The Transfer Cases of the ICTR to the Republic of Rwanda:

The challenges of implementing Rule 11 *bis*

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Tiivistelmä - Referat – Abstract

This thesis addresses the complex process of transferring cases from the International Criminal Tribunal for Rwanda (ICTR) to Rwanda. After a decade of prosecuting the leaders and organisers of the 1994 Rwandan Genocide that killed an estimated 500,000 to 1 million ethnic Tutsis, the Security Council of the United Nations called for the closure of the Tribunal. In an effort to complete all trial activities, the Completion Strategy has involved transferring the indictments of low to mid-level accused to national jurisdictions for trial.

With donor fatigue, frustration with the efficiency of the Ad-Hoc tribunals and the desire for states to manage their own issues, there is a shift in enforcement of international criminal law away from international tribunals. The outcome is that national courts will be increasingly responsible for the accountability of international crimes and the application of fair trial rights. As a result, the importance of cases being prosecuted domestically with the appropriate level of fair trial standards and the capacity of national systems will be increasingly important.

To transfer a case to a national court, the ICTR has to be satisfied that the court by which the case is referred to has the jurisdiction to adjudicate the case. Moreover, it has to confirm that the standards of trial in respect to fairness are satisfactory. Once the case has been transferred, the ICTR can appoint a monitor to observe the proceedings in the national court.

This thesis aims to determine whether the transfer cases to Rwanda were decided with the appropriate fair trial standards. To determine this, this thesis examines the decisions of the ICTR, relevant legislation, Reports of the Monitor as well as academic discussions. Further this thesis demonstrates the importance of capacity building efforts as well as legal reform to improve standards. Improvement of fair trial and penalty standards in Rwanda has involved the creation of new witness protection programs, the abolishment of the death penalty and reform of the Genocide Ideology law. However, this thesis has shown the most challenging part of capacity building by a foreign body is the sensitive and cautious way these issues need to be approached.

This thesis concludes that, from the creation of new witness protection programs, video link technology, building of new prisons, judicial training and reforms in legislation, Rwanda has developed the capacity to hold a fair trial. Moreover, twenty years after the genocide, Rwanda has become a neutral territory to hold trials for the transferred cases. However, this author is concerned that these improvements will only affect the handful of cases, which will be transferred. Many Rwandans will not have access to the same safeguards, protection and facilities. Despite these possible inequalities, the correct decision to transfer the cases to Rwanda is a step forward towards ending impunity. It means that Rwanda is willing and able to prosecute their crimes. Following the ICTR's approach towards strengthening fair trial and penalty standards in Rwanda will be a valuable lesson for the future of International Criminal Law, particularly in light of increased domestic prosecutions.

Avainsanat – Nyckelord – Keywords

International Criminal Law, ICTR, Rule 11*bis*, Transfer cases, fair trial, capacity building

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Abbreviations

ACHPR	African Commission on Human and People's Rights
AJICLS	African Journal of International and Comparative Law Studies
AJLS	African Journal of Legal Studies
AJIL	American Journal of International Law
BCICLR	Boston College International Comparative Law Review
BJIL	Berkeley Journal of International Law
CLF	Criminal Law Forum
CUP	Cambridge University Press
EJIL	European Journal of International Law
FILJ	Fordham International Law Journal
FJIL	Florida Journal of International Law
HICLR	Hastings International and Comparative Law Review
HRW	Human Rights Watch
IADL	International Association of Democratic Lawyers
ICC	International Criminal Court
ICDAA	International Criminal Defence Attorney's Association
ICCPR	International Covenant on Civil and Political Rights
ICLR	International Criminal Law Review
ICTR	International Criminal Tribunal for Rwanda
ILM	International Legal Materials
IRMCT	International Residual Mechanism for Criminal Tribunals
JHR	Journal of Human Rights
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law

MPYIL	Max Plank Yearbook of International Law
NEJICL	New England Journal of International and Comparative law
NYUJILP	New York University Journal of International Law and Policy
NWUJIHR	North Western University Journal of International Human Rights
RBA	Rwanda Bar Association
RPF	Rwandan Patriotic Front
UNSC	United Nations Security Council
VWSU	Victim and Witness Support Unit
WPU	Witness Support Unit

1. Introduction

The year of 2014 has marked the 20th anniversary since the Rwandan Genocide. Following the assassination of the Rwandan President Habyarimana on the 6 April 1994, an estimated 500,000 to 1 million ethnic Tutsis were killed over a three-month period.[1] Although the Security Council of the United Nations (hereinafter UNSC) withdrew most of the peacekeepers during this time,[2] on 1 July 1994, it voted to establish an Independent Commission of Experts, which made a formal recommendation to "enhance the fair and consistent interpretation, application and adjudication of international law on individual responsibility for serious human rights violations." Therefore for the most efficient allocation of resources, the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (hereinafter the ICTY) should be expanded to permit cases concerning the situation in Rwanda to be brought under it."[3] On the 8 November 1994, Security Council Resolution 955 was adopted establishing the International Criminal Tribunal for Rwanda (hereinafter ICTR).[4] Similar to the ICTY, in consideration of the on-going conflicts, lack of judicial capacity and professionalism,[5] the UNSC granted the ICTR concurrent jurisdiction with national courts to prosecute persons for serious violations of international humanitarian law. However, it also emphasised that the ICTR shall have the primacy over the national courts of all states. Therefore, at any stage of the trial procedure, the ICTR may formally request national courts to defer its competence. [6]

In 2003, a decade later, the UNSC called on the ICTY and ICTR (hereinafter the Ad-Hoc tribunals) to take every possible measure to complete all trial activities at instance by the end of 2008, and to finish all work by 2010.[7] The Ad-Hoc tribunals

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[1] William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (1st edn, CUP 2006) 25.
[2] ibid.
[3] UNSC, 'Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (4 October 1994)', UN Doc S/1994/1125 para 149.
[4] UNSC Res 955 (8 November 1994) UN Doc S/RES/955.
[5] Roberto Bellelli,'The Establishment of the System of International Criminal Justice' in Roberto Bellelli (ed) *International Criminal Justice* (Ashgate 2010) 12.
[6] International Criminal Tribunal for Rwanda 'Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, entered into force 20 June 1995) UN Doc S/RES/955 (n 4); Bartham Brown, 'Primacy or Complementarily: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 YJIL 383 395.
[7] UNSC Res 1503 (28 August 2003) UN Doc S/RES/1503 (UNSC Res 1503) para 7; UNSC Res 1534 (26 March 2004) UN Doc S/Res/1534 para 3 (UNSC Res 1534).

would be required to provide a report every six months to the UNSC detailing the progress made towards the implementation the completion of the work of the tribunals, which was called the Completion Strategy.[8] As a main part of completing the mandates of the Ad-Hoc tribunals, cases that have had their indictment confirmed are to be transferred to national criminal jurisdictions.[9] This thesis concerns Rule 11 *bis* of the Rules of Procedure and Evidence,[10] which governs the referral procedure of the cases which are transferred back to the Republic of Rwanda (hereinafter Rwanda) for adjudication. Therefore, these cases will be referred to throughout this thesis as the transfer cases.

The complex nature of the implementation of Rule 11 *bis* occurred to me when I was working as a legal intern at the Office of the Prosecutor at the ICTR in Arusha, at the end of 2012. During my internship I had the privilege of watching the judgment of the case *Gatete v The Prosecutor*[11] being handed down by the Appeals Chamber. The Chamber affirmed Jean-Batiste Gatete's conviction for genocide and extermination as a crime against humanity, as well as entered a conviction for conspiracy to commit genocide for his role in the killing of thousands of Tutsis during the 1994 Rwandan Genocide. However, his sentence was reduced from life imprisonment to a penalty of 40 years because he had spent over seven years in pre-trial detention awaiting trial. This time was deemed by the Chamber to violate his right to be trialled without undue delay.[12] Curiously, one of the reasons the Trial Chamber had given for this delay was that the case had been selected for referral pursuant to Rule 11 *bis.*[13] This case was the first encounter I had with the complexity of a referral for transfer. Over the next four months, I conducted legal research for the Office of the Prosecutor. However at the back of my mind, I remained perplexed as to the reasons why the implementation of a procedural rule could be a cause for a case to be delayed for over seven years.[14]

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[8] UNSC Res 1503 (n 7) para 6; UNSC Res 1534 (n 7) para 6.
[9] Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (1st edn, OUP 2008) 68.
[10] International Criminal Tribunal for Rwanda, 'Rules of Procedure and Evidence' (adopted 8 November 1994, entered into force 20 June 1995) UN Doc ITR/3/Rev 1 (ICTR RPE).
[11] (Appeals Judgment) ICTR-00-61-A (9 October 2012).
[12] ibid para 45.
[13] ibid.
[14] The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

Pursuant to Rule 11 *bis,* for a successful transfer, a Trial Chamber has to be satisfied that the court by which the case is referred to has the jurisdiction to adjudicate the case.[15] Moreover, the Trial Chamber also has to confirm that the penalty as well as the fair trial standards to be applied if the domestic courts conduct the trial is satisfactory.[16] Once a case has been transferred, the Trial Chamber can order observers to monitor the proceedings in the State concerned.[17] As attempted referrals to Rwanda have easily met the jurisdictional requirements of the territory the crime was committed, considerations of fair trial guarantees and the applicable penalty have been questioned and thus will be focused on in this thesis. Throughout the history of the transfer case decisions, the defence counsel for the accused persons (hereinafter the Defence) have raised a number of fair trial issues that might arise if the case is transferred to Rwanda. These issues include independence and impartiality of the judiciary, the presumption of innocence of the accused, the right to an effective defence, double jeopardy and witness availability and protection. Moreover, the Defence has also been concerned by the applicable penalty the accused could face if convicted. In particular, of concern is for the conditions of detention and whether the accused would face the death penalty or imprisonment in isolation.

Although academically the ICTR's Completion Strategy had been discussed widely,[18] there has not been much written on the recent jurisprudence of the transfer cases[19]

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[15] If an indictment has been confirmed, "the President may designate a Trial Chamber which shall determine whether a 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, to the appropriate court for trial within that state." RPE (n 10) Rule 11 *bis*, para a.

[16] According to the RPE, "In determining whether to refer the case the 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." RPE (n 10) Rule 11 *bis*, para c.

[17] ibid, para d (i).

[18] See for example, Cecile Aptel, 'Closing the U.N. International Criminal Tribunal For Rwanda: Completion Strategy and Residual issues' (2008) 14 NEJICL 169; Daryl Mundis, 'Completing the mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?' (2004) 28 FILJ 591; Eric Møse, 'Main Achievements of the ICTR' (2005) 3 JICJ 920; Eric Møse, 'The ICTR's Completion Strategy – Challenges and Possible Solutions' (2008) 6 JICJ 667; Larry Johnson, 'Closing an International Criminal Tribunal while maintaining International Human Rights Standards and Excluding Impunity', (2005) 99 AJIL 158; Lara Bingham,'Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 24 BJIL 701.

[19] The most recent academic discussion I am aware of is the book Lindemann Lena, *Referral of cases from international to national criminal jurisdictions: transferring cases from the ICTY and ICTR to national jurisdictions* (1st ed, Baden-Baden : Nomos, 2013) which does not discuss the transfer of *Uwinkindi* or the aftermath. I have not encountered articles, which discuss the reports of the monitor. For example see, Alex Obote-Odora, 'Transfer of cases from the International Criminal Tribunal for Rwanda on Domestic Jurisdictions' (2012) 5 AJLS 147; Amelia Canter, 'For these reasons, the Chamber: Denies the Prosecutor's request for referral: The False hope of Rule 11 *bis*' (2008) 32 FILJ

particularly after the decision of case *Uwinkindi*, which allowed for the first transfer of a case to Rwanda.[20] Perhaps the winding down of the ICTR and ICTY, has been a reason for disinterest. However, according to Donlon, the dire state of funding for war crimes tribunals and the frustration with efficiency of the tribunals has resulted in the lack of budgetary support for the Ad-Hoc tribunals. For that reason, there is a shift in the enforcement of international criminal law away from the Ad-Hoc international tribunals to hybrid and national courts. He argues that the outcome of this paradigm shift is the progressive development of national laws to ensure accountability for international crimes and guarantee the application of international human rights norms during trials.[21] Rikhof agrees, adding that a large number of domestic players have entered the international justice arena.[22] This has included prosecutions based on territorial jurisdiction by the country where the crimes occurred, active nationality jurisdiction where perpetrators were nationals of the prosecuting country or based on universal jurisdiction.[23] Moreover, since the International Criminal Court is intended to be complementary to the domestic courts, the court can only gain jurisdiction when the domestic legal system is unwilling or genuinely unable to carry out an investigation or prosecution for an accused individual.[24] It has been argued that the idea of complementarily, will likely push states to retain control over prosecuting its own nationals.[25] According to Charney, "As a rule, states wish to manage issues themselves and voluntarily refer matters to international tribunals only when no other choice presents itself or when it enables the resolution of international disputes arising from domestic difficulties of limited

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1614; Jennifer Morris, 'The Trouble with Transfers: An Analysis of the Referral of Uwinkindi to the Republic of Rwanda' (2012) 90 WULR 505; Jens Diekmann, 'UN Ad Hoc Tribunals Under Pressure-Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence' (2008) 8 ICLR 87; Ruth Frölich, 'Decision on Prosecutor's Request for Referral to the Republic of Rwanda', (2008), 47 ILM 740.

[20] *Prosecutor v Jean Uwinkindi* (Decision on Prosecutor's Request for Referral to the Republic of Rwanda) ICTR-2001-75-R11*bis* (28 June 2011); *Jean Uwinkindi v The Prosecutor* (Decision on Uwinkindi's Appeal against the Referral of his case to Rwanda and Related Motions) ICTR-01-75-AR11*bis*, (16 December 2011).

[21] Fidelma Dolon, 'Completion or Creation: Is the closure of international courts promoting the creation of domestic courts to enforce international law?' (2008) <www.isrcl.org:Papers:2008:Dolan> accessed 5 March 2014 3.

[22] Joseph Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity' (2009) 20 CLF 1.36.

[23] ibid 3.

[24] Mark Ellis, 'The International Criminal Court and the Application for Domestic Law and National Capacity Building' (2002-2003) 15 FJIL 215 221; Rome Statute (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 art 17.

[25] ibid 223.

national concern."[26] He believes that "states will feel impelled to try persons accused of such crimes as to pursue those cases in a bona fide way."[27] As a result, this author argues that the importance of cases being prosecuted domestically with the appropriate level of fair trial standards and the capacity of national systems will become increasingly important. If fair trial standards have not been adequately assessed in the transfer cases, the international community will be approving of domestic trials without the guarantee of the application of international fair trial norms. Further, the lessons of capacity building and establishing fair trial standards from the transfer cases can be applied to the increasing prosecution of international crimes domestically.

Consequently, this thesis strives to not only explore the challenges of the transfer cases, but also look forward, past the legacy of the Ad-Hoc tribunals and determine the effect on the future of prosecuting international crimes. Therefore, I will analyse the decisions of the ICTR, which have adjudicated the requests for the referral of cases. In particular, I will focus on the reasons why these referrals were initially denied and how the ICTR found these challenges were addressed to allow for the successful transfer decision starting from the case of *Uwinkindi.*[28] Given the number of concerns discussed and the limits of this thesis, I will not be addressing all areas discussed by the ICTR, which could prevent transfer. I will instead concentrate on the reasons for which the ICTR chose not to transfer the case of *Munyakazi,*[29] the first application by the Prosecutor for referral to Rwanda. Specifically, these concerns are the independence of the judiciary,[30] witness availability and protection,[31] and the applicable penalty.[32] Moreover, I will also discuss the reasons why the Appeals Chamber decided to confirm the transfer of *Uwinkindi* to Rwanda, as well as the changes between these two decisions.

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[26] Jonathan Charney 'Editorial Comments: International Criminal and the Role of Domestic Courts' (2001) 95 AJIL 120 122.
[27] ibid 123.
[28] *Prosecutor v Jean Uwinkindi*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20).
[29] *Prosecutor v Yussuf Munyakazi* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-97-36-R11*bis* (28 May 2008).
[30] ibid para 48.
[31] ibid para 66.
[32] ibid para 33.

Since the appeals decision of *Uwinkindi* has confirmed the referral of the case to Rwanda, the Office of the Prosecutor has appointed a monitor to observe proceedings, which has been reporting to the Mechanism for the International Criminal Tribunals.[33] On the 3rd of May 2013, the Appeals Chamber upheld the referral of the case of *Munyagishari*[34] to Rwanda for trial where the Prosecutor also appointed a monitor to observe the proceedings.[35] In the Reports of the Monitor, the monitor has reported concerns that have arisen after the cases have been transferred and other observations from the trial. These concerns have included issues with translation of court proceedings and documents, appointment of defence counsel of the accused's choice, prison facilities, funding for the defence and witness protection. For that reason in the thesis I will also discuss the lack of legal aid funding for the indignant accused pointed out by the monitor. This concern was made apparent after the cases of *Uwinkindi* and *Munyagishari* were transferred. Throughout the decisions of the ICTR, this issue was not considered a problem, and could cast doubt on whether the ICTR made a correct decision to transfer cases to Rwanda.

This thesis will begin by introducing the transfer cases, in particular their background and procedural history. Specifically, Chapter 2 will outline the idea behind referring cases from the ICTR back to Rwanda, as a part of the conclusion of the mandate of the tribunal and more generally, the overall aims of the ICTR. The aim of this chapter is for the reader to have an awareness of the objectives of the transfer cases and therefore come to an understanding of the reasons why certain issues have held back the transfer of cases to Rwanda. Initially, in the cases before the decision in the case of *Uwinkindi*,[36] the ICTR decided not to transfer the cases based on fair trial and penalty reasons. Therefore, Chapter 3, 4 and 5 will analyse the turning points in the case of *Uwinindi*,[37] which initially have hindered transfer. Through an examination of the decisions of the ICTR, I will firstly discuss the two issues of fair trial and then

[33] UNSC,'First Annual Report of the International Residual Mechanism for Criminal Tribunals' (1 August 2013) S/2013/464 para 51.
[34] Bernard Munyagashiri, 'Request for deferral of transfer of B. Munyagishari due to serious violation of fundamental rights' (MICT-12-20, 19 August 2013) <http://unmict.org/files/cases/munyagishari/other/130830.pdf> accessed 13 March 2014.
[35] UNSC,'First Annual Report of the International Residual Mechanism for Criminal Tribunals' (n 33) para 53.
[36] *Prosecutor v Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20).
[37] ibid.

the applicable penalty for the accused. In Chapter 3, I will turn to concerns the ICTR has had for the independence and the impartiality of the Rwandan judiciary to adjudicate the transfer cases. This will be followed by a discussion of the apprehension for the Accused's fair trial right to obtain the attendance of, and to examine, defence witnesses under the same conditions as witnesses called by the prosecution in Chapter 4. In Chapter 5, I will discuss concerns that the accused will not receive a fair penalty in line with international standards and could face life imprisonment in isolation. In Chapter 6, I will address main concern of the aftermath of the transfer cases, that is, the adequate legal aid funding for the transferred accused. Lastly, in Chapter 7, I will conclude this thesis expressing whether I believe the ICTR has adequately determined these challenges have been resolved and how these issues may appear in the future of the prosecution of international crimes.

2. The transfer cases from the ICTR to Rwanda

2.1 The Completion Strategy of the ICTR

From the underpinnings of the tribunal, it is possible to determine the reasons why Rwanda was not considered an appropriate seat for the ICTR. The United Nations Security Council (hereinafter UNSC) established the ICTR by a resolution adopted on 8 November 1994[38] to prosecute perpetrators responsible for genocide and other violations of international humanitarian law, committed in Rwanda and the territory of neighbouring states.[39] From the outset, on the basis of criteria set out in this resolution,[40] the Secretary-General concluded that Rwanda as the location for the tribunal "would not be feasible or appropriate."[41] The Secretary-General reasoned that although "the international character of the Rwanda Tribunal is a guarantee of the just and fair conduct of legal process,"[42] for complete impartiality and objectivity in the prosecution of persons responsible for crimes committed by both sides to the conflict, the trial proceedings had to be held in a neutral territory. The Secretary-General especially noted that in Rwanda, there were serious security risks in bringing into the country, leaders of the previous regime alleged to have committed acts of genocide to stand trial before the Tribunal.[43] Instead, Arusha the diplomatic city of Tanzania, was considered to have better "administrative efficiency and economy"[44] and the premise for the court was already available. [45]

Although the government of Rwanda initially requested an international tribunal to aid in the prosecution of the 1994 Genocide,[46] Rwanda decided to vote against the

[38] UNSC Res 955 (n 4)
[39] ibid para 1.
[40] According to paragraph 6, "the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency including access to witnesses, and economy…" ibid; UNSC 'Report of the Secretary-General pursuant to paragraph 5 of UNSC Resolution 955 (1994)' (13 February 1995) General S1995/134 para 41.
[41] UNSC Res 955 (n 4) para 45.
[42] ibid para 42.
[43] ibid.
[44] ibid para 43.
[45] ibid.
[46] UNSC 'Letter dated 28 September 1994 from the permanent representative of Rwanda to the United Nations addressed to the President of the Security Council' (29 September 1994) General S/1994/1115.

resolution establishing the tribunal for a number of reasons.[47] Specifically, Rwanda felt that the time period for which the ICTR could prosecute within was too short.[48] The government was also discontent with a number of other issues, in particular, sharing the Appeals Chamber and the Prosecutor with the ICTY, the lack of crimes being prioritised in the draft statute establishing the tribunal, proposals for candidates for judges from countries believed to have actively participated in the civil war in Rwanda, that detainees would be imprisoned outside Rwanda, and that the seat would not being held within Rwanda. Also, Rwanda advocated for capital punishment as provided for in the Rwandese penal code, a penalty that would not be used by the ICTR.[49] It was contended that since the ICTR would be mainly prosecuting suspects who were the main organisers and planners of the genocide, namely "the big fish", these transferred accused would escape capital punishment. In contrast, those who carried out the genocide, in other words "the small fish," would be tried in Rwandan courts and face capital punishment. Overall, this situation was argued to be non-conducive to national reconciliation in Rwanda.[50] Despite this negative vote within the UNSC, Rwanda declared its willingness to cooperate with the tribunal and generally continued to do so.[51] It is important to highlight the reasons by which Rwanda did not support the initial establishment of the ICTR, as they would later pose challenges for the transfer cases.

Throughout the operation of the tribunal, relations with the government of Rwanda were described as "often stormy."[52] For example, when the Appeals Chamber granted the motion of a key defendant and permanently stayed all proceedings in the case, the government of Rwanda became "enraged at the resulting impunity." As a result, Rwanda threatened to bar ICTR officials from entering its territory.[53] The Appeals Chamber reversed the decision knowing that this move would affect the ICTR's ability to operate.[54] Also, for a short time in 2002, the Rwandan Government did not

[47] UNSC '3453rd meeting' (8 November 1994) S/PV 3453 1 (3453rd meeting) as cited by Daphna Shraga and Ralph Zacklin, 'Symposium towards an International Criminal Court: The International Criminal Tribunal for Rwanda' (1996) 7 EJIL 501, 504.
[48] ibid 514-515.
[49] 3453rd meeting (n 47) 14-15.
[50] ibid 16.
[51] Shraga and Zacklin (n 47) 505.
[52] William Schabas referring to the *Bizimungu* case in Schabas (n 1) 31.
[53] ibid.
[54] ibid.

facilitate the travel document applications for witnesses made by the Tribunal. Two Rwandan associations of victims had announced they would discontinue their cooperation with the tribunal, complaining that witnesses were not being sufficiently protected and that suspects of genocide were being employed as defence investigators. The Rwandan authorities maintained that they could not compel the associations to cooperate with the ICTR. As a result, the UNSC issued a statement reminding the government of Rwanda of the mandatory obligation of all states to cooperate fully with the ICTR.[55] The previous willingness for the Rwandan government to interfere in work of the ICTR raises concerns as to whether an independent judgment can be made by the Rwandan judiciary for the cases transferred. Particularly, the question arises as to whether the government would also interfere in the decision of the local Rwandan courts, which would adjudicate the transfer cases.

The transfer of cases from the ICTR to Rwanda was largely influenced by the strategy of the ICTY. On the 12th of May 2000, a report by President Jorda to the Security Council initiated a discussion concerning transfer cases from the Ad-Hoc tribunals. This report proposed that the ICTY should consider holding trials in the Balkans.[56] The report suggested that the tribunal would concentrate on a restricted number of high-ranking leaders alike the Nuremburg model and would retain competence on appeal.[57] The report also recommended measures to increase trial capacity including appointing ad-litem judges,[58] delegating some of the pre-trial judge powers to take judicial administrative decisions to senior legal officers of the Trial Chamber[59] and enlarging the Appeals Chamber.[60] In response, the Security Council adopted a resolution, which established a pool of ad-litem judges and enlarged the membership

[55] UNSC 'Statement by the President of the Security Council' (18 December 2002) General S/PRST/2002/39 paras 3-5; Erik Møse, 'Main Achievements of the ICTR' (2005) 3 JICJ 920 939.
[56] UNSC 'Identical letters dated 7 September 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council' UN Doc A/55/382-S/2000/863, Annex 1 as cited by Fidelma Donlon, 'The Judicial Role in the Definition and Implementation of the Completion Strategies of the International Criminal Tribunals' in Shane Darcy and Joseph Powderly (eds) *Judicial Creativity at the International Criminal Tribunals* (1st edn, OUP, 2010) 357.
[57] ibid para 56.
[58] ibid para 106-117.
[59] ibid para 97-99.
[60] ibid para 140.

of the Appeals Chamber of the ICTY.[61] Further, the Security Council decided that two additional judges would be elected to the ICTR.[62]

Adding to the discussion of transferring cases from the Ad-Hoc tribunals, the President, Prosecutor and the Registrar produced a report in June 2002 on the prospects for referring certain cases to national courts. They had created a working group whose mission was to examine the problems, which might arise through the implementation of the process of referring certain cases.[63] Despite the increase in the size of the tribunal and the appointment of ad-litem Judges,[64] the report argued that the ICTY could not try all the accused persons on its own.[65] The report therefore recommended that low-ranking subordinates be indicted and tried by the national courts and national courts may try "intermediary-level accused" provided that the courts fully conform to internationally recognised standards and due process.[66] The President of the Security Council endorsed the Completion Strategy.[67]

Subsequently, the Security Council in Resolution 1503[68] reiterated the ICTY Completion Strategy for "completing investigations by the end of 2008" and "all of its work in 2010 by concentrating on the prosecution and trial of the most senior leaders suspected of being responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate."[69] In Security Council Resolutions 1503 and 1534, the ICTR was urged by the UNSC to formalise a detailed strategy, modelled on the ICTY Completion Strategy, where the most-senior leaders would be prosecuted by international jurisdiction and cases involving intermediate or low-ranked accused would be transferred to competent national jurisdictions as appropriate, including Rwanda, "to achieve its objectives of completion by the end of

[61] UNSC Res 1329 (5 December 2000) UN Doc S/RES/1329 para 1.
[62] ibid para 2.
[63] UNSC 'Letter dated 17 June 2002 from the Secretary-General addresses to the President of the Security Council' (17 June 2002) General UN Doc S/2002/678 para 6.
[64] ibid para 10, 19.
[65] ibid paras 10-30.
[66] ibid para 32.
[67] UNSC 'Statement by the President of the Security Council', (23 July 2002) General UN Doc S/PRST/2002.
[68] UNSC Res 1503 (n 7).
[69] ibid, preamble.

2008."[70] Subsequently, in 2002, Rule 11 *bis* in the ICTR Rules of Procedure and Evidence was amended to broaden the rule so that the accused could be transferred to a jurisdiction other than the state in which the accused was arrested.[71] This went further than the ICTY Rule 11 *bis*, which at the time only allowed the case to be transferred to the arresting state.[72]

Notably, Resolution 1503 also called upon 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 ICTR and encouraged the ICTY and ICTR Presidents, Prosecutors and Registrars to develop and improve their outreach [programs]."[73] The General Assembly reiterated the importance of carrying out an effective outreach programme within the overall mandate of the ICTR and its Completion Strategy, requesting the Tribunal to increase its capacity and out-reach activities.[74] According to the Secretary General "strengthening the judicial and prosecuting capacity of the affected countries is a key element of the Tribunals' mandates and will be an important legacy. Effective capacity-building may assist in the Tribunal's efforts to refer further cases to national jurisdictions and to support national prosecuting authorities."[75]

However, it has been argued that due to the adoption of these two Security Council Resolutions, the Ad-Hoc tribunals have been put under an enormous time and political pressure to comply with the deadlines scheduled by the Completion Strategy.[76] Further, the budgetary concerns of the ICTR may be an influencing factor

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[70] UNSC Res 1503 (n 7) preamble; UNSC Res 1534 (n 7) paras 4-5.
[71] ICTR, 'ICTR 12th Plenary Session 5-6 June 2002 Amendments adopted at the Plenary Session of the Judges ' (*ICTR*, 5-6 Junes 2002) <http://www.unictr.org/Portals/0/English/Legal/Evidance/English/amend12.pdf> accessed 20 October 2013.
[72] UNSC 'Twenty-sixth Session 11 & 12 July 2002' (11-12 July 2002) UN Doc IT/32/Rev. 24.
[73] UNSC Res 1503 (n 7).
[74] UNGA 'Resolution adopted by the General Assembly on 23 December 2005' (15 February 2006) UN Doc A/RES/60/241, paras 9-10; UNGA 'Resolution adopted by the General Assembly on 24 December 2010' (2 March 2011) UN Doc A/RES/65/252, para 11 as cited by Adama Dieng 'Capacity-Building Efforts of the ICTR: A Different Kind of Legacy' (2010) 9 NWUJIHR 403, 406.
[75] UNSC, 'Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals' (21 May 2009) General S/2009/258 para 86 as cited by Adama Dieng 'Capacity-Building Efforts of the ICTR: A Different Kind of Legacy' (2010) 9 NWUJIMR 403, 406.
[76] Diekmann (n 19) 107-108; Olympia Bekou, 'Rule 11 *bis*: An examination of the process of referrals to national courts in ICTY jurisprudence' (2009) 33 FILJ 723 726; Susan Somers, 'Rule 11 *bis* of the

in the decision to transfer the cases. Although there was no time limit in the resolution creating the ICTR, from the beginning it was clear that prosecution would not be a permanent task.[77] Around the time of the establishment of the Completion Strategy, the Ad-Hoc tribunals were already viewed as being "too costly, too inefficient and too ineffective"[78] as a mechanism for dealing with justice.[79] By 2004, the tribunals had been described as "enormous and extremely costly bureaucratic machines."[80] The Ad-Hoc tribunals had a combined budget that exceeded $250 million per annum and represented more than 10 per cent of the total annual UN regular budget. There was also a sentiment of donor fatigue, which caused financial crisis at the ICTY in June 2004, leading to a hiring freeze imposed by the UN Secretariat.[81] Not only was there an enormous expenditure, there were also such lengthy delays in trials that questions were "raised as to the violation of the tribunals of the basic human rights guarantees set out in the International Covenant on Civil and Political Rights (ICCPR)."[82] Indeed, it has even been argued that the origins of the Completion Strategy can be traced to the budget of the tribunals.[83] Specifically, links have been made with the Completion Strategy and political dialogues between states and various UN institutions that questioned the efficiency of the Ad-Hoc tribunals.[84] For example, in 2000, the Expert Group appointed by the Secretary-General found that until the process of winding down started, the financial resources required to fund the Tribunals could not be reduced.[85] These links have been argued to show the "obvious concern motivating the development of the Completion Strategy

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International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts' (2007) 30 BCICLR 175 183.

[77] Eric Møse, 'The ICTR's Completion Strategy-Challenges and Possible Solutions' (2008) 6 JICJ 667, 667.

[78] See generally Ralph Zachlin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 JICJ 541, 545.

[79] ibid.

[80] ibid 543.

[81] Dominic Raab, 'Evaluating the ICTY and its Completion Strategy' (2005) 3 JICJ 82, 96.

[82] Zachlin (n 78) 543; Raab (n 81) 88.

[83] Bingham gives the example of the origins Completion strategy being traced to a budgetary study where Kofi Annan appointed a group of experts in late 1990s to study the efficiency of the tribunals. Lara Bingham, 'Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 24 BJIL 687, 701.

[84] Bingham gives the example of then-President of the ICTY Claude Jorda observing that "[t]he Tribunal [was] at a turning point in its history," and the time had come to "question the productivity and efficiency of the Tribunal," and to identify a "time-frame… for fulfilling its mission." ibid.

[85] Donlon (n 56) 356 referring to UNSC 'Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (17 June 2000) UN Doc S/2000/597 para 35.

to be the price of international justice."[86] Notably, Justice Hunt of the ICTY Appeals Chamber was concerned that the pressure to complete the mandate could promote infringements on the rights of the accused.[87] In his dissenting opinion he expressed, "[T]his Tribunal will not be judged by the number of convictions it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials."[88] This thesis will therefore pay close attention to whether the transfer cases were decided appropriately, ensuring the conditions of fair trial and penalty in line with international standards or transferred prematurely based on budgetary concerns.

According to Rule 11 *bis*, which governs the referral of cases to national jurisdictions, a Trial Chamber must be firstly satisfied that the court by which the case has jurisdiction.[89] Therefore, part (A) of Rule 11 *bis* 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 able to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.[90]

A Trial Chamber also has to be satisfied that there will be minimum standards for the accused. As such, part (C) of Rule 11 *bis* provides:

> 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.[91]

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[86] ibid.
[87] Schabas (n 1) 43.
[88] *Prosecutor v Slobodan Milosevic,* (Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision given 30 September 2003)) IT-02-54-AR73.4 (21 October 2003) 22. See also Sarah Williams, 'ICTY Referrals to National Jurisdictions: A fair trial or a fair price?' (2006) 17 CLF 177, 221 who argues "The savings to the international community resulting from a timely conclusion to the activities of the ICTY must not come at the price of fair trials to the defendants and overburdening fledgling judicial systems.'
[89] RPE (n 10) Rule 11 *bis.*
[90] ibid.
[91] ibid.

Moreover, once the case has been transferred the ICTR will still retain some powers as well as transfer some powers to the national court. Accordingly, part (D) of Rule 11 *bis* provides:

> When an order is issued pursuant to this Rule:
>
> (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
>
> (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
>
> (iii) the Prosecutor shall provide to the authorities of the State all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
>
> (iv) the Prosecutor may, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor or through the Registrar to the President.[92]

Lastly, once the case has been transferred, the order can be revoked. Therefore, part (E) of Rule 11 *bis* provides:

> At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10. [93]

However, where indictments have not been confirmed, the Prosecutor does not need a judicial decision under Rule 11 *bis* to hand over the case file. These decisions are made on the basis of cooperation between the ICTR Prosecutor and national prosecuting authorities.[94] I will now turn to the procedural history of the transfer cases so the reader can understand when some challenges with the transfer cases have arisen and how the ICTR has attempted to alleviate them.

2.2 The procedural history of the transfer cases

In September 2003, the Prosecutor identified 40 cases that could be transferred to national jurisdictions for trial by Rule 11 *bis*. From the outset he expressed concerns for Rwandan law prescribing the death penalty.[95] This number was increased to 41 in

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[92] ibid.
[93] ibid.
[94] Møse (n 77) 672.
[95] UNSC 'Letter dated 3 October 2003 from the Secretary-General addressed to the President of the Security Council' (6 October 2003) General S/2003/946 Annex para 23.

April 2004.[96] The Rules of Procedure and Evidence were also changed so the transfer could be made to include any country that was willing and able to accept and prosecute the accused.[97] The issue of the capacity of the Rwandan judicial system to handle the transfer cases was raised, since Rwanda was additionally faced with the process of adjudicating thousands of local cases connected with the genocide.[98] As a part of the ICTR's mandate to contribute to justice, stability and reconciliation, the ICTR Outreach Programme was created in 1995 to contribute to national reconciliation and strengthening of the Rwandan judicial system.[99] The Outreach Programme included the training of jurists, advocates, human rights practitioners and awareness-raising programs within Rwanda.[100] The Programme supported Resolution 955 creating the ICTR, which emphasised the need for the international cooperation to strengthen the courts and judicial system of Rwanda.[101] Notably, the Resolution called "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 ICTR…"[102] In 2004, the Registrar concluded an inspection of prison facilities and began to consider a prisoner transfer agreement. The President of the ICTR commented "since many of the cases earmarked for transfer are destined for

[96] UNSC 'Letter dated 30 April 2004 from the President 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 addressed to the President of the Security Council' (3 May 2004) General S/2004/341 para 38 (Letter dated 30 April 2004 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council).

[97] Hassan B Jallow 'Statement by Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda to the United Nations Security Council' (UNSC, June 29 2004) <http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1081> accessed 29 July 2013.

[98] Letter dated 30 April 2004 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council (n 96) para 38.

[99] Erik Møse 'The International criminal Tribunal for Rwanda' in Bellelli Roberto (ed), *International Criminal Justice Law and Practice from the Rome Statute to Its Review* (1st edn, Ashgate Publishing Company 2010) 98 citing UNSC 'Letter dated 23 May 2007 from the President 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 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 addressed to the President of the Security Council', (31 May 2007) General S/2007/2003 Annex 5.

[100] UNSC 'Letter dated 29 May 2006 from the President 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 addressed to the President of the Security Council' (1 June 2006) General S/2006/358 Annex para 5.

[101] UNSC Res 955 (n 4) para 9

[102] ibid para 1.

Rwanda, the issue of resources may therefore affect the proposed transfer of cases to Rwanda. The transmitted cases would therefore have to await the resolution of these issues."[103] The Prosecutor also insisted on the compliance with international standards before the files would be transmitted.[104] From very early in the transfer case history, the ICTR prepared for the transfer cases through capacity building of the Rwandan judiciary and improving prison facilities to international standards.

By 2006, 30 unconfirmed case files had been handed over to Rwanda. The case-file of a suspect was also handed over to Belgium.[105] Meanwhile, negotiations with other European States for the referral of further cases were being carried out.[106] The transfer of Michel Bagaragaza to Norway was rejected by the Trial Chamber on 19 May 2006 and upheld on Appeal on 30 August 2006,[107] as Norway did not have the appropriate jurisdiction.[108] The first successful decision to transfer an accused under Rule 11 *bis* was made for the transfer of Michel Bagaragaza to The Netherlands. However, the Dutch authorities considered they had no jurisdiction to try the accused and subsequently revoked the transfer.[109] Two cases however, were subsequently successfully transferred to France having met the conditions of Rule 11 *bis*.[110]

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[103] UNSC 'Letter dated 19 November 2004 from the President 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 addressed to the President of the Security Council' (22 November 2004) General S/2004/921 para 38.

[104] UNSC 'Letter dated 23 May 2005 from the President 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 addressed to the President of the Security Council' (24 May 2005) General S/2005/336 para 40.

[105] UNSC 'Letter dated 30 November 2006 from the President 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 addressed to the President of the Security Council' (8 December 2006) General S/2006/951 para 33.

[106] Hassan Jallow 'Statement by Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda to the United Nations Security Council' (UNSC, June 7 2006) <http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1062> accessed 29 July 2013.

[107] *Prosecutor v Michel Bagaragaza* (Decision on the Prosecution Motion for Referral to the Kingdom of Norway) ICTR-2005-86-R11*bis* (19 May 2006); *Prosecutor v Michel Bagaragaza* (Decision on Rule 11 *bis* Appeal) ICTR-05-86-AR11*bis* (30 August 2006).

[108] *Prosecutor v Michel Bagaragaza,* Decision on Rule 11*bis* Appeal (n 107) para 11.

[109] *Prosecutor v Michel Bagaragaza* (Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of Netherlands) ICTR-2005-86-11*bis* (13 April 2007); *Prosecutor v Michel Bagaragaza* (Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the

In December 2007, the Government of Rwanda submitted an *amicus curiae* brief to the ICTR requesting that one of the Accuseds Yussuf Munyakazi, be transferred to Rwanda for trial.[111] The first five-referral requests including this case were denied on the basis of "the Trial Chamber's concerns for the relative ambiguity about the applicable Rwandan law concerning the risk of solitary confinement, and the availability and protection of witnesses from both within and outside Rwanda."[112] However, in 2007 Rwanda enacted legislation to exclude the application of the death penalty from transfer cases and also provided extensive guarantees for fair trial similar to the provisions of the ICTR.[113] Subsequently, on the 3rd of November 2008, Rwanda amended its laws to exempt transferees from the ICTR and other States from the provisions of solitary confinement upon conviction.[114] Also in 2008, the Government of Rwanda reported that a new prison had been built in Mpanga for transferred detainees with a special wing of 73 cells built to international standards. Moreover, during the trial, the accused would be detained in a custom-built remand facility in the Kigali Central Prison.[115]

In early 2010, the Prosecutor filed three more referrals under Rule 11 *bis*. During this time, capacity-building activities of the registry for the judiciary in Rwanda continued and Germany funded a video-link project for the Rwandan Supreme Court to increase the protection of witnesses. The ICTR also provided training programmes on witness

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Kingdom of Netherlands pursuant to Rule 11 *bis (F)* and Rule 11 *bis (G)*) ICTR-2005-86-11*bis* (17 August 2007) para 11-12.

[110] *Prosecutor v Wenceslas Munyeshyaka* (Decision on the Prosecutor's Request for the Referral of Munyeshayaka's indictment to France) ICTR-2005-87-1 (20 November 2007); *Prosecutor v Laurent Bucyibaruta,* (Decision on the Prosecutor's Request for the Referral of Laurent Bucyibaruta's Indictment to France) ICTR-2005-85-1 (20 November 2007).

[111] *Prosecutor v Yussuf Munyakazi* (*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 11 *bis*) ICTR-97-36-R11*bis* (21 December 2007) as cited by Canter (n 19) 1614.

[112] UNSC 'Letter dated 21 November 2008 from the President 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 addressed to the President of the Security Council' (21 November 2008) General S/2008/726 para 51.

[113] Hassan Jallow 'Statement by Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda to the United Nations Security Council' (UNSC, June 18 2007) <http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=987> accessed 29 July 2013.

[114] ibid.

[115] *Prosecutor v Gaspard Kanyarukiga* (Decision on the Prosecutor's Request for Referral to the Republic of Rwanda) ICTR-2002-78-R11*bis* (6 June 2008) para 91.

protection for personnel of the Rwandan judicial system.[116] In 2010, the Security Council also established the International Residual Mechanism for Criminal Tribunals (IRMCT), which would begin functioning on 1 July 2012.[117] The IRMCT would be unable to issue new indictments[118] and therefore only have power to conduct review proceedings, supervise the enforcement of sentences and decide to pardon or commute sentences.[119] As a "small, temporary and efficient structure, whose functions and size will diminish over time with a small number of staff commensurate its reduced functions."[120] Just before the decision of the first of the next 3 referrals the, Prosecutor commented that "a determination of the referral of the cases of seven of the 10 fugitives to national jurisdiction for trial will clearly impact on the Tribunal's Completion Strategy as well as on the design, timing, size, and cost of the international residual mechanism expected to inherit the residual functions of the tribunal."[121] Notably in 2013, the average duration of time between custody and judgment at the ICTR was 5.9 years.[122] The final stages of the transfer case decisions saw further capacity building for the judiciary of Rwanda but also the considerable down sizing of the ICTR by the establishment of IRMCT. However, it is questionable whether capacity building efforts will have an impact only on the handful of Transfer cases or will improve the situation of the Rwandan judicial system as a whole for domestic cases.

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[116] UNSC 'Letter dated 5 November 2010 from the President 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 addressed to the President of the Security Council' (5 November 2010) General S/2010/574 para 66.

[117] UNSC Res 1966 (22 December 2010) UN Doc S/Res/1966 Annex 1 Statute of the International Residual Mechanism for Criminal Tribunals (IRMC) art 1(1).

[118] ibid Annex 1 Statute of the International Residual Mechanism for Criminal Tribunals (IRMC), article 1(5).

[119] Guido Acquaviva, 'Was the Residual Mechanism for International Criminal Tribunals Really Necessary?' (2011) 9 JICJ 789 795.

[120] ibid preamble.

[121] Justice Hassan B Jallow 'Statement by Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda to the United Nations Security Council' (UNSC, December 12 2008). <http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1062> accessed 29 July 2013.

[122] Payam Akhavan, 'The Rise, and Fall, and Rise of International Criminal Justice' (2013) 11 JICJ 527 535.

In a landmark decision on the 28th June 2011, the ICTR Referral Chamber granted the request of the Prosecutor in the case of *Uwinkindi*[123] to be referred to Rwanda for trial. The Chamber had been satisfied with the legal framework in Rwanda, capacity building efforts to improve the legal system of Rwanda, as well as the arrangements the Prosecutor had made to monitor the trial in Rwanda. This decision resulted in the filing of the referral of the remaining cases. At this time, there were only two detainees at the ICTR left to be tried, with the rest being fugitives at large.[124] To ensure fairness of trial, the Chamber decided that the African Commission on Human and People's Rights (hereinafter ACHPR) would monitor the case of *Uwinkindi* when adjudicated in the Rwandan courts.[125] Moreover, if the ICTR were not satisfied with the Rwandan court system, it would still retain the right to revoke permission for Rwanda to try the transfer cases.[126] However, the President of the ICTR was unable to reach an agreement with the ACHPR and a stay of proceedings was ordered on the transfer of *Uwinkindi* until a suitable mechanism for monitoring was put into place.[127] The President of the Tribunal also issued additional guidelines for the monitoring mechanism to ensure uniform practices are followed after referral.[128] The case of *Uwinkindi* was expected to commence in late 2013 with pre-trial proceedings being undertaken by trial monitors of the ICTR. However, negotiations with the ACHPR, regarding the monitoring were still continuing.[129] By 1 July 2012, the Office of the Prosecutor assumed certain court monitoring functions for cases transferred by the ICTR to national jurisdictions. The First Annual Report of the (IRMCT) confirmed

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[123] *Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20) para 219.

[124] Hassan Jallow 'Statement by Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda to the United Nations Security Council' (UNSC, December 7 2011). <http://www.unictr.org/Portals/0/tabid/155/Default.aspx?id=1245> accessed 29 July 2013; UNSC 'Letter dated 16 November 2011 from the President 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 addressed to the President of the Security Council' (16 November 2011) General S/2011/731 paras 50-51.

[125] *Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20) para 219.

[126] ibid para 217.

[127] *Prosecutor v Jean Uwinkindi* (Order to stay the transfer of Jean Uwinkindi pending the establishment of a suitable monitoring mechanism) ICTR-2001-75-R11*bis* (24 February 2012) paras 3, 8.

[128] *Prosecutor v Jean Uwinkindi* (Order on the ICTR monitoring arrangements) ICTR-2001-75-R11*bis* (29 June 2012).

[129] UNSC 'Letter dated 23 May 2013 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council' (5 November 2010) General S/2013/309 Annex paras 47-48.

that the preliminary proceedings in referred *Uwinkindi* case had begun before the Kigali High Court.[130] Moreover, the Prosecutor had appointed a court monitor to observe the proceedings in the *Munyagishari* case, which had also been transferred to Rwanda for trial.[131]

2.3 The challenges of the transfer cases

From the creation of the ICTR, decisions at the inception of the tribunal as to its location would already sketch the challenges the ICTR could face if it decided to transfer cases back to Rwanda. From the initial UNSC Resolution, the Secretary General would already determine that Rwanda was not neutral territory to hold trials and this meant there were high security risks. Therefore, trials held in Rwanda may not guarantee an impartial and independent trial. With the genocide recently subsided, this author believes it would have been difficult for the victorious RPF government to make impartial decisions, the Defence Counsel for the Accused (Hereinafter the Defence) to secure witnesses to testify, or for Rwanda to guarantee that the death penalty would not be used. This opinion is particularly supported where Rwanda voted against the creation of the ICTR because the death penalty would not be implemented.

Of note is the tumultuous relationship between the Rwandan government and the ICTR that would delay the movement of witnesses in 2002. This disagreement, just one year before the Security Council resolutions to transfer cases back to Rwanda as a part of the Completion Strategy, raises concerns as to whether the Rwandan courts could adjudicate an independent decision without interference by the Rwandan government. However, the time gap between the inception of the tribunal and the transfer cases, as well as capacity building and law reform by the Rwandan government to improve the judicial culture and legal system could offset these concerns. The decision of *Uwinkindi*, almost two decades after the ICTR's inception could mean that Rwandan territory is now to be considered a neutral location to hold trials. Although there is also the question of whether capacity building of the Rwandan judiciary system and changes to the Rwandan penalty system will have an

[130] UNSC,'First Annual Report of the International Residual Mechanism for Criminal Tribunals' (n 33) paras 51-52.
[131] ibid para 53.

impact on the overall fair trial and penalty in Rwanda. Or rather, only improve the fair trial standards for the very few transfer cases.

Moreover, an overarching concern is certainly how the decision to transfer cases has fit with the Completion Strategy of the ICTR. Perhaps the referral of cases as a means to an end could have been decided prematurely without a clear confirmation of adequate fair trial standards and a penalty in line with international standards. With donor fatigue, an extraordinary budget and lengthy trials a major concern is whether the decision that cases could have been transferred back to Rwanda was made due to financial pressures. Notably, it is also concerning that after failed negotiations with the ACPHR, the monitor was appointed by the Office of the Prosecutor, which strongly advocated the transfer of the cases to Rwanda rather than an impartial body. However, to what extent should we draw the line as to how far decisions of the ICTR should go to ensure fair trial and conditions of detention up to international standards without becoming condescending or patronising towards the Rwanda? Schabas took the view that the decisions of the ICTR have been "somewhat patronising"[132] as well as "humiliating for Rwanda who has made great strides in order to modernise its justice system as inspired by international standards."[133] However, with the prosecution of international crimes moving towards the domestic sphere,[134] it will be more important than ever before to show an unwavering stance that national prosecutions should adhere to recognised fair trial standards.

Indeed, "as the final chapters on the Ad-Hoc International Criminal Tribunals are being written, it will be extremely important to balance competing values - accountability for the perpetrators, ensuring that the perpetrators receive a fair and expeditious trial, and ensuring justice for the victims and their families."[135] In other words, although it may appear preferable for international criminal justice to try the "small fish" before national criminal courts for the end result of justice,[136] the conduct

[132] William Schabas, 'Anti- Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda' (2009) 13 MPYIL <http://www.mpil.de/shared/data/pdf/pdfmpunyb/02_schabasii.pdf> accessed 24 May 2012 58.
[133] ibid.
[134] Rikoff (n 22) 3.
[135] Mundis (n 18).
[136] Hitomi Takemura, 'Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion' (2007) 7 ICLR 677 685.

of a trial in a fair manner should not be compromised. As Johnson has eloquently described the Completion Strategy "makes sense as policy planning for the tribunal's closure, but dangers exist: treating the target dates mechanistically; referring cases of senior-level accused to a domestic court; and referring cases to domestic jurisdictions that are not capable of conducting fair trials. Impunity could result. The successful completion of the Tribunal's work can be achieved only if it realized in a manner that maintains the highest standards of international human rights and due process, and excludes impunity."[137]

In what follows, I will analyse the three areas, namely the independence and impartiality of the judiciary, witness protection and availability and the applicable penalty, which the ICTR Chambers found to have negated transfer in the initial decision of *Munyakazi*.[138] I will then address the concern, which has been identified by the monitor in the aftermath of the transfer cases. That is, the payment Defence Legal Aid funding and the impact on the right of the Accused to an effective defence.

[137] Johnson (n 18) 174.
[138] *Prosecutor v Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29).

3. The Independence of the Rwandan judiciary

Under the transfer Rule 11 *bis,* a Trial Chamber has to be satisfied that the accused will receive a fair trial.[139] International legal instruments such as the International Covenant on Civil and Political Rights (ICCPR) state under procedural obligations to ensure the right to fair trial, that an accused "should be entitled to a hearing by an independent and impartial tribunal."[140] Moreover, according to the Constitution of the Republic of Rwanda, "Every person of a crime shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public, and *fair hearing*…"(emphasis added).[141] The Transfer Law, which Rwanda had passed to include Rule 11 *bis* in its legislation and to facilitate the transfer cases,[142] has reinforced this guarantee.[143]

During the history of the ICTR the current political party, the Rwandan Patriotic Front (hereinafter RPF)[144] has interfered with the prosecution of former RPF members involved in the 1994 Genocide. There has been little to no accountability for these crimes.[145] Indeed, Carla del Ponte, the former Chief Prosecutor of the ICTR has complained of "political pressure from Rwanda designed to prevent her investigating military abuses carried out by the Rwandan Patriotic Front."[146] In fact, she was encouraged to prosecute those who committed the genocide but not the war crimes carried out by the soldiers of both side. She claims that this led to her removal from her post as Chief Prosecutor of the ICTR.[147] For example, in response to the suspension of cooperation of Rwanda with the ICTR in 2002 (as discussed previously in Chapter 2), the Prosecutor felt that the true reason was not the manner by which the witnesses were being treated, but that "powerful elements within Rwanda strongly

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[139] RPE (n 10) Rule 11 *bis,* para c.
[140] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 para 1.
[141] Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005, 4 June 2003 (Rwanda) art 19.
[142] Organic Law No 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal of Rwanda and from Other States (Rwanda) art 1.
[143] ibid art 13.
[144] BBC News, 'Rwanda Profile-Leaders' (BBC News, 5 February 2013) <http://www.bbc.co.uk/news/world-africa-14093242> accessed 18 April 2013.
[145] See Haskell L and Waldorf, L, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences, (2011) 34 HICLR 49.
[146] Simpson G, *Law, War and Crime- War Crimes Trials and the Reinvention of International law* (1st edn, Polity Press 2007) 17.
[147] ibid.

oppose the investigation by the Prosecutor, in the execution of the Tribunal mandate, of crimes allegedly committed by members of the RPF Patriotic Army in 1994" and therefore, the Rwandan authorities were accused of having no genuine political will to provide assistance.[148] Due to the interference by the Rwandan government in the prosecution of former RPF members throughout the history of the ICTR, it is of concern that the Rwandan government could influence the Rwandan Judiciary when adjudicating the transfer cases.

Indeed, the tribunal's lack of enforcement power has been reasoned by scholars to give the government of Rwanda "wide latitude to withhold the vital assistance the tribunals needed to investigate atrocities, issue indictments and prosecute war crimes suspects," therefore giving the victor government the ability to control who is prosecuted.[149] For example in 2008, upon transfer of the ICTR's investigations into RPF crimes to Rwanda for domestic prosecution, the Rwandan Prosecutor General indicted four senior military officers of the RPF in connection to the killings of several clergy of the Kabgayi Parish in June 1994. On the 24th October 2008, the military court acquitted two commanding officers and convicted subordinates officers to 8 years imprisonment on the 24th of October 2008.[150] It is arguable that this was a symbol that Rwanda was ready to make unbiased decisions by showing readiness to prosecute both sides of the genocide. However, scholars have described this trial as "a sham trial that ignored crucial evidence in an apparent attempt to shield senior RPF members from criminal responsibility."[151]

More recently the wide interpretation of laws criminalising genocide ideology and discrimination and sectarianism,[152] by the Rwandan government would be a major concern. These laws which were introduced to restrict speech deemed to promote

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[148] UNSC 'Letter dated 14 August 2002 from the Charge d'affaires a.i. of the Permanent Mission to the United Nations addressed to the President of the Security Council' (15 August 2002) General S/2002/938.

[149] Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 JHR 213, 214.

[150] Hassan Jallow 'Statement by Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda to the United Nations Security Council' (UNSC, December 12 2008) <http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1062> accessed 29 July 2013 as cited by Møse (n 18) 674.

[151] Haskell (n 145) 50.

[152] Law No 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology (Rwanda); Law No 4772001 of 18/12/2001 on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism (Rwanda).

hatred in the years following the 1994 genocide,[153] have been largely misused to "criminalise criticism of the government and legitimate dissent by opposition politics, human rights activists and journalists" particularly in the lead up to the 2010 elections.[154] The independence and impartiality of the Rwandan judiciary would therefore be a concern for the ICTR in deciding whether the remaining cases could be transferred.

I will now turn to an analysis of the decisions of the ICTR on the issue of the independence of the Rwandan judiciary. This analysis will discuss the case law chronologically. It will begin with the first group of decisions of the Trial Chamber and their relative appeal decisions and then turn to the next group of transfer case decisions and their relative appeal decisions.[155]

3.1 The decisions of the ICTR on the independence of the Judiciary

The issue of independence and impartiality of the Rwandan judiciary was first discussed in the decision that denied the transfer of the case of Yussuf Munyakazi to Rwanda in May 2008.[156] The Defence raised concerns that a single judge would adjudicate the trial in Rwanda.[157] The Trial Chamber agreed, expressing apprehension that in light of a tendency of the Rwandan government to pressure the judiciary, this would mean that a single judge would be particularly susceptible.[158] The Chamber found that although Rwandan legislation enshrined the principle of judicial independence, the Rwandan Government's interrupted cooperation with the Tribunal, as well as negative reactions to foreign judges for indicting former members of the

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[153] Amnesty International, *Justice in Jeopardy: the first instance trial of Victoire Ingabire* (Amnesty International, AFR 47/001/2013) <http://www.amnesty.org/en/library/info/AFR47/001/2013/en> accessed 20 April 2013 7.

[154] ibid 7, 9.

[155] The Appeal system of the ICTR is one where the decisions of the Trial Chamber (the chamber of first instance) are appealable to the Appeals Chamber (the chamber of second instance), rather than to reconsider evidence and arguments, but to correct errors of law that may invalidate a decision and errors of fact that have occasioned a miscarriage of justice (See *Ntawukulilyayo* v *the Prosecutor* (Judgment) ICTR-05-82-A (3 August 2010) paras. 32, 77*; Prosecutor v Knorjelac* (Judgment) IT-97-25-A (17 September 2003) para. 15. Although specific rule that implies that the principle of judicial precedent is followed, it has been argued that the principle of judicial precedent is weak because it has only been established by case law. For further explanation see also Xavier Tracol, 'The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals' (2004) 17 LJIL 67 67-102.

[156] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29).

[157] ibid para 33.

[158] ibid para 40.

RPF "somewhat troubling."[159] In particular, the Rwandan Government in a series of strongly critical official statements[160] had previously condemned a French judge for issuing arrest warrants against former RPF members.[161] The Rwandan Government was also critical of a Spanish judge during a Referral Hearing when a Human Rights Watch (hereinafter HRW) representative had stated that a Spanish indictment had been issued against forty high-ranking RPF officers. The Rwandan Government representative at the hearing denied this, stating "there is no such thing as a resolution by the Rwandan Parliament to prosecute a Spanish judge."[162] Overall, the Trial Chamber found that safeguards to the impartiality and independence of the judiciary provided under Rwandan law to have not been met in the reality of past practice and that if the case was transferred, it could be subjected to indirect pressure from the Rwandan Government.[163] This was considered especially due to the trial being placed within the territory where the crimes occurred.[164] Therefore in *Munyakazi*, examples where the Rwandan government had attempted to pressure the judiciary of the ICTR, was considered by the Trial Chamber to override the guarantees of independence and impartiality in the Transfer Law and the Constitution of the Republic Rwanda.

However one month later in June 2008, in the decision of *Kanyarukiga*, the contention that there was an inclination for the Rwandan government to influence the judiciary was placed aside.[165] Although the Trial Chamber accepted that the concept of judicial independence was relatively new in Rwanda, it decided that this did not bear specific effect on the High Court or the Supreme Court, which would be adjudicating the transfer cases. It was decided that illustrations provided by HRW and International Criminal Defence Attorneys Association (hereinafter ICDAA) were too general in nature and did not focus specifically on the High Court or Supreme Court, which would adjudicate the transfer cases.[166] The Trial Chamber of *Kanyarukiga* rejected submissions by HRW, which questioned executive interference in practice[167]

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[159] ibid.
[160] ibid paras 43-44.
[161] ibid para 42.
[162] ibid para 45.
[163] ibid paras 46, 48.
[164] ibid para 47, 48.
[165] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115).
[166] ibid para 39.
[167] ibid para 34.

particularly in the case of the President of Rwanda's leading role in the appointment of judges. Executive involvement in judicial appointments was found to exist in many countries and doesn't in itself mean lack of independence.[168] Not accepted, was the amicus curiae brief of the ICDAA, which reported that there had been a tendency that higher positions of the judiciary were filled with members of the Tutsi ethnicity. The Trial Chamber rejected the reasoning that the tendency to fill higher positions of the judiciary with Tutsis who might have personally suffered from the genocide implies that the Rwandan Judiciary could not provide a "sufficiently calm and dispassionate climate."[169] The Trial Chamber dismissed these claims on the basis of having no statistical information and looking to the many accused of Hutu origin that had been acquitted.[170] The Trial Chamber accepted a statistic given by the Counsel for Rwanda that referred to an acquittal rating of close to 40%.[171] Of note, the history of interference by the Rwandan government to pressure the judiciary of the ICTR was not addressed in this decision.[172]

The subsequent decision of the Trial Chamber in the case of *Hategekimana*[173] agreed with the previous decision in *Kanyarukiga.*[174] The submissions of HRW were based on interviews with present and former jurists that argued that the Rwandan judiciary lacked independence. These submissions referred to a select number of specific examples were considered to only involve a "limited number of cases over a large period of several years where the Rwandan ordinary courts have been dealing with large numbers of cases."[175] Moreover, concerns expressed by former members of the Rwandan judiciary lacked specific examples and context.[176] The Trial Chamber also explained that it was within the transfer rules of Rule 11 *bis* and various human rights

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[168] ibid para 37.
[169] *Prosecutor v Jean Baptiste Gatete* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-2000-61-I (19 November 2008).
[170] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115) para 37.
[171] ibid para 62.
[172] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29).
[173] *Prosecutor v Idelphonse Hategekimana* (Decision on Prosecutor's Request for Referral of the Case of Ildelphonse Hategekimana to Rwanda) ICTR-00-551B-Rule11*bis* (19 June 2008).
[174] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115).
[175] ibid para 41.
[176] ibid para 42.

treaties to have one judge.[177] Further, the Trial Chamber held that the President's role in choosing the judiciary was not absolute. Thereby, the President merely proposes potential judges and the members of the Supreme Court and the Senate ultimately elect them.[178] Notably in a shift in reasoning, the Trial Chamber decided that the reactions of the Rwandan government to investigations by foreign judges into crimes committed by the RPF were instead reactions to the rulings of foreign courts.[179]

The emphasis on specific practice was reiterated by the Trial Chamber in the subsequent decision of *Gatete*,[180] who again expressed a lack of statistical information and decided that irrespectively, the exact composition of the High Court and Supreme Court would not prevent transfer as the acquittal rate in Rwanda was considerable. The Trial Chamber referred to the same acquittal rate of 40% employed in the previous decision of *Kanyarukiga.*[181] The Trial Chamber once more declared that examples given by the *amici* to be too general, not specifically focusing on the High Court.[182] When discussing the concerns of a trial being conducted by a single judge, the Trial Chamber reiterated that this "clearly does not prevent transfer" as there was no information available that an acquittal rating was lower in such trials.[183]

Finally, the decision of the Appeals Chamber in *Munyakazi*[184] reversed the finding by the Trial Chamber that had previously concluded the safeguards provided in Rwandan Law of the impartiality and independence of the judiciary was not a reality in past practice.[185] In regards to arguments made by the Defence that a single judge is incompatible with the right to a fair trial, the Appeals Chamber reiterated that international legal instruments such as the ICCPR[186] do not require that a trial or an

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[177] ibid para 41.
[178] ibid.
[179] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) paras 40-45.
[180] ibid para 35.
[181] *Prosecutor v Gaspard Kanyarukiga*, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115).
[182] *Prosecutor v Jean Baptiste Gatete,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 169) para 36.
[183] ibid para 38.
[184] *Prosecutor v Yussuf Munyakazi* (Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*) ICTR-97-36-R11*bis* (8 October 2008).
[185] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) paras 46, 48.
[186] ICCPR (n 140).

appeal to be heard by a certain number of judges to be fair and independent.[187] The Appeals Chamber was not swayed by the Opinion of the Consultative Council of European Judges and noted their opinion to be merely recommendatory.[188] The Consultative Council recommended that where a panel of professional judges hears a trial, "the number of judges should be kept to a minimum, with a single judge wherever the degree of seriousness of the case allows."[189] As the transfer cases are of a serious nature where defendants are accused of being the main planners and organisers of genocide a single judge may not be always appropriate.

The Appeals Chamber did not agree with judgment of the Trial Chamber of the decision in *Munyakazi*, that a single judge could be more susceptible to outside pressure,[190] as it held there was no evidence on the record in this particular case that single judge trials in Rwanda had been more susceptible to outside interference or pressure particularly by the Rwandan Government, than previous trials involving panels of judges.[191] The Appeals Chamber found that the Trial Chamber had erred in its consideration that there was a serious risk of government interference with the judiciary in Rwanda. In that regard, Trial Chamber's previous reasoning was based on nine years old examples. The Appeals Chamber concluded that examples of reactions of the Rwandan government to foreign judges were considered too old. The Appeals Chamber pointed to the fact that the ICTR acquitted five persons and that Rwanda did not suspend its cooperation with the tribunal as a result of these acquittals. The Appeals Chamber reasoned that the reaction of the Rwandan government to foreign indictments did not necessarily indicate how Rwanda would react to rulings by its own courts.[192]

The Appeals Chamber did not find supporting evidence from the *amicus curiae* relating to the independence of the Rwandan judiciary to be specific enough.

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[187] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184) paras 22, 26.
[188] ibid para 26.
[189] Council of Europe, *Recommendation No R (87) of the Committee of Ministers to Member States Concerning the Simplification of Criminal justice* (Adopted by the Committee of Ministers on 17 September 1987 at the 410 meeting of Ministers' Deputies) para III d 2.
[190] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 40.
[191] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis* (n 184) para 26.
[192] ibid para 28.

For example, a report citing the 2007 United State Department Report, referring primarily to the Gacaca cases rather than the High Court or Supreme Court.[193] Finally, the Appeals Chamber found that the Trial Chamber did not take into account the availability of monitoring to ensure that the independence, impartiality or competence of the Rwandan judiciary was upheld.[194] Therefore, the Appeals Chamber granted this ground of appeal and concluded that the Government of Rwanda respects the independence of the judiciary and that the composition of the courts in Rwanda did meet the right to be tried by an independent tribunal.[195] The issue of the independence and the impartiality of the judiciary from this case seemed to be largely resolved. As a consequence of this judgment the Defence did not appeal the issue of the independence and impartiality of the judiciary, in the subsequent appeal decisions of *Kanyarukiga*[196] and *Hategekimana,*[197] which discussed other issues that held back the transfer of these cases. Moreover, the trial decision of *Gatete* was not appealed.[198] However, after the Appeals Chamber decision in *Munyakazi,* challenges to the independence and impartiality of the judiciary have been nevertheless raised in different cases, which will be discussed below.

Despite these challenges, the decision in the case of *Uwinkindi*[199] confirmed that the Rwandan judiciary was independent and impartial enough to meet the fair trial standard for a transfer of case to Rwanda. The Trial Chamber reiterated that past practice in Rwanda had to be highly specific to prove otherwise. Submissions from the defence, HRW, ICDAA and the International Association of Democratic Lawyers (Hereinafter the IADL), a non-governmental organization with consultative status to Economic and Social Council and United Nations Educational and Scientific Organization[200] were not considered specific enough. Particularly, the Trial Chamber

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[193] ibid para 29.
[194] ibid para 30.
[195] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184) para 50.
[196] *Prosecutor v Gaspard Kanyarukiga* (Decision on the Prosecutor's Appeal against Decision on Referral under Rule 11 *bis*) ICTR-02-78-R11*bis* (30 October 2008).
[197] *Prosecutor v Idelphonse Hategekimana* (Decision on Prosecutor's Appeal for Request under Rule 11*bis*) ICTR-00-551B-Rule11*bis* (4 December 2008).
[198] *Prosecutor v Jean-Baptiste Gatete* (Judgment and Sentence) ICTR-2000-61-T (31 March 2011). Annex A paras 4,6.
[199] *Prosecutor v Jean Uwinkindi* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20).
[200] International Association of Democratic Lawyers, 'IADL < http://www.iadllaw.org/> accessed 20 April 2013.

found that these examples were mostly of a political nature, which "does not necessarily reflect the conditions of the trial or the charges."[201] Allegations of corruption by the Defence and HRW were set aside. For example, a recent public address by the President of the Supreme Court, where transfer cases would be adjudicated, which described the justice sector as "very prone to corruption" were found by the Trial Chamber as not enough to conclude the Rwandan judiciary was unduly corrupt. [202] This opinion was confirmed by the Appeals Chamber,[203] which found there was neither any evidence of external influence and corruption or that the Accused could support that his case would be "uniquely susceptible to interference" or support this submission of a "deteriorating political climate."[204] Therefore, it was confirmed that Rwanda met the condition of independence and impartiality of the judiciary to transfer the case.[205]

Since the Appeal of *Uwinkindi*, there have been seven cases that have been transferred to Rwanda, which found the Rwandan judiciary to be able to conduct a fair trial.[206] Notably, in the subsequent transfer case of *Kanyishema,*[207] the Prosecution had indicated that Rwanda had engaged in capacity building programmes reinforcing the competencies and skills of judges, which the Trial Chamber accepted.[208] On the other hand, the ICDAA also argued that in 2008, the Rwandan Constitution was amended so that judges no longer had the security of tenure for life

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[201] *Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda, (n 20) para 196.
[202] ibid paras 184-185.
[203] *Jean Uwinkindi v The Prosecutor* (Decision on Uwinkindi's Appeal against the Referral of his case to Rwanda and Related Motions) ICTR-01-75-AR11*bis* (16 December 2011).
[204] ibid para 75.
[205] ibid para 89.
[206] *Prosecutor v Fulgence Kayishema* (Decision on the Prosecutor's Request for Referral to the Republic of Rwanda) ICTR-01-67-R11*bis* (22 February 2012) paras 121-142; *Prosecutor v Charles Sikubwabo* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-95-ID-R11*bis* (26 March 2012) paras 119-140; *Prosecutor v Ladislas Ntaganzwa* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-96-9-R11*bis* (8 May 2012) paras 59-74; *Prosecutor v Bernard Munyagishari* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-2005-89-R11*bis* (6 June 2012) paras 172-199; *Prosecutor v Ryandikayo* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-95-1E-R11*bis* (20 June 2012) paras 57-66; *Prosecutor v Aloys Ndimbati* (Decision on the Prosecutor's Request for the Referral of the Case of Aloys Ndimbati to Rwanda) ICTR-95-1F-R11*bis* (25 June 2012) para 51-57; *Prosecutor v Pheneas Munyarugarama* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-02-79-R11*bis* (28 June 2012) paras 43-52.
[207] *Prosecutor v Fulgence Kayishema* (Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda) ICTR-01-67-R11*bis* (22 February 2012).
[208] ibid para 128.

but were now subject to evaluation, which could make them subject to making decisions to ensure the renewal of their terms.[209] However, the Trial Chamber disagreed, noting that the renewal of the terms of office is in the hands of the judicial body, which is independent of the executive and legislature.[210] The prosecution also submitted that the Rwandan legal framework ensures independence and impartiality of the judiciary, which is separate from the legislative and executive branches of government.[211] Notably, by this time, the Transfer Law had also been amended to offer the President of the Court the option of having "complex or important cases ruled by a quorum of three or more judges rather than one judge."[212] The Trial Chamber accepted this as well as examples from practice that showed the High Court convicting slightly over 200 cases and acquitting the remainder of the 283 criminal trials.[213] The Prosecution also submitted that the High Court presided over 36 genocide cases between 2006 and 2010, and the Supreme Court had heard 61 appeals or post-conviction proceedings in genocide cases between 2006 and 2008.[214] However, it would have been interesting to have information on which of these genocide cases resulted in an acquittal. The same submissions were made in the case of *Sikuwabo,*[215] where Trial Chamber upheld its previous reasoning.

In the case of *Ntaganzwa,*[216] the Counsel for the Accused argued that "any person who is a citizen of Rwanda must have either witnessed or experienced or felt the commission of the alleged crimes" and therefore would lack to impartiality to try cases.[217] The Trial Chamber noted that the Counsel did not provide any examples of bias.[218] According to the Trial Chamber, it is well established in the ICTR jurisdiction that there exists a presumption of impartiality that attaches to a judge, derived from their oath at office as well as the qualification for their appointment. The Chamber was of the opinion that it must be assumed that judges can "disabuse

[209] ibid paras 130-133.
[210] ibid para 134.
[211] ibid paras 135-136.
[212] ibid para 137.
[213] ibid para 140.
[214] ibid para 141.
[215] *Prosecutor v Charles Sikubwabo,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206).
[216] *Prosecutor v Ladislas Ntaganzwa*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206).
[217] ibid para 65.
[218] ibid para 74.

their minds of any irrelevant personal beliefs or predispositions," and that there is a "high threshold that must be reached in order to rebut the presumption of impartiality."[219] Referring the to ICTY Appeals Chamber judgment in the case of *Furundzija,* "partiality must be established on the basis of adequate and reliable evidence."[220] The Trial Chamber of the subsequent referral case of *Ryandikayo,*[221] *Ndimbati,*[222] and *Munyarugarama*[223] agreed. For the Transfer Law and Rwandan Law to be overridden, the Trial Chamber reiterated that it needed highly specific examples of practice.[224]

In the subsequent decision of *Munyagishari*,[225] the Defence raised allegations that according to the former Prosecutor General and Vice President of the Supreme Court, the Rwandan judiciary is not independent of the RPF.[226] The Defence gave the example of the trial of Victoria Ingabire to illustrate how the Supreme Court has been "used as a tool of oppression of government opponents."[227] The Prosecution argued that Victoria Ingabire was supported by a group wanted by the ICC and that the IADL failed to show how this trial might affect the case of the Accused.[228] The Chamber considered the Defence's argument as it relates to the trial of Victoria Ingabire unsubstantiated and that IADL failed to show the similarity between the Victoria Ingabire case and the case of the Accused. The Chamber concluded it was not persuaded that the Accused would face trial before a non-independent and partial bench as a consequence of corruption and external influence.[229] As the Victoria Ingabire case is the most recent example, which could shed light on the independence and impartiality of the Rwandan judiciary at present, I will discuss this example at length below.

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[219] ibid para 73 referring to (Prosecutor v Anto Furundzija) Appeal Judgement IT-95-17/1-A (21 July 2000) para 203.
[220] ibid referring to *Prosecutor v Anto Furundzija,* Appeal Judgement (n 219) para 197.
[221] *Prosecutor v Ryandikayo,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 64-65.
[222] *Prosecutor v Aloys Ndimbati,* Decision on the Prosecutor's Request for the Referral of the Case of Aloys Ndimbati to Rwanda (n 206) para 57.
[223] *Prosecutor v Pheneas Munyarugarama,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206).
[224] ibid para 51.
[225] *Prosecutor v Bernard Munyagishari,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206).
[226] ibid para 183.
[227] ibid.
[228] ibid.
[229] ibid para 198.

3.2 Evaluation

The Trial Chamber in its decision of *Munyakazi*,[230] was initially concerned that cases transferred to Rwanda could result in a decision influenced by the government of Rwanda. However, throughout the decisions of the transfer cases, the ICTR has indicated that allegations of government interference are not specific enough to rebut the presumption of independence and impartiality. Although a panel of a single judge may mean that a judge may be more susceptible to influence, the Chamber argued this should not be a reason to deny transfer, as the aim of the Rule 11 *bis* statute is to determine whether the accused will receive a fair trial. Therefore, as the ICTR stated, a minimum number of judges is not a requirement of any international legal instrument as pre-requisite for a fair trial. In any event, the transfer law has been amended so that the President of the Court has the option of having the case heard by a quorum of three or more judges. Indeed, as the ICTR has pointed out, the examples of the Rwandan government condemning decisions of the ICTR against former RPF members, given in the *Munyakazi* case in 2008 are outdated and cannot be relied upon today to give a true depiction of the Rwandan judicial system.

However, a recent example of the Victoria Ingabire case, submitted by the Defence in 2012, could indicate that the Rwandan judiciary may not be independent from the Rwandan government. Amnesty International has shown concern as towards "the Rwandan judiciary's capacity to deal with high profile political cases fairly and independently."[231] The trial of Victoria Ingabire, an opposition politician who returned to contest the 2010 elections,[232] led to her conviction of 8 years in prison by the Supreme Court of Rwanda on 17 December 2012, a year after the Appeals Chamber of the ICTR Trial Chamber pronounced the judicial system to be impartial and independent.[233] Her conviction was based on a speech, which referred to problems with reconciliation, and ethnic violence that she had made at the Genocide Memorial Centre.[234] It is concerning that Ingabire was convicted based on the punishment of the crime of Genocide Ideology and Law N°4772001 of 18/12/2001 on

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[230] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29).
[231] Amnesty International (n 153) 6.
[232] ibid.
[233] *Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20) para 226.
[234] Amnesty International (n 153) 6.

Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism.[235]

The Amnesty International report argued that the trial against Ingabire was biased, pointing to official statements made by the Rwandan authorities before the trial that came to pre-trial conclusions about the weight of evidence brought against her.[236] The report gave examples where the non-governmental organisation felt the judge was expressing favouritism towards the prosecution. For example, during the trial, the judge "expressed surprise at the submission and complained about other purported examples of misconduct by the Defence." Amnesty International found these complaints not to be clearly linked to the defence's submission.[237] The judge in the case of Ingabire also reportedly, "expressed anger that the defence had not provided written submissions responding to the prosecution's dossier earlier."[238] The report also described the judge telling the defence that the submission had been made in a "baric way" and when the defence interjected, the counsel was refused the right to respond to the concerns.[239] The alleged favouritism towards the Prosecution in the Ingabire case, could be an indication of how the accused will be treated in the transfer cases.

Also concerning is that in 2010, Ingabire's defence lawyer, American professor Peter Erlinder, was also arrested and imprisoned for genocide denial, based on internet opinion pieces authored by Erlinder. A Rwandan police spokesman also pointed to statements that Erlinder had made at the ICTR and in publications. Notably, Erlinder had also previously been the head of the ICTR defence team who had achieved Ntabakuze's acquittal for "conspiracy to commit genocide."[240] During the Ntabakuze trial, Erlinder had publicised the UN "Rwandan Genocide Papers," which were documents containing evidence of RPF-led executions of Hutu civilians.[241]

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[235] ibid 7.
[236] ibid.
[237] ibid 24.
[238] ibid.
[239] ibid.
[240] Jennifer Wren Morris, 'The Trouble with Transfers: An Analysis of the Referral of Uwinkindi to the Republic of Rwanda' (2012) 90 WULR 505 526-527.
[241] ibid.

3.2.1 Reports of the monitor

According to Rule 11 *bis* part D, the Prosecutor may send observers, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor or through the Registrar to the President.[242] Applying this rule, the Referral Chamber in the case of *Uwinkindi*, was persuaded that a robust monitoring mechanism would "ensure that any material violation of the fair trial rights of this Accused will be brought to the attention of the President of the Tribunal forthwith so that remedial action, including revoction, can be considered by this Tribunal."[243] After failed negotiations with ACHPR, the Office of the Prosecutor assumed court-monitoring functions for the transferred cases including the proceedings in the subsequently transferred *Munyagishari* case.[244] It is in this author's opinion that the Reports will carry more weight once the ICTR has designated an impartial body to carry out monitoring rather than the ICTR office of the Prosecutor, which strongly advocated for the transfer of the cases.

In November 2013, the President of the Mechanism made a decision regarding the monitoring mechanisms in the *Uwinkindi* and *Munyagishari* cases.[245] This decision considered that "the monitors in the *Uwinkindi* and *Munyagishari* cases should limit themselves to providing objective information relevant to any possible violations or impediments to the fair trial rights of Mr. Uwinkindi and Mr. Munyagishari in their reports, and refrain from including in their reports any opinion, assessment, or conclusions regarding such violations or impediments unless otherwise directed."[246] This is understandable since the monitor may not make an application for revocation and there is no duty imposed on the monitor to make an application.[247] According to the Rules of the ICTR, the requests for revocation are to be submitted by the

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[242] RPE (n 10) Rule 11 *bis* part (D) (v).
[243] *Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20) para 223.
[244] UNSC,'First Annual Report of the International Residual Mechanism for Criminal Tribunals' (n 33) paras 51-53.
[245] *Prosecutor v Jean Uwinkindi* (Decision on Registrar's Submissions regarding the monitoring mechanisms in the *Uwinkindi* and *Munyagishari* cases) MICT-12-25 (15 November 2013).
[246] ibid para 29.
[247] ibid para 37.

Prosecutor. However, the Chamber may grant other parties or entities standing to make such a request.[248]

Since the transfer of *Uwinkindi* and *Munyagashari*, the Reports of the monitor have made observations of the hearings in Rwandan Courts. Thus far, there has not been any indication of favoritism during the hearings. For example, in the August 2012 Report of the Court Monitor for the case of *Uwinkindi,* the monitor reported on a hearing fixed before the Intermediate Court of Nyarugenge on a bail application filed by the Accused. According to the monitor, the judge provided equal opportunity for the parties to address the court at every stage of the proceeding when a new argument was taken up.[249] Further, in the September 2012 report for the case of *Uwinkindi*, the monitor reported on a hearing fixed before a single judge of the Rwandan High Court to hear the Appeal against the decision by the Intermediate Court of Nyarugenge. The monitor noted that throughout the proceedings, the Judge intervened and asked questions to both the parties, and once a party had responded, allowed the opposite party to express its opinion on that question.[250] Similarly, in the January 2013 report for the case of *Uwinkindi,* the monitor reported on a nine-member bench of the Supreme Court of Rwanda, which heard oral arguments from the parties.[251] When the Defence argued that he was awaiting a response from the State about the constitutionality and jurisdiction of the High Court,[252] the Court adjourned the case to enable the Defence to receive the State's response before proceeding with his arguments.[253] This was despite the Principle State Attorney from the Ministry of Justice arguing that he had already responded, noting that the registrar had verified his email.[254] Moreover, in the March 2013 report for the case of *Uwinkindi,* where the Defence informed the Court that it was facing challenges that made it impossible to

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[248] ibid.
[249] ICTR Monitor, 'Public Report of the Court Monitor for the Uwinkindi Case August 2012' (MICT, 10 September 2012) <http://unmict.org/files/cases/uwinkindi/other/en/120910_AugReport.pdf> accessed 13 March 2014 para 9.
[250] ICTR Monitor, 'Report of the Court Monitor for the Uwinkindi Case September 2012' (MICT, 4 October 2012) <http://unmict.org/files/cases/uwinkindi/other/en/121004_SeptReport.pdf> accessed 13 March 2014 para 6.
[251] ICTR Monitor, 'Report of the Court Monitor for the Uwinkindi Case 20 December 2012 to 31 January 2013' (MICT, 31 January 2013) <http://unmict.org/files/cases/uwinkindi/other/en/130131_JanReport.pdf> accessed 13 March 2014 para 1.
[252] ibid paras 5-6.
[253] ibid para 10.
[254] ibid para 7.

commence trial, the Chamber decided to give the Defence enough time to file submissions on all the obstacles it was facing before the trial. [255]

However, in the July-August 2013 Report of the monitor, the Accused stated that he would not receive justice in Rwanda because the prosecutors, the judges, and all those handling his case are of an ethnicity other than his. Uwinkindi stated that he had been denied the right to presumption of innocence in Rwanda, as both the media coverage and the State authorities regularly proclaim his guilt for the alleged crimes.[256] Also shedding doubt on the independence of the judiciary, in the January-February 2014 Report of the monitor, the High Court decided to maintain charges of Complicity to Commit Genocide, even though these charges had been dropped from the Indictment by the ICTR, which could be of some concern.[257]

The transfer cases from ICTR will involve former senior cabinet ministers, former military commanders, political leaders, journalists and senior businessmen who have played large role in organising the Rwandan genocide.[258] As outlined above, Ingabire, a Rwandan opposition politician, has been convicted for genocide ideology where she has expressed concerns about problems with reconciliation and ethnic violence. Therefore, it is disconcerting that the Rwandan government could possibly influence the decision of a trial for a high-level organiser of the Rwandan genocide. However, the conviction of Victoria Ingabire was two years ago and this author is not aware of recent examples on arrests for genocide ideology. Only time will tell whether complaints from the Accused about the High Court maintaining charges of Complicity to Commit Genocide will have an impact on the impartiality of the overall judgment. Moreover, this author does not believe that the ethnicity of the judges and prosecutor handling the case will affect the impartiality of the decision. Thus far, the Reports of the Monitor have indicated that the judges have acted in an impartial

[255] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi 1 to 31 March 2013' (MICT, 12 April 2013) <http://unmict.org/files/cases/uwinkindi/other/en/130412_MarReport.pdf> accessed 17 March 2014 paras 6, 9.
[256] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi July to August 2013' (MICT, 12 September 2013) <http://unmict.org/files/cases/uwinkindi/other/en/130912_JulyAugReport.pdf> para 23.
[257] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi January-February 2014', (MICT, 7 March 2014) <http://unmict.org/files/cases/uwinkindi/other/en/140307.pdf> accessed 17 March 2014 para 67.
[258] International Criminal Tribunal for Rwanda, 'Detention of Suspects and Imprisonment of convicted persons The Detention Facility < http://www.unictr.org/tabid/114/default.aspx> accessed 20 April.

manner throughout hearings conducted thus far. Overall it is unlikely that the independence of Rwanda's judiciary will be problematic for the Transfer cases.

4.Witness Availability and Protection

Under International legal instruments such as the International Covenant on Civil and Political Rights (ICCPR),[259] "when determining any criminal charges, the Accused shall be entitled to minimum guarantee in full equity of examining, or have examine, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions against him."[260] This standard has been replicated in the statute of the ICTR.[261] Moreover, since the Prosecution's case is often solely based on witness testimonies at the ICTR, it is even more important for these testimonies to be credible.[262] The importance of witness protection was already evident in earlier cases *Akayesu* and *Rutaganda* where two of the witnesses were murdered, as well as from reports of attacks against genocide survivors during 1996.[263] Notably, the ICTR has incorporated witness protection into its Statute including the conduct of video-link proceedings and the protection of the witness's identity.[264] The emphasis on witness protection can be seen from the extensive measures to prevent disclosure to the public or the media of the identity of a witness. Particularly, a Trial Chamber of the ICTR can order the assigning of a pseudonym, altering of the image or voice of the testimony and holding of closed sessions.[265] Although the tribunal has been subject to criticisms relating to problems with

[259] ICCPR (n 140)*;* African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 7(1).
[260] ICCPR (n 140) art 14(3)(e).
[261] The Statute of the ICTR states "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees:(e) To examine, or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her…" Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (n 4) art 20(4).
[262] Johanna Pozen, 'Justice Obscured: The Non Disclosure of Witnesses' Identities in ICTR Trials' (2005-2006) 38 NYUJILP 281 309-310.
[263] UNGA 'Second Annual Report of the ICTR' (13 November 1997) General UN Doc S/1997/868 para 51 as cited by Goran Sluiter, 'The ICTR and the Protection of Witnesses' (2005) 3 JICJ 962 965.
[264] Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (n 38) art 21.
[265] The Rules and Evidence and Procedure states A Chamber may hold an in camera proceeding to determine whether to order: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated by him by such means as: (a) expunging names and identifying information from the Chamber's public records; (b) non-dsiclosure to the nature of the public of any records identifying the victim; (c) giving a testimony through image- or voice- altering devices or closed circuit television; and (d) assignment of a pseudonym; (ii) closed sessions, in accordance with Rule 79; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses such as one-way closed circuit television (c) A Chamber shall, whenever necessary, control the manner of harassment or intimidation. RPE (n 10) art 75.

providing adequate witness protection,[266] in contrast Gacaca, a local dispute resolution mechanism to try lower ranked persons, disclosed the full identities of witnesses within their local communities.[267] As these tribunals were derived from traditional Rwandan community courts, by which the elders would sit on the grass and resolve community conflicts, witnesses did not have their identities shielded.[268] Therefore, some critics have suggested the ICTR needed to engage in a more careful and individualised analysis of witness protection, to balance a defendant's right to a fair trial without undue delay with the protection of witnesses.[269]

Rwanda's Transfer Law includes similar provisions to the ICTR Rules of Evidence and Procedure, which facilitate witness testimony and provide witness protection. The High Court of Rwanda has the power to order measures of non-disclosure to the public of any documents or information,[270] non-disclosure of victims and witnesses,[271] and measures for the protection of victims and witnesses.[272] Moreover, pursuant to Rwandan domestic law, the Prosecutor General of Republic of Rwanda can facilitate the witnesses in giving testimony including those living abroad, by the provision of appropriate immigration documents, personal security as well as medical and psychological assistance.[273] The government has also provided "immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials" for witnesses travelling from abroad.[274] However, the High Court of Rwanda can also impose reasonable conditions on the witness, such as "limitations of movements in the country, duration of stay and travel."[275]

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[266] See generally Sluiter (n 263); Anneolotte Walsh 'International Criminal justice and the girl child: different needs, equal opportunities' in Lisa Yarwood, *Women and Transitional Justice The Experience of Women as Participants* (1st edn, Routledge, 2013) 67.
[267] Pozen (n 262) 283
[268] Erin Daly,'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda' (2002) 34 NYUJILP 355 356 as cited by Pozen (n 262) 283.
[269] Pozen (n 262) 310-312.
[270] RPE (n 10) art 53.
[271] ibid art 69.
[272] ibid art 75.
[273] Organic Law No 11/2007 of 16/03/2007 (n 142) art 14.
[274] ibid.
[275] ibid.

4.1 The decisions of the ICTR on Witness Availability and Protection

Despite the regulations mentioned above, the Defence in *Munyakazi* argued that the guarantees under Rwanda's Transfer Law did not correspond to the reality in Rwanda, where defence witnesses have been harassed and risk both violence and assassination for testifying.[276] Despite video-link facilities for witnesses from abroad and a witness protection unit established by the Rwandan government,[277] the ICDAA submitted that Rwandan witnesses believed the Rwandan authorities would breach protective mechanisms provided for under the Transfer Law.[278] Therefore, it would be "extremely unlikely" that defence witnesses would feel secure enough to testify. The ICDAA agreed that witnesses in Rwanda risked being rejected by their community, mistreatment and arrest.[279] It was their contention that Rwandan authorities would not be able to provide services comparable to the ICTR for witnesses from abroad.[280] HRW agreed, submitting that the witness protection service was understaffed, and witnesses were unlikely to use the service due to administrative problems. Also, they argued there were no mechanisms in Rwanda to facilitate safe travel from abroad.[281] As most defence witnesses would come from abroad to testify, this would result in the majority of defence witnesses being affected.[282]

The Trial Chamber agreed that it is likely that the rights for witnesses would be violated.[283] For witnesses inside Rwanda, the Chamber was concerned primarily for their safety and therefore the difficulty the Accused would have in securing defence witnesses. Particularly of concern were reports of murdered witnesses where at least eight genocide survivors had been murdered in 2007, with some killings relating to testimonies survivors had given. Additionally, a US State Department Report stated that during 2006 there were between 12 and 20 genocide survivors killed and 328 incidents of violence involving Gacaca trials.[284] Moreover, the Trial Chamber was also concerned that defence witnesses may fear being accused of "genocide ideology"

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[276] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 51.
[277] ibid para 53.
[278] ibid para 55.
[279] ibid.
[280] ibid.
[281] ibid para 56.
[282] ibid para 57.
[283] ibid para 59.
[284] ibid para 61.

(Discussed in Chapter 3) or arrested upon their return to Rwanda, as documented by HRW.[285] Further, the Chamber felt that the Rwandan witness protection program was understaffed employing only 16 people and speculated that defence witness may not consider the Prosecutor and the police administering the program, as neutral bodies. They would therefore refrain from using the service.[286]

For defence witnesses coming from outside of Rwanda, the main concern was that these witnesses would fear intimidation and threats, and arrest.[287] Another problem was that under the ICTR's Statute,[288] the Accused has the benefit to obtain the cooperation of States with regard to securing the attendance or evidence of witnesses. The Trial Chamber felt that Rwanda on the other hand, did not have any mutual assistance or cooperation with other states.[289] Finally, the Trial Chamber found that video-link facilities would not be a complete solution for witnesses from abroad. Since the majority of defence witnesses would be heard via video link, and the majority for the Prosecution witnesses heard in person, this would undermine the Accused's right to examine witnesses under the same conditions.[290] The Trial Chamber therefore concluded that the Accused's fair trial right to obtain the attendance of, and to examine, defence witnesses under the same conditions as witnesses called by the Prosecution could not be guaranteed.[291] This initial decision highlights the understaffed nature of the witness protection program as well as fears the witnesses hold of harassment, murder and arrest.

Despite the negative decision in *Munyakazi* one month later in the decision of *Kanyarukiga*,[292] the Chamber was satisfied with protective measures in the Rwandan Transfer Law.[293] However, interviews submitted by HRW showed that Rwandan provisions of protection were not widely known and applied by legal practitioners. The Trial Chamber rejected this argument, as it related to knowledge of the law in the

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[285] ibid para 61.
[286] ibid para 62.
[287] ibid para 63.
[288] Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (n 4) art 28.
[289] ibid para 64.
[290] ibid para 65.
[291] ibid para 66.
[292] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115).
[293] ibid para 65.

ordinary courts and not the Transfer law.[294] Moreover, where HRW and ICDAA, as well as the previous Trial Chamber had concluded the Rwandan witness protection service was lacking in resources with only 16 staff members,[295] the Trial Chamber pointed to the 900 witnesses who had been subject to this protection service. According to the Trial Chamber, capacity also depends on the priority given to particular cases.[296] Instances of threats, harassment and violence, including 10 cases of defence witnesses before the tribunal being purportedly arrested, re-arrested and subjected to worse conditions of incarceration[297] were not considered to represent the "large majority of witnesses which have testified without such consequences."[298] Therefore, the Trial Chamber did not find that witnesses in general, faced risks if they testified in transfer proceedings. The Trial Chamber concluded if such an incident should occur, the High Court or Supreme Court could initiate an investigation. Moreover, if these measures were insufficient, the monitoring mechanism would take charge.[299]

However, overall the Trial Chamber found that witnesses may be deterred from testifying and therefore the Accused would not have an equal opportunity to call defence witnesses. HRW and ICDAA submitted that defence witnesses might not seek assistance from the witness protection service as the Rwandan witness protection service refers all cases of threats to the local police. The Trial Chamber found that this might reduce the willingness of some potential defence witnesses to testify.[300] Also, the Trial Chamber could not exclude that some potential defence witnesses in Rwanda may be fearful of testifying as they may be accused of harbouring "genocide ideology."[301] This is particularly because the concept has been given such a wide interpretation.[302] Although the Trial Chamber was satisfied with the legal framework regarding witnesses abroad, particularly the immunity of defence witnesses from arrest and detention, it was also persuaded by submissions by the Defence and HRW

[294] ibid para 66.
[295] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 62.
[296] ibid para 67.
[297] ibid para 68.
[298] ibid para 69.
[299] ibid.
[300] ibid para 70.
[301] ibid para 72.
[302] ibid para 72.

that many Rwandans living abroad were afraid to testify in Rwanda.[303] This fear included many Rwandans believing that the immunity guaranteed by law was a falsehood to facilitate their later arrest and forced returns to Rwanda.[304] These fears were particularly exacerbated when the Rwandan Minister of Justice in February 2007, stated that immunity for witnesses "will be a step toward their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest."[305] The Trial Chamber was also concerned that Rwanda had not taken steps to conclude conventions about mutual assistance in criminal matters.[306] The Trial Chamber agreed with the decision in *Munyakazi*[307] that if most or all witnesses from the Defence were heard by video-link,[308] their testimony risked being less weighty.[309] This is because it would be more difficult for the bench to assess their credibility, and for the Accused and parties to follow the evidence and proceedings.[310] Overall, although the Trial Chamber was satisfied by the witness protection system in Rwanda but decided that the fear of being accused of "genocide ideology" could be a large deterrence for witnesses to testify for the Defence.

The subsequent Trial Chamber in *Hategekimana* reiterated the previous Trial Chamber reasoning and findings.[311] Additionally to the previous decisions the Defence, HRW and ICDAA offered examples of witnesses who had been threatened, harassed or arrested after testifying on behalf of the accused in ordinary or *Gacaca* courts.[312] Also, HRW provided examples from witnesses stating they would not be willing to testify for fear of being prosecuted under genocide ideology laws.[313]

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[303] ibid para 76.
[304] ibid fn 107.
[305] ibid.
[306] ibid para 77.
[307] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) paras 65-66.
[308] ibid para 78.
[309] ibid para 77.
[310] ibid para 79.
[311] *Prosecutor v Idelphonse Hategekimana,* Decision on the Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda (n 173) paras 61-71.
[312] ibid para 66.
[313] ibid para 67.

Moreover, the Defence pointed to witnesses living outside Rwanda claiming refugee status that may prevent them from returning to Rwanda.[314]

In the Appeal of *Munyakazi,* the Appeals Chamber upheld that witnesses might be unwilling to testify for the Defence due to considerable information of harassment, fear of being indicted to face trial before *Gacaca* courts or being accused of genocide ideology.[315] The Appeals Chamber found that the Trial Chamber did not err when it decided that Rwanda's witness protection service currently lacked resources and was understaffed. This was a step back from the previous decision in *Kanyarukiga*, where the Trial Chamber determined the service to have satisfactory capacity.[316] The Appeals Chamber in the case of *Munyakazi* agreed with Trial Chamber in the case of *Kanyarukiga* about concerns that threats of harassment are reported to the police, which witnesses may not trust as impartial. Therefore the Appeals Chamber concluded that this could mean that witnesses might be afraid to avail themselves for this service.[317] The Appeals Chamber agreed there was sufficient information before the Trial Chamber that many witnesses residing outside Rwanda would be afraid to testify in Rwanda despite protections available under Rwandan law.[318] It also upheld that video-link facilities were not a complete satisfactory solution to the testimony of witnesses outside Rwanda.[319]

However, the Appeals Chamber in the case of *Munyakazi* found that the Trial Chamber in the case of *Kanyarukiga*[320] overlooked several mutual assistance agreements with states in the region and elsewhere in Africa, and that cooperation had been arranged with other states.[321] The Appeals Chamber also felt that the Trial

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[314] ibid para 68 citing to Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
art 1(c)(1) (Noting that the convention will no longer apply to persons who voluntarily avail themselves of the protection of their country of nationality).
[315] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184) para 37.
[316] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115) para 67.
[317] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184) para 38.
[318] ibid para 40.
[319] ibid para 42.
[320] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115)
[321] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184) para 41.

Chamber should have taken into consideration monitoring provisions where the Prosecutor of the ICTR could send observers to monitor proceedings. The Prosecutor could revoke the transfer order and make a formal request for deferral if not satisfied with proceedings.[322] However, this error was not enough to invalidate the findings.[323] The Appeals Chamber in *Kanyarukiga* agreed with the previous decisions, denying transfer.[324] The Chamber concluded that Kanyarukiga might face difficulties in obtaining witnesses residing within Rwanda because they would be afraid to testify. Moreover, he might not be able to call witnesses residing outside of Rwanda.[325] The subsequent Trial Chamber decision of *Gatete* and *Hategekimana* also followed similar reasoning[326] and came to the same conclusion[327] to deny transfer on the basis of the Accused not being afforded the equal opportunity as the Prosecution to call witnesses.

However, the Trial Chamber in the decision of *Uwinkindi* changed its opinion on the ability of the Accused to call witnesses. Since the previous decisions, which denied transfer, Article 13 of the Rwandan Transfer law had been amended to include immunity for anything said or done during the course of the trial of a transferred case. Also, all witnesses who travel from abroad to Rwanda to testify in the trial of transferred cases shall now have immunity from search, seizure, arrest or detention during their testimony and their travel to and from the trials.[328] Article 14 of the Transfer law had also been amended to provide witnesses residing abroad the option of testifying in Rwanda or in a foreign jurisdiction. Moreover, there was also the option of testifying by video-link hearing taken by the judge at trial or by a judge in a foreign jurisdiction.[329] Further, the witness protection unit would now be run within

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[322] ibid para 44; Rules of Procedure and Evidence (n 10) Rule 11*bis* (D)(iv), (F).
[323] ibid para 44.
[324] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Appeal against Decision on Referral under Rule *11 bis* (n 196) paras 23-38.
[325] ibid*,* para 35.
[326] *Prosecutor v Jean Baptiste Gatete,* Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, (n 169) paras 54-72; *Prosecutor v Idelphonse Hategekimana,* Decision on Prosecutor's Appeal for Request under Rule 11*bis* (n 173) paras 14-40.
[327] ibid para 72; ibid paras 39-40.
[328] *Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20) (28 June 2011) para 92; Article 13 states "Without prejudice to the relevant laws on contempt of court and perjury, no persons shall be criminally liable for anything said or done in the course of trial." Organic Law No 3/2009/OL of 26/05/2009 Organic Law modifying and complementing the Organic Law No 11/2007 of 16/03/2007 26 May 2009 (Rwanda).
[329] ibid para 62.

the Supreme Court and High Court rather than the Rwandan police.[330] Rwanda submitted that in regards to criticisms of the ambiguity of laws against genocide ideology, it had commissioned a study to deal with the potential problems and said that there was no reason to believe that Rwanda's judiciary would not fairly and impartially interpret the law.[331] Nevertheless, the Kigali Bar Association (hereinafter the KBA) submitted that there was not a single case where a defence witness had been charged for harbouring genocide ideology[332] and they had no difficulty in convincing witnesses to testify for the Defence.[333] The concern therefore becomes whether providing immunity for defence witnesses as well as other options for witnesses to testify will ensure that an Accused has the equal opportunity to examine witnesses under the same conditions as the Prosecution.

In contrast, the Defence submitted that none of his witnesses were willing to appear at all if the case was transferred to Rwanda[334] for fear of being harassed, victimised by the Rwandan authorities, repercussions for their relatives. They were also terrified of Rwandan laws on genocide denial.[335] According to HRW, this unwillingness to testify increased as a result of political events within Rwanda in 2010 where opposition leaders Bernard Ntaganda and Victoria Ingabire were arrested for "genocide ideology" in the lead up to the parliamentary election (Discussed in Chapter 3). HRW confirmed that witnesses feared repercussions for their testimony.[336] The ICDAA reiterated, "the Government of Rwanda's campaign against genocide denial and related crimes has proven to be the most significant obstacle in securing defence testimony in genocide cases."[337] However, the Prosecution provided statistics that 40% of the prosecutions for genocide ideology between 2008 and 2010 resulted in acquittals. Moreover, Rwanda had introduced new legislation that would allow the panel for any case referred for trial in Rwanda to include judges from foreign or international courts. It was argued that this should calm defence witness fears about appearing before a Rwandan judge.[338]

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[330] ibid.
[331] ibid para 67.
[332] ibid.
[333] ibid para 69.
[334] ibid para 70.
[335] ibid para 71.
[336] ibid para 77.
[337] ibid para 78.
[338] ibid para 83.

Where the Prosecution argued that there were no adverse consequences upon the return of witnesses to Rwanda, the Defence claimed that attacks on defence witnesses have not been systematically monitored or tracked by Rwandan authorities or local organizations. Moreover, WVSS lacked follow-up mechanisms to address threats and harassment and therefore incidents were not recorded. Further, defence witnesses feared that reporting would aggravate their security situation.[339] In response to Rwanda's claim that it had facilitated the work of foreign defence teams while on mission in Rwanda, the Defence argued that this cooperation did not show whether similar facilities and cooperation would be afforded to local counsel assigned to represent the Accused.[340] Further, many witnesses who are refugees or asylum seekers would be afraid to return to unresolved issues that made them leave as well as losing their refugee status.[341] Also, since the NPPA Genocide Fugitive Tracking Unit will handle travel documentation and entry visas to Rwanda, this would also potentially discourage defence witnesses from abroad.[342]

The Trial Chamber felt that it was not it's role to determine whether the fears expressed by defence witnesses are legitimate, reasonable or well-founded, but simply "the likelihood that the Accused will be able to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."[343] According to the Trial Chamber, the statement made by the Minister of Justice in 2007 about using signed affidavits from grants of immunity showing their current address to arrest defence witnesses, in combination with affidavits being provided by the NPPA's Genocide Fugitive Tracking Unit may give rise to the concerns of witnesses who fear being accused of genocide in connection to their testimony for the Defence. However the Trial Chamber found overall that Article 13 of the Transfer Law, granting witnesses immunity in regard to their testimony makes these fears "premature."[344]

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[339] ibid paras 72-73.
[340] ibid para 74.
[341] ibid para 75.
[342] ibid para 76.
[343] ibid para 85.
[344] ibid paras 86-88.

The Trial Chamber reiterated that it was not its role to assess the fears of defence witnesses being transferred to prisons away from their families or persecuted in prison after testifying.[345] Immunities and protections such as Article 14 and newly amended Article 13 should provide adequate protection.[346] The Trial Chamber welcomed a commissioned study by the Minister of Justice examining the potential problems the law on the prohibition of genocide ideology. However, the Chamber found unsatisfactory the unclear nature of how long this evaluation would take. Nevertheless, the Chamber requested Rwanda to inform the ICTR president of the progress of the studies before *Uwinkindi's* trial begins in Rwanda and emphasised that if a witness or Accused made statements during the trial which denied genocide, it was expected that he or she shall not be prosecuted for contempt or perjury. [347]

The Trial Chamber subsequently turned to discuss fears of witnesses from within Rwanda. Information that the number of defence witnesses was fewer than the number of prosecution witnesses was not considered to indicate lack of fair trial. The Chamber took into account arguments that the low number of defence witnesses in a few cases could be a result of shaky self-representation.[348] Further, the Trial Chamber decided Article 13 had addressed Defence witness fears of being accused of "genocide ideology".[349] Previous findings that witnesses may be unwilling to testify because of fears of serious consequences were balanced with the fact that in 36 genocide cases tried in the High Court of Rwanda, the Defence in most cases was able to secure the attendance of witnesses without the safeguards of the transfer laws.[350] According to the Chamber, this was complemented by improvements made to the Rwandan Victims and Witness Support Unit and the Creation of the Witness Protection Unit under the Judiciary.[351]

According to the Trial Chamber, findings that there would be inequalities in the weight of oral testimony since most Defence witnesses reside outside Rwanda and would have to testify via video-link testimony, have been reconciled by several

[345] ibid para 90.
[346] ibid paras 91-93.
[347] ibid paras 94-96.
[348] ibid paras 97-98.
[349] ibid para 99.
[350] ibid para 100.
[351] ibid para 101.

alternative methods to give oral testimony.[352] Moreover, the Accused could exercise his right to examine or cross-examine a witness[353] by utilising video-link facilities.[354] Where witnesses claiming refugee status might face legal obstacles preventing them from returning to Rwanda, the Trial Chamber noted Rwanda's several mutual assistance agreements with states in the region and elsewhere in Africa, as well as agreements, which have been arranged with other states.[355]

The Trial Chamber then turned to an extensive discussion on Rwanda's Witness protection program. The Prosecution submitted that Rwanda had addressed previous concerns that witnesses may be afraid to avail themselves of the services of Victim and Witness Support Unit (hereinafter the VWSU) because the Office of the Prosecutor General administers it. In response, the Witness Protection Unit (hereinafter the WPU) was created. According to the Prosecutor, the Rwandan judiciary manages this service,[356] with staff running both VWSU and WPU undertaking training programs conducted by the ICTR registry.[357] The Defence argued that the witnesses do not wish their identities disclosed to any Rwandan authority.[358] Moreover, the processes to access WPU had requirements such as the applicant requesting for the assistance of the Prosecutor General or Chief Prosecutor and this procedure is lengthy, bureaucratic and assistance can be denied.[359] In support, HRW gave statistics that between 2006 and 2008, VWSU assisted 265 defence witnesses and 739 prosecution witnesses, and argued that this discrepancy might reflect unwillingness by defence witnesses to use the service.[360] The Trial Chamber was however satisfied with the steps Rwanda had taken to establish an additional witness protection unit. It was aware that defence witnesses would have to apply to the Office of the Prosecutor general for assistance of WPU but noted that the judiciary would ultimately administer the protection service under WPU.[361] Overall, the Chamber noted that external monitors would oversee these witness protection

[352] ibid para 106.
[353] ICCPR (n 140) Article (3)(d).
[354] *Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20) para 113.
[355] ibid paras107-108.
[356] ibid paras 117-118.
[357] ibid para 119.
[358] ibid para 124.
[359] ibid para 125.
[360] ibid paras 126-127.
[361] ibid para 131.

programmes as per Rule 11 *bis* (D)(ii).[362] Therefore, an ICTR appointed monitor would be expected to meet with the defence counsel and WPU on a regular basis to address concerns through regular reports to the tribunal.[363] Overall, the Chamber was satisfied with the improvement of the VWSU over the past two years, noting the increase in staff size, funding and awareness raising programmes.[364]

The Appeals Chamber in *Uwinkindi* upheld the reasoning of the Trial Chamber.[365] Notably, the Appeals Chamber added that it would be a violation of the equality of arms if the majority of defence witnesses appeared by means substantially different from those of the prosecution. However, *Uwinkindi* had not identified how many potential witnesses might fall into this category or that it constitutes a sufficiently significant part of his possible evidence. Moreover, the Appeals Chamber found it cannot be said that hearing a portion of evidence from either party by alternative means would *per se* amount to the violation of an Accused's rights.[366] The subsequent cases upheld the reasoning in *Uwinkindi*.[367] In its 19 August 2011 Report, Rwanda stated it was drafting legislation to provide clearer definitions to the Genocide Ideology laws.[368] The government also reduced the applicable sentences as well as eliminated criminal responsibility for minors.[369]

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[362] Rule 11 *bis* (D)(ii) states "the Trial Chamber may order that protective measures for certain witnesses or victims remain in force." Rules of Procedure and Evidence (n 10) Rule 11 *bis* (D) (ii).
[363] ibid para 132.
[364] ibid para 129.
[365] *Jean Uwinkindi v The Prosecutor,* Decision on Uwinkindi's Appeal against the Referral of his case to Rwanda and Related Motions (n 10).
[366] ibid para 67.
[367] *Prosecutor v Fulgence Kayishema,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 206) paras 53-95;
Prosecutor v Charles Sikubwabo, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 51-93; *Prosecutor v Ladislas Ntaganzwa*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 35-44; *Prosecutor v Bernard Munyagishari,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, (n 206) paras 86-139.
Prosecutor v Ryandikayo, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 39-50; *Prosecutor v Aloys Ndimbati,* Decision on the Prosecutor's Request for the Referral of the Case of Aloys Ndimbati to Rwanda (n 206) paras 36-42; *Prosecutor v Pheneas Munyarugarama,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 29-35.
[368] *Prosecutor v Fulgence Kayishema,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 206) para 68.
[369] *Prosecutor v Bernard Munyagishari,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) para 97.

However, in the later decision of *Munyagashiri,* the Defence raised the loophole that witnesses who testify in its transfer case may be compelled to provide evidence that is relevant to another non-transfer, domestic case. Under Article 54 and 55 of the Code of Criminal Procedure, witnesses in Rwanda are obligated to appear and give evidence in other cases.[370] Concerning is that when giving testimony in domestic proceedings, these witnesses would not be given the immunities provided for in the Transfer Law. Coupled with laws criminalising genocide ideology, this loophole could be exploited by the Rwandan government.[371] Although it was in the Trial Chamber's view that this potential loophole may create objectively reasonable fears among defence witnesses, it noted that Rwanda did not intend to abolish the Genocide Ideology Law. Therefore to eliminate the potential gap in immunity, the Trial Chamber made three suggestions the Prosecutor General could undertake.[372] The Trial Chamber considered that any transfer had to be conditioned upon one of assurances.[373] This loophole was discussed only once more in the subsequent case of *Ryandikayo* where the Trial Chamber simply said that it expects Rwanda "will continue with its efforts and requests that it submit another report on the ongoing reforms."[374] It is therefore uncertain whether the loophole has been reconciled.

On 6 August 2012, the Prosecutor General provided the ICTR with an update on Rwanda's ongoing legislative reforms, focusing on the proposed legislation to reform the genocide ideology law. In later 2012, Rwanda's Minister of Justice reported that the genocide ideology law would be replaced with "an entirely new law." The new law reduced the penalty from a maximum of 25 years to 9 years and the definition for

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[370] ibid para 119.
[371] ibid para 122.
[372] The Chamber stated it "considers these objectively justified fears would be eliminated if the Prosecutor General: 1. Demonstrates in writing to the President of this Tribunal or the Residual Mechanism that Articles 54 and 55 of the Code of Criminal Procedure *could* not be used to compel witnesses testifying in a transfer case to testify in a subsequent domestic case on the basis of their evidence in this transfer case; or
2. makes a binding concession in writing to the President of this Tribunal or the Residual Mechanism that Articles 54 and 55 of the Code of Criminal Proceedings *would* not be used to compel witnesses testifying in a transfer case to testify in a subsequent domestic case on the basis of their evidence in this transfer case; or 3. makes a binding concession in writing to the President of the Tribunal or the Residual Mechanism that any witnesses who testify this transfer case and who may be then compelled to testify in subsequent domestic cases pursuant to Articles 54 and 55 of the Code of Criminal Procedure shall also be granted the same immunities contained within Article 13 of the Transfer Law while participating in such domestic cases." [emphasis added] ibid, para 124.
[373] ibid para 125.
[374] *Prosecutor v Ryandikayo,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) para 50.

"genocide ideology" was changed to be an "intentional act, done in public."[375] According to HRW, the revised law has been submitted to the Rwandan parliament in 2013. However, HRW was also of the opinion that although the revised law contained a more narrow definition of the offence and a reduction in prison sentences, but it kept the notion of "genocide ideology" as a criminal offence. Also, the unchanged vague language could still be used to criminalise free speech.[376] This author agrees that the vague langue in the new law may still be used to convict defence witnesses.

4.2 Evaluation

Overall, the ICTR was of the opinion that amendments to the Transfer Law to provide immunities for defence witnesses as well as alternatives to video-link testimony would be enough to overcome the realities in Rwanda. The decisions also saw an increase in the capacity of the Rwandan witness protection service, as well as a new witness protection unit being created to be run within the Supreme Court and High Court to calm witness fears of reporting to Rwandan police. Therefore the ICTR believed that this gave the Accused the guarantee to satisfactorily secure the attendance and examination of witnesses under the same conditions against him. As a part of this evaluation, I will firstly turn to the Reports of the Monitor, which provide details on the progress and status of the witness protection programs.

4.2.1 Reports of the Monitor

Since the transfer of *Uwinkindi* and *Munyagashari* to Rwanda, the Reports of the monitor have made observations of the progress of the witness protection programs. In the "May to June 2012" report for Uwinkindi, the Accused highlighted the fact that of the 49 potential defence witnesses identified by his legal team, only eight resided in Rwanda. However, the monitor noted that at the juncture of this case, the issue is not whether witnesses will travel to testify from abroad, but whether financial resources are available that would permit either the Defence or the Prosecution of investigations

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[375] Martin Ngoga 'Re: *The Prosecutor c. Bernard Munyagishari*, Case No. ICTR-2005-89-R11*bis* 'Republic of Rwanda National Public Prosecution Authority' (MICT, 6 August 2012) <http://unmict.org/files/cases/munyagishari/other/120806.pdf> accessed 24 March 2014.

[376] Human Rights Watch, *World Report 2013* (Human Rights Watch, ISBN-13: 978-1-60980-389-6) <https://www.hrw.org/sites/default/files/wr2013_web.pdf> accessed 20 April 2013 150.

to conduct investigations abroad. She noted that at the moment, there is no evidence that any such resources are available to either the Defence or the judicial police.[377] Moreover, she observed that the Prosecution and the judicial police were conducting defence investigations. As a result, she determined that by giving judicial police or prosecution the information of defence witnesses, this could give the Prosecution the advantage of being able to obtain statements from its witnesses indicating what they were likely to say. The monitor believed that this could ultimately become the central issue in determining whether his right to fair trial will be respected.[378] However, the Rwandan court granted funding to the Defence to carry out investigations, which ultimately resolved this issue. (For an extensive discussion, see Chapter 6).

According to Reports of the Monitor, progress in setting up witness programs was steady but without its challenges. In the July 2012 report for the case of *Uwinkindi,* the Government of Rwanda asserted that the two witness programs under the Office of the Prosecutor General; the WVSU and the WPU which was ran under the auspices of the Supreme Court, were fully operational and functioning.[379] However, when the monitor met with the Registrar of the Supreme Court, he was informed that an expert was expected to provide training to the registrars of the WPU in July 2012 but this project fell through. The monitor was advised that the Registrar and his colleagues were waiting for the training session and the expert's guidance to begin setting up the WPU. Further, although financing was available to the Supreme Court for a safe house, no such safe house yet existed, and no staff apart from the registrars had yet been identified or hired. In fact, no other preparations were in place.[380] The monitor also met with the Coordinator of the WVSU, which was established in 2006 and reported that it appeared to be dynamic and fully functional. With respect to the anonymity of witnesses, the Prosecution completed work on a draft law that would provide further protection.[381] However, the monitor concluded that where the WPU had been reluctant to rent a safe house and hire staff, he observed that none of the Defence witnesses have yet been identified or contacted. In the monitor's opinion,

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[377] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi 1 May to 30 June 2013', (MICT, 30 June 2013) <http://unmict.org/files/cases/uwinkindi/other/en/130702_MayJuneReport.pdf> accessed 17 March 2014 para 11.
[378] ibid paras 13-14.
[379] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi July to August 2013' (n 256) para 6.
[380] ibid para 8.
[381] ibid paras 11-12.

it was not at all clear that an effective support and protection program could be set up within short deadlines that might arise in the *Uwinkindi* case. This was particularly since genocide trials in Rwanda generally take no more than one or two months to compete.[382]

By the end of 2012, the witness protection program had progressed and was arguably trial ready. In the December report 2012 for *Uwinkindi,* the Chief Registrar of the Supreme Court informed the monitor that the Ministry of Justice was in the process of reorganising the old structure of the witness protection program. Asked whether the program was ready and prepared to implement comprehensive witness protection should Court proceedings commence, he responded in the affirmative, and added that a safe house was already in place.[383] At the end of July 2013, the monitor met with the head of the WPU[384] who stated the budget was sufficient for the further modification and refurbishment of facilities within the Supreme Court to handle protected witnesses. He informed the monitor that procurement procedures have been initiated for further improvement of facilities.[385] Further, WPU had the means and infrastructure to access and support protected witnesses anywhere in Rwanda. Also, a provision had been made in the WPU budget for a safe house where protected witnesses can be accommodated. The WPU had additionally proposed creating a database of witnesses in order to provide protective measures even after the conclusion of trial.[386] Moreover, the WPU had also assisted with the protection of witnesses in one genocide case before the High Court and Supreme Court.[387] In the September 2013 report for the cases of *Uwinkindi* and *Munyagishari,* the head of WPU confirmed that it was ready to facilitate the travel of witnesses residing abroad and arrange for video-link testimony for those unwilling or unable to travel to Rwanda.[388] In the November 2013 report for *Uwinkindi* and *Munygishari*, the head of

[382] ibid para 13.
[383] ICTR Monitor, 'Report of the Court Monitor for the Uwinkindi Case 20 December 2012 to 31 January 2013' (n 251) paras 15-16.
[384] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi July to August 2013' (n 256) para 38.
[385] ibid para 40.
[386] ibid para 43.
[387] ibid para 46.
[388] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi September 2013', (MICT 28 October 2013) <http://unmict.org/files/cases/uwinkindi/other/en/131028_SeptReport.pdf> accessed 17 March 2014 para 42; ICTR Monitor, 'Monitoring Report for the Munyagishari Case (September 2013)' (MICT, 28 October 2013)

WPU provided a tour of the new courtroom facilities at the High Court, which had been designed to allow protected witnesses to testify.[389] His office had also liaised with police in order to brief them and train them on the treatment of witnesses.[390]

However, in the January 2014 report, the head of WPU stated the High Court had not yet requested the WPU to contact any protected witnesses in the *Munyagashari* and *Uwinkindi* case.[391] He stated that in general, the parties litigating international crimes cases before the Court were not yet acclimated to the idea that the witnesses are under the care of the Court and protected as such.[392] In general it was reported that the witness programmes have been resolved and are ready for operation. However, as discussed earlier in the Decisions of the ICTR, the WPU was created so that witnesses would not need to avail themselves to the services of VWSU, which was administered by the Office of the Prosecutor General. Certainly more work is needed for defence witnesses to utilise the WPU.

Overall, although initial progress was shaky, the Reports of the monitor have indicated that these programmes are now fully operational. However, it was not just the fear of harassment, violence and assassination that were of concern for defence witnesses in Rwanda but also that defence witness from abroad were concerned with being arrested under genocide denial laws that had been interpreted widely to arrest political opponents and defence lawyers. It is concerning whether granting defence witnesses immunities from prosecution would alleviate fears since the Government of Rwanda, under the Rwandan Criminal Code could still decide to compel the witness

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<http://unmict.org/files/cases/munyagishari/other/en/131028_SeptReport.pdf> accessed 13 March 2014 para 105.

[389] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi October-November 2013', (MICT, 19 December 2013) <http://unmict.org/files/cases/uwinkindi/other/en/131219.pdf> accessed 17 March 2014 para 65; ICTR Monitor, 'Monitoring Report for the Munyagishari Case (October and November 2013)' (MICT, 19 December 2013) <http://unmict.org/files/cases/munyagishari/other/en/131219.pdf> accessed 13 March 2014 para 36.

[390] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi October-November 2013' (n 389) para 63; ICTR Monitor, 'Monitoring Report for the Munyagishari Case (October and November 2013)' (n 389) para 34.

[391] ICTR Monitor, 'Monitoring Report for the Munyagishari Case (January and February 2014)' (MICT, 7 March 2014) <http://unmict.org/files/cases/munyagishari/other/en/140307.pdf> accessed 13 March 2014 para 19; ICTR Monitor, 'Report of the Court Monitor for Uwinkindi January-February 2014' (n 257) para 9.

[392] ICTR Monitor, 'Monitoring Report for the Munyagishari Case (January and February 2014)' (n 391) para 21; ICTR Monitor, 'Report of the Court Monitor for Uwinkindi January-February 2014' (n 257) para 11.

to testify in a domestic case and then arrest them where the immunity would not apply.

However, the Chamber made it clear that a transfer would be conditioned on an assurance from the Rwandan government that this would not be the case. It is interesting that an assurance from the Rwandan government would suffice to alleviate the fears of defence witnesses coming from abroad. The ICTR seemed to be resolved that it would not be able to convince Rwanda to abolish the Genocide Ideology law. It appears that the ICTR knew Rwanda was particularly adamant in keeping this law and felt that a government assurance would constitute the best protection if cases were to be transferred. Overall, the law in Rwanda and witness protections programmes have been changed to provide immunities for witnesses. However, witnesses may still fear being arrested under "genocide ideology" laws through a loophole, which has not been reconciled. It remains to be seen whether the witnesses will be protected under the assurances of the Rwandan government or deterred from testifying for a transferred accused by the possibility of being arrested.

5. Applicable Punishment

According to Rule 11 *bis,* a Trial Chamber has to be satisfied that the death penalty will not be imposed or carried out.[393] During the conception of the Completion Strategy the Prosecutor had already identified that "transfer is made difficult by the fact that Rwandan law prescribes death penalty as a sentence for certain crimes."[394] In 2007, Rwanda abolished the death penalty, which had previously been a penalty for those who were convicted of serious crimes of genocide and crimes against humanity.[395] The Trial Chamber in *Munyakazi* was satisfied that the new Repealed Death Penalty Law[396] meant that "the death penalty provisions in the Rwandan Code of Criminal Procedure or any other legislation are no longer applicable" and therefore the Chamber was content that the death penalty would not be imposed in Rwanda.[397] In it's place, the death penalty was substituted by life imprisonment or life imprisonment with special provisions.[398] Life imprisonment with special conditions under the 2007 Organic law would mean that a convicted person is kept in isolation and was reserved for re-offenders and those who have committed "atrocious crimes." The abolishment of the death penalty by the government of Rwanda showed its willingness to cooperate with the ICTR to establish a fair penalty in-line with international standards.

Although there is no provision in Rule 11 *bis* that a Trial Chamber may set out the conditions of detention for a convicted accused, the Trial Chamber in *Munyakazi*[399] reasoned that according to the jurisprudence of the ICTR and ICTY, the penalty structure within a State to which an indictment may be referred must provide an appropriate punishment for offences with which the Accused is currently charged."[400]

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[393] RPE (n 10) Rule 11 *bis* para c.
[394] Letter dated 3 October 2003 from the permanent representative of Rwanda to the United Nations addressed to the President of the Security Council (n 95) para 23
[395] Organic Law No 31/2007 of 25/07/2007 (n 142) art 2.
[396] ibid preamble.
[397] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 24.
[398] Organic Law No 31/2007 of 25/07/2007 (n 142) states "In all legislative texts in force before the commencement of this Law, the death penalty is substituted by life imprisonment or life imprisonment with special provision provided for by this Organic Law."
[399] *Prosecutor v Yussuf Munyakazi* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 21.
[400] The Trial Chamber in *Prosecutor v Munyakazi* (n 29) referred to cases such as *Prosecutor v Radovan Stankovic* (Decision on Referral of Case under Rule 11 *bis*) IT-96-32/2-PT (17 May 2005)

Further, the ICTR would take into account that conditions of detention must be in accordance with internationally recognised standards.[401] The Trial Chamber reasoned that the conditions of detention in a national jurisdiction, "touches upon"[402] the fairness of that jurisdiction which is "an inquiry squarely within the Chamber's mandate."[403] With this reasoning, the Trial Chamber has arguably stepped outside the plain wording of Rule 11 *bis* that states that the death penalty will not to be imposed or carried out.[404]

However, imprisonment in isolation has been a particular concern for Rwanda. In 2009, the Human Rights Committee (HRC) recommended that Rwanda "should put an end to the sentence of solitary confinement and ensure that persons sentenced to life imprisonment benefit from the safeguards of United Nations Standard Minimum Rules for the Treatment of Prisoners."[405] The Committee noted that although it welcomed the abolition of the death penalty in 2007, it was concerned that it had been replaced at present by life imprisonment in solitary confinement. The Committee noted solitary confinement is treatment contrary to Article 7 of the Covenant on Civil and Political Rights.[406] Particularly, these minimum rules hold that "the efforts addressed to the abolition of solitary confinement as a punishment, or the restriction of its use should be undertaken and encouraged."[407] The HRC stressed that it "remains concerned about deplorable conditions in some prisons, particularly as regards to health conditions, access to health care and food"[408] and urged Rwanda to "adopt effective measures against overcrowding in detention centres and ensure conditions of detention that respect the dignity of prisoners, in accordance with Article 10 of the Covenant."[409]

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para 32 and *Zeljko Mejakic v The Prosecutor* (Decision On Joint Defence Appeal Against Decision On Referral Under Rule 11*bis*) IT-02-65-*AR11bis.1* (7 April 2006) para 48.

[401] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 21.

[402] ibid fn 39.

[403] ibid.

[404] RPE (n 10) Rule 11 *bis,* para c.

[405] UNHCR, 'Consideration of Reports submitted by State parties under Article 40 of the Covenant' (7 March 2009) CCPR/C/RWA/CO/3 para 14.

[406] ibid.

[407] UNGA, 'Basic Principles for the Treatment of Prisoners' (14 December 1990) A/RES/45/111 annex, para 7.

[408] UNHCR, 'Consideration of Reports submitted by State parties under Article 40 of the Covenant' (n 405) para 15.

[409] ibid.

5.1 The decisions of the ICTR on life imprisonment in isolation

The concern that Rwanda would not provide an appropriate punishment to the Accused was firstly discussed in the transfer decision of *Munyakazi*,[410] which denied the transfer of the case to Rwanda. The Trial Chamber felt that the Accused could be subjected to life imprisonment in isolation,[411] since the Repealed Death Penalty Law, which abolished the death penalty stated that the penalty would be replaced as such.[412] The Prosecution stated according to the Transfer Law, "life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from the ICTR."[413] The tension lay as to which law would be applicable, the earlier Transfer Law or the later Repealed Death Penalty Law. The Trial Chamber decided that since there was no inconsistency between the two laws, the later Repealed Death Penalty law would override the former Transfer law and the Accused could face life imprisonment in isolation.[414] Moreover, The Trial Chamber was of the opinion based on "established jurisprudence and observations of Human Rights bodies" that "imprisonment in isolation should be an exceptional punishment" applied only where necessary, proportionate and in compliance with minimum safeguards.[415] For the penalty to be adequate, the court considered the minimum safeguards of an assessment of the necessity and proportionality of the punishment, right to review by a judicial body and arrangements of activities to ensure human contact and mental physical stimulation in the Rwandan Law.[416]

In the subsequent decision of *Kanyarukiga,*[417] the Trial Chamber agreed that the Accused risked solitary confinement due to the tension between the Death Penalty law and the Transfer law. Since there was no case law in Rwandan courts concerning the relationship between the Repealed Death Penalty Law and the Transfer law, it was unclear which law would apply.[418] The Prosecution argued the Transfer law could be

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[410] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 39.
[411] ibid paras 29-32.
[412] ibid para19.
[413] ibid art 21.
[414] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 28.
[415] ibid para 30.
[416] ibid paras 31-32.
[417] *Prosecutor v. Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115).
[418] ibid para 96.

interpreted as *lex specialis* in the field of transfer and therefore would apply. However, the legal situation was deemed by the Chamber to be unclear. This was particularly so where the Death Penalty law could also be interpreted as *lex posterior* as it was adopted a few months after and stated in Article 9 that "all legal provisions contrary to this Organic Law are hereby repealed." This according to the Trial Chamber made the application uncertain and the Accused Kanyarukiga was not considered satisfactorily protected against a conviction of imprisonment isolation if transferred.[419] In the following case, the Trial Chamber in *Hategkimana* agreed that, the Chamber could not rule out that a Rwandan Court could possibly apply the Death Penalty and the Accused could face imprisonment in isolation.[420] The Trial Chamber agreed with the decision of *Munyakazi*[421] that the Death Penalty Abolition law does not seem to provide any safeguards under Rwandan law to ensure that the use of solitary confinement for 20 years, or more would not be abused.[422]

The Appeals Chamber in *Munyakazi*[423] agreed with the Trial Chamber that it was unclear how these two laws may be interpreted and which law would prevail where there is an inconsistency.[424] In the Amicus Brief submitted by Rwanda, on the scope of the law, the report assured that no person transferred by the ICTR would be sentenced to life imprisonment in solitary confinement, and the Supreme Court of Rwanda was seized of a constitutional challenge to provisions regarding solitary confinement.[425] However, the Appeals Chamber in *Kanyarukiga* decided there was no reason to depart from the findings of the Appeals Chamber in *Munyakazi,*[426] although the Rwandan government stated that they had submitted a formal request to the Parliament for the authentic interpretation of sentencing provisions of the Transfer law.[427] In contrast, Kanyarukiga submitted that in a recent Supreme Court case and a

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[419] ibid paras 95-96.
[420] *Prosecutor v Idelphonse Hategekimana* Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda (n 173) para 23.
[421] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 29) para 30
[422] *Prosecutor v Idelphonse Hategekimana* Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda (n 173) para 25.
[423] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184).
[424] ibid para 16.
[425] ibid para 14.
[426] *Prosecutor v Gaspard Kanyarukiga* Decision on the Prosecutor's Appeal against Decision on Referral under Rule 11 *bis* (n 196) para 12.
[427] ibid para 10.

letter from the Minister of Internal Security indicated that Rwanda has no intention of abolishing solitary confinement as a penalty.[428] The Defence in Munyakazi also responded that the fact that Rwanda found it necessary to issue a statement is proof that the law is ambiguous.[429] The ICTR was adamant that the courts of Rwanda provided an interpretation of the relevant laws.[430]

Similar reasoning appeared in the Trial Chamber of *Gatete*[431] and *Hategekimana*[432] which both did not allow for the transfer of the Accused. In the case of *Hategekimana*, the Rwandan government submitted that the parliament recently passed a new law that modified the Repealed Death Penalty Law.[433] In this new law, life imprisonment with special provisions was verified not to apply to cases transferred to Rwanda.[434] Hategekimana responded that Rwanda could modify this law again once he was transferred since this law was enacted so quickly, demonstrating the instability of Rwanda's legislative system.[435] However, the Appeals Chamber acknowledged that if the new law had entered into force in its current form, ambiguity as to applicable punishment would be resolved.[436] By changing the transfer law, the government of Rwanda had satisfied that life imprisonment in solitary confinement would not be a penalty.

In the case of *Uwinkindi*,[437] the Trial Chamber decided based on rather sparse reasoning that the Accused would not be at risk of a penalty of life imprisonment in solitary confinement. Since both the Prosecution and the Defence no longer disputed

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[428]ibid para 11.
[429] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184) para 15.
[430] ibid para 19.
[431] *Prosecutor v Jean Baptiste Gatete,* Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence (n 169) paras 80-87.
[432] *Prosecutor v Idelphonse Hategekimana, Decision* on Prosecutor's Appeal for Request under Rule 11*bis* (n 173) paras 31-38.
[433]ibid para 37.
[434]ibid; art 3 **of** Organic Law No 66/2008 **of** 21/11/2008 Organic Law modifying and complementing the Organic Law No 31/2007 of 25/07/2007 21 November 2008 (Rwanda) reads special provisions "life imprisonment with special provisions as provided for by paragraph one of this Article shall not be pronounced in respect of cases transferred to Rwanda from the [ICTR] and from other States in accordance with the provisions of [the Transfer law]."
[435]*Prosecutor v Idelphonse Hategekimana, Decision* on Prosecutor's Appeal for Request under Rule 11*bis* (n 173) para 37.
[436] ibid para 38.
[437]*Prosecutor v Jean Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20).

that life imprisonment with special conditions could be a potential penalty in transfer cases,[438] the Chamber found the current penalty structure of Rwanda to be adequate. Overall, the Chamber was satisfied by the ambiguity of whether the Repealed Death Penalty Law or Transfer Law that existed in previous Rule 11 *bis* applications were no longer present.[439] The former Chief of the Appeals and Legal Advisory Division of the Office of the Prosecutor of the ICTR, Alex Odora argued that the position taken by the Appeals Chamber was not duly justified. He wrote that this decision "did not have substantive persuasive reasons explaining its departure… although it has the right to do so" given that "it is a settled legal principle that an Appeals Chamber need not give reasons on every issue it decides."[440] After the Trial Chamber decision in *Uwinkindi,* the Defence or ICDAA no longer contested whether the Accused could be held in life imprisonment in isolation in the Appeal of *Uwinkindi,*[441] or in any other subsequent decision.[442]

5.2 Evaluation

From the initial decision of *Munyakazi*, the ICTR was not convinced as to whether the Repealed Death Penalty Law would be applied, and therefore the Accused may risk imprisonment in isolation. The Chamber decided that since there were no examples of case law in Rwandan courts concerning the relationship between the two laws being applied the situation was unclear. In the case of *Uwinkindi,* the Chamber was satisfied by new provisions of the Repealed Death Penalty Law explicitly stating that life imprisonment with special provisions would not apply to the cases transferred from the ICTR to Rwanda. The ICTR believed that the Rwandan law verified that

[438]ibid para 47.
[439]ibid para 51.
[440]A Obote-Odora, 'Transfer of cases from the International Criminal Tribunal for Rwanda on Domestic Jurisdictions' (2012) 5 AJLS 147 178.
[441] *Jean Uwinkindi v The Prosecutor,* Decision on Uwinkindi's Appeal against the Referral of his case to Rwanda and Related Motions (n 20).
[442] *Prosecutor v Fulgence Kayishema,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 206) paras 121-142; *Prosecutor v Charles Sikubwabo,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 119-140; *Prosecutor v Ladislas Ntaganzwa*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 59-74; *Prosecutor v Bernard Munyagishari*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 172-199; *Prosecutor v Ryandikayo* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 57-66; *Prosecutor v Aloys Ndimbati* Decision on the Prosecutor's Request for the Referral of the Case of Aloys Ndimbati to Rwanda (n 206) para 51-57; *Prosecutor v Pheneas Munyarugarama,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) paras 43-52.

life imprisonment in isolation would not be employed as a penalty for the transfer cases. However, the Chamber did not check whether life imprisonment in isolation occurred in Rwandan prisons. One reason for this could be that in the previous jurisprudence of the tribunal, it was held that the ICTR was not required to look further than the State's relevant legislation when determining whether an accused would receive a fair trial in that State.[443] The Trial Chamber in the transfer cases acknowledged however, "that it is not *required* to look beyond the relevant legislation, but considers that it is *authorized* to do so."[444] Therefore, the Chamber considered that it may and should look beyond relevant legislation to examples of the practices of Rwandan courts.[445] Another reason could be that Rule 11 *bis* makes no explicit mention of conditions of detention.[446] However, the Trial Chamber reasoned that the conditions of detention in a national jurisdiction touch on the fairness of that jurisdiction. Moreover, the Chamber reiterated that it "has to be satisfied the accused will receive a fair trial in the courts of the State concerned".[447]

5.2.1 Reports of the Monitor

The abolishment of the death penalty is certainly a positive step forward for the Rwandan penalties to be in-line with international standards. Moreover, the Reports of the Monitor have shown that it is highly unlikely the transferred Accused will face life imprisonment in isolation. In a series of meetings with the Accused, the Monitor discussed his feedback in regards of the conditions of detention and his perspectives on the progress of his trial. In the December 2013 Report of the monitor, Munyagashiri complained that the Special Enclosure detainees were not allowed to attend religious services with prisoners in the main section of Kigali Central Prison, where there is a church. Munyagishari said that this was a way of isolating the

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[443] *The Prosecutor v Zeljko Mejakic*, Decision on Joint Defence Appeal on Decision against Referral under Rule 11bis (n 400) para 96 as cited by N Palmer, 'Transfer or Transformation?: A Review of the Rule 11 *bis* decisions of the International Criminal Tribunal for Rwanda' (2012) 20 AJICLS 10

[444] *Prosecutor v Idelphonse Hategekimana,* Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda (n 173) para 35.

[445] ibid.

[446] It is stated in Rule 11*bis* that "in determining whether to refer the case the 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." RPE (n 10) para c.

[447] ibid.

Special Enclosure detainees.[448] Similarly, in the February 2014 Report of the monitor for the case of *Uwinkindi*, the Accused described the condition of the Special Enclosure for transferred detainees as isolated since they do not interact with general prison population.[449] The monitor did not assess the complaints of the Accuseds. This reflects the decision of the President of the Mechanism in November 2013[450] which considered that monitors should "limit themselves to providing objective information relevant to any possible violations or impediments to the fair trial rights" and should refrain from including in their reports any opinion, assessment, or conclusions."[451] In the author's opinion, these complaints were the closest relating to imprisonment in isolation and are clearly not within the meaning. Under the scrutiny of the monitor, life imprisonment in isolation is a penalty that is unlikely to happen for the two accused.

However, in the new law, which modified the Repealed Death Penalty Law, life imprisonment in isolation still applies to Rwandan cases, which are not transferred by the ICTR. So far, only eight cases have been referred to Rwanda; with only two Accuseds in pre-trial detention and the remaining six still fugitives.[452] Life imprisonment in isolation will still be a punishment overall for local cases. This is particularly true since the ICTR not check the practice of imprisonment in isolation in Rwandan jails. Further, this could also result in a rather contradictory penalty, where higher-level organizers of the genocide are transferred to Rwanda where they would face a lesser penalty than other participants with less culpability that have not had their cases transferred by the ICTR and have been tried nationally.

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[448] ICTR Monitor, 'Monitoring Report for the Munyagishari Case (December 2013)' (MICT, 17 January 2014) <http://unmict.org/files/cases/munyagishari/other/en/131219.pdf> accessed 13 March 2014 para 15.

[449] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi January-February 2014' (n 257) para 62.

[450] *Prosecutor v Jean Uwinkindi* (Decision on Registrar's Submissions regarding the monitoring mechanisms in the *Uwinkindi* and *Munyagishari* cases) MICT-12-25 (15 November 2013).

[451] ibid para 29.

[452] United Nations Mechanism for International Criminal Tribunals 'Cases' (UNMICT) <http://unmict.org/cases.html> accessed 12 March 2014.

6. Right to an Effective Defence

The issues that I have discussed thus far are concerns, which have appeared during the decisions as to whether to transfer the cases to Rwanda. However, one issue that has appeared after the transfer has been the problem of the right to an effective defence. Since the Appeals decision of *Uwinkindi* has confirmed the referral of the case to Rwanda, the Office of the Prosecutor has appointed a monitor, which has been reporting to the Mechanism for the International Criminal Tribunals.[453] On the 3rd of May 2013, the Appeals Chamber also upheld the referral of the case of *Munyagishari*[454] to Rwanda for trial where the Prosecutor also appointed a monitor to observe the proceedings.[455] One of the main concerns as reported by the monitor, has been the payment of Defence Counsel and the lack of staff being assigned to each case. On the 16th of September 2013, the Counsel for Uwinkindi filed a request for revocation of the order referring Uwinkindi's case to Rwanda on the basis that the Ministry of Justice of Rwanda had not made the necessary funds available to Uwinkindi's defence team that would allow it to contact defence witnesses, the defence team has insufficient members, and Counsel for Uwinkindi have not been paid since February 2013.[456]

On the 14th March 2014 the President of the Mechanism decided on the matter. He considered that "insofar as the funding issues raised by Counsel for Uwinkindi could impact, *inter alia,* the adequacy of time and facilities for the preparation of his defence or his ability to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, these are matters of concern to the Mechanism.[457] However, the President found that various funding issues raised by the Revocation Request had either been rendered moot or are still the focus of ongoing negotiations that may be subject to further review within the

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[453] UNSC,'First Annual Report of the International Residual Mechanism for Criminal Tribunals' (n 130) para 51.
[454] Bernard Munyagashiri, *Request for deferral of transfer of B. Munyagishari due to serious violation of fundamental rights* (MICT-12-20, 19 August 2013) <http://unmict.org/files/cases/munyagishari/other/130830.pdf> accessed 13 March 2014.
[455] UNSC,'First Annual Report of the International Residual Mechanism for Criminal Tribunals' (n 130) para 53.
[456] *Prosecutor v Jean Uwinkindi* (Decision on Request for Revocation of an order referring a case to the Republic of Rwanda) <http://unmict.org/files/cases/uwinkindi/presdec/en/140312.pdf> (12 March 2014) pg 2.
[457] ibid pg 2.

Rwandan courts.[458] The President dismissed the revocation request, however, invited the Defence to file a new request for revocation should circumstances so warrant.[459] Rather than revoke the case the President believed that this should be a matter to be reconciled by the Rwandan Courts. However, of concern is that the decisions of the ICTR on to transfer the case to Rwanda overlooked funding of defence as an issue. Below, I will give an overview of these decisions to determine how the issues were decided. I will then turn to the Reports of the Monitor to evaluate whether these funding issues can be resolved and their impact on future transfer cases.

6.1 The decisions of the ICTR on legal aid

At the ICTR, under Article 20(4)(d) if the accused did not have sufficient means to pay for counsel, legal assistance will be assigned to him or her.[460] However, once the accused's case has been transferred, Article 13(6) of the Transfer Law applies which provides that in case the accused "has no means to pay, he or she shall be entitled to legal representation."[461] The Transfer Law also holds that an accused shall be given adequate time and facilities to prepare his defence.[462] This provision reflects the Article 14(3)(d) of the ICCPR where the accused has the right to have legal assistance assigned to him, in any case where the interests of justice so require, and *without payment by him in any such case if he does not have sufficient means to pay for it...*" [emphasis added][463] and Article 14(3)(b) where in the determination of any criminal charges against him, everyone shall be entitled to the minimum guarantee of "adequate time and *facilities for the preparation* of his defence and to communicate with defence counsel of his own choosing" [emphasis added].[464]

In an early decision not to transfer the case of *Kanyarukiga* to Rwanda, in regards to funding for Defence, the Chamber noted the submissions of two *amici* that Rwandan authorities had not disbursed funds to provide payment for legal representation of indigent accused in the past, and that the legal aid budget administered by the

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[458] ibid.
[459] ibid.
[460] Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (n 4) art 20(4)(d).
[461] Organic Law No 11/2007 of 16/03/2007 (n 142).
[462] ibid art 13(4).
[463] ibid art 14(3)(d).
[464] ICCPR (n 140) art 14(3)(b).

Rwandan Bar Association was always depleted.[465] However, according to the Chamber, what mattered in that context, was the situation under the Transfer Law where the Ministry of Justice had made budgetary provisions of approximately 500,000 USD for 2008 to fund the legal aid scheme in respect to the transfer cases. The Chamber decided that it did not have to consider whether this amount will be sufficient, and that it follows from case law that there is no obligation to establish in detail the sufficiency of funds available as a precondition for referral, such as itemising the provisions of the budget.[466] The Chamber was therefore satisfied that legal aid would be available if Kanyarukiga is transferred and if there were future financial constraints, it would be a matter for the monitor mechanism to evaluate.[467] In the subsequent case of *Hategekimana,* the Trial Chamber clarified *Avocats Sans Frontiers* in cooperation with the Belgian Technical School would also provide funds for Defence Counsel.[468] The subsequent decision in the case of *Gatete* adopted the same reasoning.[469]

In *Kayishema,* the ICCDA noted that Rwanda had passed laws that create the right to counsel for indignent persons accused of genocide. It pointed to the fact that money for legal aid is not allocated to a case, but goes to pay the salaries of staff who handle all legal aid requests and cases for both civil and criminal matters, for the entire country.[470] The Chamber trusted that the Prosecution and Rwanda had provided sufficient budgetary allocations for legal aid to the Accused in good faith and that the Chamber would "not lightly intervene in the domestic jurisdiction of Rwanda, and considers that it is not obligated to either scrutinise Rwanda's budget or verify its disbursal."[471] The Chamber warned of the possibility of revocation of the Accused's referral should they need to address any failure by the Rwandan authorities to make counsel available or disburse funds necessary for legal aid and to ensure the

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[465] *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 115) para 57.
[466] ibid.
[467] ibid para 58.
[468] *Prosecutor v Idelphonse Hategekimana,* Decision on Prosecutor's Request for Referral of the Case of Ildelphonse Hategekimana to Rwanda (n 173) para 55.
[469] *Prosecutor v Jean Baptiste Gatete,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 169) paras 47-49.
[470] *Prosecutor v Fulgence Kayishema* Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (n 206) para 104.
[471] ibid para 105.

Accused's fair trial rights.[472] The issue of Defence funding was not brought up in the Appeal of *Munyakazi*, *Kanyarukiga* and *Hategekimana.*[473]

In the transfer decision of *Uwinkindi*, the Prosecution and Rwanda submitted that Rwanda has created several legal programmes and has made a budgetary provision of 100 million Rwandan francs to fund legal aid for transferred cases.[474] On the other hand, HRW submitted that the Rwandan legal system might still be limited in its ability to provide the Accused with counsel or financial support for representation.[475] In the Trial Chamber's decision to transfer the case, the Chamber reiterated that it did not share the Defence's position that it should verify the availability of funds for legal aid at the domestic level and would not lightly intervene in the domestic jurisdiction of Rwanda.[476] This issue was not brought up for review upon Appeal of the decision.[477]

However, in the Transfer decision of the following case of *Munyagashiri,* the Defence submitted that the Rwandan legal aid system was insufficiently funded and that the funds earmarked for legal aid were unknown. According to the Defence, the extra 30 million Rwandan francs added to the 2010-2011 budgets could not be considered legal aid funds since they are designated for general ICTR related costs. Moreover, the funds allocated to the KBA by the Ministry of Justice could not be used for transferees because it had been expressly placed aside for vulnerable people. Finally, the Defence considered that 92 million Rwandan francs available for all referred cases were not considered sufficient.[478] The Chamber did not agree, recalling that it was not obligated to itemise the provisions of Rwanda's budget and "the factual assertions of the Defence fail to rebut the affidavits of the Minister of Justice and the Secretary-

[472] ibid para 106.
[473] *Prosecutor v Yussuf Munyakazi,* Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (n 184); *Prosecutor v Gaspard Kanyarukiga,* Decision on the Prosecutor's Appeal against Decision on Referral under Rule 11 *bis* (n 196); *Prosecutor v Idelphonse Hategekimana,* Decision on Prosecutor's Appeal for Request under Rule 11 *bis* (n 197).
[474] *Prosecutor v Jean Uwinkindi*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20) para 141.
[475] ibid.
[476] ibid para 144.
[477] *Jean Uwinkindi v The Prosecutor,* Decision on Uwinkindi's Appeal against the Referral of his case to Rwanda and Related Motions (n 20).
[478] *Prosecutor v Bernard Munyagishari*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (n 206) para 151.

General of the Supreme Court."[479] The Chamber considered these assurances that appropriate funding would be provided in good faith. Moreover, it was encouraged by the Prosecution's submission that 118 million Rwandan francs had been designated specifically for transferred cases for the period between January and June 2012 in reaction to the referral of *Uwinkindi.*[480]

6.2 Reports of the monitor

To analyse the progression of the issue of adequate funding for Defence Counsel in each case after transfer, I will firstly discuss the reports of the monitor for the case of *Uwinkindi* and then turn to the reports of the monitor for the case of *Munyagishari*. From the first report of the monitor, the Counsel for Uwinkindi had not been paid for his work.[481] The argument of the monitor reiterated the concerns of Uwinkindi's Defence Counsel in the decision to transfer the case to Rwanda. According to the monitor the Rwandan legal system might still be limited in its ability to provide the Accused with counsel or financial support for representation.[482] Also, the KBA has no budget of its own to provide for the defence of indigent accused persons. Therefore, any fund it receives comes from the Ministry of Justice. However, in the monitor's opinion no designated fund for legal aid has ever existed at the Ministry of Justice.[483] The monitor explained, the actual figure that the Rwandan government has, in theory, set to provide for Uwinkindi's legal assistance is completely unknown. She argued "more importantly, whether the figure is 10 Rwandan francs or 122 million Rwandan francs, two months after Uwinkindi's transfer to Rwanda, none of this money has reached the Defence and no commitment to provide any funds in the future has been made."[484] According to the monitor rather than addressing the substance of Uwinkindi's case, the Defence has been devoted to addressing the issue of funding.[485]

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[479] ibid para 153.
[480] ibid.
[481] ICTR Monitor, 'Public Report of the Court Monitor for the Uwinkindi Case June 2012', (MICT, 4 July 2012), <http://unmict.org/files/cases/uwinkindi/other/en/120704_JuneReport.pdf> accessed 13 March 2014 para 1.
[482] *Prosecutor v Jean Uwinkindi*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (n 20).
[483] ibid para 2.
[484] ibid para 6.
[485] ibid.

In the September 2012 report of the monitor, in a meeting with the monitor, the Defence Lead Counsel highlighted that his team was facing constraints on account of unavailability of funding to conduct Defence investigations. He stated that legal aid provided to him and his co-counsel only pertained to remuneration for provision of services. The legal aid budget did not permit hiring investigative personnel or to incur any travel or other expenses to allow the Defence to identify potential Defence witnesses, make contact with them or take their preliminary statements to ensure their availability before court.[486] He also acknowledged that on 18 July 2012, the Ministry of Justice concluded the work done by the Defence was as of now paid and a contract was negotiated for legal aid.[487] However, the Defence Lead Counsel reiterated that his team was still facing constraints on account of unavailability of funding to conduct Defence investigations.[488] The Defence also complained that the 30,000 Rwandan francs he had negotiated was the minimum rate for legal aid in an ordinary case before a Rwandan court and was not an appropriate sum for a complex case. Moreover, there was still no provision for administrative expenses.[489] On 17 January 2013, in a private meeting with the monitor, the Lead Counsel for Uwinkindi, raised the concern to strengthen the Defence team who is only composed of two lawyers. Also, the request for the appointment of Defence investigators to assist the team in locating and interviewing defence witnesses and a Legal Assistant was still unaddressed.[490]

By March 2013, in the scheduled commencement of trial, the High Court of Rwanda observed that it was almost one year since the case of *Uwinkindi* was transferred to Rwanda for trial. It commented that the trial had already been postponed several times on the request of the Defence, and that the Defence did not seem to be prepared for the trial.[491] The Defence submitted that one of the obstacles to the commencement of trial was the appointment of independent Defence Investigators.[492] On the 16th

[486] ICTR Monitor, 'Report of the Court Monitor for the Uwinkindi Case September 2012' (n 388) para 14.
[487] ICTR Monitor, 'Report of the Court Monitor for the Uwinkindi Case October-November 2012' (n 389) para 16.
[488] ibid para 13.
[489] ibid para 25-26.
[490] ICTR Monitor, 'Report of the Court Monitor for the Uwinkindi Case 20 December 2012 to 31 January 2013' (n 251) para 25.
[491] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi (1 to 31 March 2013)' (n 255) para 7.
[492] ibid para 17.

May 2013, the Court denied the Defence request for the appointment of Investigators and Legal Assistants, noting that Law Number 11/2007 (the Transfer law)[493] does not provide for such an appointment. Moreover, in regards to the appointment of Investigators, the Court noted that relevant paragraphs of Law Number 13/2004[494] related to Criminal Procedures provides that the Judicial Police should conduct investigations on behalf of the Defence as well. The Court ordered that the Defence approach the Rwandan Ministry of Justice and Kigali Bar Association for allocation of financial resources to facilitate investigations by the Defence Counsel themselves.[495] On 11 October 2013, before the High Court of Rwanda, the Defence argued that despite the previous decisions of the High Court of Rwanda where the court permitted the Defence to contact the Ministry of Justice to seek funds to conduct its investigation, no money had been received to conduct the investigation as of the date of the hearing. Also, the Defence had not received money to contact witnesses within Rwanda or witnesses living abroad.[496] The Prosecutor replied that the Defence had lied about not receiving money for its investigation, as the Prosecution had received a copy of the cheque that had been issued by the Ministry of Justice to the National Bank on 27 September 2013.[497] The Defence replied that it had not received the money as of 10 October 2013.[498] The Court deliberated and decided that the Defence had received the money from the Ministry of Justice for investigations.[499]

On 11 October 2013, the Defence complained that he had not been paid since February 2013 and he had submitted invoices for payment of work performed in February, March and April 2013.[500] On 18 November 2013, the Defence indicated that he received a letter from the Ministry of Justice indicating that the payment scheme for the case was being changed and that the previous contract he was working under was void.[501] In a meeting with the Permanent Secretary in the Rwandan Ministry of Justice, the new proposed payment policy would institute a lump sum

[493] Organic Law No 11/2007 of 16/03/2007 (n 142)
[494] Organic Law No 13/2004 of 17/05/2004 Relating to the Criminal Code of Procedure (Rwanda).
[495] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi (1 May to 30 June 2013)' (n 377) para 8.
[496] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi (September 2013)' (n 388) para 7.
[497] ibid para 13.
[498] ibid para 13.
[499] ibid para 17.
[500] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi (October-November 2013)' (n 390) para 4.
[501] ibid para 25.

payment system, providing a single amount for the case.[502] This is similar to the ICTR policy whereby the Registrar may establish an alternative scheme of payment based on a fixed fee system consisting of a maximum allotment of money for each Defence Team in respect of each stage of the procedure.[503] This system provides defence teams with greater flexibility and incentive to manage their resources in the most efficient manner.[504] On 13 January 2014, according to the Permanent Secretary of the Rwandan Ministry of Justice, the Defence had come to an agreement with the Ministry of Justice regarding remuneration.[505] However, the Defence argued although they had signed the contract, the monthly amount provided for in the contract did not properly reflect the amount of work required for a case of that magnitude and size.[506] The monitor noted by the end of November, negotiations continue between the Defence Counsel and Ministry of Justice on providing funding for the Defence.[507]

Uwinkindi is not the only transferred case, which has had issues with funding of Defence Counsel. At a 7 November 2013 meeting between the monitor and Defence Counsel for Munyagishari, the Lead Counsel indicated that he had not received a proposed contract for the case.[508] He stated that himself and his Co-Counsel were currently working without a contract and they had yet to be paid for their representation of Munyagishari.[509] On the 22nd of November 2013, the Monitor met with the President of the Rwanda Bar Association who stated that he met with Ministry of Justice and they agreed that the Ministry would negotiate payment for transferred cases directly with counsel.[510] Three months later, the Monitor met with the Permanent Secretary in the Rwandan Ministry of Justice, who noted the contract

[502] ibid para 43.
[503] ICTR, 'Directive on the Assignment of Defence Counsel' (ICTR, 14 March 2008) <http://www.unictr.org/Portals/0/English/Legal/Directive%20on%20Assignment/English/05-Directive%20Assignment.pdf> accessed 20 March 2014 art 22 (c)
[504]UNSC, 'Comprehensive Report on the Progress made by the International Criminal Tribunal for the Former Yugoslavia in Reforming its Legal Aid System' (12 August 2003) General UN Doc A/58/288 24 as cited by Silvia de Bertodano, 'What Price Defence? Resourcing the Defence at the ICTY' (2004) 2 JICJ 503 507.
[505] ICTR Monitor, 'Report of the Court Monitor for Uwinkindi (January-February 2014)' (n 257) para 27.
[506] ibid para 31.
[507] ibid, para 70.
[508] ICTR Monitor, 'Monitoring Report for the Munyagishari Case (October and November 2013)' (n 390) para 38.
[509] ibid para 40.
[510] ibid para 41.

provided to Counsel representing Jean Uwinkindi, which provided funding of one million Rwandan francs per counsel per month for the duration of the *Uwinkindi* proceedings. For Munyagishari, the renumeration for defence would be a lump sum payment of 15 million Rwandan francs for the entire duration of the case. The same lump sum will be given to other transfer cases.[511] He also stated that the Ministry of Justice had not been informed of who is the counsel for Munyagishari and therefore non-contract negotiations had begun with regard to the payment of the Defence in that case.[512]

On the 29th of January 2014, the Rwandan Bar Association said that it would provide advice to assigned counsel and the Ministry of Justice regarding the reasonableness of fees to be paid.[513] Two days later, the monitor met with the Co-Counsel for Munyagishari. He stated that the Defence had received a letter from the President of the Rwandan Bar Association informing the Defence to go to the Ministry of Justice and negotiate a contract setting out the terms of their representation. He stated that the Defence team for Munyagishari had not yet received any payment.[514] As of 26 February 2014, in the latest report of the Monitor, the Defence was unable to secure a meeting with the Permanent Secretary of the Ministry of Justice regarding a potential contract providing for re-numeration as the Permanent Secretary was on mission.[515]

6.3 Evaluation

The reports of the monitor for the transfer cases have shown to the contrary of decisions from the ICTR where the Chamber was confident that legal aid would be available if the cases were transferred. During the decisions of the transfer case, Trial Chamber was encouraged by the Prosecution's submission that 118 million Rwandan francs had been designated specifically for transferred cases for the period between January 2012 and June 2012 in reaction to the Referral of *Uwinkindi*. The Chamber was also satisfied that *Advocats Sans Frontiers* would also provide funding in cooperation with the Belgian Technical School

[511] ICTR Monitor, 'Monitoring Report for the Munyagishari Case (January and February 2014)' (n 392) para 25.
[512] ibid para 26.
[513] ibid para 52.
[514] ibid para 59.
[515] ibid para 90.

However, in reality, the Monitor in two transferred cases, have indicated that Counsel for both Uwinkindi and Munyagashiri have had problems with payment. In the case of Uwinkindi, the Defence has complained that legal aid provided did not permit for hiring Defence investigative personnel and legal assistants. The Defence also argued that there was no provision for administrative expenses and the overall amount was not an appropriate sum for a complex case. However, of most concern is that the Defence had postponed the trial several times and did not seem prepared. Particularly, where the Defence has submitted that one of the obstacles to the commencement of trial was the appointment of independent Defence investigators. In the end, the Court ordered the Defence to approach the Rwandan Ministry of Justice and the KBA for allocation of financial resources to facilitate the investigations themselves. It seems as though the situation has eventually resolved itself over time. This is similar to the occasion where the Defence complained he had not been paid for three months and was paid after the Ministry of Justice finalised a new payment policy. However, in the case of *Munyagishari*, the Defence Counsel indicated that he had not received a proposed contract for the case. As of 26 February 2014, almost one and a half years after the Decision to transfer the case on the 6 June 2012, payment still had not been made. Alike the previous situations, given time, it is likely a proposed contract can be agreed upon and payment will be made.

It is concerning that waiting for funding could result in inadequacy of facilities for the preparation of the Accused's defence. The ICTR has taken a non-interference approach on the matter of payment of Defence Counsel. This reflects the challenge of deciding how much involvement an international tribunal should have after the transfer of the case. Particularly on the issue of funding, micro-managing Rwanda's budget could appear condescending and discouraging. In this situation, this author believes that at this stage, the ICTR made the correct decision not to intervene unless there unless problems with negotiations became serious and there was a grave threat to the effectiveness of the Defence.

7. Conclusion

From the conception of idea to transfer cases to national courts in 2000[516] till the Appeal decision to transfer the first case to Rwanda at the end of 2011,[517] the transfer of cases back to Rwanda has been a decade long process. Through an analysis of the history of the transfer cases, the ICTR transfer decisions and the Reports of the Monitor, this thesis set out to determine the main challenges of the transfer cases and whether these challenges were adequately resolved before transfer. Despite political will in Rwanda to accommodate the transfer cases, during the writing process of this thesis it has become evident that there have been two prominent challenges that have precluded transfer. The first concern is the capacity of the Rwandan legal system to prosecute large and complex cases. The second is the issue of the neutrality of the territory, particularly whether there is the judicial independence to prosecute leaders of the previous regime fairly.

Overall, the capacity of the Rwandan legal system to prosecute the transfer cases has been largely resolved. To prepare for the transfer of cases, the ICTR has increased it's capacity and out-reach activities to strengthen Rwanda's capacity to prosecute cases. From video-link projects, to a Special Enclosure for the transfer detainees, and the creation of programs and units to protect witnesses, the ICTR has worked hard to facilitate the transfer of cases to Rwanda. The creation of the Witness Protection Unit under the auspices of the Rwandan courts, for witnesses afraid to avail themselves to the police, and the Victim and Witness Support Unit are now fully operational. As a suggestion, for the future of the witness protection program, a more effective outreach program could ensure the WPU is more utilised. Moreoever, the organisation of the lump sum payment system implemented in *Uwinkindi* is a step forward in the payment of the Defence. Given the slow organisation of payment in the past, this author is confident that the Defence Counsel for *Munyagashiri* will also be paid in time. Finally not only has the Death penalty in Rwanda been abolished, life imprisonment in isolation will not be a penalty for the transfer cases. Therefore, it is

[516] UNSC 'Identical letters dated 7 September 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council' (n 49)
[517] *Jean Uwinkindi v The Prosecutor*, Decision on Uwinkindi's Appeal against the Referral of his case to Rwanda and Related Motions (n 17).

in this author's opinion that the Rwandan legal system has the capacity to prosecute the Transfer cases.

Secondly, the issue of neutrality has also been largely resolved. With a history of government interferences prosecuting former RPF members, the criminalisation of genocide ideology and the wide interpretation of the law to convict political opponents has been the major concern for the transfer cases. Not only was there the risk that judges may not make a decision independent from the government, but witnesses may also fear testifying. This author agrees with the ICTR Chambers that many of the examples where one may question the impartiality of the judiciary are rather old. It was in 2008 that the Military Court acquitted two RPF soldiers and the Rwandan Government had released a series of strongly critical statements against the tribunal. Moreover, it was more than a decade ago, in 2002 that Rwanda suspended cooperation with the ICTR, after a decision favoring an Accused's motion. Further, this author is not aware of examples after the 2012 conviction of Victoria Ingabire in the Rwandan Supreme Court or the 2010 arrest of Ingabire's Defence lawyer for "genocide denial." Although it may be too early in trial proceedings to tell, the reports of the Monitor have shown that there has not been any indication against the impartiality of hearings. Moreover, for witnesses the fear of intimidation, threats and arrests for harbouring "genocide ideology" are now protected by the Transfer laws, which have been changed to provide immunity from arrest. One concern is that witnesses may still fear being arrested under "genocide ideology" laws through a loophole, which has not been reconciled. However, it remains to be seen whether the witnesses will find comfort in the assurances of the Rwandan government rather than deterred from testifying for a transferred accused by the possibility of being arrested. This author concludes that presently, the Rwanda is a neutral territory to hold the trials of the transfer cases.

Although this author believes that the Accuseds would be afforded a fair trial and penalty in line with international standards if the cases were transferred to Rwanda, it should be highlighted that it is unlikely capacity changes will affect the Rwandan legal system overall. Notably, only 8 cases have been referred to Rwanda, with two Accuseds currently in detention and 6 still fugitives. One criticism is that Rwandans, which have not been indicted by the ICTR, particularly the thousands of cases before

the Gacaca courts, may not benefit from judicial and witness protection training. They will not enjoy the special enclosure for transfer detainees or an international tribunal championing their access to legal aid funding. Further, they may still be sentenced to life imprisonment in isolation or convicted of harbouring "genocide ideology" under a law, which has been widely interpreted. It is unlikely that Rwandans overall will have an external monitor scrutinising the fair trial standards of their case.

With the completion of the mandate of the Ad-Hoc tribunals, the lessons of the transfer cases should not be abandoned. The changes to the Rwandan justice system and fair penalties have resulted from capacity building in areas such as witness protection programs, judicial training, building new prisons and the enactment of new laws. Twenty years onwards, the tension of foreign interference in a domestic legal system has eased, making Rwanda a neutral territory to hold trials for the transferred cases. Following the ICTR's approach towards strengthening fair trial and penalty standards in Rwanda will be a valuable lesson for the future of International Criminal Law, particularly in light of increased domestic prosecutions.