referral, decision not appealed).

<sup>23</sup> See *Prosecutor v. Milan Lukić*, Case No. IT-98-32/1-AR11bis.1, "Decision on Milan Lukić's Appeal Regarding Referral", 11 July 2007, paras. 18-26. (Note that this was the basis of the third and fourth grounds of his appeal, which were accepted, his referral was revoked)

<sup>24</sup> See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, "Decision on Referral of a Case Pursuant to Rule 11bis", 8 July 2005, paras. 21-23 (Prosecution appeal on sentence pending).

<sup>25</sup> See *Mejković* Appeal, para. 22, "When assessing [...] the Appellants [...] level of responsibility, the Referral Bench properly considered only those facts alleged in the Indictment before reaching a determination concerning the appropriateness of referring the case to a national jurisdiction."

<sup>26</sup> Indictment, para. 4.

<sup>27</sup> Indictment, Counts 1 and 2.

- (iv) at Leonard Bamenyayundi's house in Gisuma *Commune*, Cyangugu *préfecture*, planned to kill all the displaced Tutsis gathered at Nyarushishi Refugee Camp, and was present at Nyarushishi to execute the plan the following day;
- (v) with the Bugarama *Interahamwe*, attacked Tutsi civilians who had sought refuge at Cyangugu Cathedral; and
- (vi) attacked and killed Tutsi civilians who sought refuge at three parishes in Cyangugu *préfecture*, and in Bisesero in Kibuye *préfecture*.<sup>28</sup>

13. The Chamber notes that the Accused had neither a rank of any military significance, nor had any official political role. He was an *Interahamwe* leader, whose role was largely limited to Cyangugu *préfecture*. The Accused's level of responsibility is comparable to many of those referred to national jurisdictions and is lower than Laurent Bucyibaruta, a former *préfet* of Gikongoro *préfecture* in Rwanda, whose case was referred to the Republic of France.<sup>29</sup>

#### D. Conclusion

14. The Chamber is satisfied that the level of responsibility of the Accused makes his an appropriate case for referral to the authorities of a State.

### III. REFERRAL TO RWANDA

#### A. Jurisdiction

15. Rule 11*bis* (A), which governs the transfer of accused persons from the Tribunal to a national jurisdiction, provides:

"If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case'

so that those authorities should forthwith refer the case to the appropriate court for trial within that State."

<sup>28</sup> Indictment, paras. 7.1 to 7.6 and 8.1 to 8.5.

<sup>29</sup> See *Bucyibaruta* Referral.

16. It is not disputed that Rwanda has jurisdiction as the State in whose territory the crimes were committed pursuant to Rule 11bis (A) (i). Where a Chamber finds that any one of the three grounds in Rule 11bis (A) is established, it can proceed to determine, pursuant to Rule 11bis (C), whether the Accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.<sup>30</sup>

## B. Penalty Structure

### A. Submissions

#### *i. Non-Imposition of Death Penalty*

17. The Prosecutor submits that Rwanda has enacted legislation abolishing the death penalty.<sup>31</sup> The Defence responds that the Rwandan Code of Criminal Procedure retains certain provisions for the death penalty.<sup>32</sup> The Prosecutor replies that the provision for life imprisonment in the Rwandan law governing the transfer of cases from the Tribunal, supersedes any prior legislative provisions.<sup>33</sup>

#### *ii. Applicable Punishment*

18. The Prosecutor submits that the Transfer Law provides for a penalty structure identical to that enshrined in the Tribunal's Statute and Rules.<sup>34</sup> The Prosecutor refers to Article 21 of the Transfer Law which states that life imprisonment shall be the heaviest penalty for an Accused transferred from the Tribunal to Rwanda.<sup>35</sup>

<sup>30</sup> Rule 11bis (C) states that "In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out."

<sup>31</sup> Article 3 of Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty ("Death Penalty Law") states: "In all legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided for by this Organic Law." See Referral Request, para. 27.

<sup>32</sup> Articles 212-217 of the Law No. 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure ("Rwandan Code of Criminal Procedure"). See Defence Response, para. 5.4.

<sup>33</sup> Article 1 of the 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") states that it shall "regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda." Article 21 states that life imprisonment will be the highest penalty. See Prosecutor's Reply, para. 24.

<sup>34</sup> Referral Request, para. 28.

<sup>35</sup> Referral Request, para. 26.

19. In response, the Defence refers to Article 4 of the Death Penalty Law which states that life imprisonment with special provisions is imprisonment in isolation.<sup>36</sup>

#### B. Law

20. In order to refer the Accused's case, the Chamber must satisfy itself that the death penalty will not be imposed.<sup>37</sup>

21. Furthermore, although not expressly provided for in Rule 11*bis*, pursuant to the jurisprudence of the Tribunal and the ICTY, the penalty structure within a State to which an indictment may be referred must provide an appropriate punishment for the offences with which the Accused is currently charged.<sup>38</sup> Moreover, conditions of detention, a matter which touches upon the fairness of a jurisdiction's criminal justice system, must accord with internationally recognised standards.<sup>39</sup>

22. Specifically with regard to imprisonment in isolation or solitary confinement, although the prohibition of contact with other prisoners for security, disciplinary or protective reasons may be necessary, human rights bodies have consistently held that imprisonment in isolation is an undesirable penalty and should be used only in exceptional circumstances and for limited periods.<sup>40</sup> Furthermore, protracted periods of

<sup>36</sup> Article 4 of the Death Penalty Law states that "Life imprisonment with special provisions is imprisonment with the following modalities: - 1. a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment; 2. a convicted person is kept in isolation." See Defence Response, para. 4.4.

<sup>37</sup> Rule 11*bis* (C).

<sup>38</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, "Decision on Referral of Case under Rule 11*bis*", 17 May 2005 ("*Stanković* Referral"), para. 32; *Mejakić* Appeal, para. 48; *Ljubicić* Appeal, para. 48; and *Bagaragaza* Appeal, para. 9.

<sup>39</sup> The Chamber recalls that conditions of detention in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction's criminal justice system and is an inquiry squarely within the Chamber's mandate. See *Stanković* Appeal, para. 34, and *Todović* Appeal, para. 99. These internationally recognised standards include: (i) Freedom from torture, or cruel, inhuman or degrading treatment or punishment as contained in Article 5, Universal Declaration of Human Rights ("UDHR"); Article 7, International Covenant on Civil and Political Rights ("ICCPR"); Article 5, African Charter on Human and People's Rights ("ACHPR"); Article 16 (1), Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"); and Principle 6 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988) ("Body of Principles"); and (ii) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person as contained in Article 10 (1), ICCPR; Article 5, ACHPR; and Principle 1 of the Body of Principles.

<sup>40</sup> The Human Rights Committee ("HRC") has stated: "... solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant." See Concluding Observations of the HRC: Denmark, 31/10/2000, CCPR/CO/70/DNK, para. 12. See also, *Ramirez Sanchez v. France*, European Court of Human Rights (ECtHR), Grand Chamber (GC), App. No. 59450/00, 4 July 2006, para. 121.

solitary confinement may amount to acts violating human rights standards.<sup>41</sup> Therefore, solitary confinement is an exceptional punishment and where implemented, should be as short as possible. Where it is prolonged, the detainee should be informed in writing of the substantive reasons for such measures in order to avoid any risk of arbitrariness,<sup>42</sup> and be afforded the right to independent judicial review of the merits and reasons for the prolonged solitary confinement.<sup>43</sup> Arrangements for solitary confinement should also be reviewed in order to provide prisoners with a wider range of activities and ensuring appropriate human contact.<sup>44</sup>

23. Therefore, States must ensure that where individuals are imprisoned in isolation, effective safeguards are in place to guarantee that such isolation is consistent with the right to humane treatment and respects the inherent dignity of the person.<sup>45</sup>

### C. Discussion

#### *i. Non-Imposition of the Death Penalty*

24. The Death Penalty Law abolishes the death penalty, and replaces it in all previous legislative texts with life imprisonment or "life imprisonment with special provisions."<sup>46</sup>

<sup>41</sup> HRC, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994), para. 6. Further, in assessing whether solitary confinement will amount to a violation of an individual's right to humane treatment which respects his or her inherent dignity, human rights bodies have considered factors such as the duration of the isolation and its physical and mental effects. See *Achutan and Amnesty International v. Malawi*, African Commission on Human and People's Rights (ACommHR), Comm. No.s 64/92, 68/92, and 78/92 (1995), para. 7; *Lorse and others v. The Netherlands* (ECtHR), App. No. 52750/99, 4 February 2003, para. 63; *Matthew v. The Netherlands* (ECtHR) App. No. 24919/03, 29 September 2005, paras. 200 and 201; and *Ramirez Sanchez v. France*, para. 117.

<sup>42</sup> *Matthew v. The Netherlands*, para. 199 and *Ramirez Sanchez v. France*, para. 139.

<sup>43</sup> The ECtHR has held that where a detainee was held in solitary confinement for a period of eight years, in view of the length of that period, a rigorous examination was necessary to determine: whether it was justified; whether the measures taken were necessary and proportionate compared to the available alternatives; what safeguards were afforded the applicant; and what measures were taken by the authorities to ensure that the applicant's physical and mental condition was compatible with his solitary confinement. See *Ramirez Sanchez v. France*, paras. 145 and 146. The HRC has found that detention in solitary confinement for a period of 13 years was considered to be a measure of such gravity and of such fundamental impact on the individual in question that it required the most serious and detailed justification. See *Yong-Joo Kong v Republic of Korea*, U.N. Doc. CCPR/C/78/D/878/1999, 23 July 2003, para. 7.3.

<sup>44</sup> *G.B. v. Bulgaria* (ECtHR), App. No. 42346/98, 11 March 2004, para. 84 and *Matthew v. The Netherlands*, para. 199.

<sup>45</sup> *G.B. v. Bulgaria*, para. 84 and *Lorse and others v. The Netherlands*, paras. 62 and 63.

<sup>46</sup> Article 3 of the Death Penalty Law provides that in all legislative texts, the death penalty is substituted with imprisonment or life imprisonment with special provisions. Further, Article 21 of the Transfer Law provides that life imprisonment is the highest penalty that can be imposed for cases referred to Rwanda by the Tribunal. The Referral Bench shall consider "life imprisonment with special provisions." See paras. 25 to 31.

Accordingly, the death penalty provisions in the Rwandan Code of Criminal Procedure,<sup>47</sup> or any other legislation, are no longer applicable. Thus, the Chamber is satisfied that, in line with Rule 11bis (C), the death penalty will not be imposed in Rwanda.

ii. *Applicable Punishment*

25. However, the Chamber is concerned that life imprisonment in the Accused's case would mean life imprisonment in isolation.<sup>48</sup>

26. The Death Penalty Law, dated 25 July 2007, came into force after the Transfer Law, dated 16 March 2007. Article 25 of the Transfer Law states:

"In the event of any inconsistency between the Organic Law and any other Law, the provisions of this Organic Law shall prevail."

In the Chamber's view, there is no inconsistency between the Transfer Law and the Death Penalty Law. The latter states that the death penalty is replaced with life imprisonment and provides two categories of life imprisonment, namely: (i) life imprisonment; and (ii) life imprisonment with special provisions. Article 5 of the Death Penalty Law further details that the crimes of torture, murder, genocide and crimes against humanity are amongst those crimes attracting a sentence of "life imprisonment with special provisions." Therefore, the Death Penalty Law does not prescribe a sentence that is inconsistent with the Transfer Law, but rather provides further guidance on the sentence of life imprisonment and states when it is applicable.

27. In any event, the Death Penalty Law repeals the earlier law in respect of sentencing as Article 9 states:

"All legal provisions contrary to this Organic Law are hereby repealed."

28. The Chamber therefore considers that pursuant to the Death Penalty Law, the Accused, if transferred and convicted of the crimes charged, could be subject to the sentence of life imprisonment with special provisions.<sup>49</sup>

<sup>47</sup> As referred to by the Defence, *see supra* para. 17.

<sup>48</sup> Although the Chamber has been informed by the Prosecutor and Rwanda that the relevant law applicable to the Accused, if transferred, is the Transfer Law which provides that the highest penalty that can be imposed is life imprisonment, neither the Prosecutor, nor the Rwanda, satisfactorily responded to the Defence submission that this means life imprisonment in isolation.

<sup>49</sup> Pursuant to Articles 3, 4 and 5 of the Death Penalty Law.

iii. *Does the Applicable Punishment Accord with International Standards?*

29. The Chamber heard submissions that conditions of detention in Rwanda accord with international standards.<sup>50</sup> Notwithstanding such submissions, pursuant to the Death Penalty Law, the Accused would be sentenced to life imprisonment in isolation if convicted of the crimes charged. The Chamber must therefore consider whether such a sentence, which impacts upon detention conditions, accords with internationally recognised standards.

30. In view of the established jurisprudence and observations of Human Rights bodies, the Chamber considers that, where provided for in domestic law, imprisonment in isolation should be an exceptional punishment, applicable only where necessary and proportionate, and include the following minimum safeguards:

- (i) Prior to imposition of such punishment, an assessment of the prisoner to determine whether imprisonment in isolation is a necessary and proportionate punishment;
- (ii) A right of review by a judicial body to determine whether continued isolation remains necessary and proportionate; and
- (iii) Arrangements aimed at providing a range of activities to ensure appropriate human contact and mental and physical stimulation.

31. The Chamber is not aware of any such safeguards in Rwandan law.

D. Conclusion

32. The Chamber finds that although the death penalty would not be imposed in Rwanda, thereby satisfying one of the requirements in Rule 11*bis* (C), the applicable sentence in the Accused's case, if convicted, would be life imprisonment in isolation. The Chamber considers that without the aforementioned safeguards, the current penalty structure is not adequate, as required by the jurisprudence of the ICTY and the Tribunal,

---

<sup>50</sup> The Prosecutor refers to Article 23 of the Transfer Law which provides that any person transferred to Rwanda by the Tribunal shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment ("Body of Principles"). See Prosecutor's Reply, para. 27. Further, Rwanda submits that convicts transferred from the Tribunal or other jurisdictions shall be detained in a new prison built to international standards. See Rwanda's *Amicus* Brief, paras. 30 and 31. During the Referral Hearing, the Rwandan Government's representative provided a further description of the detention facilities and informed the Chamber that imprisonment would be "under the conditions agreed upon by the ICTR Registry on the management of the prison." See T. 24 April 2008, p. 77.

thus precluding referral to Rwanda. The Chamber will next address areas where it considers the Accused's fair trial rights will not be guaranteed if referred to Rwanda.

### C. Fair Trial Guarantees

#### 1. Independence of the Judiciary

##### A. Submissions

###### *i. Parties*

33. The Defence submits that international standards of fair trial require that persons accused of serious crimes under international humanitarian law appear before a panel of three judges in the first instance and before five judges at the appellate level.<sup>51</sup> The Defence further argues that it is "both absurd and unacceptable that a single judge be allowed to give rulings on accusations related to serious violations of International Law, such as genocide, crimes against humanity and war crimes."<sup>52</sup>

34. The Prosecutor replies that Rule 11*bis* does not envisage the transfer or imposition of the Tribunal's judicial structures to the referral State, but rather the transfer of a case so it can be prosecuted in the judicial system of that referral State.<sup>53</sup> The Prosecutor submits that criminal trials presided over by a single judge are widely used in national systems and a court presided over by a single judge can provide a fair trial.<sup>54</sup>

###### *ii. Rwanda*

35. Rwanda confirms that the proceedings will be presided over by a single judge in the first instance,<sup>55</sup> as are capital cases before the High Courts of Kenya, Tanzania, Uganda, the Republic of South Africa, Botswana and Zambia.<sup>56</sup> Rwanda submits that this

---

<sup>51</sup> Defence Response, para 7.5.

<sup>52</sup> *Ibid.*, para 7.4.

<sup>53</sup> Prosecutor's Reply, para 37.

<sup>54</sup> *Ibid.*, para 38.

<sup>55</sup> Article 2, Transfer Law.

<sup>56</sup> Rwanda's *Amicus* Brief, footnote 17, page 10. Rwanda submitted that this court structure was adopted following a comparative study of common and civil law systems in East, Central and Southern Africa which showed that trials of capital cases before the High Courts of many of these countries went before a single judge.