

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO.: ICTR-05-89-I
CHAMBER III

THE PROSECUTOR
OF THE TRIBUNAL
v.
BERNARD MUNYAGISHARI

THURSDAY, 12 APRIL 2012
0907H
ORAL HEARING

Before the Judges:

Lee Gacuiga Muthoga, Presiding
Seon Ki Park
Gustave Gberdao Kam

For the Registry:

Mr. Constant Hometowu
Mr. Issa Mjui

For the Prosecution:

Mr. James Arguin
Mr George Mugwanya
Ms. Inneke Onsea
Mr. Abdoulaye Seye
Mr. Francois-Xavier Nsanzuwera
Ms. Erica Bussey

For the Accused Bernard Munyagishari:

Mr. Philippe Moriceau
Ms. Natacha Faveau Ivanovic

Court Reporters:

Ms. Kirstin Bruinsma
Ms. Eleanor Bastian
Ms. Sithembiso Moyo

PROCEEDINGS

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MR. PRESIDENT:

Good morning, everyone. The Court is in session now.

Can I have the appearances of the parties, beginning with the Prosecution.

MR. ARGUIN:

Good morning, Mr. President, and may it please the Chamber.

Appearing on behalf of the Prosecution today are Senior Appeals Counsel George Mugwanya, to my left; Senior Appeals Counsel Inneke Onsea, to my right; and in the back bench, Senior Appeals Counsel Abdoulaye Seye; and Appeals Counsel Francois-Xavier Nsanzuwera and Erica Bussey. I am James Arguin, the chief of the appeals division.

MR. PRESIDENT:

And the Defence -- the Defence?

MR. MORICEAU:

Good morning, Mr. President, Your Honours. Good morning, Mr. President, Your Honours.

The Defence is composed of Ms. Natacha Fauveau Ivanovic, a lawyer in the Paris bar association; and Madam Majda Dautovic, a legal assistant; and myself, Philippe Moriceau, the lead counsel and a lawyer in the Paris bar association.

MR. PRESIDENT:

And would the registrar please read out the case for the Court, the case.

MR. HOMETOWU:

Thank you, Mr. President.

Trial Chamber III of the International Criminal Tribunal for Rwanda, composed of Judge Lee G. Muthoga, presiding, Judge Seon Ki Park, and Judge Gustave Kam, is now sitting in open session, today, Thursday the 12th of April 2012, for an oral hearing in the matter of the Prosecutor versus Bernard Munyagishari, Case No. ICTR-2005-89-I. Thank you.

MR. PRESIDENT:

Good.

The Court is composed this morning to take from the parties any amplification, clarifications, additions of the dispositions that -- the pleadings that you have placed before us. We have taken the trouble to go through the pleadings, and we will continue to -- going through the pleadings.

What is provided today is an opportunity to summarise those proceedings to the Court, to underline

1 anything that you feel would strengthen the -- the pleadings, and to explain anything that the Court may
2 wish to -- explained. And after the session, if there are any things that we feel you have not fully
3 tackled, we will ask you questions and direct you to the areas that you would like assistance in, in
4 determining this 11 *bis* application that the Prosecutor has brought forward.

5
6 Am I clear to all the parties?

7
8 Prosecution?

9 MR. ARGUIN:

10 Yes, Your Honour. Thank you.

11 MR. PRESIDENT:

12 Defence?

13 MR. MORICEAU:

14 Yes, Mr. President.

15 MR. PRESIDENT:

16 Now, the Prosecution has been -- each party has been allotted one and a half hours. We think that is
17 more than adequate for that purpose, and we will attempt to keep you within those limits. And then
18 each party will have 45 minutes in -- to respond or to -- yes, to clarify and to respond to whatever the
19 other party will have said.

20
21 So, can we now have the Prosecution on their feet. It is now, according to my watch, ten minutes
22 past nine, or just after. And so the Prosecution has one and a half hours.

23 MR. ARGUIN:

24 Mr. President, may it please the Chamber.

25
26 The Prosecutor's application for the referral of this case to Rwanda should be allowed, because, as the
27 Appeals Chamber, and three other Referral Chambers found only a few weeks or months ago,
28 Rwanda's existing legal framework is adequate to ensure that if the referral of this case is allowed the
29 accused will receive a fair trial in Rwanda.

30
31 Now, bearing in mind Your Honour's instructions this morning, I do not intend to repeat what has
32 already been found by the *Uwinkindi* Appeal Chamber, and by the Referral Chambers in *Uwinkindi*,
33 *Sikubwabo*, and *Kayishema*. Many of the same submissions made in these earlier cases are already
34 before this Chamber. And many of these same submissions also have formed the basis of decisions
35 issued by the European Court of Human Rights, the African Union, and national courts in Norway,
36 Canada, and, most recently, France, allowing the extradition of suspects and their transfer of cases to
37 Rwanda for trial.

1 The common thread in all of these prior decisions is that, in the years since the genocide, Rwanda has
2 put in place numerous legal reforms to protect the fair trial rights of the accused in this case and other
3 referred cases.

4
5 This morning I would like to first update the Chamber on some significant developments since our
6 last written submissions were filed. I will then address two discrete points that were left open by prior
7 decisions, that should give this Chamber assurance that if a referral was allowed, the accused will
8 receive a fair trial in Rwanda. Lastly, I will show, contrary to the submissions of the Defence, there is
9 nothing unique about the accused in this case that would warrant a different conclusion from that
10 reached by prior Chambers.

11
12 Let me start by updating the Chamber on three significant developments on the judicial front. I will then
13 turn to several significant developments in Rwanda.

14
15 On the judicial front, I have already alluded to two recent decisions: The Referral Chamber's decision
16 to refer the case of Charles Sikubwabo to Rwanda for trial is, I believe, significant in two respects. It is
17 the latest in a series of decisions from the Tribunal recognising the material improvements that Rwanda
18 has made to its laws and justice system.

19
20 But it's significant, I think, in another respect as well. Because duty counsel appointed by the ICTR to
21 represent the interests of the accused in that case, after conducting -- or, after being allowed several
22 months to conduct an investigation to develop evidence to oppose the Prosecution's application,
23 ultimately agreed that Rwanda will be able to provide a fair trial to the accused in that case. Despite
24 this concession, the Chamber proceeded on its own independent review of the record and likewise
25 reached the same conclusion.

26
27 Now, the second decision that I alluded to earlier is a recent decision of a Court in Rouen, France,
28 allowing the extradition to Rwanda of Claude Muhayimana, a dual French and Rwandan citizen. A
29 copy of that decision is available -- we just received it yesterday -- and I would offer it to the registrar to
30 distribute to the Chamber and the parties.

31
32 The decision confirms, in significant part, at page 5, that Rwanda is able to ensure the
33 fundamental procedural guarantees and protections of the rights of the Defence at any trial. This
34 decision is in line with, as I mentioned, a growing list of international and regional courts in -- that have
35 allowed and recognised the same guarantees, and a growing list of national courts that have allowed
36 extradition requests to Rwanda.

1 The third significant development on the judicial front that has occurred since our last submissions was
2 the President's decision in the *Uwinkindi* case last week on the monitoring mechanism. That decision is
3 dated 5 April 2012, and it's the decision on monitoring arrangements, and it appears in the
4 *Uwinkindi* file at registry pagination 5801 to 89.

5
6 The decision from the President is significant, I think, for several reasons: First, it confirmed that
7 monitoring by the African Commission of Human and People's Rights remains "a viable option". It
8 further confirms that the African Commission on Human and People's Rights is, in fact "the organisation
9 of first choice to serve as the Chamber's monitor".

10
11 The President, therefore, directed the registrar to resume negotiations with the African Commission
12 aimed at expeditiously concluding an agreement for monitoring, including the payment of reasonable
13 compensation for the monitor's time. Now, to avoid further delay in the implementation of that
14 monitoring scheme, the President also directed that two Chambers staff be appointed as
15 interim monitors and continue to assist the full-time monitor once they are formally in place in Kigali.

16
17 The decision is significant in another respect, as well, in that the President also clarified and provided
18 additional guidance on the modalities of monitoring, the terms of reference that should be included for
19 the monitor in their agreement, and details of what the monitor should include in their reports to the
20 president.

21
22 That decision from the President last week, I think, shows that the monitoring mechanism that the
23 Prosecutor has proposed for this case remains viable, and it also provides substantial guidances to this
24 and other Referral Chambers on how monitoring of a referred case can and should work in practice.

25
26 While on the subject of monitoring, I would also like to call the Chamber's attention to another filing that
27 was made after our last submissions. It is the registrar's confidential Rule 33(B) submissions that the
28 Chamber requested on the monitoring mechanism in this case. In connection with that filing, I draw the
29 Court's attention to annex B, which appears at registry pages 788 to 83. Annex B is a checklist the
30 registry prepared for the monitoring mechanism in *Uwinkindi* and other referred cases. It was signed
31 and agreed to by the prosecutor-general of Rwanda on behalf of the government. I point it out because
32 it shows that Rwanda will extend the same courtesies, access, and protections to any monitor
33 appointed by this Chamber as it would to any monitor appointed by the Prosecutor.

34
35 Now, the Defence in its submissions in this case suggested that the monitoring mechanism would be
36 ineffective because, in part, article 19 of the transfer law, as currently drafted, only mentions monitoring
37 by the Prosecutor. As Your Honours know, the Tribunal has amended Rule 11 *bis* to allow monitoring

1 by the Chamber as well. According to the Defence, though, Rwanda should have amended the
2 transfer law to specifically include a reference to any monitor appointed by the Chamber, not just by the
3 Prosecutor. I think given the agreement that has been executed between the registrar of the Tribunal
4 and Rwanda, there is no need for any formal amendment of the transfer law. Rwanda already has
5 agreed to provide the same access and rights to any monitor appointed by the Chamber as it would to
6 any monitor appointed by the Prosecutor.

7
8 With regard to Rwanda, I'd like to update the Court on two -- on the continuing progress that Rwanda
9 has made on the legislative front, and also in terms of increased readiness for the referral of
10 ICTR cases for trial.

11
12 Now, as noted in Rwanda's amicus brief, submitted in this case, Rwanda's parliament has adopted
13 new legislation allowing the president of the supreme court discretion to invite foreign or
14 international judges to sit on the panel of international or cross-border cases. The relevant legislation is
15 attached as annex A to Rwanda's brief, and it appears at registry page 570.

16
17 Now, Rwanda has already detailed that in its brief. But what was not mentioned is another significant
18 aspect of this legislation. Because the legislation further provides that, in any international or
19 cross-border criminal cases, the panel shall be tried both at first instance and at the appeal level by at
20 least a three-judge bench. This means that the panel in any referred case will be comprised by at least
21 three judges.

22
23 Now, other developments on the legislative front are mentioned in Rwanda's amicus brief, and I won't
24 dwell on them here. I will just highlight the fact that they include, as part of an overall reform of the
25 penal code, substantial reductions in the range of sentences available to the crime -- or, applicable to
26 the crime of genocide ideology. That's detailed in annex B to Rwanda's amicus brief at
27 registry page 568 to 556.

28
29 The other major legislative reform is a reform of the code of criminal procedure. Included in that is the
30 elimination of former article 59 of the code of criminal procedure, relating to the use of
31 accomplice testimony. That appears in annex C to Rwanda's amicus brief at registry page 553.

32
33 In terms of readiness, there are two particular initiatives by the chief justice of the supreme court that I
34 think deserve special mention.

35
36 In the wake of the *Uwinkindi* referral, the chief justice obtained a supplemental budget appropriation of
37 118 million Rwandan francs in January 2012 specifically for the trial of referred cases. Now, in

1 connection with our reply brief, we submitted an affidavit from the general secretary of the
2 supreme court. It was attached to our reply at registry page 538. That affidavit indicated -- mentioned
3 a 100 million Rwandan francs supplemental appropriation. In the intervening weeks the appropriation
4 has been increased by an additional 18 million. These additional funds, as noted in the
5 general secretary's affidavit, are intended only for the six-month period from January of this year to
6 June of this year. They are -- and they will be reviewed again as part of the overall budget process that
7 is scheduled to take place in June of this year.

8
9 Those funds are being used to immediately enhance the high courts' and supreme court's capacity for
10 trials in referred cases. The supplemental funds are being used specifically to pay for additional judges,
11 registrars, interpreters, stenographers, a witness protection expert, information technology experts, as
12 well as to purchase new equipment, including new computers, printers, and a sound system for an
13 additional courtroom.

14
15 The other significant development in terms of readiness relates to the witness protection unit within the
16 judiciary. Following the *Uwinkindi* referral, the chief justice instructed three registrars to make all
17 arrangements necessary to immediately activate the WPU so it would be ready to provide services in
18 referred cases. At present the WPU is staffed by seven registrars from the supreme court,
19 five registrars from the high court. In addition, three additional registrars have been hired to provide
20 extra support, and a highly experienced full-time victim/witness advocate with experience at an
21 international tribunal is being recruited to provide additional expertise to the WPU. And that hiring
22 process is nearing completion.

23
24 Now, those are the updates on the events that I have since our reply brief was filed.

25
26 I would like to now correct two mis-impressions about Rwandan law and practice that have been
27 mentioned in recent referral cases. I stress, however, that neither of these mis-impressions from the
28 Chamber's earlier decisions to refer cases to Rwanda detracted from the ultimate conclusion.
29 Nevertheless, they are mis-impressions that should be corrected and should provide this Court with
30 additional assurance that if this case is referred to Rwanda the trial will be fair.

31
32 The two corrections relate to the operations of the witness protection unit within the Rwandan judiciary,
33 and the tenure of judges.

34
35 With regard to the WPU, the witness protection unit, all prior Chambers have viewed the
36 establishment of a new witness protection unit within the judiciary as a positive step. The
37 *Uwinkindi* Referral Chamber, however, suggested that witnesses seeking assistance from WPU

1 would first have to apply to the public prosecutor. The Sikubwabo and *Kayishema* Referral Chambers
2 appear to have been under a similar impression.

3
4 There is no such requirement. Witnesses seeking services from WPU will be able to apply directly to
5 the court or administrators within the judiciary. This is consistent with article 14 of the transfer law,
6 which grants the high court the power to order appropriate protective measures in referred cases.

7
8 Now, the source of the confusion regarding where witnesses would apply for services was an internal
9 directive issued by the prosecutor general relating to the witness protection services currently being
10 provided by the witness and victims services unit which is housed within the office of the prosecutor.
11 This internal directive, which was attached to Uwinkindi's response to those referral proceedings at
12 registry page 3660, relates only to services provided by that separate victim/witness services unit. It
13 has no bearing on the WPU because, as all the prior Chambers have recognised, the WPU is formed
14 and exists within the judiciary. It is being managed under the direction of the chief registrar of the
15 supreme court.

16
17 The affidavit that we submitted in our reply brief in this case, from the secretary-general of
18 Rwanda's supreme court, which appears at registry page 549, confirms that the WPU will be
19 administered by the judiciary itself under the direction of the chief registrar of the supreme court.
20 Therefore there should be no further confusion that the WPU, and witnesses seeking services from the
21 WPU, may apply directly to the judiciary.

22
23 Turning now to the tenure of judges. The *Uwinkindi* Referral Chamber expressed concern that
24 Rwandan judges might not be appointed for life, but only for a determinate term. This, too, is incorrect.
25 Rwandan law confirms life tenure on both supreme court and high court judges. Article 24 of the law of
26 14 April 2004, on the statute for judges, expressly states: "Judges who have been confirmed in their
27 posts are irremovable." Article 8 of the organic law establishing the supreme court, likewise provides:
28 "The tenure of office of supreme court judges is not of fixed duration. Judges are removable only by
29 their voluntary retirement, resignation, or impeachment for serious misconduct."

30
31 Now, contrary to prior decisions of the Trial Chambers, the 2010 amendment of article 142 of the
32 constitution does not change this and it does not create any ambiguity relating to the terms of office.
33 The 2010 amendment relates only to the terms of office judges as administrators. It sets the term, for
34 instance -- the term of office for the presidents -- the president and vice-president of the supreme court,
35 which is set at eight years, not renewable, and it sets the term of office for the president and the
36 vice-president of the high court and lesser courts for five years, renewable only once.

1 A distinction, therefore, is drawn under Rwandan law between the terms of office for judges serving in
2 judicial functions, for which they enjoy life tenure, and judges serving as administrative heads of the
3 courts, for which they serve determinate terms of office, as specified in the constitution.

4
5 I would like to turn now to addressing a few points the Defence has raised about why this case is
6 allegedly different from other cases that have been referred to Rwanda for trial.

7
8 More particularly, the Defence claim that this case is unique because Security Council
9 Resolutions 1503 and 1534 allegedly require that only low- or immediate-ranked cases be subjected to
10 referral. And in this regard they contend that Mr. Munyagishari is allegedly too senior a leader for his
11 case to be selected for referral.

12
13 The Defence also claims that Mr. Munyagishari's case is unlike other cases that have been referred to
14 Rwanda for trial, because he is charged with joint criminal enterprise, a mode of liability that he claims
15 is not recognised by Rwandan law.

16
17 Neither distinction is correct.

18
19 Security Council Resolutions 1503 and 1534 do not require, but merely recommend, that only accused
20 of low or immediate rank be subject to referral. Security Council Resolution 1534 likewise does not
21 restrict the Prosecutor for indicting -- for indictments filed after March 2004, to only indicting the most
22 senior leaders of the genocide.

23
24 Each Tribunal -- because these resolutions were directed both at the ICTR and ICTY -- was free to
25 include these recommendations in their rules of practice and procedure, but they were not mandated to
26 do so. As the *Uwinkindi* Trial Chamber recently recognised, in contrast to its ICTY counterpart, the
27 ICTR Rule 11 *bis* does not require the Referral Chamber to consider the gravity of crimes charged and
28 the level of responsibility of the accused. That appears in footnote 20 of the
29 *Uwinkindi* Referral Chamber decision.

30
31 Furthermore, even if this requirement did exist under the ICTR's Statutes and Rules, the Defence have
32 not known that Mr. Munyagishari is one of the most senior leaders within the meaning of the
33 Security Council Resolutions. According to the indictment, Mr. Munyagishari was, at various times, a
34 school teacher and national football referee. He was active in the MRND, but only at the local level
35 where he served as a secretary-general in Gisenyi city, and as the president of the local *Interahamwe*
36 for the Gisenyi *préfecture*. Those allegations appear in the indictment at paragraph 2.

1 The Tribunal has referred other local leaders of comparable rank, including Uwinkindi, who was the
2 local pastor in Kayenzi; Kayishema, who was a local inspector of police in Kivumu; and Sikubwabo,
3 who was a local *bourgmestre* in Gishyita. Munyagishari is also far less senior than
4 Laurent Bucyibaruta, who was the former prefect of Gikongoro *préfecture*, whose case was referred to
5 France.

6
7 Merely because Mr. Munyagishari is charged with superior responsibility under 6.3 does not make him
8 a senior leader. The *Jankovic* Appeals Chamber, at paragraph 19, explicitly rejected this argument,
9 holding that command of others on a local level does not qualify the accused as a leader, or a most
10 senior leader, for purposes of Rule 11 *bis*.

11
12 Similarly, merely because the accused in this case is charged as being member -- is charged as being
13 a member of a joint criminal enterprise that included some higher ranking government officials does not
14 mean his case is not subject to referral. The *Mejacic* Referral Chamber at paragraph 24 rejected this
15 argument. It noted that the focus for referral is on the accused's particular position and functions, not
16 the position and functions of other members of the JCE.

17
18 In short, there is nothing unique about the accused's rank or position that would render his case
19 ineligible for referral.

20
21 The accused also suggests that his case is different because it includes JCE as a mode of liability.
22 Now, as detailed in our reply at paragraph 76 to 80, Rwanda's constitution makes clear that its courts
23 can apply customary international law, including the principle of JCE as a mode of liability, to
24 national criminal prosecutions, so long as those principles were recognised at the time the crime was
25 committed. And that appears in Rwanda's constitution at articles 20 and 201. JCE, as the Defence
26 concedes, was recognised as a mode of liability that was in existence in 1994 when the crimes here are
27 alleged to have been committed.

28
29 The inclusion of JCE as a mode of liability is therefore not a barrier to referral. In fact, the indictment at
30 issue in the *Uwinkindi* case, which was just referred to Rwanda, included joint criminal enterprise as a
31 mode of liability. Similarly, the indictment at issue in the recent Muhayimana extradition case in France
32 also included joint criminal enterprise as a mode of liability.

33
34 Now, the Defence further claims that referral should be denied because the indictment in this case did
35 not specifically identify what category or categories of JCE the Prosecutor intended to rely upon. I
36 would remind the Chamber that the indictment in this case has been and remains confirmed by the
37 confirming Judge. The Defence did not raise any challenge to the form of the indictment within the time

provided by Rule 72. And even if such a challenge could be raised by way of its response brief in these referral proceedings, this Chamber is not constituted to resolve that challenge.

Nevertheless, in the interests of procedural efficiency, and to facilitate the referral of this case to Rwanda, the Prosecutor is willing to no longer pursue JCE as a mode of liability. Thus the indictment may be referred to Rwanda without including JCE as a mode of liability. All of the other substantive charges remain unaffected, all the other modes of liability remain completely unaffected. And contrary to the Defence's suggestion that this would somehow result in undue delay, no formal amendment of the indictment is required for the Prosecutor to declare that he does not intend to pursue a particular charge or mode of liability. In fact, the jurisprudence of our Tribunal shows that this can be done, and has been done as late as the start of trial, and even in closing briefs.

And in this regard I would point the Chamber to the Trial Chamber's decision of the *Prosecutor v. Muvunyi* of February 2005, where the Chamber held at paragraph 31: "A Prosecutor who no longer intends to prosecute an accused on certain counts of the indictment needs no amendment of the indictment to achieve that end. He could, for instance, simply declare at the opening of trial that he will not present any evidence on those counts."

Similarly, the Appeals Chamber, in the *Ntagerura* decision, found at paragraphs 149 to 50 and 164, that the same principle applies where the Prosecutor elects to not pursue a particular mode of liability. The same holds true here. And in light of the Prosecutor's willingness to not pursue JCE as a mode of liability, the alleged lack of specificity the Defence has belatedly raised relating to the pleading of JCE in the indictment here is irrelevant and not an obstacle to the referral of this case.

Now, having updated the Chamber on recent events and clarified a few other points relating to Rwanda's law and the indictments in this case, the Prosecutor is content to rely on his written submissions for the remainder of its case. So unless the Chamber has any additional questions, the Prosecutor would pray that this Chamber, like prior Chambers in *Uwinkindi*, *Sikubwabo*, and *Kayishema*, is satisfied that if referral is allowed the accused will receive a fair trial in Rwanda.

MR. PRESIDENT:

Is that all?

MR. ARGUIN:

Unless the Chamber has any questions, that would be our submissions, Your Honour.

MR. PRESIDENT:

Before you sit down, just clarify my mind on one of the things you have just said, which I find strange.

If the indictment is not amended to remove JCE, if all we have is an undertaking or a declaration by the

Prosecutor that he would not -- he would be -- no longer be asking for JCE, can that bind the subsequent prosecutor in the referral jurisdiction to which the case is referred? Can what the Prosecutor here said in court bind whichever the prosecutor in the state of referral as to that?

MR. ARGUIN:

The answer, I think, is no, as a technical matter. Because as the Appeal Chamber recognised in *Bagaragaza*, the Appeals Chamber decision of paragraph 17, the concept of a case is broader than any given charge in the indictment. And that the authorities in a referral state need not necessarily proceed under their laws against each act or crime mentioned in the indictment in the same manner as the Prosecutor would before this Tribunal. That's confirmed by article 3 of the transfer law, which says that -- which provides that Rwanda can add new charges or modes of liability, so long as they are within the Tribunal's jurisprudence.

And this reality I think highlights why no procedural efficiency would be gained by requiring the Prosecutor to formally amend the indictment in this case to clarify the alleged lack of specificity with regard to the categories of JCE. The adaption process available in Rwanda could do that.

In -- the Appeals Chamber's recent decisions in *Uwinkindi* on the defects of the indictment that were at issue in that case, I think -- are important to consider in several respects.

First, unlike this case, the Defence in *Uwinkindi* raised timely challenges to the indictment in the manner required by Rule 72, and they did that before the Pre-Trial Chamber. The Pre-Trial Chamber found no defects in the indictment. The Defence in that case then applied for certification to appeal. That certification was allowed.

On appeal, the Appeals Chamber found that there are errors. And what it said was that -- it took cognisance of the fact that there was also a parallel referral proceeding pending. It noted that it would condition the referral of the case to Rwanda on the proper amendment of the indictment and confirmation of the amended indictment. And it said it would do that for two reasons. One, because it wanted to make sure that the indictment, when it went to Rwanda, was clean and could be adapted in accordance with article 3 of the transfer law to comply with all the provisions of Rwandan law. But it also said that it also wanted to make sure that in the event of revocation, the indictment would be returned in ready -- and trial ready when it came back to the Tribunal, if it came back.

Now, the procedure here that Rule 72 required was not followed. Right? There has been no timely motion to raise a defect in the indictment. What we have is an allegation --

MR. PRESIDENT:

We are offering it not on the basis of defect of the indictment, but on an allegation by the Defence that

1 JCE is not available in the Rwandan jurisdiction, which you have indicated to us that it is in fact
2 available.

3 MR. ARGUIN:

4 Yes.

5 MR. PRESIDENT:

6 And you have then made, gratis (*inaudible*), an offer not to rely on jurisprudence -- on JCE. And I am
7 asking, is that an offer the accused can take to Rwanda --

8 MR. ARGUIN:

9 Well, I think --

10 MR. PRESIDENT:

11 -- and plant it on the prosecutor in Rwanda and say, "Don't offer JCE, you have previously said you are
12 not going to talk on JCE."

13 MR. ARGUIN:

14 Strictly speaking, just looking at the framework under article 3 and the decision from the
15 Appeals Chamber in *Bagaragaza*, no. But this Chamber can condition the referral of any case on the
16 requirement that the Prosecutors -- that JCE is not being referred. So our representation to the
17 Chamber, which we can confirm in writing, certainly, is that to facilitate the expeditious proceedings in
18 this referral case, and to facilitate the prompt referral of the case to Rwanda so it can be ready for trial,
19 the Prosecutor would withdraw reliance on JCE as a mode of liability. This Chamber, as I suggested,
20 would then refer the case with that understanding. And so the -- the indictment that is being referred
21 could be referred without JCE being included, and on the express condition, that the Chamber has the
22 discretion to impose, that JCE not be added back.

23

24 My point was that the laws technically allow Rwanda to do it. But this Chamber can set conditions on
25 the referral. And one of those conditions is that in following the adaption process in Rwanda, the
26 Rwandan prosecutors do not reintroduce JCE. And I think that's something that, under the
27 circumstances of this case, given the factual allegations, given the availability of other
28 substantive charges and other modes of liability, is readily done without compromising the ability of
29 either the Prosecutor at the Tribunal, or the prosecutor in Rwanda to successfully try this case to reflect
30 the full gravity of the offences that were committed.

31 MR. PRESIDENT:

32 My next question: You have not dealt with all issues relating to ability to mount a defence, and the
33 issues of fair trial. You do not wish to comment on any of the matters that the Defence has raised in
34 its --

35 MR. ARGUIN:

36 Well, I believe they're covered adequately by our brief. But I will comment briefly on that. I think, you
37 know, the primary allegation in that seems to be relating to alleged witness fears about testifying in

1 Rwanda about a trial held in Rwanda. And I would note that these same fears were addressed and
2 raised by the Defence in the *Uwinkindi* case, and they were rejected there. And I think as both the
3 *Uwinkindi* Appeals Chamber or Referral Chamber noted, a Referral Chamber's role is not to determine
4 whether those fears are subjectively credible or well founded, but rather to assess whether there are
5 any objective reasons to believe that the witnesses would not in fact come forward to participate in a
6 trial in Rwanda.

7
8 And I suggest that, as in *Uwinkindi*, no such objective reasons exist here, first and foremost, because
9 the transfer law affords immunity to witnesses for anything said or done at trial. This is confirmed by
10 article 13 of the transfer law that provides that no person shall be criminally liable for anything said or
11 done in the course of trial. And it's confirmed by article 14, which says that all witnesses who travel
12 from abroad to testify in the trial of cases transferred from the ICTR shall have immunity from search,
13 seizure, arrest or detention during their testimony and during their trial, to and from trials. And
14 article 15, I would note, of the transfer law, extends the same protection, not only to Defence counsel,
15 but to Defence teams.

16
17 Now, none of the affidavits that the Defence submitted in support of their alleged witness fears indicate
18 that any of the witnesses were told about these immunity provision. And, hereto, the same situation
19 was presented to the Trial Chamber in *Uwinkindi*.

20
21 I would also note, as I mentioned earlier, that Rwanda has established a new witness protection service
22 within its judiciary to address the past concerns that were raised about having a victim/witness unit
23 housed within the office of the prosecutor. The records of the 36 genocide cases that are attached to
24 our submissions -- at annex N to our initial application, at registry pages 125 to 110, confirm, as the
25 *Uwinkindi* Referral Chamber found, that those cases show that the Defence had no particular difficulty
26 in securing the attendance of witnesses in those genocide cases.

27
28 The Kigali bar brief, both in *Uwinkindi* and here, before this Chamber, confirms that its lawyers have not
29 encountered any serious difficulties in obtaining witness testimony. I point particularly to registry
30 page 594 of the Kigali bar brief, paragraph 44. And at paragraph 51 of their brief they further attest that
31 victims and witnesses have willingly testified in favour of the Defence in numerous cases, including
32 genocide cases or high-profile cases.

33
34 And the experience of the Kigali bar association with respect to the availability of witnesses is echoed
35 by submissions by the Dutch government and the Norwegian police, who have conducted numerous
36 investigations in Rwanda.

1 In connection with the Bandora case that was pending before the Kingdom of Norway, the
2 Oslo district court, a police superintendent with Norway's national criminal investigation service made
3 over ten separate trips to Rwanda and interviewed a total of 149 witnesses. He gave testimony that
4 was credited by the Norwegian court: "No witness has ever expressed any fear of the authorities in
5 connection with the interview." And he went on to say: "Nor have we the impression that they are
6 afraid to testify for any reason. And we have never heard of any threats, reprisals, et cetera, that has
7 influenced the testimony in any direction." That appears at registry page 326. And, as I say, it was
8 credited by the Norwegian court.

9
10 The Dutch government likewise confirmed that in the years that they have been conducting
11 investigations in Rwanda --

12 MR. PRESIDENT:

13 Please deal with the issue that I am putting to you. Because what you are -- what you are telling me
14 about is what other people have said about it, I will read that and I will believe that of it which I think is
15 credible.

16
17 What I am saying is, address the issue of fears of Rwandese witnesses living abroad as refugees,
18 fearing to go back to Rwanda to testify. That's the area that I would be happy to -- to get views on.
19 How has that been addressed, if it has been addressed?

20 MR. ARGUIN:

21 It has been addressed, as I said, with the -- certainly with article 14 of the transfer law, which was
22 added in 2009, which specifically relates to providing any immunity to witnesses who travel from
23 abroad, where they shall be -- have immunity from search, seizure, arrest, or detention during their
24 testimony or during their travel to and from the trials in Rwanda.

25
26 It's also been addressed in other aspects as well. The transfer law, article 14 *bis*, has tried to
27 accommodate some of those concerns that Your Honour has expressed in other ways. It provides for a
28 variety of alternative means for testifying. And these were the methods that the Trial Chamber in
29 *Uwinkindi* discussed. But I should stress that as the Trial Chamber in *Uwinkindi* found, these
30 alternative means are exceptions to the usual rule in Rwanda that witnesses will provide live testimony.

31
32 But, nevertheless, in exceptional cases or where, according to article 14 *bis* of the transfer law, there's
33 a determination that the witness is unable or, for good reason, unwilling to appear before the Court to
34 give testimony, the trial chamber -- the presiding judge can allow testimony by three alternative means:
35 One, by video link; two, by deposition in Rwanda or some other foreign jurisdiction; or, by a judge sitting
36 in a foreign jurisdiction and taking testimony there. All of those three means, alternative means were
37 addressed by the Trial Chamber in *Uwinkindi*, which found that they adequately addressed the

1 concerns of any witnesses living abroad. And that finding was affirmed on appeal to the
2 Appeals Chamber.

3
4 Now, Rwanda has also submitted, in its amicus brief, additional information on its capacity, for instance,
5 to establish video link technology. Rwanda now has seven fully operational video link units that are
6 available for the use of trial in any referred case. Two of those units are in the supreme court, four are
7 in the regional courts, one is in a commercial court. That appears in the affidavit of the director general
8 in charge of information technology for the supreme court of Rwanda, which appears at
9 registry page 481.

10
11 As Rwanda has indicated in its amicus brief, it is already routinely using this equipment to facilitate
12 testimony from witnesses located in remote provinces of Rwanda to Kigali, as well as from Rwanda to
13 foreign countries. The newest unit was just installed earlier this year. Pictures of that unit and
14 supreme court where the trial of this case would take place were attached to Rwanda's amicus brief in
15 this case. And, in fact, during 2011, Rwanda has attested and provided an affidavit from the director of
16 its victim/witness unit, which appears at registry page 578, it has facilitated witness testimony from
17 abroad on 12 different occasions involving 11 witnesses from Germany and one in Canada.

18
19 So, the alternative means of testimony -- of getting testimony from witnesses abroad exists. But, I
20 would stress again, this is an exception to the rule. The usual rule will be that the witnesses will appear
21 and give testimony live before the Court in Rwanda. And the immunity protections that have been
22 available, both for witnesses within and coming from abroad, adequately address that, as the
23 *Uwinkindi* Trial and Appeals Chambers have already said.

24
25 And I would also note that Rwanda has a long history of facilitating investigations with other countries
26 and has cooperated and engaged in mutual legal assistance with a range of European and other
27 countries to facilitate witness testimony in their domestic criminal prosecutions. It can rely on those
28 same contacts, that same spirit of cooperation that is shown, to obtain comparable assistance from any
29 foreign country to help facilitate testimony from witnesses abroad.

30 *(Pages 1 to 15 by Kirstin Bruinsma)*

1 MR. ARGUIN (*continued*):

2 It also, if need be, can invoke article 28 and demand assistance to facilitate that testimony. So in all
3 those respects, those are essentially the same submissions that were made in *Uwinkindi*. And they
4 show that there have been several practical and meaningful steps made to address any alleged witness
5 fears, and most importantly through the immunity protections but also through providing new alternative
6 means of testimony.

7
8 One other issue that the Defence raised indicates some confusion with regard to the provision of
9 legal aid in Rwanda. And again I hesitate to repeat what we've already said in our briefs. But let me
10 bring some clarity to the situation. Rwanda provides legal aid to indigent accused and I don't think
11 there is anything confusing about its submissions on this point. For referred cases in particular the
12 current budget, which will be in place until June of this year, allocates a total of
13 122 million Rwandan francs to legal aid specifically in referred cases.

14
15 Now this is detailed in the affidavit submitted from the minister of justice at paragraphs 2 to 3, which
16 appears at registry page 108. These funds are available to pay counsel appointed to represent the
17 interests of the accused in any referred case. And the rate of payment is established for the tariffs that
18 have been adopted by the Kigali bar association for Rwandan lawyers. And those are detailed in the
19 Kigali bar association's brief in *Uwinkindi* at paragraph 29.

20
21 Now separate and apart from transfer cases, Rwanda also has two other legal aid provisions that are
22 relevant. They are relevant because they show that Rwanda's commitment to likely aid for
23 indigent accused expands not only to referred cases but also to domestic cases. The first are the
24 contracts that the ministry of justice has entered into with the Kigali bar association for the provision of
25 legal aid services to juveniles and other vulnerables.

26
27 Now pursuant to the most recent contract for 2012, the government of Rwanda has committed to
28 paying nearly 148 million Rwandan francs for domestic legal aid services, provided by
29 30 full-time legal aid lawyers. This is detailed in the Kigali bar brief at paragraph 26, appearing at
30 registry pages 600 and 589 to 86.

31
32 And as the Kigali -- as the minister of justice's affidavit in the Kigali bar brief indicates, although these
33 service -- these funds are targeted for services to minors and other vulnerables, they also have been
34 used to fund cases for indigent criminals who are accused. That appears at paragraph 26 of the Kigali
35 bar amicus brief and the Rwanda *Uwinkindi* amicus brief at paragraph 22.

36
37 Now the third prong of Rwandan legal aid is the pro bono requirement that is imposed by

1 article 56 of the law establishing a bar in Rwanda. It is pursuant to this provision that as a condition of
2 licensure all Rwandan lawyers are expected and required to provide pro bono legal assistance. And
3 during the past four years, as the KBA has attested at registry page 158, the KBA has provided
4 pro bono assistance to over 4,000 accused persons.

5
6 So, contrary to the submissions that have been made by the Defence, Rwanda has a functional
7 legal aid system and it has committed substantial resources for both referred and domestic cases and
8 the system is, in fact, working.

9
10 Now apart from those matters, I believe the rest of the submissions are adequately covered by
11 our briefs. But if the Chamber has any questions I'm certainly happy to provide additional information
12 or clarification.

13 MR. PRESIDENT:

14 *(Inaudible)* it does not need any further assistance from you at the moment.

15
16 So that takes us to the Defence.

17
18 It is now ten past ten. Which is wiser, to take a break or to just start and go on for -- can we probably
19 just take you on between now and eleven? If you have not finished by that time we will take a break. Is
20 that good for you?

21 MR. MORICEAU:

22 Mr. President, I prefer that we take the break so that we can digest what has just been said.

23 MR. PRESIDENT:

24 Digesting isn't a reason for taking a break. We only take a break because -- for health reasons. And
25 we feel that break might be better taken later than now. So that you get on your feet, tell us what you
26 can tell us between now and eleven. If you haven't finished we will then take a break.

27
28 Is that all right?

29 MR. MORICEAU:

30 Yes. Quite so, Mr. President.

31 MR. PRESIDENT:

32 Let's hear the Defence now.

33 MR. MORICEAU:

34 Thank you, Mr. President.

35
36 I have the honour to introduce myself for Mr. Munyagishari. On the request made by the Prosecutor
37 concerning the transfer of the accused on the basis of Rule 11 *bis*, may I first of all indicate to the

1 Chamber that Rule 11 *bis* needs to be convinced. But I'm hearing a lot of suppositions about what
2 would happen in response to texts that need to be applied. But today we need all to be aware that
3 no case has been referred to Rwanda and we are being faced with a very fluid situation.

4
5 The Office of the Prosecutor has referred on several occasions to the decisions which have been
6 rendered either by the ICTR or by the European Court of Human Rights and other decisions from other
7 countries which have spoken on the issue of referrals and extradition.

8
9 I do not wish to repeat what we said in our reply brief, but I would like to go into the explanations by the
10 Prosecutor. And I would like, on my part, to be specific on issues and leaving it to you, Mr. President,
11 Your Honours, to ask any more specific questions if you so wish.

12
13 First of all, Mr. Munyagishari experiences a certain number of difficulties which makes it inapplicable for
14 all other case law or jurisprudence to be applied. First of all, in the *Uwinkindi* case, which is the closest
15 to ours, Uwinkindi was a pastor in a *commune* and had therefore no other activity of any kind
16 whatsoever. Mr. Munyagishari is, and we confirm this, that he is Congolese and he is not Rwandan.
17 Mr. Munyagishari was not in flight, as has been suggested by the Prosecutor in his response. He was
18 in Congo for many years with his family. He had a professional activity, he was a civil servant and
19 consequently he was living quite calmly and quietly.

20
21 With regard to the Congo and other substantial differences, that Mr. Munyagishari was in North Kivu
22 during the period during which the activities took place and he was questioned by the
23 mapping commission and so he was one of the people who had further difficulties, which we'll see later
24 on within the framework of fears he may have in being transferred to Rwanda.

25
26 Mr. Munyagishari was the secretary-general of the MRND in Gisenyi *préfecture*. He was the chairman
27 of the *Interahamwe* in Gisenyi *préfecture*. And, furthermore, he has been prosecuted for acts
28 concerning Rwanda. So Mr. Munyagishari, given his function and the allegations that are made against
29 him in the indictment, and the allegations made against him, he is obviously not someone who is of low
30 rank, as has been said in the text that we have read. So the personality of Mr. Munyagishari
31 necessarily brings about a difference from the *Uwinkindi* case.

32
33 Let me quickly mention the decisions of the European Court of Human Rights. And this is very
34 interesting because, in fact, we are talking about auto jurisprudence, if I may so speak. Because today
35 we are talking about a decision of the European court which itself relies on the *Uwinkindi* decision. And
36 this, to me, seems quite inappropriate. The decisions which were rendered in certain states authorising
37 extradition have all been appealed against except Canada which, in effect, executed the decision. But I

1 remind you that the UN commission asked for a stay of that decision and it has not been effected.

2
3 So, given the prior jurisprudence, there is nothing that can be applied to Mr. Munyagishari. Therefore,
4 there are several questions which we can ask: Would the transfer of Mr. Munyagishari, if it is possible
5 according to law, if you believe so, legally speaking, would it be a purely legal action? Is it possible,
6 given the facts and circumstances and conditions under which he will be prosecuted in Rwanda?

7
8 We are going to recall that the resolutions of the Security Council are on the standards which are higher
9 and therefore the Security Council, which in its Resolutions 1503 and 1534, have a higher value in
10 respect of all decisions or interpretations which may be made. Furthermore, Resolution 1534 is the last
11 resolution which is of interest to us and therefore applies to the most recent of decisions. It is higher in
12 standard and would apply to all the elements composing -- this Tribunal must respect the resolutions of
13 the Security Council under Chapter 7 of The Charter. But this is not what appears to be the case here,
14 because let us recall that Resolution 1534 specifically stated that there was need -- in the case of the
15 completion of the Tribunal's work it would be necessary to prosecute necessarily persons of high rank
16 who were responsible for the acts that took place in 1994.

17
18 So the question we need to ask is whether Mr. Munyagishari in respect of his functions is a person of
19 high responsibility?

20
21 The answer is obviously yes, for the reasons which I mentioned earlier.

22
23 And on the criminal conspiracy which is being mentioned by the Prosecution, it does not apply to
24 Mr. Munyagishari. We do understand this quite well, that it is of worry to the Prosecution. Because we
25 have to justify our explanations and we have to justify our submissions. Resolution 1534 was taken in
26 total in respect of the indictments which need to be confirmed for people in Rwanda.

27
28 However, the Prosecutor has asked for the confirmation, in September 2005. In other words,
29 several months later. In other words, carrying out its own mandate. And I'm repeating the term "its own
30 mandate". So the Prosecution asked for the confirmation of an indictment which it considered
31 necessarily as fulfilling the conditions determined by Resolution 1534 of the Security Council.

32
33 Consequently, this resolution, which I heard it is being set aside somewhat by the Prosecutor. Let us
34 recall that even if today the provision of this resolution was not in -- was integrated in the -- was not
35 integrated in our rules of procedure, but it is asking each tribunal to ensure that every indictment targets
36 the high-ranking suspect. And this is to show that the Prosecution has not completed or complied by
37 what was asked of it by that resolution.

1 In the implementation of its mandate the Prosecution itself said that these were people who needed to
2 be prosecuted by an international court and, therefore, today, it cannot be subject to --
3 Mr. Munyagishari cannot be subject to transfer to Rwanda.

4
5 Let me recall in this respect that in our brief we have also submitted that Mr. Munyagishari is a
6 Congolese and the conditions under which such a transfer would be effective would be inappropriate in
7 regard to the good faith when it comes to the application of international conventions.

8
9 Mr. Munyagishari was arrested by the -- in Congo because of the primacy of the Tribunal. And the
10 authorities in Congo, in fact, surrendered Mr. Munyagishari to the Tribunal and he is now being
11 considered to be transferred to Rwanda and not having considered that the Congo should be informed
12 of this request. In the Prosecution's reply there were two interesting issues raised. Namely, that in the
13 final analysis -- and, furthermore, these are explanations which were provided were a bit vague,
14 concerning the fact that the Prosecution would not have made that request because Mr. Munyagishari
15 was at large? I am wondering about this because today the same request has been made within the
16 framework of Fulgence Kayishema and Charles Sikubwabo. Why was not this done in respect of
17 Mr. Munyagishari if the Prosecution indeed did not think that Mr. Munyagishari was a co-perpetrator
18 and therefore needed to be transferred?

19
20 There was a lot of time taken after the arrest in order to make this request. But let's recall that the
21 Defence had submitted a motion at the commencement of trial in order to avoid any delays and any
22 legal delays which we are experiencing. To the contrary, this request is against what the Prosecution
23 has always said, that Munyagishari was a high-ranking person and should be tried by this Tribunal.

24
25 The other issue concerns the allegations which we have been made aware of today. And it is all just
26 mere theatre and drama. The Defence is being blamed somewhat for having failed to provide the
27 appropriate defence. We ought to have, apparently, filed preliminary motions on this application. I
28 maintain that it is up to the Defence to take decisions which are appropriate to it in the interests of its
29 client and it does not have to receive any advice from anyone whatsoever; because the Defence is to
30 hear -- is to ensure that submissions are made.

31
32 The indictment which has been placed before the international court was satisfactory to us insofar as
33 debate on it was necessary so that we can defend ourselves against the allegations. We have in fact
34 fought against this indictment and there would be no reason whatsoever to file any preliminary motions
35 for which we are being blamed today. We are ready to discuss the indictment as it is, with its defects, if
36 we are so allowed. And this in the interest of our client. So this request on the part of the Prosecution
37 does not apply. And the Defence has the opportunity and has the means at its disposal to raise the

1 necessary submissions.

2
3 With regard to conspiracy, we have affirmed and we still stand by that affirmation that this mode of
4 liability does not exist in Rwandan law. It does not exist. And in the written submissions or
5 explanations that we are hearing, even today in oral session, it would seem that the Prosecution would
6 like to throw the baby out with the bath water. And it's this response -- the liability does not exist in
7 Rwandan law and here let us refer to the *Uwinkindi* jurisprudence. Let me recall that in Rwanda the
8 jurisdiction which would be seized of this matter can in no way amend the indictment which has already
9 been confirmed. This is a principle which has been set and confirmed by the *Uwinkindi* jurisprudence,
10 because the indictment which does not respond to the concerns of the Chamber. The latter preferred
11 to request the Prosecution to amend the indictment before he was transferred to the Rwandan court.

12
13 This is an important aspect because we need to consider the fact that the indictment is really -- this
14 legal document which is presented to the judge. The Rwandan judge therefore needs to be seized of
15 the matter *stricto sensu* by the indictment transferred to him or her by the ICTR. The judge cannot only
16 apply this unless this is within a framework of the judge's own rights and powers to be able to amend it.

17
18 I had heard from the Prosecution that there was obvious confusion in Rwandan law, or at least with the
19 Rwandan authorities, especially the prosecution but also the judges. The Rwandan prosecutor may
20 amend. But he can nothing adapt or amend if this is not in the framework of criminal proceedings. And
21 the prosecutor has no right to amend any substantial law or document that is transferred to him. And
22 we know that we have to make a complete disassociation with the substantial law and the penal code.

23
24 The Rwandan prosecutor can in no way amend allegations submitted to him within the framework of the
25 indictment. He can only adapt the penal proceedings and that is where the problem raised by the
26 Prosecutor a moment ago will be coming to the fore. And I'll come back to that. That's on the issue of
27 witnesses.

28
29 This is under article 4(1) of the organic law.

30
31 Criminal enterprise, JCE, is it applicable in Rwandan law? That is no. And the position of the
32 Prosecutor today confirms this to me. The Prosecutor confirmed the mistake of reminding me of the
33 law because legally speaking this does not apply. The indictment that you have been given does not
34 make any distinction about category 1, 2 or 3 in joint criminal enterprise. We will have to search for this
35 in vain. But if I am to say this, this is not applicable in no way whatsoever, because we're not dealing
36 with category 1 or category 3, but we're dealing with category 2, because contrary to our case, the
37 matters in -- the issues in this indictment were linked to a camp and this has been related in the

1 principle per se.

2
3 So in this respect I think we are certain of the indictment that we have today, and that is the very
4 subject of the case before the international tribunal cannot be applied by the Rwandan judges.

5
6 Now, the main question that is before the Trial Chamber, once we would have determined whether
7 there is the possibility of applying article 11 *bis* or not, is that you should be convinced that
8 Mr. Munyagishari will have the benefit of a fair trial. I heard a short while ago something very important
9 and interesting that was recalled by the Prosecutor regarding one of the very recent decisions of the
10 international tribunal in the Sikubwabo case.

11
12 In the Sikubwabo case, indeed, there is something that has been recalled by the Tribunal and that is
13 the presumption of innocence, in spite of everything else. And this principle was retained in the
14 Sikubwabo case, which is what we underscored in our brief. The presumption of innocence is not
15 guaranteed for Mr. Munyagishari in Rwanda, and this for several reasons. The first and the most
16 important reason is due to the general atmosphere and the behaviour of the authorities and in particular
17 of the president of the Republic of Rwanda who took it upon himself to make statements that obviously
18 are reprehensible regarding the provisions of the international convention or covenant and the
19 provisions relating to the presumption of innocence, because we know now that even people who have
20 been acquitted before the ICTR are still referred to as criminals in Rwanda.

21
22 The public authority that is the subject of the instrument today takes all its dimensions because indeed
23 it is one of the principles that were retained, that is, denying the accused the presumption of innocence.
24 This presumption of innocence has a direct bearing on the fear or the understanding of information and
25 on the general atmosphere that is cause of concern for witnesses. And I will explain this in a short
26 while.

27
28 The presumption of innocence is also affected because today there is no guarantee that persons who
29 will be transferred and who will be awaiting trial --

30 MR. PRESIDENT:

31 Mr. Moriceau.

32 MR. MORICEAU:

33 Yes, Mr. President.

34 MR. PRESIDENT:

35 I am informed that you are speaking too fast. So take --

36 MR. MORICEAU:

37 My apologies to the interpreter.

1 Indeed, today we have all the possible fears concerning the possibility of Mr. Munyagishari enjoying all
2 the international rights, all the rights that are provided by international standards. And there are several
3 things here.

4
5 The first is that we have been told that he will be in a modern prison that will meet
6 international standards, and that those who have been convicted by the Special Court for Sierra Leone
7 are imprisoned in those detention facilities. This is supposed to reassure us. Well, this does not
8 reassure me at all. And why? First of all, there have been many incidents in those prisons. There
9 have been recent incidents that have not been mentioned in reports. This is what we have been told.
10 And so there have been problems in the detention facilities where those convicted persons are housed.

11
12 Secondly, nothing has been said in respect of the different kind of treatment. And I should recall that
13 these are convicted -- people who have been convicted by the Special Court of Sierra Leone. And we
14 are told that Mr. Munyagishari will be treated in the same way and that we should not be concerned
15 about this since those prison facilities meet standards. No. The detention facilities must meet
16 international standards of international organisation facilities.

17
18 It is also important to know whether Munyagishari will be housed in separate detention facilities and if
19 he will enjoy all the rights provided for by international standards. We have received no answer to this.
20 And these are questions that we raised in our briefs and we have not received any answer to these
21 questions so far from the Prosecutor.

22
23 Will Munyagishari have a fair trial?

24
25 And this takes me to what made the Prosecutor to develop theories concerning witnesses. Now
26 regarding witnesses, today we have 16 witnesses. And these 16 witnesses are either in Rwanda or
27 abroad or outside Rwanda. But these witnesses do not want to give testimony before a
28 Rwandan court, whatever the medium by which they are going to give the testimony. And they give
29 different reasons -- many reasons for this: One, fear. But then we are told that there are many people
30 who have made reports to the effect that there is no problem about this really. There can be no
31 problem if people cannot express themselves and if they are afraid of expressing themselves. And that
32 policemen go to Rwanda and say that there is no problem. Well, that a Norwegian policeman should
33 go to Rwanda and come back and send a report that there was no problem. Well, I am not astonished
34 by this.

35
36 Now, giving testimony in favour for a person who is being prosecuted for charges that we are aware of
37 means itself -- constitutes a risk. Because if you defend such a person you may be accused of denying

1 the genocide ideology. As I have said a short while ago, we are being given promises and promises
2 that have not been kept. I should recall to the Chamber that the decision in the *Uwinkindi* case, which
3 was taken and which we do not challenge, well, that decision was taken on the basis of two obvious
4 elements: One, the confidence that the International Criminal Tribunal had in the
5 Rwandan government -- or, in the willingness of the Rwandan government. And we certainly have this
6 paragraph which shows how optimistic the Trial Chamber was in asking Rwanda to put in place
7 mechanisms as speedily as possible so that they can be in a position to try Mr. Uwinkindi.

8
9 But today we are still in square one. The Prosecutor is telling us the same thing today, the same thing
10 that was sent by the Office of the Prosecutor in the *Uwinkindi* case: Promises that were made,
11 speculations that were made and from the -- because according to them once you had provisions this
12 showed the willingness of the government and so the matter is settled. We are sure of one thing as
13 jurists and experienced lawyers and it is that documents, instruments in themselves are not enough.
14 We are here to enforce or to try to ensure enforcement of legal provisions. And in various respects we
15 are all aware that in many countries international conventions and covenants were ratified.

16
17 Indeed, the international convention against torture was ratified by virtually all countries of the world, but
18 has torture disappeared for all of that? No. And what this means is that statutory instruments are good
19 but practice, enforcement of provisions thereof, is better.

20
21 Now in this matter of transfer, we are at an experimental stage. There is no precedent on which to rely,
22 and we know this very well. What we know is that the injunctions of the decisions rendered in the
23 *Uwinkindi* case was not followed up on several months later. That is where we stand.

24
25 Now talking about the witnesses, the witnesses are well aware of all of this. The witnesses are scared.
26 Witnesses are not protected. So, obviously, what about the major -- the important principles? We
27 know that the organic law has article 14, thereof leads to the principle of equality -- of equal treatment
28 and the protection of both the prosecution and the defence witnesses. That is well and good. The
29 principle is good and I do endorse it entirely. But what about the practice? The practice that will arise
30 from it, what will it be, indeed? And I'm asking myself a simple question and without obviously meaning
31 to challenge the Prosecutor's duties.

32
33 Now, this protection of prosecution and defence witnesses is accepted -- is recognised by the
34 prosecutor. But, now, what this also means is that the defence witnesses who will be managed by the
35 office of the prosecutor. I do not doubt the good faith of the prosecutor but when -- but we should bear
36 in mind that the defence really has a certain attitude vis-à-vis the prosecutor. So was this the -- was the
37 prosecutor the most appropriate person to take care of witnesses? Both defence and

1 prosecution witnesses.

2
3 The office of the prosecutor is one. And I cannot see how that service can take care both of
4 prosecution -- of defence witnesses and put them on the same footing. But it is even better. Article 14
5 of the organic law lays down a principle. It is a principle. When we are going to stand before the
6 Rwandan court, which are the instruments that will apply? The administration of evidence? Which are
7 the such instruments that govern them? And this takes us to article 21 of the common law, which talks
8 about the practices of summoning and having witnesses appear. That Article 128 is a common and
9 permanent practice, and that this naturally will be the instrument that will be applied when the witnesses
10 will appear. It will not necessarily be the provisions of article 14 of the organic law. And this law does
11 not allow for equal treatment of defence witnesses.

12
13 So, even here you cannot be satisfied that the trial will be fair, for the simple reason that as far as the
14 principle goes the witnesses of both prosecution and the defence will have equal treatment because in
15 practice we will have major problems that have not yet been ironed out by the instruments in force. The
16 organic law has not been organised with the penal -- with the criminal procedure. I'm talking about the
17 criminal procedure.

18
19 I will talk about a document that was referred to or that was disclosed to us by the Prosecutor in the
20 past weeks. This is a decision that was supposedly taken by the appeals chamber in the
21 Gacaca courts. That decision concerned Mr. Bernard Munyagishari and, indeed, there are a number of
22 things that can give the impression that that Gacaca decision concerned him.

23
24 The only thing is that it is surprising that he appears in that document as a businessman, whereas he
25 has never been a businessman. And that is just one more error. But what is interesting is that the
26 appeals court decision is that -- it does say that there is -- that there's international proceedings are
27 going on and that (*inaudible*) should stay proceedings at their level. This is something we are
28 interested in.

29
30 First of all, an appeal decision generally -- well, both in domestic law as international law recalls the
31 date of the decision that is being referred to, that is the date on which the appeal was filed. You will
32 look for that date. You will look for the Gacaca decision, the trial chamber decision or the first instance
33 decision of the Gacaca court that is being appealed against. But when we read that appeal decision we
34 look for the penalty. And talking about penalty, there is none that is indicated, which presupposes that
35 the Gacaca court did not impose any conviction. And so it is difficult to tell who is being appealed
36 against. So this is all about the -- how proceedings are conducted and on appeal in Rwanda.

1 Now, today, Rwanda is telling us that it has done lots of progress. That it has very good intentions.
2 That it is reforming or amending most of its statutory instruments in order to be consistent with the
3 international standards. And it is seeking to reassure you, the Chamber. But in order to better reassure
4 us, in order to convince you, to persuade you better, should Rwanda not be gone with -- by applying
5 those instruments in common law?
6

7 If there are things to note today, it is that Rwanda in the day-to-day running of justice or
8 administration of justice there has been no improvement. And I am not the person who is saying it. It is
9 the various international observers that have said so, the United Nations
10 international committee of human rights and Amnesty International have concerns as to whether the
11 system is changing in spite of the good intentions and the different reforms that it has undertaken.
12

13 Everybody is aware of the efforts that have been made, but the results are not there. But then if we
14 could have convictions regarding the transfer procedure, shouldn't we have been in an inconvenient
15 situation where we have double standards in the application of justice in Rwanda? Could we caution
16 such justice that has double standards?
17

18 I do not think that it would be in the interest of international justice for us to (*inaudible*) that two-tier kind
19 of justice. I recalled -- I submitted in my brief that witnesses would also find themselves in a very
20 uncomfortable situation and I think that my colleagues on the other side did not quite understand what I
21 said, or probably were not very clear. A witness -- a protected witness and we hope a witness who is
22 protected in the best possible conditions, who would be appearing in a referral case pointed out to the
23 prosecutor general -- who realises that this Defence witness is very interesting -- would he not have the
24 possibility of asking him to testify in cases that are not referral cases? And what are the penalties
25 applicable to witnesses in the Rwandan courts? And I am referring to article 128 here. So this witness
26 would be compelled to appear and therefore will find himself, as the instruments stand today, may be
27 prosecuted over genocide ideology. Now, this is the embarrassing situation that we see looming large
28 for Defence witnesses. And this takes me to the concept of legal aid.
29

30 There is a principle, Mr. President, Your Honours, that we are all aware of and that is applied here.
31 That is the possibility of an accused to choose his counsel. This is a principle that is provided for by the
32 statute which only applies the international covenant. Now, we are being told Mr. Munyagishari will be
33 transferred to Rwanda and that he will have a counsel that will represent him.
34

35 Will he be able to have a counsel of his choosing?
36

37 The organic law says so. And indeed in its article 13(6) that is what it says, but will that be the reality?

1 No. Because the appointment of a duty counsel for an indigent accused, because I should point out
2 that Mr. Munyagishari was recognised as an indigent accused person here and this would be the case
3 in Rwanda too. And that is where everything falls apart. Because if an accused person under the
4 organic law has the possibility of having a counsel of his choosing, if he is indigent -- but in the event
5 that the accused person is indigent it is the president of the bar council that will choose his counsel.
6 And that is what we have, the principle that we have in the *amicus curiae*, and that is the principle that
7 is applied.

8
9 Now, since Mr. Munyagishari is indigent what this means is that it is the president of the bar association
10 who will choose a lawyer for him. So we can image the situation adopted by the Kigali bar association
11 in the bar *amicus curiae* brief because, of course, what he says does mirror the position of the
12 Rwandan government.

13
14 On the other hand, we are being told that the counsel that is assigned under the legal aid regime will
15 not have any problem. And I should recall that the Prosecutor talked about the financing provided by
16 international assistance that would be granted to Rwanda within the framework of referral cases. I
17 heard of millions of Rwandan francs. I did not hear the names of lawyers mentioned. That is the legal
18 assistance will be given for purchasing computers, for doing other things. But, apparently, lawyers will
19 have to be defending the accused persons on a *pro bono* basis. And this shows all the difficulties and
20 the repercussions concerning a case like Mr. Munyagishari's case. And when we look at all these
21 problems I am deeply concerned about this notion of *pro bono* -- of representation *pro bono*, because
22 when you are indigent in Rwanda only minor children and women who are victims of rape are provided
23 with legal aid.

24
25 Whether my colleagues in Rwanda are very honest or independent or not, I am not sure that they can
26 provide for such representation free of charge. And as far as I am concerned, because I'm
27 lead counsel who was designated, who was appointed by this Tribunal. And who could be better
28 placed to defend him I would like to know. Or it should be made clear that there is no reciprocity
29 between France and Rwanda today insofar as legal representation is concerned. A Rwandan lawyer
30 cannot plead in a French court directly, nor can a French lawyer represent accused persons in Rwanda
31 directly because of the lack of reciprocity clause between the two countries.

32
33 Now if we look -- I will give the case of foreign lawyers who have sought to represent accused persons
34 in Rwanda. And I will give the case of Erlinder. And if you look at his case you can imagine the kind of
35 threats that foreign lawyers may face in Rwanda. And because of it, they may not be inclined to go and
36 represent accused persons there, even if they were to have the benefit of a special regime as
37 mentioned by the Prosecutor in his submissions.

1 To conclude, and subject to making any further explanations that the Chamber may require, I am
2 confirming today that the conditions for applying Rule 11 *bis* are not met vis-à-vis Mr. Munyagishari and
3 the conditions for allowing the application for -- well, today we have no certainty or assurance that he
4 will enjoy a fair trial.

5
6 We said a short while ago in the *Uwinkindi* trial there were two conditions that underpinned the
7 decision: That is, one, Rwanda's willingness to amend its laws. The second condition had to do with
8 the creation or the recourse to a monitoring which was the talk of the day in the past week. Today,
9 what do we know about that monitoring mechanism? Once again we are being given assurances,
10 promises. Months after the *Uwinkindi* position had been taken we are still at the level of being provided
11 with assurances. The African Union has made it clear that yes, it could ensure monitoring but it would
12 need financing. And we know that such financing does not exist.

13
14 We have been told if it is not the African Union it will be other international institutions. Which
15 international institutions? We would like to know which ones they are. We would like to know what is
16 the credibility of the legal observers. We are being reassured that in the meantime there will be people
17 who will be empowered to do the monitoring. And we will know who those persons are. And I would
18 like to know what is their place vis-à-vis our system.

19
20 I find it difficult to admit that a person who is attached to a tribunal will come to monitor decisions that
21 have already been made. You are taking a very big risk, because all that we have today are
22 speculations, promises.

23
24 We have instruments that have not yet been enforced and so we have no idea as to how or where they
25 will be applied. Imagine that these monitors, whoever they are, if they come in a few months and
26 cannot confirm the doubts that we have raised. Well, the doubts do not lie in your decisions but in your
27 convictions, and we are expressing doubts.

28
29 So if in a few months our doubts were to be confirmed, you may have to bring back accused persons
30 that you would have transferred on the basis of mere promises, promises made in *amicus curiae*.
31 Because what is also interesting in our presentation is that today the Rwandan government is there as
32 a country giving promises. And at the same time it is here in our Court as an *amicus curiae*. And I
33 think this will be rendering poor services to international justice by applying Rule 11 *bis* and then
34 revoking the order. And here we have lost so much time.

35
36 We have the Defence's rights have been trampled upon because for two months Munyagishari has
37 been telling this Court that he wants to be tried by international judges and by an international court and

1 he is ready to be tried. And imagine the amount of time that has already elapsed, months before you
2 arrive at a decision, when your Tribunal would have already disposed of the matter.

3
4 And I thank you, Mr. President, and Your Honours.

5 MR. PRESIDENT:

6 We will take a short break of half an hour. And then we will come back.

7
8 When the parties address us in this second phase, we would like each of you to address the following
9 issues: One, on an assumption that this transfer is granted, to what extent -- or, how soon does the
10 Prosecution see a trial getting under way?

11
12 There is the problem of language, which has been raised in Defence pleadings, that the accused
13 speaks French, Lingala and Swahili. If that is the case, would that affect the delay in the execution of
14 the trial?

15
16 And would the parties address that, bearing in mind that one of the rights to which the accused is
17 entitled is to be tried without undue delay?

18
19 When we come back, at half past eleven, we will then give you what time you need, but not more than
20 half an hour to address us on any matters you haven't addressed or which have been raised by the
21 opposing party. And then we will conclude these proceedings after that.

22
23 So the Court now adjourns until 11:30.

24 *(Court recessed at 1101H)*

25 *(Pages 16 to 29 by Eleanor Bastian)*

(Court resumed at 1133H)

MR. PRESIDENT:

The session resumes.

Now, Prosecution.

And one other matter we will ask you to assist us in is, what powers, if any, exist from the Rwandan judiciary to compel attendance of witnesses who may be residing outside Rwanda and who are unwilling to testify? Is there any method of compelling them -- the Defence witnesses but, especially -- who may be outside Rwanda living in other countries to come to Rwanda and testify? If you know of any mechanism that will enable that to happen and if it has happened and you are aware of any instances where it happened, we would be grateful for you to share that information with us.

So proceed, Mr. Prosecutor.

MR. ARGUIN:

Thank you, Mr. President. Let me start with the questions the Chamber asked before the break. Assuming the referral is granted, the Chamber asked how soon the trial in Rwanda would get under way.

MR. PRESIDENT:

Speaking realistically.

MR. ARGUIN:

Realistically, yes. But realistically speaking, what I would say is, as soon as the accused is physically transferred to Rwanda, he will be brought before the appropriate judicial officer for an initial appearance or a determination of counsel and conditions of detention and all those other preliminary matters would be assessed. From there the adoption process takes place where the indictment is reviewed and brought into compliance with Rwandan law, and I will talk more about that later.

The rest of the proceeding really then goes in the same manner it would go here. It depends on the preliminary motions that are filed. It depends on whether the Defence requests more time. What I would know is that with the referral of the case the Prosecutor hands over not only the indictment but all the supporting materials to the Rwandan prosecutor so that they are ready and trial ready as soon as the case is referred.

I would also note that in connection with this proceeding and the Prosecutor -- the ICTR Prosecutor has already turned over to the Defence all the supporting materials underlying the indictment. So in this sense both the Prosecution and the Defence are ready -- trial ready and the Rwandan prosecutors too would be trial ready. The delay I think would come from many motions practice -- or preliminary filings

1 that may be made under the Rwandan code of criminal procedure or under other provisions of
2 Rwandan law.

3 MR. PRESIDENT:

4 We appreciate that. Realistically talking, if it is in fact transferred, it means it moves out of this
5 Defence's hands and goes into some other defence hands.

6 MR. ARGUIN:

7 Well, let me suggest, Your Honour -- that's a point I was going to address. That assumption is not
8 correct. It's -- certainly his present counsel who has been appointed to the Tribunal can apply for
9 admission or accreditation in Rwanda and continue to represent him in Rwanda. And the
10 KBA submissions show they would request for accreditation. It can be processed in as little as a day.
11 That's in the KBA brief at paragraph 17 at record -- registry page 603 as well as the KBA *Uwinkindi* brief
12 at paragraph 18, registry page 143. That was what was done for the Erlinder case as well as for the
13 Ingabire case; accreditation was allowed within one day.

14
15 And furthermore, even if present counsel would elect not to continue to represent the accused in
16 Rwanda, they would still remain under an ethical obligation to ensure a smooth transition of the defence
17 to successor counsel. And I would also note that referral chambers -- that the Appeals Chamber in
18 connection with an ICTY referral in the *Ljubicic* at paragraph 28 rejected a similar argument against
19 referral where the Defence cited possible delays attributed to the possible change of defence counsel
20 that might happen after the case was referred. That was not a valid basis for denying referral by the
21 Appeals Chamber, and it's not a valid basis here, nor is it a practical barrier here, because, as I had
22 said, counsel could be admitted to practice in Rwanda.

23
24 And while I am on that subject, let me address the Defence point that somehow reciprocity would be not
25 available in Rwanda for a lawyer admitted to the French bar. In fact, as Rwanda has pointed -- as the
26 Kigali bar has pointed out in its -- in an affidavit submitted by the *bâtonnier*, which was attached as
27 annex I to our reply brief -- it appears at registry page 534 -- Rwanda has in fact admitted lawyers from
28 France to its bar and France has admitted lawyers from Rwanda to its bar. The reciprocity for
29 bar admission exists, and it has already been done. Moreover, the lawyers, as I said, could also be
30 accredited, which is a special process where you are accredited solely for one case and allowed to
31 appear in connection with only that case before the Rwandan bar.

32
33 Again, here too, the *bâtonnier* while president, has indicated that he has done this; he has done the
34 accreditation process in as little as one day. And there I point again to registry page 534. So that
35 would not be an obstacle in terms of getting the trial proceedings in Rwanda under way.

36
37 The other question Your Honour has asked is about the translation services or interpretation services

1 given the representation that Mr. Munyagishari speaks French and some other languages. I can say
2 that, under the code of criminal procedure in Rwanda, Article 79 to 83 recognised that accused persons
3 have the free assistance of an interpreter, if he cannot speak the language currently in use.

4
5 Now, Rwanda already has experience in this case. The Ingabire case, which is ongoing at this time, is
6 providing simultaneous translation where necessary from Kinyarwanda to French. Rwanda in its
7 amicus brief in this case has also submitted photographs of the existing translation booths similar to our
8 own available for simultaneous translation of the proceedings into the language that the accused may
9 require.

10
11 I also note in the supplemental funding additional funds have been available or made available to
12 support hiring additional interpreters to again enhance the existing capacity of both the high court and
13 the supreme court in referred cases. So that is contained in the January 2012 supplementary
14 appropriation of the 112 million -- 118 million Rwandan francs, and again, that too would be reviewed
15 again as part of the usual budget process in June of this year. So not only is there a right to
16 interpretation services, the interpretation services are presently in use and additional funds have been
17 made available specifically to enhance the existing capacity to provide in this and other referred cases.

18
19 Now, you mentioned the -- the last question was, what powers exist for the Rwandan judicial authorities
20 to compel testimony from witnesses abroad.

21
22 In that regard, I refer Your Honours to the Appeals Chamber decision in *Hategekimana*
23 referral proceedings, specifically paragraph 25, where the Chamber said, "With respect to Rwanda's
24 ability to compel witnesses to testify, the Appeals Chamber recalls its findings in *Munyakazi* and
25 *Kanyarukiga*. In noting Rwanda's submissions in this case finds that Rwanda has several
26 mutual assistance agreements with states in the region and elsewhere in Africa. And the agreements
27 have been negotiated with other states as part of the Rwanda's cooperation with the Tribunal in the
28 conduct of domestic trials.

29
30 "Furthermore, the Appeals Chamber reiterates the UN Security Council resolution."

31 THE ENGLISH INTERPRETER:

32 Mr. President, could counsel be asked to go slowly for the benefit of the interpreters.

33 MR. ARGUIN:

34 Sorry to the interpreters.

35
36 Security Council Resolution 1503 calls on States to assist national jurisdictions when cases have been
37 referred. This, the Appeals Chamber said, provides a clear basis for requesting and obtaining

1 cooperation from member states to facilitate witness testimony from abroad. I think that article
2 addresses the Chamber's question, particularly given the alternative means of testimony that we
3 discussed before the break.

4
5 Now -- if I could now turn to several points that the Defence raised in its submissions. I would like to
6 first start with the framework for review of Rule 11 *bis* proceeding.

7
8 Counsel has raised an argument similar to that which was raised by the Defence in *Uwinkindi*.
9 Rule 11 *bis* requires some sort of higher level -- or prove some sort of convincing and that this is difficult
10 to do where no cases have yet been referred to Rwanda. Well, I think that argument was soundly
11 rejected in *Uwinkindi* by the Appeals Chamber and the Trial Chamber and it should be rejected here. If
12 not for only that the rule by its plain language is framed in prospective terms, it necessarily looks at
13 trials that have not yet occurred.

14
15 The trial -- the Appeals Chamber in *Uwinkindi* at paragraph 64 in fact confirmed that the Court inquiry is
16 whether or not the Chamber is satisfied that the existing legal framework is adequate to protect fair trial
17 rights. Once the Chamber is satisfied that the existing legal frame work exists, the Chamber need not
18 enquire further. So by definition under the rule, what one has to look at is if Rwanda has laws in place
19 to protect safe trial -- fair trial rights, the Chamber should be satisfied that the trial will be fair because
20 the trial -- because the presumption is as recognised by the *Uwinkindi* Appeals Chamber and other
21 Chambers that the laws would be applied as they are written. And what is more, our submissions here
22 and our submissions in *Uwinkindi* show that, in fact, that is the actual practice. And I would address
23 some of the specific other points that the Defence raised relating to the actual practice shortly.

24
25 But let me first address another threshold issue. It relates to the alleged double standard between
26 domestic cases and referred cases. And here, too, I think the Defence counsel has misunderstood the
27 applicable standard for referral. The focus of any referral is on the accused in this case and whether he
28 or she will receive a fair trial in Rwanda or whatever other national jurisdiction.

29
30 Clearly, the reforms -- legal reforms that have taken place in Rwanda and that are ongoing in Rwanda
31 have been inspired by the prospect of obtaining referred cases. There is no question about -- from
32 Rwanda's amicus brief and other submissions that that is a goal of theirs and they see it as critical
33 international reconciliation and healing. But it is not just Rwanda's interest. It's in the Tribunal's interest
34 as well because the Tribunal has invested substantial time, money and energy in capacity-building
35 efforts intended to show up the national jurisdiction in its ability to try cases fairly.

36
37 Now, that was done, not only through the Tribunal's efforts, obviously but in partnership with other

1 member states throughout the world. The success that the Tribunal has now experienced in allowing
2 its cases to -- recent cases to be referred to Rwanda show that those efforts have paid off.

3
4 But with regard to this double standard, I think it does not exist because Rwanda has logically focused
5 its efforts at the prodding of the international committee, at the prodding of the ICTR and on its own
6 volition to improve its legal framework, and it is focused primarily on referred cases, but that does not
7 mean it is stopping there. The process is already in place to extend the same reforms to other cases.
8 The new prison that the commissioner general of Rwanda's prisons has indicated will start construction
9 next year will have state of the art facilities meeting international standards, not just for international
10 cases but for domestic cases as well. The plan will also extend victim/witness services from the
11 witness protection unit, not only to referred cases but to domestic cases as well.

12
13 Reform, however, takes time. It doesn't happen overnight. For Rwanda has a democratically elected
14 parliament. Its parliament considers the laws and the funding has to be approved to support those
15 initiatives. Contrary to what was said, we are not presenting empty promises of continued
16 legal reforms. Rwanda's amicus brief makes clear there have been substantial changes on the
17 legislative front. Admittedly, they have not yet been published in the official gazette. But to be
18 published in the official gazette, they must be translated into three languages. That process is under
19 way.

20
21 The reform for the foreign judge legislation will be done shortly. The draft law is attached to
22 Rwanda's submissions. The reform of the penal code and the code of criminal procedure also referred
23 to in Rwanda's submissions are much more comprehensive. They are several hundred pages long.
24 The full text was not submitted to you because it was -- it's a comprehensive reform. It will take time for
25 those laws to be translated into the three official languages and therefore published in the
26 official gazette, but the reforms are meaningful. The reforms are real. The tangible proof is in the --
27 Rwanda's submission where the text of the draft laws is provided.

28
29 And with regard to the genocide ideology law, Rwanda has also explained that as well. They have
30 solicited comments far and wide from state quarters, not only in Rwanda but across the world, including
31 critics such as Human Rights Watch and Amnesty International.

32
33 Now, the process of finalising the language of the draft law is still ongoing, and they intend to hold
34 further discussions to make sure consensus is built. They had explained this in their amicus brief. But
35 what is significant is that they have already drastically reduced the sentences available to genocide
36 ideology. Unless by falling into the trap of suggesting the genocide ideology is a barrier to referral -- I
37 would remind Your Honours that the transfer laws immunity provisions provide an adequate protection

1 for anything said or done in the course of a referred case -- a trial in a referred case.

2
3 In this regard, let me respond directly to the Defence's suggestion that a witness who testifies in a
4 referred proceeding could somehow subsequently be prosecuted in another proceeding. That is
5 completely wrong. The immunity extends to anything said or done in the course of a referred case.
6 They cannot be prosecuted for anything said or done during the trial of a referred case, nor under
7 Rwandan law could they be compelled to give evidence against themselves. They have a right to
8 remain silent.

9
10 Now, could their testimony be admitted against someone else? That would depend on the rules of
11 evidence in another proceeding, but they certainly cannot be subjected to prosecution based on
12 anything said or done in the course of a referred case. That's the entire point of the immunity provision
13 that was identified and discussed in the *Uwinkindi* Appeals Chamber and referral Chamber's decision
14 most recently.

15
16 Let me turn now to the alleged barrier that exists to the referral of this case because of the discretionary
17 provisions of the Security Council Resolution 1503 in 1534. I won't repeat what's already been said
18 there, but those provisions are not binding on the Prosecutor. They are merely providing guidance as
19 well, and they are not reflected in our rules as the *Uwinkindi* Trial Chamber found. But I know further
20 that they seem to be inconsistent with the Defence's reliance on those as a barrier to referral is
21 inconsistent with this Chamber's 13th December 2011 decision on the Defence's request to commence
22 proceedings, where at paragraph 6 this Chamber said and recognised. "The referral is part of the
23 jurisprudence and procedures of the Tribunal."

24
25 And the Security Council itself has found or noted that the referral of cases to national jurisdictions is
26 essential to the completion -- the primary completion of the Tribunal's mandate. So if anything, the
27 jurisprudence from this Chamber interpreting the very Security Council resolutions on which the
28 Defence relies to pose a barrier to referral, in fact, encourage referral. And, in fact, view it as a critical
29 part of the Tribunal's mandate.

30
31 I would also note with regard to the concept that Resolution 1534 does not restrict the Prosecutor --
32 restricts the Prosecutor for any indictments filed after March 2004 to indicting only the most senior
33 leaders is not supported by the Tribunal's own practice. In fact, the two cases that were referred to
34 France were -- both had indictments that were confirmed after March 2004.

35
36 On the subject of referral, there seems to be a suggestion that the accused somehow has an
37 expectation to be tried here at the Tribunal as opposed to in Rwanda or some other national jurisdiction.

1 There is, however, no right, as the other chambers have recognised, the *Mejakić* referral bench, for
2 instance, at paragraph 127, formally recognises that the jurisdiction and power of the Tribunal includes
3 the power to refer cases to national jurisdiction. They could infer no right on an accused to be tried only
4 by the Tribunal or in any particular jurisdiction. Moreover, the provisions allowing the referral of cases
5 to national jurisdictions here at the ICTR were in place when the accused was indicted in
6 September 2005 and when he was finally apprehended involuntarily five years later in May 2011.

7 MR. PRESIDENT:

8 In that regard, is it your position that an accused person who has been brought into the custody or
9 possession of the Tribunal has no legitimate expectation to be tried by the Tribunal or under rules that
10 are lower than the rules of the Tribunal?

11 MR. ARGUIN:

12 I think he absolutely has no legitimate expectation that his trial will take place here. That is squarely the
13 holding of the *Mejakić* referral bench at paragraph 127. It also -- that -- any such expectation would be
14 completely unreasonable given the plain language of Rule 11 *bis*, which is -- I know has been in
15 existence at all relevant times here when he was first indicted and when he was arrested.

16 MR. PRESIDENT:

17 But as you will observe, the rule does state that, when the accused is in custody, he should be heard.
18 The only reason he needs to be heard is because his expectation is being taken away from him.

19 MR. ARGUIN:

20 No. No, Your Honour. I think if one looks at the text of Rule 11, it says, "If an indictment has been
21 confirmed, whether or not the accused is in custody at the Tribunal, the President may designate a
22 Trial Chamber to determine whether the case should be referred to national juris -- authorities." Even
23 when the accused is not in custody, the Tribunal will appoint duty counsel to represent the interests of
24 the accused. When the accused is in custody, counsel is also appointed, but the issue there is not --

25 MR. PRESIDENT:

26 Go down that same paragraph. Read on.

27 MR. ARGUIN:

28 But even when the accused is in custody, the issue is whether or not the Chamber is satisfied that, if
29 referral was allowed, he will receive a fair trial in Rwanda or other national jurisdictions. It is not "Where
30 would I like to be tried?" That is not his choice. He has no such right. The right in fact that is being
31 proposed here that seems to be suggested -- "I think I would rather go to the DRC because allegedly I
32 am a national of the DRC," which I will address is completely false. That's not his choice. The fact that
33 he claims to be a national of the DRC is in fact given very little weight in the analysis of Rule 11. What
34 matters is which case -- which case the Prosecutor selects in his discretion, which jurisdiction. And so
35 long as that jurisdiction bears a substantial nexus to the case, it is entitled to substantial deference
36 before this Tribunal and there can't be any real serious contention that Rwanda does not bear a serious
37 and substantial nexus to this case.

1 Rwanda is the place where the crimes were committed. Rwanda is the place where the victims were
2 killed or otherwise assaulted. And at the time the crimes occurred, the accused was either present or
3 his subordinates were present and perpetrated the crimes. It has the most substantial link to this case
4 than anyone else, than any other country. And I would note the proposition that the DRC is somehow a
5 better choice is not substantiated by any submissions. There is certainly no indication that the DRC
6 would even entertain it. But more importantly, it lacks the substantive law for the simple reason that it
7 retains the death penalty. So that is not a valid choice.

8
9 In terms of the legitimate expectations, again, we would note that the idea that he has some
10 expectation to be tried here is contrary to what this Chamber also found about the importance of the
11 referral proceedings to fulfilling the Tribunal's mandate. And it is also contrary, I would add, to the
12 Prosecutor's repeated reports to the Security Council that started in December 2005 and continued to
13 the time of Mr. Munyagishari's arrest where he indicated repeatedly that several fugitives -- open
14 fugitive cases would be subject to referral. So even if legally there were such a basis, which I submit
15 there is not, there would be no legitimate or reasonable expectation on the part of the accused that his
16 case would be tried here and only here. The rules simply don't anticipate that nor does the
17 jurisprudence.

18
19 And while on this topic, let me address the point raised by the Defence that the Prosecutor somehow
20 delayed initiating the referral. Rule 11, of course, sets no time limit on when an application for referral
21 must be filed. The only practical constraint I think is that it must be done before trial proceedings reach
22 an advanced stage. Here the Prosecutor's application was filed only days after Rwanda confirmed its
23 willingness to accept the case. That's confirmed by registry page 275, annex F to our materials.

24 MR. PRESIDENT:

25 What's in your -- what is the position -- or is it the basis or the purpose of Rule 11 *bis* (B) -- requiring
26 that the Trial Chamber gives notice to the accused when he is in custody? What is -- why is he being
27 given notice?

28 MR. ARGUIN:

29 Well, I have no doubt that the proceedings involving the referral of the case which determine where the
30 trial would be held and whether -- if the case is referred, the host jurisdiction -- the national jurisdiction
31 will honour fair trial rights. It is a matter of substantial importance to the Defence. I think they have a
32 right to be heard. I think it would be very odd if they weren't heard. I think, in fact, the fact that some
33 fugitive is appointed counsel to represent their interests even though they elect to remain a fugitive from
34 the Tribunal and from international justice confirms that. What we want to ensure is that when this
35 Tribunal undertakes a review of fair trial guarantees in a potential referred state, their -- all views are
36 heard. And I think this Chamber and other Chambers have done that. They have solicited the input,
37 not only from the government of Rwanda, which is the host state, but from all other interested parties.

1 The Defence had the opportunity, not only to submit its own briefs but to submit amicus briefs as well,
2 as was done in other referred cases. The Prosecution had the same obligation.

3
4 The Chamber should take all that information into account. These are not intended to be
5 ex-parte proceedings. I think that would be very much an affront to international justice. The accused
6 should be heard absolutely, but that does not give him an expectation that he should be tried here. It
7 simply means, "We would like to hear your views of whether you think this referral or your application
8 should be allowed or not allowed." I don't even think it gives in the standing to say, "I would like to
9 second-guess the Prosecutor's choice and think of some other places I would like to go." He doesn't
10 have the right to control where he's tried. That's the point of prior reform decisions, and that would be
11 my answer to that. The fact that he is allowed an opportunity to be heard creates no expectation. And
12 nothing in the --

13
14 I am coming back to this point of undue delay. Not only did we file this only days after Rwanda
15 indicated its willingness to take the case, it was only three months after the accused was arrested and
16 transferred to the Tribunal. It was no -- no trial was scheduled at that time. And while it's true that
17 Rule 11 *bis*, as we've discussed, would have allowed the Prosecutor to file an application while he
18 remained a fugitive, we did not do that because, as a practical matter, the Prosecutor's earlier
19 applications for referral that were filed in 2008 had been denied. That situation remained unchanged
20 until June 20th -- I am sorry -- until June 28th of 2011 when the *Uwinkindi* Referral Chamber issued its
21 first decision allowing the referral of cases to Rwanda.

22
23 The accused only made his initial appearance before the Tribunal eight days before that decision was
24 rendered. And even though the *Uwinkindi* referral decision remains subject to appeal, we,
25 nevertheless, enquired from Rwanda whether they would be willing to accept this case, and we filed our
26 application for referral of this case three days later before we even received the Appeals Chamber
27 decision affirming the referral of the case to Rwanda.

28
29 The Prosecutor, therefore, has not delayed these proceedings. He has acted expeditiously in
30 accordance with the applicable rules. The primary source of the delay, if any, is the fact that this man
31 remained a fugitive for over five and a half years. He could have surrendered at any time, and he could
32 have had his trial then. He chose not to do so. That is not the fault of the Prosecution.

33
34 I would also like to correct what appears to be a misimpression regarding the adaption process.
35 Counsel seems to think that the adaption process means that the prosecution in Rwanda is stuck with
36 whatever indictment is referred. That is not true. As I mentioned earlier, the
37 *Bagaragaza* Appeals Chamber decision at paragraph 17 and the transfer law, Article 3, specifically say

1 that they are limited only in the fact that they cannot add -- or -- add new charges or modes of liability
2 that were not -- that are within the trials' own jurisprudence, but they do have the capacity to charge an
3 indictment. It need not necessarily proceed under their laws against each act or crimes that are
4 mentioned in the indictment. And that's what the Appeals Chamber said at paragraph 17 of
5 *Bagaragaza*.

6
7 So the adaption process is not as restrictive as the Defence suggests. In fact, they also suggested that
8 the Rwandans would be limited to applying simply their code of criminal procedure. That's not true.
9 The code of criminal procedure just sets out the process for how an indictment in Rwanda is confirmed,
10 but that process has to also consider the substantive law. It has to consider whether the charges are
11 recognised under Rwandan law. So that requires consideration of the constitution, the code of
12 criminal -- the penal code and other relevant laws. In all that I think there is also a misunderstanding in
13 relation to the Prosecutor's submission on JCE, joint criminal enterprise.

14
15 We contend -- and I've submitted the relevant citation from the Rwandan constitution of Articles 20 and
16 201 showing that Rwanda recognises customary principles of international law and will apply them to
17 their domestic cases so long as they were in effect and recognised at the time the crimes were
18 committed. JCE was clearly recognised by customary international law when these crimes were
19 committed. So JCE is recognised.

20
21 My suggestion now in terms of the Prosecutor submitting a -- formally indicating his intention to not
22 pursue joint criminal enterprise in this particular case is only a reflection of the fact that we think that
23 would facilitate the referral of this case to Rwanda and it would be most procedurally efficient.

24
25 And Your Honour asked during the opening session as to whether or not -- if the Prosecutor here at the
26 ICTR indicates that willingness to not pursue it, how would it affect Rwanda. Well, as I mentioned --
27 and I would just call your attention to the conditions that were imposed in the
28 *Uwinkindi* Referral Chamber at page 58, particularly. There were specific conditions imposed on a
29 referral of that case regarding what the Chamber interpreted as being the correct interpretation of
30 certain laws and how they wanted those laws to be applied in the transfer case. It is not different here.
31 The Prosecutor has indicated solely for the interests of facilitating the referral of this case that they are
32 willing to forego for the reliance on JCE as a mode of liability. That's our submissions on that point.

33
34 There is also some indication that the Prosecutor's reliance on the extradition cases are somehow in
35 opposite. Let me just briefly explain why we think those cases are relevant.

36 MR. PRESIDENT:

37 Are you bringing it to a close?

1 MR. ARGUIN:

2 Oh, thank you. I will end on this point. The standards applied by the European Court of Human Rights
3 and the other national jurisdictions that have allowed the referral of cases to Rwanda are looking at the
4 same factual issues that this Tribunal is looking at for the referral of cases under Rule 11. Article 6, for
5 instance, at the Convention for the Protection of Human Rights and Fundamental Freedoms at issue in
6 the European Court of Human Rights case and the Norway cases look at essentially the same criteria
7 that we look at under Article 20 of our rules. Is there a fair public hearing? Is there a presumption of
8 innocence? Does he have a right to be informed promptly of the charges? Does he have a right to
9 examine witnesses and obtain the attendance of witnesses? All those at the very same proceedings --
10 or the same issues before this Chamber, and all of them were resolved favourably, just as our own
11 Chambers have resolved them favourably to Rwanda's ability to meet those standards.

12
13 And, having said that -- I would use up my remaining time -- I would rest on our written submissions for
14 the remainder of our case. And I thank Your Honours for their time.

15 MR. PRESIDENT:

16 We thank you.

17
18 Defence.

19 MS. IVANOVIC:

20 Mr. President, Your Honours, the Defence has no idea as to when the proceedings in Rwanda will go
21 under way. And in spite of the Prosecutor's explanations, he does not know either. We have heard
22 that the Prosecutor could abandon the charge under JCE and that the prosecutor in Rwanda could
23 proceed without those charges. I am not very -- I am not in agreement that he will come back on it
24 later.

25
26 Now, let us assume that the Rwandan prosecutor proceeds with the charge on JCE and that will need
27 an amendment of the indictment and you need that indictment to be notified to the accused and the
28 translation into French for the accused and it would require a number of things. But that is just part of
29 the problem.

30
31 The Prosecutor also told us that the Rwandan prosecutor is ready and the Defence also. And as you
32 immediately pointed out, it would be correct if it is the present Defence team that would be defending
33 him in Rwanda. But, Mr. President, Your Honours, I have a great regret to tell you that, in spite of the
34 Defence's willingness to go and defend Bernard Munyagishari in Kigali, we cannot do so. Legal aid in
35 Rwanda is not able to assume the substantial needs of foreign Defence counsel to go to Rwanda. It is
36 all very well to say that foreign advocates could go there. It is all very well to say that the jurisprudence
37 of ICTY has said that changing counsel is not a problem, and it would depend on real and effective

1 legal aid granted to Defence counsel. But the problem is that we, Defence counsel -- we simply do not
2 have the means to go to Kigali and defend Bernard Munyagishari there.

3
4 Contrary to what the Prosecution contends, first, there is a problem with French Defence counsel, and I
5 do admit that Rwandan lawyers can be admitted in the bar exam and the bar council in France
6 inasmuch as they pass the examination and are registered in the French bar. The Kigali bar president
7 tells us that there are French lawyers who are registered in the Kigali bar, but the problem is that it
8 happened -- after our response and after the affidavit, no French lawyer was mentioned. Then, again,
9 what the French lawyers say is written down, but we have been given no names, no examples, nothing
10 whatsoever. So should we really take their word, what the Kigali bar president says?

11
12 Now, even assuming that the simplified accreditation process given to lawyers actually works and we
13 go there -- I repeat, once again, that the resources available to Rwanda and the Kigali bar association
14 are insufficient and, in fact, unavailable for foreign counsel who live on their profession and have no
15 other sources of income. Therefore, we simply cannot go to Kigali. And of necessity, there would be a
16 new defence team. That new defence team will have to study the case file, work to gain the trust of the
17 accused and then build on that trust and build its relationship with the accused, and, above all, it needs
18 to obtain the documents that we ourselves have not been able to obtain, confidential documents related
19 to other matters that are tied to this case, but we were unable to obtain them because the
20 11 *bis* procedure is under way. So quite frankly, I have no idea whatsoever when this trial would get
21 under way.

22
23 Before I move on to the next point, I would like to dwell briefly on the Prosecutor's arguments in the
24 sense that he has no blame in terms of the delays registered in this case. It is not mentioned today, but
25 in his response he indicated that, indeed, if there was a delay, it should rather be attributed to the
26 Defence.

27
28 Mr. President, Your Honours, such an argument is simply a negation of any right recognised to the
29 Defence because what the Prosecution blames the Defence for is what it is doing. We objected to the
30 referral, but it is the Defence's right to do so in a criminal case. Moreover, there are issues that depend
31 on the Prosecutor's will or on any other person's will. Today we'll have to wait for the decision. There
32 would be an appeal, and then we will have to wait for the referral.

33
34 Let me recall that the Appeals Chamber in the *Uwinkindi* case delivered its decision on the
35 16th of December 2011. Today is the 12th of April 2012, four months after the handing down of that
36 judgement, and Mr. Uwinkindi is still here in Arusha. I saw the case -- the observers have not been
37 secured.

1 Now, the Prosecutor a while ago mentioned a decision of the President directing the registry to get in
2 contact with the African Commission. I have no doubt that this Tribunal is making efforts to speed up
3 things and find the right solution. Certainly, there would be one and everybody would like to see one,
4 but the trouble is that today we have no result. And, in fact, if we find the necessary funding and if we
5 find an agreement for Uwinkindi, we would have to find an agreement for Munyagishari. Then we will
6 have to go through another process to address the issue of observers and to find the desired
7 observers.

8
9 Mr. President, on the right of the accused to use his own language if he does not understand the
10 language used in the proceedings in Kigali, it is clear that Rwandan law provides for that right to an
11 accused person. We also know -- and we have all heard in the past few days that Leon Mugesera, who
12 was extradited by Canada, precisely had problems because he demanded the use of English and that
13 right was not granted to him. I have no doubt that Rwanda has interpreters and has interpretation
14 booths indeed. We saw the photographs, but I must recall that the Prosecutor himself in his response
15 raised the problem that is not directly related to interpretation but, rather, to translation.

16
17 The significant difference in Article 128 on the law of evidence -- the English version and the
18 French version are completely different. Now, I wonder what indeed would be the effective law on
19 interpretation and translation for the accused in Rwanda. I wonder because I have no answer thereto.

20
21 On the third question as to Rwanda's powers -- powers available to Rwanda to compel witnesses living
22 abroad to appear and testify, I would say this is very interesting because the Prosecutor alludes to the
23 Security Council resolution, and the same resolution he just said was not really binding. Well, of
24 course, I do not endorse that position.

25
26 The Security Council resolution takes precedence following the United Nations Charter, Article 7. It is
27 binding. Yes, States have the obligation to cooperate. But, again, what States? Some States have
28 agreements. What States? We do know that there are States. Rwanda, certainly, but what exactly is
29 the content of those agreements, and what exactly transpires in actual practice, and how is it going to
30 happen really when a witness is found? A witness living in some far-flung province far from the capital?
31 We do not know.

32
33 So what I wanted to say, again -- because it is kind of connected to this -- is that the Prosecutor in his
34 request and in his response said that it was not really necessary for witnesses to come to Rwanda
35 because there were alternative means of giving testimony. He even went on to demonstrate that
36 Rwanda has put in place lots of measures for these alternative measures such as video link being
37 effective in third world countries. And today we are told that indeed this would be something

1 exceptional and to be used only in exceptional circumstances.

2
3 I agree with the Prosecutor because such alternative means should be exceptional, but the problem of
4 Defence witnesses is that such alternative measures may be the only ones available to them and that
5 no Defence witness identified as of today by Bernard Munyagishari's Defence team will go to Rwanda
6 to testify.

7
8 Now, we are told by the Prosecutor that we are wrong to feel that our witnesses would face any
9 prosecution or charge for whatever they say in a trial in Rwanda. But we know. We are not saying
10 anything contrary. What we are saying, and what the Prosecutor agrees to today, is that those
11 witnesses, whether they are brought in by the Prosecution or by the Defence in another case unrelated
12 to the referral case, a purely Rwandan case and where they repeat their testimony in that second
13 Rwandan case -- could be prosecuted. There is even no condition that they will be prosecuted,
14 because contrary to what the Prosecutor contends, the organic law is expressly limited to
15 referral cases. So it applies only to referred cases. Immunities to witnesses are granted only in
16 referred cases. Article 14 reiterates this point clearly in each of its paragraphs.

17
18 I would also like to clarify a point on joint criminal enterprise and the Defence argument because, once
19 again, the Prosecutor today concentrates on the defects -- on the procedural defects of the indictment.
20 That is not our contention. We have never attacked Rule 72 of the rules. We trust the Judges of this
21 Tribunal that they will deal with the indictment as it were. But there are some shortcomings, and as I
22 said, we trust the Judges of this Tribunal. Conversely, we believe that this indictment as it stands now
23 is unable to be referred to Rwanda because Rwanda cannot use it the
24 way it is.

25
26 Now, the Prosecutor comes up with some issue of the Rwandan constitution and customary
27 international law in which this concept is incorporated. Because the article of the constitution to which
28 the Prosecutor refers concerns Rwandan customs and does not refer to international customary law.
29 And, indeed, even if that article referred to the international customary law, I wonder where Rwanda
30 would go to find joint criminal enterprise therein.

31
32 Admittedly, it is more of a liability recognised by this Tribunal and the ICTY. It is not a category of
33 customary international law. It was rejected by the International Criminal Court, which is the only
34 international criminal court with universal jurisdiction. One could say that Rwanda could look for
35 joint criminal enterprise ingredients right here in this ICTR. Why not? But then the indictment should
36 be able to give it that possibility. But when we look at the indictment, we realise that the objective or the
37 outcome of JCE is all mixed up. There is a confusion between categories 1 and 3. And if we look at

1 JCE category 3, we see a lot more problems because even the Cambodian court does not recognise it;
2 even the Lebanese court expressed some reservations thereto, notably, in relation to crimes that
3 require particular attention, such as genocide.

4
5 So it would appear to me that there are a lot of problems to be addressed here and we need to take
6 some more time. A lot of time would have to elapse before Munyagishari's trial begins, and he has
7 been in detention for 11 months and 10 months under the custody of this Tribunal.

8
9 And to conclude, I would like to mention just one point because I believe that the Prosecutor, once
10 again -- or maybe he did not want to understand our argument. Bernard Munyagishari is a Congolese
11 citizen today. The Defence is fully aware that the Democratic Republic of Congo would have
12 transferred Munyagishari even if he was informed that he was Congolese. We are fully aware that the
13 obligation to transfer suspects takes precedence over all other considerations when it comes to the
14 Tribunal.

15
16 What the Defence does not admit is that the Prosecutor did not bother to check, or maybe he just
17 ignored certain facts. That -- we do not admit that the Prosecutor would ignore principles of good faith.
18 And, once again, it is unbelievable that the Prosecutor calls it some amorphous principle but the
19 good-faith principle is a principle of cooperation. Both principles are the cornerstone of
20 international law. Both principles are enshrined in the Charter of the United Nations.

21
22 The Defence considers that the Tribunal should not give its blessing to such an oversight on the part of
23 the Prosecutor, such non-compliance with international law on the part of an international prosecutor,
24 someone who, more than anyone else, should respect international law. Thank you.

25 MR. PRESIDENT:

26 Is that all?

27 MS. IVANOVIC:

28 Yes, Mr. President.

29 MR. PRESIDENT:

30 Thank you. I want to take this opportunity to thank all of us, the counsel on both sides, the
31 court management staff, our legal officers, the interpreters and translators and good people sitting in
32 the public gallery for having attended these proceedings today. They have now come to an end, and
33 the Chamber will now go and reread these matters and think over them, and sometime in due course
34 they would let -- they will issue a decision on the question of whether this case should be referred to the
35 Republic of Rwanda for hearing or not. That decision would be rendered in the usual way in which we
36 render decisions, not necessarily in open court, as the hearing has come to an end.

1 So I want to thank everybody and wish you all the best in whatever you are doing, wherever you are
2 doing it. The Court is adjourned.

3 *(Court adjourned at 1230H)*

4 *(Pages 30 to 45 by Sithembiso Moyo)*

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CERTIFICATE

We, Kirstin Bruinsma, Eleanor Bastian, and Sithembiso Moyo, Official Court Reporters for the International Criminal Tribunal for Rwanda, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*stenotype*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of our ability and understanding.

We further certify that we are not of counsel nor related to any of the parties to this cause and that we are in no wise interested in the result of said cause.

Kirstin Bruinsma

Eleanor Bastian

Sithembiso Moyo