International Criminal Tribunal for Rwanda

Trial Chamber III

Before: Judge Inés M. Weinberg de Roca, presiding
Judge Lee Gacuiga Muthoga
Judge Robert Fremr

Registrar: Adama Dieng

Date: 3 January 2008

THE PROSECUTOR

v.

Fulgence KAYISHEMA

Case No. ICTR-2001-67-I

BRIEF OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE* IN OPPOSITION TO RULE 11 *bis* TRANSFER

The Prosecution
Hassan Bubacar Jallow

The Defence

INTRODUCTION

1. On 25 October 2007, Human Rights Watch (hereinafter "HRW") filed its request for leave to appear as *amicus curiae* in the present case, pursuant to Rule 74 of the Rules of Procedure of Evidence of the International Criminal Tribunal for Rwanda ("ICTR").

2. On 8 November 2007, this Chamber granted HRW leave to appear as *amicus curiae* in the present case and requested that HRW address submissions on a number of points.[1]

3. HRW is an international non-governmental organization that monitors human rights in more than 75 countries around the globe. It has extensively documented the 1994 genocide in Rwanda and human rights conditions in the country thereafter, and has maintained an office in Rwanda since 1995.

4. HRW researchers have been monitoring the judicial system in Rwanda since 2005, assessing its performance following wide-reaching reforms in the years 2002 through 2004. Our researchers have monitored conventional and *gacaca* trials and interviewed dozens of persons working the field of justice: judges, prosecutors, lawyers, and staff of Rwandan and international nongovernmental organizations. We have also interviewed Rwandans who have benefited or suffered from the performance of the judicial system. The factual allegations in this brief are based on research supervised by Alison Des Forges.

Transfers under Rule 11 *bis*

5. As part of a completion strategy, the ICTR Prosecutor is seeking to transfer a number of cases to national jurisdictions. This is a move governed by Rule 11 *bis* of the ICTR Rules of Procedure and Evidence (hereinafter "Rule 11 *bis*"), which gives the President discretion, after an indictment has been confirmed, to designate a Trial Chamber to determine whether a case should be referred to a State.

6. Rule 11 *bis* permits the referral of cases to any 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."

7. For a case to be transferred to a Referral State, the Trial Chamber must be satisfied that the Accused will receive a fair trial and that the death penalty will not be imposed or carried out. Further, the Referral State must have jurisdiction *ratione materiae*, *ratione personae*, *ratione loci*, and *ratione temporis*.

8. Where an order is issued pursuant to Rule 11 *bis*, the Trial Chamber may order that protective measures for certain witnesses or victims remain in force, and the Prosecutor may send observers to monitor the proceedings in the courts of the Referral State.

[1] *Prosecutor v. Kayishema*, Decision on the Request of Human Rights Watch for Leave to Appear as *Amicus Curiae* in the Proceeding for Referral of the Indictment Against Fulgence Kayishema (TC), 8 November 2007.

9. Rwanda is eager to have cases transferred and has demonstrated its willingness to accommodate demands made in order for transfers to receive court approval. Most importantly, it abolished the death penalty. It has undertaken to ensure adequate accommodations in certain prisons, otherwise known for their inhumane conditions, for the exclusive use of detainees transferred from the ICTR and from foreign national jurisdictions. It has agreed to allow monitors appointed by the ICTR to follow the proceedings without hindrance. Finally, it has promised to guarantee fair trials according to international standards. [2]

Summary of Argument

10. This *amicus* brief will support HRW's view that the Accused Fulgence Kayishema (hereinafter "the Accused") should not be transferred pursuant to Rule 11 *bis*. The brief will proceed in three parts.

11. In Part I HRW sets forth its concerns over the asserted basis for *ratione materiae*, or subject matter, jurisdiction. Given that the 1996 law criminalizing genocide and other violations of international humanitarian law was abrogated in 2004, there may exist a lacuna in domestic law. The legal basis articulated by the Prosecution and the Government of Rwanda fails to address this issue. The Chamber should inquire further into this matter before taking its decision on the transfer.

12. HRW believes that the Rwandan judicial system in its current state—despite the attempts and promises noted above—cannot guarantee a fair trial for the Accused Fulgence Kayishema. The gap between Rwanda's judicial theory and practice presents a serious obstacle to fair and credible proceedings. This is especially true for prosecutions of persons accused of genocide and other crimes of political importance.

13. On their face Rwanda's laws comply with the fair trial provisions of Article 20 of the Statute of the Tribunal ("Statute").[3] Nevertheless, these laws are inconsistently applied.

14. The information amassed by HRW researchers demonstrates that this transfer should not be authorized because the practice of Rwandan courts is not properly aligned with its laws. Rwandan courts remain subject to political influence; services intended to protect witnesses and provide counsel to the indigent suffer from significant fiscal constraints; and the power of the police and security forces is insufficiently regulated.

15. Part II sets forth that :

a. Transfer may violate Article 20 of the ICTR Statute. Rwanda cannot guarantee that the Accused will:

[2] *Prosecutor v. Kayishema*, *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*, 1 October 2007 (hereinafter "Rwandan Government Amicus Brief").
[3] *Id.*

i. Have the opportunity to obtain witnesses on his behalf and to examine witnesses under the same conditions as witnesses testifying against him. This section includes information on widespread official action against "genocidal ideology" which may deter potential witnesses from testifying;

ii. Be presumed innocent until proven guilty; or

iii. Be tried by an independent and impartial court.

b. Transfer may expose the Accused to violation of his rights under Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), to which Rwanda is a State Party. Rwanda cannot guarantee that the Accused will be protected against double jeopardy.

c. Transfer may expose the Accused to violation of his rights under Article 7 of the ICCPR, to which Rwanda is a State Party. Rwanda's imposition of lifetime solitary confinement for certain persons, including some convicted of genocide, may amount to torture or cruel, inhuman, and degrading treatment or punishment.

16. In Part III, this *amicus* brief will address each of the Chambers' requests pursuant to its 8 November 2007 Decision by demonstrating the following:

a. The Rwandan legal system may be limited in its ability to provide the Accused with assistance in:

i. Securing adequate legal representation;

ii. Obtaining appropriate financial support for such representation; and

iii. Facilitating travel and investigations for Defence teams.

b. The Defence of the Accused may face significant impediments in the discharge of its function;

c. Inadequate procedures exist to ensure protection of witnesses before, during, and after testifying in court;

d. Prosecution and/or Defence witnesses face threats, harassment, and violence in Rwanda before, during, and after giving testimony;

e. Inadequate procedures exist for the procurement and the facilitation of safe and secure travel for witnesses, particularly for Rwandan witnesses who reside abroad. Witnesses may be unable to benefit from a safe passage to and from Rwanda;

f. Rwandan laws governing arrest and detention are unlikely in practice to afford to the Accused the same protection as the protection applied by the Tribunal;

g. It is not known whether the detention facilities for convicted persons in Rwanda will comply with internationally recognized standards.

ARGUMENT

17. HRW bases this *amicus* brief on its research findings. Although Rwanda has made notable progress in improving its judicial system, serious obstacles to fair and credible prosecutions remain in Rwanda, especially for persons accused of genocide and other crimes of political importance.

I. TRANSFER MAY NOT BE POSSIBLE DUE TO A POTENTIAL LACK OF *RATIONE MATERIAE*, OR SUBJECT MATTER, JURISDICTION.

18. In assessing whether a State is competent within the meaning of Rule 11 *bis* to accept a case transferred by the Tribunal, the Trial Chamber must consider whether the State has a legal framework that criminalizes the alleged conduct of the accused in the same terms as those of the ICTR Statute.

19. The Prosecution argues that Rwanda possesses an adequate legal framework for the prosecution of genocide and other violations of international humanitarian law established by its ratification of relevant international treaties and by its adoption of other domestic legislation.[4] The same argument has been asserted by the Government of Rwanda.[5]

20. In support of this argument, three submissions are made. First, the Prosecution and the Government of Rwanda mention Rwanda's ratification of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the four Geneva Conventions of 1949 (and additional protocols).[6] Second, they refer to the Organic Law of 30 August 1996 on the *Organization of the Prosecution of Offences Constituting Genocide or Crimes against Humanity Committed Since 1 October 1990* (often known and hereinafter referred to as "the Genocide Law"), which provided for the prosecution of genocide and other violations of international humanitarian law.[7] Finally, they assert that Organic Law 11/2007 of 16 March 2007 *Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda* (hereinafter the "Transfer Law") provides Rwandan courts with jurisdiction over cases to be transferred from the Tribunal.[8]

21. However, these legal texts may be insufficient to confer *ratione materiae,* or subject matter, jurisdiction on Rwanda for the acts alleged in the *Kayishema* Indictment. In 2004, Organic Law 16/2004 of 19 June 2004 *Establishing the Organization, Competence, and*

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[4] *Prosecutor v. Kayishema*, Prosecutor's Request for the Referral of the Case of *Fulgence Kayishema* to Rwanda Pursuant to Rule 11 *bis* of the Tribunals Rules of Procedure and Evidence, 11 June 2007, paras. 9-12 (hereinafter "Prosecution Request for Transfer").
[5] Rwandan Government Amicus Brief, paras. 11-14.
[6] Prosecution Request for Transfer, para. 10. Rwandan Government Amicus Brief, para. 12.
[7] Prosecution Request for Transfer, para. 10. Rwandan Government Amicus Brief, para. 13
[8] Prosecution Request for Transfer, paras. 12-16. Rwandan Government Amicus Brief, para. 14.

Functioning of Gacaca Courts expressly abrogated the Genocide Law.[9] This abrogation seems to have left a void in domestic legislation as the 2004 gacaca law does not define the crimes of genocide and other violations of international humanitarian law or provide another legal basis for prosecuting such crimes.

22. The Transfer Law did not address this issue as it only conferred competence on the High Court and Supreme Court to judge crimes included in the ICTR Statute without otherwise defining these crimes in domestic law.[10] In 2003, Rwanda adopted Law 33/bis/2003 *Punishing the Crime of Genocide, Crimes against Humanity and War Crimes*. This law generally adopts the terms of the international conventions concerning these crimes and assigns penalties for them. However, the law makes no reference to the crimes of 1994 and does not appear to be retroactive in operation. Human Rights Watch is unaware of any other national legislation that provides both a domestic legal definition for the crime of genocide and a legal basis for prosecuting acts committed in 1994 as such.

23. According to figures provided by the Rwandan government, Rwandan courts convicted 204 persons for crimes of genocide between January 2005 and September 2007. These persons were convicted under the terms of Organic Law 16/2004 and the Rwandan Penal Code Code which defines the crime of genocide only through the non-retroactive law of 2003.

24. The Chamber should inquire into this apparent discrepancy and whether there is a complete definitional basis for the relevant crimes in Rwandan law to support an 11 bis transfer.

II. TRANSFER MAY VIOLATE ARTICLE 20 OF THE ICTR STATUTE AND ARTICLES 7 AND 14 OF THE ICCPR.

Transfer may violate Article 20 of the ICTR Statute: Right to Present Witnesses

25. Rwanda cannot guarantee that the Accused will be able to exercise his right to present witnesses. See also Paragraphs 85-105 in Part III.

[9] Organic Law 16/2004 of 19/6/2004 *Establishing the Organization, Competence and Functioning of Gacaca Courts*, article 105: "Organic law n° 08/96 of August 30, 1996 organizing proceedings for offences constituting the crime of genocide and crimes against humanity committed from October 1, 1990 and organic law n° 40/2000 of January 26, 2001 setting up Gacaca Courts and organizing prosecutions of offences constituting the crime of genocide and crimes against humanity, committed between October 1, 1990 and December 31, 1994, as modified and completed to date, and all previous legal provisions contrary to this organic law, are hereby abrogated."

[10] In its brief of 1 October 2007, the government of Rwanda states that, "Rwanda adopted *Organic Law N° 11/2007* of 16 March *2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda*, which confers jurisdiction *rationae materiae* on the High and Supreme Court to prosecute persons whose cases are referred for trial to Rwanda from the Tribunal. This law was specifically passed to facilitate the prosecution in Rwanda of Persons transferred from the Tribunal and other jurisdictions for international crimes committed in Rwanda. In the context of this Brief, the Transfer Law is the *lex specialis* that will apply to the prosecution and trial of the Accused if referred to Rwanda for trial."

26. According to the Rwandan law on evidence, Rwandan officials prosecuting and judging crimes may take any measure necessary to protect witnesses or others providing information and other assistance necessary for the prosecution.[11] This article of the evidence law was mentioned by only one of some fifteen lawyers, prosecutors, and judges questioned by HRW researchers about witness protection, suggesting that this provision of the law on evidence is not widely known or, in any case, is not perceived as intended to protect witnesses. One judge, then president of a Court of Higher Instance, specifically said that the law on evidence provided no protection for witnesses. None of the jurists questioned mentioned any instance of this law being invoked by prosecutors, defence counsel, or judges in order to protect witnesses.[12] In May 2005, the Secretary General of the Ministry of Justice stated that witness protection laws are not appropriate to the Rwandan social context and would be too expensive to administer.[13]

27. The Rwandan witness protection service cannot provide protection to witnesses, whether of the prosecution or the defence. The government established the service in 2005 but thus far has left its funding to foreign donors. The service is understaffed, with only 16 staff members serving the entire country. It refers all cases of threats to witnesses or victims to local police and political authorities, and has no capacity to provide protection itself. At present, the witness protection service forms part of the national prosecutor's office, making it unlikely that witnesses for the defence would seek its assistance.[14]

28. Rwandan judicial officials have failed to respect the Tribunal's measures to protect witnesses. In at least one case, Rwandan judicial officials failed to heed the ICTR protection order to conceal witness' identities. The Higher Instance Court of Gasabo included the names of protected witnesses in a 26 June 2007 order directing the detention of Leonidas Nshogoza, a lawyer then serving as investigator for an ICTR defence team.[15]

29. In dozens of interviews during 2005, 2006, and 2007, Rwandan judges, defence counsel working both inside Rwanda and at the ICTR, and Rwandan and foreign jurists with years of experience observing proceedings in the Rwandan judicial system all identified obtaining the testimony of defence witnesses as one of the most serious obstacles to conducting fair trials in Rwanda.

Harbouring "Genocidal Ideology"

30. Fear of being accused of harbouring "genocidal ideology" deters potential witnesses from giving testimony in defence of persons accused of genocide. As indicated below, the term "genocidal ideology" is mentioned in the 2003 Constitution, but is not defined in law. Absent a legal definition, the term has been manipulated by government officials and others to encompass

[11] Loi Nº 15/2004 du 12/6/2004 *portant modes et administration de la preuve*, article 128. (Translation in English not available).
[12] HRW interviews, 26, 28, and 30 May 2005; 1, 2, 3, 6, 7, and 8 November 2006; 11 September and 14 November 2007.
[13] HRW interview with Secretary General, Ministry of Justice, Kigali, 27 May 2005.
[14] HRW interviews with member of staff from the Witness Protection Programme, 8 November 2006 and 12 and 19 November 2007.
[15] Tribunal de Grande Instance, Gasabo, Order RDP 0469/07/TGI/GSBO.

a broad spectrum of ideas, expression, and conduct, often including those perceived as being in opposition to the policies of the current government.

31. In the preamble and in Article 9 of the 2003 Constitution, the State of Rwanda committed itself to fighting "the ideology of genocide and all its manifestations." There is no further definition, but Article 13 of the Constitution specifies that revisionism, negationism, and the minimization of genocide are punishable by law.[16]

32. The 2003 law punishing genocide does not mention "genocidal ideology" but prohibits "any negation of genocide, any gross minimalization of the genocide, any attempt to justify or approve of genocide, and any destruction of evidence of the genocide."[17]

33. "Genocidal ideology" became well known and frequently used after publication of two reports on the topic, one by a parliamentary commission in 2004 and another by the Rwandan Senate in 2006. These reports also did not define the term, but instead listed hundreds of persons and organizations allegedly guilty of holding or disseminating "genocidal ideology."[18] In mid-December 2007, a third parliamentary report once again raised fears about "genocidal ideology" among Rwandans, concluding that such ideas were widely held in more than 30 Rwandan schools. Teachers and staff were blamed for disseminating "genocidal ideology" to their pupils.[19]

34. According to the 2006 Rwandan Senate report, questioning the legitimacy of the detention of a Hutu is one manifestation of "genocidal ideology."[20] Potential witnesses have reason to fear that their willingness to testify could in itself be taken as proof of this form of "genocidal ideology."

35. In a highly publicized proceeding against a foreign priest accused of genocide, only one person testified for the defence, although hundreds of his former colleagues and parishioners attended the hearing. A general of the Rwandan Defence Force criticized the witness, a HRW researcher, immediately after her testimony. Four months later he published a newspaper article

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[16] The Constitution of the Republic of Rwanda, 4 June 2003, Preamble, Articles 9, 13, and 33 (hereinafter "Constitution of Rwanda").

[17] Law Nº 33*bis*/2003 of 06/09/2003 *Punishing the Crime of Genocide, Crimes Against Humanity, and War Crimes*, article 4, available at http://droit.francophonie.org/doc/orig/rw/loi/fr/2003/2003dfrwlgfr1/2003dfrwlgfr1.pdf (accessed 2 January 2008).

[18] Among the international organizations criticized for having or facilitating the dissemination of genocidal ideology in the reports were CARE International, Trocaire, Norwegian People's Aid, Pax Christi, Voice of America (VOA), British Broadcasting Corporation (BBC) and Human Rights Watch as well as the Catholic Church, the Association of Pentecostal Churches in Rwanda, the International United Methodist Church, and the Mennonites. République Rwandaise. *Rapport de la Commission Parlementaire ad hoc crée en date du 20 janvier 2004 par le Parlement, Chambre des Députés, chargée d'examiner les tueries perpétrées dans la province de Gikongoro, l'idéologie génocidaire et ceux qui la propagent partout au Rwanda* and Rwandan Senate, *Rwanda, Genocide Ideology and Strategies for Its Eradication*, 2006.

[19] James Buyinza, "Damning Revelations," *The New Times*, 12 December 2007, available at http://www.newtimes.co.rw/index.php?issue=1376&article=2895 (accessed 19 December 2007); and James Buyinza, "MPs Grill Education Ministers," *The New Times*, 19 December 2007, available at http://www.newtimes.co.rw /index.php?issue=1383&article=3046 (accessed same date).

[20] Rwandan Senate, Rwanda, "Genocide Ideology and Strategies for Its Eradication," 2006, p. 18, fn. 5-7.

further criticizing her for "revisionism," a crime related to "genocidal ideology" and named in the 2003 Constitution.[21]

36. In several cases documented by HRW, witnesses who have appeared for the defence at the ICTR were arrested after their return to Rwanda. In one case, the witness was detained without charge for two years and then released. In another case, in 2005, where a witness was himself falsely accused of genocide, the prosecutor general acknowledged in writing that there was no proof, although as of this writing the person is still detained. Although these witnesses and others had testified as protected witnesses, many in their communities knew of their testimony and attributed their arrests to that testimony.[22]

37. In the last two months alone, HRW has documented four cases of persons who refused, out of fear, to testify in defence of persons whom they knew to be innocent of the charges against them.[23] In a recent case, a man who was too frightened to testify in defence of a person who had saved his life and that of more than ten family members broke down in tears while describing his shame to a HRW researcher.[24]

38. The right to present witnesses is seriously undermined by the fact that many Rwandans living abroad are unwilling to testify in Rwandan courts. A substantial number of witnesses who appear for the defence at the ICTR live outside Rwanda. One experienced defence lawyer estimated that as many as 90 percent of the witnesses called by his clients and other accused persons reside outside Rwanda.[25]

39. In February 2007, Minister of Justice Tharcisse Karugarama was quoted in a response to Senate criticism of immunity for witnesses coming from outside Rwanda:

> We have nothing to lose [by granting immunity] if anything, we have everything to gain, by these people turning up, it 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.[26]

40. This comment, widely circulated among Rwandans in the diaspora, served only to confirm the fears of many Rwandans that the immunity guaranteed by the transfer law was in fact a falsehood to facilitate their later arrest and forced return to Rwanda. See also paragraphs 103-105 in Part III below.

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[21] Brig. Gen. Frank K. Rusagara, "The Continued Négationism of the Rwandan Genocide," *The New Times*, 11 January 2006.
[22] Electronic communication to HRW, 28 August 2007; HRW interviews, 9, 11, 12, 13, 15, 16 November 2007.
[23] HRW interviews, 4 May 2007; 5 and 6 September 2007; 2 December 2007.
[24] HRW interviews, 4 and 5 May 2007.
[25] HRW interview, 7 December 2007.
[26] Felly Kimenyi & Steven Baguma, "Senate Endorses ICTR Transfers Bill," *The New Times*, 6 February 2007.

Transfer may violate Article 20 of the ICTR Statute: Innocent Until Proven Guilty

41. Rwanda cannot guarantee that the Accused will be presumed innocent until proven guilty.

42. Rwandan officials often speak and act in blatant disregard of the right of the accused to be presumed innocent. In May 2007, HRW asked the Commissioner General of the National Police for information on the killings of 20 detainees by police officers in a series of incidents that had begun the previous November. In response, the Commissioner General sent a statement admitting that the detainees had been killed in police custody but claiming they had all been attempting to escape or to seize the weapons of police officers. The statement asserted that the "suspects involved in these cases were of extreme criminal character," "terroristic," and "don't care about their own lives leave alone others." None of those killed had been in custody for more than a brief period, and none had been tried for the crimes for which they had been detained.[27]

43. The failure to uphold the presumption of innocence also appears in law. The 2003 electoral law specifically denied voting rights to those in pretrial detention, some 80,000 people at the time.[28] Though Rwandan law allows for depriving persons convicted of a crime of the right to vote, the 2003 law denied voting rights to detainees who had not yet been tried and should have been presumed innocent.[29]

44. The failure to uphold the presumption of innocence also is evident from the manner in which detainees are treated in prison. In many prisons, detainees are housed together with convicted criminals. They are subject to the same requirements regarding the wearing of prison uniforms and, in at least one prison, to the mandatory shaving of their heads. They also ordinarily appear in court in their prison uniforms.[30]

45. The practice of collective punishment further undermines the right to a presumption of innocence. Since early 2007, persons living in the vicinity of places where survivors have had crops vandalized, cattle killed, or buildings set afire have been forced to pay fines, provide labour, or suffer beatings, all without any process of law having determined whether they were guilty or not. According to one senior judicial official, collective punishments are carried out for "their educational as well as their punitive" effect.[31] The number and distribution of incidents of

[27] Letter from Andrew Rwigamba, Commissioner General of Rwanda National Police to HRW researcher, 4 June 2007; electronic communication, annexed to HRW, "There Will Be No Trial – Police Killings of Detainees and the Imposition of Collective Punishments", pp. 34-37, Vol. 19., Number 10 (A), July 2007 (hereinafter "There Will Be No Trial").

[28] Organic Law Nº 17/2003 du 07/7/2003 Governing Presidential and Parliamentary Elections, article 10.

[29] The ICCPR holds that if there are deprivations of the right to vote, they must be reasonable. *See* ICCPR, Article 25. In its 1996 General Comments on the ICCPR, the Human Rights Committee stated, "Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote." General Comment (No.25 (57)) 27 August 1996, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument (accessed 17 November 2007).

[30] HRW observation during visits to prisons in Butare, Gikongoro, Gitarama, and Kigali through 2007; electronic communication to HRW, former detainee, 30 October 2007.

[31] HRW interview with senior judicial official, Kigali, 13 March 2007.

collective punishment, as well as the high praise given to the practice by some national officials, indicates that this practice is sanctioned by the government, although it is not authorized by law.[32]

46. Collective assignations of guilt also appear in some officials' public statements. Because many Hutu participated in the genocide, some officials have succumbed to the tendency to speak as if all Hutu were guilty, seriously undermining the presumption of innocence. Such characterizations can have particularly damaging effect when made by an important judicial official. For example, in an address to legal professionals in The Hague in 2006, the President of the High Court said that delivering justice for the genocide was difficult because "the architects of the genocide literally made everyone a direct or indirect participant."[33]

47. Official campaigns against "genocidal ideology" also reinforce the tendency to ascribe guilt to others without regard to judicial processes. In early 2003, officials began a campaign against "genocidal ideology," which involved public denunciation of hundreds of people and dozens of Rwandan and international organizations. In public meetings, Rwandans were pressed to identify neighbours who held "genocidal ideas." With little or no verification and no judicial process whatsoever, the names of the accused were publicized on the radio and at public meetings. The persons shamed by being so designated enjoyed no presumption of innocence and suffered loss of employment, expulsion from school, and social isolation.[34]

48. Initially carried out in the press and the public arena, the campaign against "genocidal ideology" later moved into the judicial system. In 2006, the higher instance court in Muhanga, for example, judged only five cases of genocide but 13 cases of "genocidal ideology."[35]

Transfer may violate Article 20 of the ICTR Statute: A Fair and Public Trial by an Independent and Impartial Court

49. Rwanda cannot guarantee that the Accused will be given a fair and public trial by an independent and impartial court.

50. The Rwandan Constitution and two laws – one on the organization, functioning and jurisdiction of the courts and another on the code of ethics of the judiciary – guarantee the

[32] HRW, "There Will Be No Trial" pp.27-29.
[33] The president of the Rwandan High Court, paper delivered at the Centre for International Legal Cooperation, Seminar on Legal and Judicial Reform in Post Conflict Situations and the Role of the International Community, 7 December 2006 and published as "Reality and challenges of legal and judicial reconstruction in Rwanda," *The New Times*, 31 December 2006.
[34] République Rwandaise, *Rapport de la Commission Parlementaire ad hoc crée en date du 20 janvier 2004 par le Parlement, Chambre des Députés, chargée d'examiner les tueries perpétrées dans la province de Gikongoro, l'idéologie génocidaire et ceux qui la propagent partout au Rwanda* and Rwandan Senate, *Rwanda, Genocide Ideology and Strategies for Its Eradication,* 2006.
[35] "Muhanga: Au tribunal de grande instance on se réjouit des résultats de l'année passée," Umukindo, No. 29, March 2007.

independence of the judiciary.[36] One indispensable measure of judicial independence is the manner of appointment of judges and the security of their tenure in office. Under Rwandan law, a Supreme Council of the Judiciary appoints, disciplines, and removes judges of the High Court.[37] In addition, the Constitution provides that judges hold office for life and shall not be suspended, transferred, even if for purposes of promotion, or otherwise removed from office.[38] Yet in mid-October 2007 the cabinet moved three judges (two from the High Court and one from a court of higher instance) from their posts to newly created positions as deputy attorneys general in the ministry of justice.[39]

51. In interviews or written exchanges with HRW researchers in 2005, 2006, and 2007, at least twenty-five Rwandan high-ranking judicial officials, judges, prosecutors, and lawyers now or formerly active in the Rwandan judicial system told HRW that the Rwandan courts were not independent, even after the reforms of 2004, which were supposed to ensure their autonomy.

52. An independent expert group that recently performed an assessment of the Rwandan justice system at the invitation of the Government of Rwanda and with the endorsement of the Office of the Prosecutor of the ICTR, found that the "concept of an independent judiciary is relatively new in Rwanda." The group noted allegations of continuing political pressure on the judiciary, the paucity of prosecutions against individuals in the ruling party responsible for war crimes and crimes against humanity committed in 1994, and the need for legislative reforms to be accompanied by "a corollary shift in judicial culture towards greater independence."[40]

53. Professor William Schabas, recruited by the Crown Prosecution Service for the Rwandan government and testifying under oath as an expert witness in extradition proceedings in the Westminster's Magistrates Court, also spoke of the continuing politicization of Rwandan courts. In his 16 November 2007 testimony, Professor Schabas stated that the President of the High Court had told him of a recent attempt (occurring within the past six months) at political interference in a judicial proceeding by someone from the executive branch of the government.[41]

54. The departure from Rwanda of leading judicial figures seems linked to efforts by the executive to control the judiciary. In the past five years, senior officials of the Ministry of Justice and a former judge of the Supreme Court as well as at least three judges and a prosecutor who were involved in trials of great political importance have left Rwanda to live abroad.[42] One Rwandan judge told a HRW researcher that his advice to a colleague facing a difficult judicial

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[36] Constitution of Rwanda, article 140; Organic Law Nº 07/2004 of 25 April 2004 *Determining the Organization, Functioning and Jurisdiction of the Courts,* article 64; Law Nº 9/2004 of 29 April 2004 *Relating to the Code of Ethics for the Judiciary,* article 22.

[37] Organic Law Nº 02/2004 of 20 March 2004 *Determining the Organization, Powers and Functioning of the Superior Council of the Judiciary;* Organic Law Nº 07/2004 of 25 April 2004 *Determining the Organization, Functioning, and Jurisdiction of the Courts,* article 22.

[38] Constitution of Rwanda, article 142.

[39] HRW interview with former high-ranking judicial official, 23 October, 2007; Felly Kimenyi, "Karugarama is Attorney General," *The New Times,* http://www.newtimes.co.rw/index.php?issue=1318&article=1610, accessed October 15, 2007.

[40] International Legal Assistance Consortium, "Justice in Rwanda: An Assessment," Section 6.3.7, November 2007.

[41] Testimony of Professor William Schabas, live note 111607, Westminster's Magistrate's Court, London, p. 79.

[42] HRW interviews, August 16 and 17, October 23, November 4 and 8, 2007.

decision was to turn off the telephone and simply be unavailable to politically powerful persons.[43]

Transfer may expose the Accused to violation of his rights under Article 14 of the ICCPR:[44] No Double Jeopardy

55. Rwanda cannot in practice guarantee that the Accused will be protected from double jeopardy.

56. The ICTR Statute prohibits prosecution of an accused by a national court for acts for which he or she has already been tried by the ICTR; the same principle of *non bis in idem* should apply concerning prosecutions within a national system for accused persons transferred to its jurisdiction by the ICTR.

57. The existence of two tracks (conventional courts and *gacaca* popular jurisdictions) within the Rwandan judicial system presents a threat to the Accused's right to be protected from double jeopardy. By September 2007, the Minister of Justice estimated that there had been dozens of cases where persons tried in conventional courts were brought to *gacaca* jurisdictions for prosecution of the same crimes for which they had already been judged.[45]

58. Furthermore, the Gacaca Courts of Appeal, established by the 2004 organic law on *gacaca*, are the only courts competent to review judgments in cases where a *gacaca* court finds guilty a person previously acquitted by an ordinary court. The law fails to specify or limit the circumstances under which a *gacaca* court could try a person already tried by an ordinary court.[46]

59. A substantial number of cases documented by HRW clearly violate the prohibition against double jeopardy as specified in the ICCPR.[47] HRW documented one case in which a man spent five years in prison before being acquitted in conventional court of charges of genocide. In October 2007, he was called before *gacaca* on the same charges, lodged by his original accusers. As of this writing, the case is still pending.[48]

60. In another case, a man was arrested by a soldier in 1997 after a single accusation and no investigation. He spent seven years in prison but was freed by a conventional court on the grounds of mistaken identity. In August 2006, he was called to appear as a witness in a *gacaca* proceeding, but was in fact immediately tried, found guilty of the charges for which he had been

[43] HRW interviews and electronic communications, 16 July, 16 August, 17 August, 23 October, 24 October, 4 November, 5 November, and 8 November 2007.
[44] *See* International Covenant on Civil and Political Rights, Article 14(7): "No one shall be liable to be tried or punished again for an offence for which he has been finally convicted or acquitted in accordance with the law and penal procedure of each country." (hereinafter "ICCPR")
[45] HRW interview with the Minister of Justice, Kigali, 10 September 2007.
[46] Organic Law Nº 16/2004 of 19/6/2004 *Establishing the Organization, Competence and Functioning of Gacaca Courts*, article 93. The 2006 gacaca law (article 20) repeats the same provision, but allows anyone to ask for revision of the judgment, not just the parties to the case as specified in the 2004 law.
[47] HRW *gacaca* observation notes, Tare, 20 December 2006 and Bulinga, 5 June 2007.
[48] HRW interview, 11 and 12 October 2007.

originally accused, and sentenced to 30 years in prison. He spent four more months in prison until his appeal was heard and he was again acquitted. He nonetheless spent an additional two weeks in prison before he was released.[49]

Transfer may expose the Accused to violation of his rights under Article 7 of the ICCPR:[50] Freedom From Torture and Cruel, Inhuman or Degrading Treatment or Punishment

61. Rwanda does not guarantee that the Accused will not be subjected to torture or cruel, inhuman, or degrading treatment or punishment.

62. Rwanda abolished the death penalty in July 2007. The law now provides that persons sentenced to death will have their sentences commuted to life in prison or to life in prison with special provision.[51]

63. Life in prison with special provision means confinement in isolation, *i.e.* in solitary confinement, with no possibility of pardon or other measures to attenuate the sentence for at least twenty years.

64. Life in prison with special provision may be applied to recidivists as well as to a category of enumerated persons. Among those listed are persons convicted of genocide.

65. The law abolishing the death penalty, dated July 2007, repeals all previous provisions contrary to this law.[52]

66. In January 2007, Minister of Justice Tharcisse Karugarama commented about the conditions involved in this provision, saying, "They will be tough in that they (criminals) will regret not having been hanged."[53]

67. Prolonged solitary confinement potentially violates The Convention Against Torture and Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Human Rights Committee has interpreted Article 7 of the ICCPR in the following way: "The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7."[54]

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[49] HRW interview, Kigali, 13 September 2007.
[50] *See* ICCPR, Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
[51] Organic Law Nº 31/2007 *Regarding the Abolition of the Death Penalty of 25 July 2007*, articles 4 and 5.
[52] *Id.*, article 9.
[53] Felly Kimenyi, "Death Penalty-Recidivists to Have Special Imprisonment," *The New Times*, 25 January 2007.
[54] Human Rights Committee, General Comment 20, Article 7, point 6 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

III. HRW RESPONDS TO THE QUERIES OF THE COURT.

68. The third part of this *amicus* brief consists of HRW's responses to the queries of the Court posed in its 8 November 2007 Decision.

The Rwandan legal system may be limited in its ability to provide the Accused with assistance in securing adequate legal representation.

69. Securing adequate legal representation for the Accused may prove difficult because several attorneys who have undertaken the defence of a person accused of genocide or other politically important crimes have consequently faced threats, harassment, and even prosecution.

70. In June 2007, one Rwandan lawyer serving as investigator to an accused at the ICTR found himself before the national courts on allegations of corruption and minimizing genocide.[55] The allegations stem from supposed contact that the lawyer had with a protected prosecution witness, who recanted his original testimony before the Tribunal. In the order confirming his detention, he was said to have become an expert in finding witnesses to defend persons accused of genocide, which is not a crime.[56]

71. In September 2007, one lawyer defending a person accused of genocide was himself accused of genocide by a prosecution witness during the trial. When the lawyer asked the judge to instruct the witness to cease such verbal attacks, the judge did not do so but instead, in a decision marred by numerous irregularities, ordered the lawyer jailed for contempt of court and sentenced him to one year in prison. The decision was overturned on appeal the next day, but only after the lawyer had spent the night in jail and the Rwandan Bar Association had come to his defence.[57]

72. Two different lawyers who were threatened or harassed as a result of defending persons accused of genocide told HRW researchers that they would not undertake such representation in the future. Three additional lawyers fled Rwanda because of threats or harassment resulting from their defence of persons accused of genocide or related crimes.[58]

73. The Rwandan Bar Association currently lists 274 members, a number that is insufficient to meet the needs of all Rwandans for legal representation.[59] Nevertheless, some lawyers have said they would undertake to represent persons transferred under article 11 *bis*, provided they were assured adequate compensation. In the past when the international non-governmental

[55] HRW trial observation notes, Tribunal de Grande Instance Gasabo, 17 October 2007, 23 October 2007 and 31 October 2007.
[56] Order RDP 0469/07/TGI/GSBO, Tribunal de Grande Instance, Gasabo, 26 June 2007.
[57] Judgment RPA 0786/07/HC/NYA, Decision of the High Court of Nyanza, 27 September 2007.
[58] HRW interviews, 28 February, 9 October, 9 December 2007; Cyiza Davidson, "Le Barreau des Avocats du Rwanda est persecuté," *Rushashya*, July 2007.
[59] Ajprodho, Caurwa, Cestrar, Cladho, Haguruka, Human Rights First, *Broadening Access to Justice: A Civil Society Position Paper on the Draft Bar Law*, October 2006. Although the current number of lawyers and interns is somewhat higher than the 197 cited in the October 2006 report, the situation has not changed substantially.

organization *Avocats sans Frontières* assured payment to members of the Rwandan bar to represent defendants accused of genocide, some Rwandan lawyers agreed to do so. [60]

74. In addition, there is the possibility of lawyers from abroad representing persons transferred to Rwanda under article 11 *bis*.

The Rwandan legal system may be unable in practice to provide appropriate financial support to the Accused.

75. An indigent accused is likely to face significant obstacles in obtaining appropriate financial support in the Rwandan legal system. Even though financial support might be provided by the Rwandan government, the Rwandan Bar Association, or an international government or international NGO, there is no guarantee that financial support will be supplied by any of these sources.

76. The Rwandan government has undertaken to provide some $500,000 in fiscal year 2008 to assist any indigent persons transferred under article 11 *bis*. According to many lawyers working in Rwanda, the Rwandan government has not disbursed funds to provide payment for the legal representation of indigent persons in the past.[61]

77. The Rwandan Bar Association administers a program of legal aid to indigent who apply for assistance, including a fund to pay the costs of such legal representation. The fund, however, is almost always depleted. As a result lawyers either find ways to avoid undertaking such cases or are forced to pay any related costs themselves.[62]

78. One functioning program of legal aid for the indigent, administered by the international non-governmental organization *Avocats sans Frontières*, provided assistance to 477 clients last year, 312 of them accused of genocide. A second, smaller program, funded by the Belgian government, has assisted minors in conflict with the law.[63]

The Rwandan legal system may be limited in its ability to facilitate travel and investigations for the Defence team of the Accused.

79. According to information provided by defence lawyers at the ICTR and Rwandan government officials in November 2007, the Rwandan government has never previously facilitated the travel of defence teams. Further, the Rwandan government has delayed or failed to deliver necessary assistance to defence teams attempting to carry out investigations in the course of their work.

[60] HRW interview with *Avocats sans Frontières* employee, Kigali, 26 November 2007.
[61] HRW interviews, 30 and 31 May 2005; 1, 2, 6, 7, and 8 November 2006.
[62] *Id.*
[63] *Id.*

80. The Rwandan government is obligated pursuant to Security Council Resolution 955, which established the ICTR,[64] to provide complete cooperation to persons working under the aegis of the ICTR, but as demonstrated below, has failed to do so on numerous occasions.

81. In November 2007, HRW researchers interviewed ICTR defence lawyers, Rwandan jurists, and other knowledgeable persons about the cooperation provided to ICTR defence teams by Rwandan government officials. A number of the attorneys cited multiple instances when ICTR defence teams were unable to obtain documents from Rwandan authorities in a timely fashion, were unable to see potential witnesses currently incarcerated in Rwanda, or were able to see them only after great effort and under conditions inimical to productive work.[65]

82. In one notable case, ICTR Trial Chamber I issued a subpoena ordering the appearance of Gen. Marcel Gatsinzi, Rwandan Minister of Defence. Although the Rwandan government presumably had the means to compel General Gatsinzi to honour the subpoena, he never appeared as a witness.[66]

The Defence of the Accused may face significant impediments in the discharge of its function.

83. As described at length in paragraphs 25-40 and 85-105, the defence of the accused may face significant impediments in obtaining witnesses, securing witness testimony, and ensuring protection of witnesses.

84. As described at length in paragraphs 69-74 above, defence attorneys have faced threats, harassment, and even prosecution. Several lawyers felt so threatened after defending clients in "sensitive" cases that they left Rwanda. In one such case documented by HRW, the lawyer had represented a client accused of "genocidal ideology." Like several judges and prosecutors who no longer felt secure in Rwanda, he sought asylum abroad.[67]

Inadequate procedures exist for ensuring protection of any witnesses in the Accused's case before, during, and after testifying in court.

Rwanda's Witness Protection Service

85. As previously described, Rwanda established a witness protection service in 2005, but has left its funding to foreign donors. The human and financial resources of the witness protection service are limited. The funding for the first three quarters of 2007 was approximately US $132,000. The service is currently staffed by 16 persons, four of whom are jurists. Four staffers are located in Kigali and one each is located in the office of the prosecutor at each of the

[64] United Nations Security Council Resolution 955, Article 28, 8 November 1994.
[65] HRW interviews with or electronic communications from ICTR defence lawyers, 9, 11, 12, 13, 15, 16 November 2007. *See also Prosecutor v. Bagosora et al*., Further Requests to the Government of Rwanda for Cooperation and Assistance.
[66] *Prosecutor v. Bagosora et al.,* Decision on Bagosora Motion for Additional Time for Closing Brief and Related Matters (TC), 2 May 2007; HRW interview, 12 November 2007.
[67] Cyiza Davidson , "*Le Barreau des Avocats du Rwanda est persecuté*," *Rushashya*, July 2007

12 higher instance courts. According to information from staff of the service, it has assisted more than 900 persons since its establishment.[68]

86. The service refers all cases of threats to witnesses or victims to local police and political authorities. It has no capacity to provide protection itself.

87. Further, the witness protection service forms part of the national prosecutor's office, making it unlikely that witnesses for the defence would seek its assistance.

Laws Protecting Witnesses

88. As discussed in Paragraph 26 in Part II above, the law on evidence that mentions witness protection has not been invoked to protect any witnesses, according to some fifteen lawyers, prosecutors, and judges. Only one person in this group even mentioned the relevant article of the evidence law as applicable to the issue of witness protection. [69]

Prosecution and/or Defence witnesses in the Accused's case may face threats, harassment, and violence before, during and after giving testimony.

89. Both Prosecution and Defence witnesses may face threats before, during and after giving testimony in Rwanda. Even contemplating testifying exposes potential witnesses to threats including physical and verbal attacks, harassment, intimidation, and recriminatory prosecution. One lawyer speaking about the problem of testifying in Rwandan courts summed up the situation: "Any statement can bring misfortune."[70]

90. According to at least two Rwandan judges, it is not uncommon for state agents to torture, mistreat, threaten, or otherwise seek to force accused persons to confess or testify against co-defendants. HRW researchers have documented three such cases since 2005. As demonstrated below, in none of them did Rwandan judges or prosecutors seek to ascertain the truth of allegations by the accused that they had been tortured.

91. In one politically important case heard by the High Court in early 2005, the defendant Leonard Kavutse told the court that he had been beaten to make him confess to having committed several crimes. The court did not investigate his complaint.[71]

92. In a second case, four co-defendants in a politically sensitive case told the Military High Court that they had been tortured. They said they had been forced to walk on their knees from their detention lock-up to the court over rocky terrain. Their knees were obviously hurt and bleeding. Despite counsel's request that the court order a medical evaluation, neither the Military High Court nor the Supreme Court which heard an appeal that raised this issue, ordered medical evaluations.[72]

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[68] HRW interview, 12 November 2007.
[69] HRW interview with Ministry of Justice, Secretary General, Kigali, 27 May 2005.
[70] HRW interview, lawyer, Kigali, 10 September 2007.
[71] Case No. RP 0004/05/HC/KIG-RP 41.934/KIG.
[72] Case No. RPA 0017/07/ CS, Supreme Court, Kigali, 16/05/07.

93. A third case of abuse—recognized by a United States District Court as torture—involved Rwandan civilian police, military officers and other security agents. The court heard charges against three Rwandans accused of having murdered U.S. citizens in Uganda. In a 160 page decision, the Judge set out a detailed account of the testimony, including medical expert testimony, and concluded that the Rwandans had been tortured by Rwandan state agents in order to force confessions.[73] The Judge refused to admit the confessions as proof of guilt; the U.S. prosecutor dropped the case. Even though the Rwandan Minister of Justice, the Prosecutor General, and the head of the military justice system were all made aware of this decision by May 2007, no Rwandan judicial authority has investigated the torture by Rwandan police and soldiers in this case. Two of these three judicial authorities actually made light of the case, asserting that the scars of the victims proved nothing since all Rwandans had scars.[74]

94. HRW documented two additional instances of mistreatment of witnesses by state agents seeking to influence their testimony in the politically sensitive case of former President Pasteur Bizimungu and his co-defendants. In court, one witness complained that state agents had mistreated him to influence his testimony.[75] Another witness told the court that he had been detained for two years without charge in order to force his testimony against former President Bizimungu. The court did not order investigations into either of these allegations.[76]

Threats Facing Prosecution Witnesses

95. Prosecution witnesses have suffered attacks, harassment, insults, and, occasionally, physical harm. Such attacks are monitored and reported by Ibuka (an association of genocide survivors of genocide), the press, and political authorities.

96. Each year several survivors of the genocide are murdered in Rwanda. At least eight survivors were murdered in 2007.[77] In some cases, these killings are related to testimony that the survivors provided or intended to provide in genocide prosecutions. Many others who have testified suffer verbal abuse, rocks thrown on their roofs at night to frighten them, or damage to property, farm animals, or crops.

Threats Facing Defence Witnesses

97. HRW has documented approximately 10 cases where persons who testified for the defence before the ICTR were subsequently arrested, re-arrested, subjected to worse conditions of incarceration or otherwise harassed after returning to Rwanda.[78] Although HRW makes no judgments on the merits of the arrests or indictments, most of the arrests occurred shortly after

[73] *United States of America v. Francois Karake, et al.*, 2006 WL 2374463 (D.D.C. 17 August 2006).
[74] HRW interviews, 2 May 2007; exchange with the Prosecutor General, The Hague, 7 May 2007.
[75] HRW trial observation, 3 May 2004.
[76] HRW interview, Kigali, 22 July 2004.
[77] HRW interview with official of witness protection service, 12 November 2007.
[78] HRW interviews with or electronic communications from Rwandan lawyers and lawyers serving on defence teams at the ICTR, 9, 11, 12, 13, 14, 15, 16 November 2007.

the witnesses testified in Arusha, suggesting that independent evidence may not have been gathered apart from the witness' own testimony.

98. Although the identities of protected witnesses should remain unknown, HRW is aware of many cases where the identities are well-known, especially in their local communities.[79]

99. As described above, defence witnesses fear they will be accused of harbouring "genocidal ideology."

100. Unlike attacks on Prosecution witnesses, attacks on Defence witnesses have not been systematically monitored nor tracked by any local organizations, the press, or the authorities. For this reason, it is impossible to know how many killings or injuries have occurred or how much property damage has been inflicted on persons because they have testified or been willing to testify for the defence.

101. Nevertheless, in many interviews and other exchanges with HRW researchers, defence witnesses have expressed fears of recrimination, arbitrary detention and false charges. They express these fears for themselves as well as for their family members.[80]

102. In addition to problems of witness having testified before the Tribunal, HRW has received reports of defence witnesses being detained or otherwise intimidated by police or local authorities as a result of their testimony in *gacaca* proceedings.[81]

Inadequate procedures exist for the procurement and facilitation of safe and secure travel for witnesses, particularly for Rwandan witnesses who reside abroad – witnesses for the Accused may be unable to benefit from a safe passage to and from Rwanda.

103. HRW has no knowledge of procedures put in place to facilitate safe travel for witnesses from abroad. The witness protection service has never assisted any persons travelling from abroad in order to testify. Given its present staffing and funding, it is unlikely that it will be able to offer such assistance in the near future.

104. As described in detail in Paragraphs 38-40 above, many Rwandans living abroad distrust the current government of Rwanda. Even persons familiar with the guarantees provided by the Transfer Law maintain that they put no faith in such guarantees. HRW questioned some two dozen Rwandans living abroad about their willingness to travel to Rwanda to testify for the defence in cases transferred under article 11 *bis*; none was willing to do so.[82]

[79] HRW interviews or electronic communications, 18 April 2006, 23 October and 8 November 2007.
[80] HRW interviews, 5-6 September 2007, 2 December 2007.
[81] HRW interviews and electronic communications, 9 September, 30 October, 11 November, 2 December 2007.
[82]The judicial experts who did the recent assessment of the Rwandan judicial system reached essentially similar conclusions about the problems of witness protection and the difficulty of securing witnesses from outside Rwanda. International Legal Assistance Consortium, "Justice in Rwanda: An Assessment," Sections 6.4.1 and 6.4.3, November 2007.

105. Even Rwandans otherwise willing to travel to Rwanda might be reluctant to do so because returning to their home country could prevent their obtaining asylum or delay their obtaining citizenship in their countries of residence.

Rwandan laws governing the arrest and detention of an accused are unlikely in practice to afford to the Accused the same protection as the protection applied by the Tribunal.

106. As noted above, laws regulating arrest and detention are on their face compliant with international standards, but in practice are often ignored by state agents. Thus if transferred to Rwanda, the Accused may not be afforded the same protection as he would be if he were tried before the Tribunal. While the Accused may not suffer from abusive treatment as a result of his detention or arrest, such treatment might be meted out to others believed likely to testify for the defence of transferred persons.

107. In contravention of Rwandan law, police and other state agents frequently detain persons for excessive periods of time, in irregular facilities, and in inhumane conditions. Such abuses are regularly criticized by Rwandans, including lawyers, judges, and representatives of human rights organizations.[83]

108. In late 2005, Deputy Prosecutor General Martin Ngoga told a meeting of prosecutors that failure to follow appropriate procedures, *e.g.* in detention cases, represented a real problem.[84]

109. In one criminal case in February 2005, the judge recognized that the 18 months the defendant had spent in pretrial detention far exceeded the maximum permitted by law. Nonetheless, no penalty was imposed on the prosecution and no remedy was offered to the defendant.[85]

It is not known whether the Rwandan detention facilities for the Accused and other transferred persons will comply with internationally recognized standards.

110. HRW tried repeatedly and without success to secure a meeting with authorities whose authorization was needed to visit the new temporary detention facilities at Kigali central prison. Hence HRW researchers had no opportunity to visit the new facilities. When a HRW researcher visited Mpanga prison in November 2006, construction of special facilities for persons transferred from the ICTR had not been completed. According to Rwandan authorities, funds are available for completing the construction but the work has not yet been done.

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[83] HRW, "There Will Be No Trial"; Rwandan National Human Rights Commission, Report for 2005. *See also* U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Rwanda, 8 March 2006.

[84] "Rwanda: Prosecutors Meet on Search Warrant, Arrest Procedures," IRIN, 7 November 2005, available at http://www.irinnews.org/report.asp?ReportID=49955&SelectRegion=Great_Lakes&SelectCountry=RWANDA (accessed 27 November 2007).

[85] Case No. RP 0004/05/HC/KIG-RP 41.934/KIG, at p.6, translated from the Kinyarwanda: "Le tribunal constate que la police judiciaire n'a effectivement pas respecté le délai de détention préventive, mais que le ministère public explique que cela a été du à plusieurs raisons dont notamment le fait qu'il a été arête vers le week-end, le fait qu'il y a eu plusieurs congés et la réforme judiciaire […]."

CONCLUSION

111. In conclusion, HRW respectfully submits that it has demonstrated that the Accused Fulgence Kayishema should not be transferred pursuant to Rule 11 *bis* for the reasons below:

a. Inquiry into the issue of *ratione materiae*, or subject matter, jurisdiction and the adequacy of the Rwandan legal framework in criminalizing the alleged conduct of the Accused must precede any decision concerning the request for transfer of this case. The Chamber must ensure that Rwanda has an adequate legal framework to try the crimes the Accused is alleged to have committed;

b. Transfer may violate Article 20 of the ICTR Statute because Rwanda cannot guarantee that the Accused will have the opportunity to examine witnesses and obtain witnesses in his defence, be presumed innocent until proven guilty, or be given a fair and public trial by an independent and impartial court;

c. Transfer may expose the Accused to violations of his rights under Article 14 of the ICCPR, to which Rwanda is a State Party because Rwanda cannot guarantee that the Accused will be protected from double jeopardy;

d. Transfer may expose the Accused to violations of his rights under Article 7 of the ICCPR, to which Rwanda is a State Party, because Rwanda's imposition of solitary confinement for life or a minimum of twenty years on some persons, including those convicted of genocide, may amount to torture or cruel, inhuman and degrading treatment or punishment;

e. The Rwandan legal system may be limited in its ability to provide the Accused with assistance in securing adequate legal representation;

f. The Rwandan legal system may be limited in its ability to provide appropriate financial support to the Accused;

g. The Rwandan legal system may be limited in its ability to facilitate travel and investigations for the Defence team of the Accused;

h. The Defence of the Accused may face significant impediments in the discharge of its function;

i. Inadequate procedures exist to ensure protection of any witnesses in the Accused's before, during, and after testifying in Court;

j. Prosecution and/or Defence witnesses in the Accused's case may face threats, harassment, and violence before, during, and after giving testimony in Rwanda;

k. Inadequate procedures exist for the procurement and facilitation of safe and secure travel for witnesses for the Accused, particularly Rwandan witnesses who reside abroad and are unable to benefit from safe passage to and from Rwanda;

l. Rwandan laws governing the arrest and detention of an accused are unlikely in practice to afford to the Accused the same protection as the protection applied by the Tribunal; and

m. It has not yet been shown that the detention facilities for the Accused and others transferred to Rwanda and convicted of violations of international law will comply with internationally recognized standards;

WHEREFORE, the Trial Chamber should deny the Prosecutor's request for the referral of the case of Fulgence Kayishema to the Republic of Rwanda for trial.

Respectfully submitted,

New York, 3 January 2008

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Human Rights Watch