UNITED NATIONS

Mechanism for International Criminal Tribunals

Case No.: MICT-12-25-AR14.1
Date: 22 September 2016
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Burton Hall, Presiding**
Judge Joseph E. Chiondo Masanche
Judge Mparany Mamy Richard Rajohnson
Judge José Ricardo de Prada Solaesa
Judge Ben Emmerson

Registrar: **Mr. John Hocking**

Decision of: **22 September 2016**

PROSECUTOR

v.

JEAN UWINKINDI

PUBLIC REDACTED VERSION

DECISION ON REQUESTS FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL

Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Richard Karegyesa
Mr. Cheickh Bangoura

Counsel for Mr. Jean Uwinkindi:

Mr. Gatera Gashabana

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of six motions filed by Mr. Jean Uwinkindi ("Uwinkindi") on 2 March 2016,[1] 3 March 2016,[2] 17 March 2016,[3] 30 March 2016,[4] 8 June 2016,[5] and 23 June 2016[6] in which he seeks the admission of additional evidence on appeal pursuant to Rule 142 of the Rules of Procedure and Evidence of the Mechanism ("Rules"). The Prosecution of the Mechanism ("Prosecution") filed a confidential, consolidated response to Uwinkindi's first three motions on 19 April 2016 and another confidential, consolidated response to Uwinkindi's last two motions on 1 August 2016.[7] Uwinkindi filed a confidential, consolidated reply to the Prosecution's Consolidated Responses on 16 August 2016.[8]

I. BACKGROUND

2. Uwinkindi was charged with genocide and extermination as a crime against humanity before the International Criminal Tribunal for Rwanda ("ICTR").[9] On 28 June 2011, pursuant to Rule 11*bis* of the Rules of Procedure and Evidence of the ICTR, an ICTR referral chamber ("Referral Chamber") ordered that Uwinkindi's case be referred for trial before the High Court of

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[1] Motion by the Defence of Jean Uwinkindi for Admission of Evidence pursuant to Rule 142 of the Rules of Procedure and Evidence, 11 March 2016 (original French version filed on 2 March 2016) ("First Motion"). Uwinkindi's filings in relation to his requests to admit additional evidence on appeal at times omit paragraphs or repeat paragraph numbering. For ease of reference, the Appeals Chamber qualifies paragraphs with "*bis*" where it is the second occasion a paragraph number appears in the same filing.

[2] Second Motion by Jean Uwinkindi Defence for Admission of Evidence pursuant to Rule 142 of the Rules of Procedure and Evidence, 4 May 2016 (confidential; original French version filed on 3 March 2016) ("Second Motion").

[3] Motion by the Defence of Jean Uwinkindi for Admission of Evidence pursuant to Rule 142 of the Rules of Procedure and Evidence, 5 May 2016 (confidential; original French version filed on 17 March 2016) ("Third Motion").

[4] Submission of Supplemental Evidence and Material to the Chamber in Support of Jean Uwinkindi's Defence Motion for Admission of Additional Evidence pursuant to Rule 142 of the Rules of Procedure and Evidence, 9 May 2015 (confidential; original French version filed on 30 March 2016) ("Fourth Motion").

[5] Motion by Jean Uwinkindi Defence for Admission of Additional Evidence, 17 June 2016 (confidential; original French version filed on 8 June 2016) ("Fifth Motion").

[6] Motion by Jean Uwinkindi Defence for Admission of Additional Evidence, 8 July 2016 (confidential; original French version filed on 23 June 2016) ("Sixth Motion").

[7] Prosecution's Consolidated Response to *Requête de la défense d'Uwinkindi Jean aux fins d'admissions des moyens de preuve en application de l'article 142 du Règlement de procédure et de preuve* dated 21 Feb, 3 March 2016 and 17 March 2016, 19 April 2016 (confidential) ("Prosecution's Consolidated Response of 19 April 2016"); Confidential and *Ex Parte* Annex to Prosecution's Consolidated Response, 19 April 2016 (confidential and *ex parte*); Prosecution's Consolidated Response to *Requête de la défense d'Uwinkindi Jean aux fins d'admission des moyens de preuve additionnels*, 1 August 2016 (confidential) ("Prosecution's Consolidated Response of 1 August 2016") (collectively, "Prosecution's Consolidated Responses"). The Prosecution did not file a response to Uwinkindi's Fourth Motion, which concerned Uwinkindi's transfer to Mpanga Prison and supplemented arguments raised in his Third Motion and presented new proposed additional evidence concerning Rwanda's withdrawal from the African Court on Human and Peoples' Rights. *See infra* paras. 59, 60, 70, 71.

[8] Reply from Defence of Jean Uwinkindi to Prosecution's Consolidated Response to Motions Filed pursuant to Rule 142 of the Rules of Procedure and Evidence, 24 August 2016 (confidential: original French version filed on 16 August 2016) ("Consolidated Reply"). *See also Eléments de preuve à l'appui de la réplique de la défense d'Uwinkindi Jean aux conclusions consolidées du procureur en réponse aux requêtes introduites en application de l'article 142 du Règlement de procédure et preuve*, 19 August 2016 (confidential).

[9] *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 ("ICTR Appeal Decision"), para. 2.

the Republic of Rwanda ("Rwandan High Court" and "Rwanda", respectively).[10] On 16 December 2011, the ICTR Appeals Chamber affirmed the order of the Referral Chamber[11] and Uwinkindi was transferred to the custody of the Rwandan authorities on 19 April 2012.[12]

3. On 13 May 2015, the President of the Mechanism considered Uwinkindi's comments as reported in a monitoring report for March 2015 as a request for revocation of the order referring his case to Rwanda and assigned the matter to a trial chamber of the Mechanism ("Trial Chamber").[13] On 22 October 2015, having considered submissions from Uwinkindi, the Prosecution, and Rwanda, the Trial Chamber dismissed Uwinkindi's request to revoke the referral of his case to Rwanda.[14]

4. Uwinkindi has appealed the Trial Chamber's decision denying his request to revoke the referral of his case to Rwanda.[15] In support, he seeks to admit as additional evidence on appeal: (i) judgements issued in The Netherlands and the United Kingdom in November and December 2015, respectively, denying requests to extradite genocide suspects for trial in Rwanda; (ii) a confidential report submitted to the Prosecution on [REDACTED]; (iii) the judgement rendered by the Rwandan High Court in December 2015 convicting Uwinkindi of genocide and extermination as a crime against humanity and sentencing him to life imprisonment; (iv) submissions from Uwinkindi's counsel before the Rwandan High Court in November 2015 concerning the unpreparedness of defence witnesses; (v) Articles 29 and 95 of the Rwandan Constitution as amended in December 2015; (vi) a motion filed in March 2016 by Mr. Bernard Munyagishari ("Munyagishari") in his proceedings in Rwanda seeking the disqualification of the presiding judge who also presided over Uwinkindi's trial before the Rwandan High Court; (vii) letters from Munyagishari's counsel to the President of the Rwandan High Court sent in May 2016 seeking the disqualification of the same judge; (viii) letters from the Rwandan government dated February and March 2016 seeking Rwanda's withdrawal from the jurisdiction of the African Court on Human and Peoples' Rights; (ix) an article contained in the Rwandan publication in *Igihe* on 18 May 2016; and (x) the fact that, in March 2016, Uwinkindi was transferred to Mpanga Prison. Uwinkindi also requests that he and Munyagishari be granted leave to testify before the Appeals Chamber concerning their proceedings in Rwanda.

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[10] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 ("ICTR Referral Decision"), pp. 57-59.
[11] ICTR Appeal Decision, para. 89.
[12] *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (May 2012), 1 September 2012 (confidential and *ex parte*), para. 3.
[13] *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Decision on Uwinkindi's Request for Revocation, 22 October 2015 ("Impugned Decision"), para. 3.
[14] Impugned Decision, para. 42.
[15] *See* Notice of Appeal from the Defence of Jean Uwinkindi, 27 November 2015 (original French version filed on 20 November 2015) ("Notice of Appeal"); Appeal Brief from the Defence of Jean Uwinkindi, 25 February 2016

II. APPLICABLE LAW

A. Rule 142 of the Rules

5. Rule 142 of the Rules provides for the admission of additional evidence on appeal, and the Appeals Chamber finds that, in accordance with the jurisprudence of the ICTR and the International Tribunal for the former Yugoslavia ("ICTY"), this provision is applicable to appeals of decisions issued pursuant Rule 14 of the Rules.[16] According to Rule 142(A) of the Rules, a motion for the admission of additional evidence shall clearly identify with precision the specific finding of fact made by the trial chamber to which the evidence is directed. For additional evidence to be admissible under Rule 142(C) of the Rules, the applicant must demonstrate that the additional evidence was not available at trial in any form, or discoverable through the exercise of due diligence.[17] The applicant must also show that the additional evidence is relevant to a material issue at trial and credible.[18] Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 142(C) of the Rules whether it *could* have been a decisive factor in reaching the Impugned Decision.[19]

6. Where, however, the evidence was available during the revocation proceedings or could have been discovered through the exercise of due diligence, it may still be admissible on appeal pursuant to Rule 142(C) of the Rules if the applicant shows that the exclusion of the additional evidence *would* lead to a miscarriage of justice, in that, if it had been admitted at trial, it *would* have had an impact on the Impugned Decision.[20]

7. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon

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(original French version filed on 11 February 2016) ("Appeal Brief"). *See also Eléments de preuve à l'appui de la réplique contre les conclusions du Procureur*, 11 February 2016.

[16] *See Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari's First and Second Motions for Admission of Additional Evidence, 25 February 2013 ("*Munyagishari* Decision of 25 February 2013"), para. 5; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Motion to Admit Additional Evidence before the Appeals Chamber pursuant to Rule 115, 16 November 2005 ("*Mejakić et al.* Decision of 16 November 2005"), para. 6.

[17] *Augustin Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Decision on Ngirabatware's Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014 ("*Ngirabatware* Decision of 21 November 2014"), para. 24; *Munyagishari* Decision of 25 February 2013, para. 5.

[18] *Ngirabatware* Decision of 21 November 2014, para. 25; *Munyagishari* Decision of 25 February 2013, para. 5; *Mejakić et al.* Decision of 16 November 2005, para. 10.

[19] *Munyagishari* Decision of 25 February 2013, para. 5; *Mejakić et al.* Decision of 16 November 2005, para. 10. *Cf. Ngirabatware* Decision of 21 November 2014, para. 26.

[20] *Cf. Ngirabatware* Decision of 21 November 2014, para. 27; *Munyagishari* Decision of 25 February 2013, para. 6; *Mejakić et al.* Decision of 16 November 2005, para. 12.

the trial chamber's decision.[21] An applicant who fails to do so runs the risk that the tendered material will be rejected without detailed consideration.[22]

III. DISCUSSION

A. Preliminary Matters

8. Uwinkindi's request for relief in his First Motion suggests that he seeks to admit as additional evidence on appeal the Impugned Decision issued by the Trial Chamber, his Notice of Appeal, and Appeal Brief.[23] As these documents are already part of the record, the Appeals Chamber dismisses this aspect of his request as moot.

9. In the Second Motion, Uwinkindi indicates that he seeks to admit a letter he sent to the Prosecution in February 2016 requesting disclosure of a report.[24] However, Uwinkindi's letter does not touch on the substance of his appeal and is therefore neither relevant to nor could have been a decisive factor in reaching the Impugned Decision. Consequently, the Appeals Chamber dismisses Uwinkindi's request in this respect without further consideration.[25]

B. Discussion

1. Judgements of the District Court of The Hague, The Netherlands[26] and the Westminster Magistrates' Court, United Kingdom[27]

10. Uwinkindi seeks to admit as additional evidence on appeal a Dutch Judgement, issued by the District Court of The Hague, The Netherlands on 27 November 2015, and a British Judgement, issued by the Westminster Magistrates' Court on 22 December 2015. He contends that the Dutch and British Judgements are credible, relevant, and were not available at trial.[28] Specifically, he argues that the findings of the Dutch Judgement, which ruled against the extradition of a genocide suspect for trial in Rwanda, show that the Rwandan justice system does not adhere to international

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[21] *Cf. Ngirabatware* Decision of 21 November 2014, para. 28 and references cited therein.
[22] *Ngirabatware* Decision of 21 November 2014, para. 28 and references cited therein.
[23] *See* First Motion, para. 40 (requesting the admission of "annexes 1 to 6"), Registry pagination ("RP.") 3538 (noting that Annexes 1, 2, and 6 contain the Impugned Decision, the Notice of Appeal and its English translation, and excerpts of the Appeal Brief, respectively). *See also* First Motion, Annexes 1, 2, and 6, RP. 3537-3506, 3297-3269.
[24] Second Motion, paras. 9, 41*bis* (requesting admission of, *inter alia*, Annex 1), RP. 12/3576*bis* (noting that annex 1 is the February 2016 Letter). *See also* Second Motion, Annex 1, RP. 11/3576*bis*.
[25] *Cf. Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version), para. 47.
[26] First Motion, Annex 3, RP. 3491-3481 (*Jean Claude Iyamuremye v. the State of the Netherlands*, Case No. C/09/494083/KG ZA 15/1205, The Hague District Court, 27 November 2015) ("Dutch Judgement").
[27] First Motion, Annex 4, RP. 3470-3343 (*The Government of the Republic of Rwanda v. Vincent Brown et al.*, Westminster Magistrates' Court, 22 December 2015) ("British Judgement").
[28] *See* First Motion, paras. 31-35.

standards of fairness towards the defence and undermine several conclusions to the contrary in the Impugned Decision.[29] He further argues that the British Judgement, which denied the extradition of five genocide suspects for trial in Rwanda, undermines several findings in the Impugned Decision as it demonstrates that: (i) the defence counsel imposed on him lacked the necessary expertise; (ii) he was denied the right to equality of arms as his defence had insufficient resources for investigations outside Rwanda and was unable to call witnesses under the same conditions as the prosecution; (iii) the right to choose his counsel was violated; and (iv) the principle of separation of powers was violated by the Rwandan Ministry of Justice.[30] He maintains that the Dutch and British Judgements could have been decisive to the Impugned Decision.[31]

11. The Prosecution notes that the Dutch and British Judgements rely on a report, which Uwinkindi filed before the Trial Chamber, dated 3 June 2015 and written by Martin Witteveen ("Witteveen"), a former Dutch Prosecutor and Magistrate who worked for the National Public Prosecution Authority in Rwanda.[32] Consequently, it contends that Uwinkindi improperly seeks to admit evidence that has already been considered and rejected by the Trial Chamber.[33] It further argues that Uwinkindi has failed to show how the Dutch and British Judgements could have been decisive in reaching the Impugned Decision in light of the fundamental differences between the legal regimes for extradition by national courts and referral by the ICTR.[34] Specifically, the Prosecution submits that cases referred to national jurisdictions by the ICTR provide additional safeguards, such as independent monitoring and the prospect of revocation, which do not exist in extradition proceedings.[35]

12. Uwinkindi replies that the "law gives equal treatment to the guarantees offered by" Rwanda regardless of whether the accused persons are transferred by the ICTR or other states.[36]

13. The Appeals Chamber considers that the Dutch and British Judgements, whose authenticity is not disputed, are sufficiently credible for admission as additional evidence under Rule 142 of the Rules.[37]

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[29] First Motion, paras. 10, 11, *referring, inter alia, to* Impugned Decision, paras. 25-28, 33, 34, 36. *See also* Dutch Judgement, RP. 3481 (para. 5.1).
[30] First Motion, paras. 13-16, *referring, inter alia, to* Impugned Decision, para. 25; Third Motion, paras. 26, 27.
[31] First Motion, paras. 16, 36, 39; Third Motion, para. 27.
[32] Prosecution's Consolidated Response of 19 April 2016, para. 10. *See also Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, *Transmission des éléments de preuve a l'appui de nos diverses écritures*, 9 September 2015, RP. 1406-1389 ("Witteveen Report of 3 June 2015").
[33] Prosecution's Consolidated Response of 19 April 2016, para. 10. The Prosecution further argues that the Dutch and British Judgements are "merely legal arguments" and do not constitute "evidence" as envisioned under Rule 142 of the Rules. *See* Prosecution's Consolidated Response of 19 April 2016, paras. 8, 10.
[34] Prosecution's Consolidated Response of 19 April 2016, para. 9.
[35] Prosecution's Consolidated Response of 19 April 2016, para. 9.

14. Turning to the availability of the Dutch and British Judgements during the proceedings before the Trial Chamber, the Appeals Chamber recalls that a party must establish that the evidence sought to be admitted was not available at trial "in any form whatsoever".[38] Although some of the evidence considered in the two judgements was available to Uwinkindi while the proceedings before the Trial Chamber were on-going, the Appeals Chamber considers that the Dutch and British Judgements reflect judicial determinations that were not available to Uwinkindi before the judgements were delivered.[39] Consequently, the Dutch and British Judgements may be admitted if they *could* have been a decisive factor in reaching the Impugned Decision.

15. The Dutch Judgement held that the right to legal assistance in genocide cases in Rwanda is insufficiently guaranteed and that, as a result, there is a well-founded reason to believe that the genocide suspect's extradition to Rwanda would result in a flagrant breach of Article 6 of the European Convention on Human Rights ("ECHR"), which concerns the right to a fair trial.[40] Consequently, the Dutch Judgement ruled against extradition of the suspect unless The Netherlands adequately addressed the concerns expressed in the Witteveen Report of 3 June 2015 concerning the lack of "capable legal assistance" for genocide suspects.[41]

16. As regards the British Judgement, Uwinkindi relies on passages reflecting the concerns of the Westminster Magistrates' Court about: (i) the general quality of defence representation in genocide cases in Rwanda;[42] (ii) the adequacy of defence counsel assigned to assist Uwinkindi

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[36] *See* Consolidated Reply, para. 25. In support of this proposition, Uwinkindi points to litigation related to the extradition of suspects to Rwanda that involve arguments made before the ICTR or that concern the Transfer Law. *See* Consolidated Reply, paras. 23, 24.

[37] The Appeals Chamber observes that the Prosecution has not objected to the French and English translations of the Dutch Judgement.

[38] *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Tharcisse Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal, 27 September 2010 ("*Renzaho* Decision of 27 September 2010"), para. 19 (emphasis omitted).

[39] *Cf. Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Decision on Referral under Rule 11*bis*, 3 May 2013 ("*Munyagishari* Decision of 3 May 2013"), para. 23. The Appeals Chamber rejects the Prosecution's position that the Dutch and British Judgements do not constitute "evidence" as envisioned under Rule 142 of the Rules.

[40] Dutch Judgement, RP. 3482, 3481 (para. 4.13). *See also* Dutch Judgement, RP. 3483 ("4.11. Witteveen has specifically in regard to genocide cases under the Transfer Law concluded that the defence for the accused lacks or it is insufficient/no [*sic*] adequate. Witteveen advises the States that extradite to Rwanda to provide with (genocide) accused [*sic*] with capable legal assistance to guarantee the fair trial.").

[41] Dutch Judgement, RP. 3482, 3481 (paras. 4.13, 5.1).

[42] Third Motion, para. 26, *quoting* British Judgement, RP. 3353 ("620. Witteveen was an objective witness who unlike any other had witnessed the trials of the transfer cases and considered the monitors' reports. Although of course counsel for Rwanda are right when they say he had seen only a limited number hearings but he had read the notes provided by his colleague as well as all the other evidence in relation to the conduct of the trials. The evidence he gave about how shocked he was by what he had witnessed of the defence representation of Bandora was striking and vivid. He had such "*deep concern*" and "*profound doubts*" (cross-examination 9.6.15) about the quality of defence representation that he felt duty bound to draft his Additional Report and wanted to give the court a true picture of what was going on. One can only imagine what a difficult situation he must have found himself in.") (emphasis in original), 3352 ("623. Witteveen does not blame the defence community in Rwanda for their lack of experience or ability but rather points out that whilst

following an order to that effect by the Rwandan High Court;[43] (iii) the Rwanda Bar Association[44] underestimating the amount of work and rates of pay in genocide cases;[45] and (iv) the finding that the lack of funding for locating and identifying defence witnesses, particularly those residing abroad, would inhibit Uwinkindi's ability to present a defence case.[46] Having noted these concerns among other considerations, the British Judgement concluded that should the genocide suspects be extradited to Rwanda, they would be exposed to a real risk of a flagrant denial of justice and a breach of Article 6 of the ECHR.[47]

17. The Appeals Chamber observes that both the Dutch and British Judgements assessed whether the proposed extraditions were compatible with Article 6 of the ECHR and, in particular, whether the genocide suspects in question would face a real risk of a flagrant denial of justice should they be extradited to Rwanda. In this context, The Hague District Court and Westminster Magistrates' Court examined the evidence before them and concluded that there was such risk. However, the test that needs to be met for the judgments to be admitted before the Mechanism as additional evidence on appeal under Rule 142 of the Rules is whether they *could* have been a decisive factor in reaching the Impugned Decision. For the reasons that follow, the Appeals

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the prosecution (NPPA) and the judiciary have received extensive help in capacity building from donors, the Rwanda[] Bar Association has received virtually none.").

[43] First Motion, para. 13, *quoting* British Judgement, RP. 3352 ("625. [...] In the Supreme Court, Uwinkindi argued that one of the two new counsel had been found by another court not to have the ability to plead a genocide case whilst the second lawyer had no relevant experience. [...] but on the face of it I had to agree with Uwinkindi they did not seem to have the experience that is needed in such cases.").

[44] The phrases Kigali Bar Association and Rwanda Bar Association are used interchangeably among the submissions and proposed additional evidence presented by Uwinkindi. For consistency, the Appeals Chamber will use "Rwanda Bar Association".

[45] Third Motion, para. 26, *quoting* British Judgement, RP. 3352 ("624. I feel reluctant to consider the rates of pay fixed by the President of the [Rwanda] Bar Association who after all knows the local conditions and what the cost of living in Rwanda is, which this court does not. Nevertheless I did consider that the officers of the [Rwanda Bar Association] who negotiated the rates of pay for the defence lawyers with [the Ministry of Justice] did not understand the demanding nature of even an adequate defence approach to such cases and had never considered the amount of preparation required. It was clear from [the Ministry of Justice's] approach that it had completely underestimated the time it would take to defend such cases when it had decided on the original fees of [30,000 Rwandan Francs] per hour per lawyer. [The Ministry of Justice] was concerned this was open to abuse and since then it has gradually reduced the fees which has led to the disputes. It is mark of the lack of professionalism of the lawyers that they have allowed the disputes to overshadow the work that should have been taking place to defend the transferred men who face such serious charges with long sentences if they are convicted.").

[46] Third Motion, para. 26, *quoting* British Judgement, RP. 3351 ("629. This leads to the second concern I have in relation to these [requested persons] which is the lack of funding for the identification and locating of witnesses in particular abroad. Without such funding and without defence counsel with the ability to identify, locate, contact and interview such witnesses themselves or without an investigator to do it for them, it is difficult to see how Uwinkindi or any other defendant will have a defence case to put before the court.").

[47] British Judgement, RP. 3350 ("632. I find that if extradited, as things presently stand, the defendants would be denied the effective representation of counsel in cases which so obviously call for effective and skilled representation by suitably experienced and resourced defence lawyers. It is too early to say that sufficient funding for defence investigations in relation to witnesses abroad will be provided. These defendants are legally aided in this country and will be indigent in Rwanda. I have seen in this case what the effective representation by counsel can achieve. Without such representation and funding, the High Court in Rwanda would be presented with the prosecution case and the [requested persons] would find it impossible to present their side of what happened. I find the [requested persons] would be exposed to a real risk of a flagrant denial of justice and a breach of Article 6 [of the ECHR].").

Chamber finds that any possible impact that the judgements may have had on the findings made in the Impugned Decision *could not* have been decisive.

18. The Appeals Chamber observes that the circumstances of the cases considered by the Dutch and British courts, on the one hand, and the Trial Chamber, on the other, were inherently and significantly different. The two domestic courts were confronted with extradition requests whereas the Trial Chamber considered a request for revocation of the specific transfer of Uwinkindi's case to Rwanda that was made under Rule 11*bis* of the ICTR Rules. Significantly, like the ICTR before it, the Mechanism is under a statutory obligation to monitor cases referred to national courts by the ICTR and can revoke a referral order "where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice" to do so.[48] Uwinkindi has not demonstrated that The Netherlands and the United Kingdom could provide the combined safeguards of monitoring with the possibility of revocation with respect to extradition. The lack of such safeguards in extradition is a marked difference from Uwinkindi's case, which bears negatively on any possible impact the Dutch and British Judgements could have had on the Impugned Decision.[49]

19. Furthermore, it appears that Uwinkindi's circumstances differed significantly from what the suspects in the Dutch and British extradition cases could expect. In this respect, the British Judgement noted that the funding available for Uwinkindi's defence was considerably higher than the sum available to genocide suspects under the Ministry of Justice's new legal aid policy. Specifically, it noted that, whereas under the new conditions accused facing genocide charges would be provided 15 million Rwandan Francs for proceedings through appeal, counsel for Uwinkindi had received approximately 80 million Rwandan Francs by December 2014.[50]

20. Moreover, the two judgements were based to a large extent on information about Uwinkindi's proceedings in Rwanda that was before the Trial Chamber when issuing the Impugned Decision. Specifically, the findings of the Dutch Judgement were exclusively based on the Witteveen Report of 3 June 2015, which addressed the circumstances surrounding Uwinkindi's trial as well as four other genocide-related trials in Rwanda.[51] Although the Trial Chamber did not expressly refer to the Witteveen Report of 3 June 2015 in the Impugned Decision, the Appeals

[48] Article 6(6) of the Statute of the Mechanism ("Statute").
[49] The Appeals Chamber observes that, in ultimately rejecting Uwinkindi's revocation request, the Trial Chamber emphasized the need not only for monitoring to continue but the ability "of taking remedial action and revoking Uwinkindi's case if the interests of justice so require." *See* Impugned Decision, para. 41.
[50] British Judgement, RP. 3405 (para. 331). *See also* Impugned Decision, para. 33. The British Judgement also considered that it was a "mark of the lack of professionalism of the lawyers that they have allowed the disputes to overshadow the work that should have been taking place to defend the transferred men who face such serious charges with long sentences if they are convicted." *See* British Judgement, RP. 3352 (para. 624).
[51] Dutch Judgement, RP. 3489-3487, 3482, 3481 (paras. 2.7, 4.13-4.15). *See also* Witteveen Report of 3 June 2015, RP. 1402, 1401, 1399-1394, 1390.

Chamber observes that the Trial Chamber extensively considered the circumstances identified in the Witteveen Report of 3 June 2015 that concerned Uwinkindi's proceedings in Rwanda.[52] Under these circumstances, the Appeals Chamber finds that the Dutch Judgement, other than offering its own conclusions in the context of a different legal regime, *could not* have been a decisive factor in the Trial Chamber's consideration of Uwinkindi's revocation request.

21. Likewise, the relevant excerpts of the British Judgement do not point to any material circumstances concerning Uwinkindi's proceedings in Rwanda that were not considered by the Trial Chamber in the Impugned Decision.[53] Like with respect to the Dutch Judgement, the Appeals Chamber observes that the material issues concerning Uwinkindi's trial that were considered by the Westminster Magistrates' Court were extensively considered by the Trial Chamber when reaching the Impugned Decision.[54] In this context, the Appeals Chamber is not persuaded that the Westminster Magistrates' Court analysis and findings in relation to the requested extradition of the genocide suspects before it *could have* been a decisive factor in reaching the Impugned Decision.

22. In conclusion, the Appeals Chamber finds that judicial opinions about Uwinkindi's case in Rwanda pronounced by domestic authorities in different proceedings adjudicating different cases, as set out in the Dutch and British Judgements, *could not* have been decisive in reaching the Impugned Decision. For the foregoing reasons, the Appeals Chamber dismisses Uwinkindi's request to admit the Dutch and British Judgements as additional evidence on appeal.

2. [REDACTED] Report of [REDACTED][55]

23. Uwinkindi seeks to admit as additional evidence on appeal a confidential report, dated [REDACTED], written by [REDACTED].[56] He contends that this report is credible, relevant, and would have impacted the Impugned Decision.[57] In particular, he argues that the report contradicts findings in the Impugned Decision on: (i) the competence of counsel Joseph Ngabonziza ("Ngabonziza"), who was appointed by the Rwandan High Court to assist Uwinkindi despite his

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[52] *Compare* Impugned Decision, paras. 18-29, 33 *with* Witteveen Report of 3 June 2015, RP. 1401-1399 (paras. 19-25).
[53] The Appeals Chamber observes the British Judgement considered the Witteveen Report of 3 June 2015, Witteveen's testimony on 8 and 10 June 2015, litigation before the ICTR concerning Uwinkindi's transfer, monitoring reports filed before the ICTR and the Mechanism as well as submissions from the Rwandan government in relation to Uwinkindi's proceedings in Rwanda, and the Impugned Decision when reviewing the particular circumstances surrounding Uwinkindi's proceedings in Rwanda and before the Mechanism. *See, e.g.*, British Judgement, RP. 3435, 3434, 3416, 3414-3498, 3390, 3357-3351.
[54] *Compare, e.g.*, British Judgement, RP. 3405-3400, 3356-3354, 3352, 3351 (paras. 328-369, 606, 614-617, 624, 625, 630) *with* Impugned Decision, paras. 18-20, 25-40.
[55] Confidential and *Ex Parte* Annex to Prosecution's Consolidated Response, 19 April 2016 (confidential and *ex parte*), RP. 4216-4208 (Memo from [REDACTED] to Chief, Appeals and Legal Advisory Division, MICT, in re: Transfer Genocide Cases in Rwanda, dated [REDACTED]) ("[REDACTED] Report of [REDACTED]").
[56] Second Motion, paras. 16, 17, 41; Fifth Motion, paras. 4, 26, 31.
[57] *See* Fifth Motion, paras. 4, 28-31; Second Motion, para. 18.

objections;[58] (ii) the equality of arms principle;[59] and (iii) his right to be tried by an independent and impartial tribunal.[60] He also submits that the report, transmitted confidentially to the Prosecution on [REDACTED], was unavailable as he only learned of it after the issuance of the Impugned Decision and did not receive it until 1 June 2016, after the Appeals Chamber ordered the Prosecution to disclose it.[61]

24. The Prosecution responds that Uwinkindi makes no effort to demonstrate how the [REDACTED] Report of [REDACTED] would have impacted the Impugned Decision,[62] and that it "contains factually incorrect assertions and equally erroneous, if not contradictory opinion, and cannot be relied upon to controvert the evidence before the Trial Chamber".[63] It specifically submits that: (i) regarding Ngabonziza, Uwinkindi relies on assertions in the [REDACTED] Report of [REDACTED] that are factually incorrect and repetitive of arguments rejected by the Trial Chamber;[64] (ii) regarding the equality of arms principle, observations in the report are out-of-date and thus of no probative value and Uwinkindi fails to demonstrate any impact of the report on the Impugned Decision;[65] and (iii) regarding judicial independence, it highlights aspects of the

[58] Fifth Motion, paras. 10-12, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4215, 4214 (paras. 5, 13). *See also* Consolidated Reply, para. 10, *referring to* [REDACTED] Report of [REDACTED], RP. 4214, 4209 (paras. 13, 40).

[59] Fifth Motion, paras. 13-17, *referring, inter alia, to* Witteveen Report of 3 June 2015, RP. 1403, 1401, 1399, 1393 (paras. 14, 21, 24, 51) *and* [REDACTED] Report of [REDACTED], RP. 4215, 4214 (paras. 9-11); Sixth Motion, paras. 24, 25, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4215, 4214 (paras. 9-11); Consolidated Reply, paras. 11-13, *referring, inter alia, to* Witteveen Report of 3 June 2015, RP. 1393-1389 (paras. 51, 52, 54, 56, 58, 62, 63) *and* [REDACTED] Report of [REDACTED]RP. 4209, 4208 (paras. 45-48).

[60] Fifth Motion, paras. 18-26, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4215-4211 (paras. 9, 11, 12, 17, 18, 26-28). Uwinkindi further submits that the author of the [REDACTED] Report of [REDACTED] questions the independence of the Rwanda Bar Association, particularly as it concerns the association's appointment of Ngabonziza as his counsel. Fifth Motion, para. 25, *quoting* [REDACTED] Report of [REDACTED], RP. 4209, 4208 (paras. 40, 44); Consolidated Reply, para. 40.

[61] Second Motion, paras. 8-13, 40; Fifth Motion, paras. 2, 3, 27, 40. *See also* First Motion, para. 29. In his Fifth Motion, Uwinkindi cites to several paragraphs of the [REDACTED] Report of [REDACTED], which he only generally argues "contradict[] the Trial Chambers assertions regarding the issues highlighted above." Fifth Motion, para. 30, n. 29, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4215, 4213, 4211-4209 (paras. 6, 8, 15, 19, 20, 31, 32, 38, 42). Where the cited paragraph is obviously related to an argument developed in the Fifth Motion, the Appeals Chamber has considered it in its analysis below.

[62] Prosecution's Consolidated Response of 1 August 2016, paras. 2, 8, 11, 12.

[63] Prosecution's Consolidated Response of 1 August 2016, paras. 3, 8, 9, 13, 14. In the Prosecution's Consolidated Response of 19 April 2016, it submits that the [REDACTED] Report of [REDACTED] "was an unsolicited and unsigned memo documenting the personal views and observations of the author, expressing unverified assertions of fact and untested conclusions, based on a doubtful methodology". In the Prosecution's view, the document "clearly does not qualify as a report" and that it "fell short of being either factual or expert evidence". *See* Prosecution's Consolidated Response of 19 April 2016, para. 16.

[64] Prosecution's Consolidated Response of 1 August 2016, paras. 9, 10.

[65] Prosecution's Consolidated Response of 1 August 2015, para. 11. The Prosecution also stresses that the [REDACTED] Report of [REDACTED] predates a practice direction issued by the Rwandan Chief Justice on 6 August 2015, which sets out the procedure for securing funding for defence investigations. *See* Prosecution's Consolidated Response of 1 August 2016, para. 11.

observations in the report that are contradictory on this issue and contends that Uwinkindi does not attempt to demonstrate the impact of the report on the Impugned Decision.[66]

25. Uwinkindi replies that the [REDACTED] Report of [REDACTED] is sufficiently credible given that its authenticity is not contested and in view of the fact that it was in the Prosecution's possession.[67] He further argues that significant credence should be given to the report in view of [REDACTED],[68] the fact that points raised in the report are corroborated by other sources,[69] and that the issues raised in the report were relied upon by the Westminster Magistrates' Court in the British Judgement.[70]

26. The Appeals Chamber considers that the [REDACTED] Report of [REDACTED], which was transmitted by the Prosecution to Uwinkindi, is sufficiently credible for admission as additional evidence on appeal as it is reasonably capable of belief.[71] As to its availability, the Appeals Chamber accepts that Uwinkindi was unaware of the confidential report during proceedings before the Trial Chamber and that it was not disclosed to him until 1 June 2016.[72] It also accepts that the report, which [REDACTED] transmitted confidentially to the Prosecution, could not have been discovered through an exercise of due diligence.

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[66] Prosecution's Consolidated Response of 1 August 2016, paras. 12-14. As evidence of the contradictory and unreliable nature of the [REDACTED] Report of [REDACTED], the Prosecution points to the appellate judgement of *The State of The Netherlands v. Jean Claude Iyamuremye*, Case No. 200.182.281/01, 5 July 2016, and argues that that judgement "flatly rejected conclusions" in the [REDACTED] Report of [REDACTED]. Prosecution's Consolidated Response, para. 14, n. 24.

[67] Consolidated Reply, paras. 3, 4. *See also* Consolidated Reply, para. 7.

[68] Consolidated Reply, paras. 3, 6.

[69] Consolidated Reply, para. 8, *referring generally to Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Public Report of the Court Monitor for the Uwinkindi Case June 2012, 5 November 2012; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (December 2012), 21 December 2012.

[70] Consolidated Reply, para. 8, *referring to* British Judgement, RP. 3466, 3352, 3351 (paras. 7, 625-628).

[71] *See Ngirabatware* Decision of 21 November 2014, para. 25. While the Prosecution responds that the report is "inherently unreliable" or of "doubtful credibility and reliability", the Appeals Chamber considers that the document contains sufficient indicia of *prima facie* credibility, including the date, the name of the author, and the recipient – Prosecution counsel of the Mechanism – for admission under Rule 142 of the Rules. *See* [REDACTED] Report of [REDACTED], RP. 4216.

[72] In the Second Motion, Uwinkindi requested the Prosecution to disclose the [REDACTED] Report of [REDACTED]. *See* Second Motion, paras. 8-18, 41. *See also* First Motion, para. 29. On 26 April 2016 and 4 May 2016, Uwinkindi filed two motions requesting that the Prosecution be ordered to disclose the report to him pursuant to Rules 71(B) and 73 of the Rules. *See* Ur[]gent Defence Motion for Disclosure of Additional Evidence by Prosecution, 6 May 2016 (confidential; original French version filed on 26 April 2016); Supplementary Defence Motion for Disclosure of Additional Evidence by Prosecution, 18 May 2015 (confidential; original French version filed on 4 May 2016). On 25 May 2016, the Appeals Chamber, *inter alia*: (i) granted, in part, Uwinkindi's motions for disclosure; (ii) ordered the Prosecution to allow Uwinkindi to inspect the report after obtaining consent from its author; and (iii) ordered Uwinkindi to file any motion related to the report within seven days of having inspected it. *See* Decision on Motions for Disclosure, 25 May 2016, p. 5; Prosecutor's Submission pursuant to the Decision on Motions for Disclosure of 25 May 2016, 31 May 2016. The Fifth Motion, which is the first motion that presents arguments as to the admissibility of the [REDACTED] Report of [REDACTED], was filed on 8 June 2016 and after the deadline of not later than 30 days of the filing of the reply brief on appeal. *See* Rule 142(A) of the Rules. However, the Prosecution has not objected on this basis and because the report was not disclosed to Uwinkindi until 1 June 2016 and only after a judicial order, the Appeals Chamber considers good cause exists for the delayed filing to seek this report's admission.

27. Notwithstanding, for additional evidence to have been unavailable in the first instance, it must not have been available at trial "in any form whatsoever".[73] In this respect, the Appeals Chamber considers that information in the [REDACTED] Report of [REDACTED] concerning the qualifications of Ngabonziza, the counsel imposed on Uwinkindi by the Rwandan High Court, is largely duplicative of information that was before the Trial Chamber.[74] Excerpts of the [REDACTED] Report of [REDACTED] concerning the lack of funding for defence investigation, changes in the legal aid scheme, and contractual disputes between defence counsel and the Rwandan Ministry of Justice[75] are also repetitive of information that was before the Trial Chamber.[76] Likewise, the elements of the [REDACTED] Report of [REDACTED] that Uwinkindi highlights concerning the Rwandan judiciary's alleged partiality, particularly as it concerns contractual disputes between defence counsel and the Ministry of Justice,[77] are repetitive of information that was before the Trial Chamber.[78] However, and in material respects, Uwinkindi's references to the [REDACTED] Report of [REDACTED] also contain the author's opinions concerning the circumstances of Uwinkindi's case and others, which were not before the Trial Chamber. Consequently, the [REDACTED] Report of [REDACTED] may be admitted if Uwinkindi demonstrates that it *could* have been a decisive factor in reaching the Impugned Decision.

28. Turning to the relevance and impact of the excerpts of the [REDACTED] Report of [REDACTED] regarding the competence of Uwinkindi's defence counsel Ngabonziza, the Appeals Chamber observes that the Trial Chamber concluded that Uwinkindi had not substantiated his submission that his "newly appointed counsel had insufficient years of experience" and referred to, *inter alia*, the annexed *curriculum vitae* of Ngabonziza.[79] Uwinkindi, however, highlights excerpts of the [REDACTED] Report of [REDACTED], which state that Ngabonziza had told the author

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[73] *Renzaho* Decision of 27 September 2010, para. 19 (emphasis omitted).

[74] As it concerns the qualifications of Ngabonziza, *compare* Fifth Motion, para. 12, *referring to* [REDACTED] Report of [REDACTED], para. 13 *and* Impugned Decision, para. 25, n. 104, *referring to Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Prosecution Brief Responding to Uwinkindi's Revocation Request, 4 September 2015 ("Response Brief at Trial"), Annex 13, RP. 1215, 1214.

[75] Fifth Motion, para. 16, *referring to* [REDACTED] Report of [REDACTED], RP. 4215, 4214 (paras. 9-11). *See also* Fifth Motion, n. 29, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4213, 4211, 4209, 4208 (paras. 15, 18, 32, 42, 44).

[76] *See* Impugned Decision, paras. 18, 19, 25, 30-35. The information is also duplicative of information that was in the Witteveen Report of 3 June 2015. *See* Witteveen Report of 3 June 2015, RP. 1401, 1400, 1394, 1393 (paras. 22, 23, 50-53).

[77] Fifth Motion, paras. 21-24, nn. 24-26, *referring to* [REDACTED] Report of [REDACTED], RP. 4215-4211 (paras. 9, 11, 12, 17, 18, 26-28).

[78] *See* Impugned Decision, paras. 18-21, 25-28, 38-40. Notably, the Witteveen Report of 3 June 2015 discussed contractual disputes between Uwinkindi's counsel and the Ministry of Justice, which delayed proceedings and resulted in the Rwandan High Court dismissing requests for adjournments, sanctioning counsel, and accelerating the examination of witnesses. Witteveen Report of 3 June 2015, RP. 1401-1399 (paras. 22-24).

[79] Impugned Decision, para. 25 n. 104.

that "he was a defence attorney for only five years", the author's observations that Ngabonziza "has no international experience and did not even defend a genocide case in Rwanda", and his opinion that Ngabonziza does not qualify "as a competent, experienced lawyer that has been before the ICTR".[80]

29. The Appeals Chamber is not persuaded that these excerpts of the [REDACTED] Report of [REDACTED] *could* have been a decisive factor in reaching the Impugned Decision. The Trial Chamber took express account of Ngabonziza's *curriculum vitae*, which reflects that he had been a military judge in Rwanda from 2001 to 2009 and had received repeated trainings concerning the crime of genocide.[81] In this respect, the [REDACTED] Report of [REDACTED] highlights that Ngabonziza had tried genocide cases as a military judge and, in addition, had five years of experience as a defence attorney.[82] Furthermore, while the [REDACTED] Report of [REDACTED] indicates that Ngabonziza has no international experience and had not defended a genocide case, the author's conclusion that he would not qualify as a competent, experienced lawyer before the ICTR on this basis is speculative and, in fact, inconsistent with the pre-requisites for the appointment of defence counsel before the ICTR.[83] Consequently, the Appeals Chamber finds that Uwinkindi fails to demonstrate that this aspect of the [REDACTED] Report of [REDACTED] *could* have been a decisive factor in reaching the Impugned Decision.

30. As to portions of the [REDACTED] Report of [REDACTED] that allegedly contradict findings in the Impugned Decision concerning the equality of arms principle, the Appeals Chamber observes that Uwinkindi highlights excerpts discussing changes in legal aid policies in Rwanda and, specifically, that the Minister of Justice "unilaterally ended the contract with [Uwinkindi's]

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[80] Fifth Motion, para. 12, *referring to* [REDACTED] Report of [REDACTED], RP. 4214 (para. 13).
[81] *See* Impugned Decision, para. 25, n. 104, *referring to* Response Brief at Trial, Annex 13, RP. 1215, 1214.
[82] [REDACTED] Report of [REDACTED], RP. 4214 (para. 13). To the extent that Uwinkindi also relies on the [REDACTED] Report of [REDACTED] to suggest that Rwanda Bar Association lacks sufficient independence, and more specifically, improperly and unduly influenced Uwinkindi's proceedings in Rwanda because its President "handpicked" Ngabonziza, a "military [judge] with clearly less sufficient experience than dozens of other lawyers", the Appeals Chamber is not persuaded that this evidence *could* have been a decisive factor in reaching the Impugned Decision. *See* [REDACTED] Report of [REDACTED], RP. 4209 (para. 40). These suggestions in the report fail to account for other evidence, which was considered by the Trial Chamber, that Uwinkindi was provided the opportunity to select new counsel after Ngabonziza's appointment but refused to do so. *See* Impugned Decision, para. 21. Furthermore, the Trial Chamber extensively considered the issues raised in the [REDACTED] Report of [REDACTED]as it concerned the conduct of the Rwanda Bar Association's acceptance of the new flat rate system of pay as well as its involvement in the appointment of Uwinkindi's attorneys after the termination of his original counsel's appointment. *Compare* Impugned Decision, paras. 19, 28, 33, nn. 75, 120, 139 *with* [REDACTED] Report of [REDACTED], RP. 4209 (para. 40).
[83] *See* Directive on the Assignment of Defence Counsel (ICTR), 14 March 2008, Article 13(i) ("Any person may be assigned as Counsel if the Registrar is satisfied that he fulfils the following pre-requisites: He is admitted to practice law in a State, or is a professor of law at a university or similar academic institution and has at least seven years' relevant experience"). As highlighted above, the evidence before the Trial Chamber reflected that Ngabonziza's legal career began in 2001 as a military judge. *See* Response Brief at Trial, Annex 13, RP. 1215, 1214.

attorneys in the middle of the crucial part of trial" and rejected a budget proposal submitted by the defence to conduct an investigation abroad.[84]

31. As noted above, such information was before the Trial Chamber.[85] The Trial Chamber extensively considered the changes in legal aid policies as it concerned transferred cases,[86] the conduct of the Ministry of Justice, including its termination of the contract of Uwinkindi's original counsel,[87] and the fact that the Ministry of Justice had rejected Uwinkindi's budget for defence investigations abroad.[88] The Trial Chamber determined, *inter alia*, that Uwinkindi failed to explain why funding already provided to him by Rwandan authorities was insufficient or how appointment of new counsel by the Rwanda Bar Association, subsequently confirmed by the Rwandan High Court and the Supreme Court, justified revocation of the referral of his case to Rwanda.[89] Additionally, the Appeals Chamber notes that beyond his cursory submission that excerpts of the author's opinion "give credence" to his arguments on appeal,[90] Uwinkindi fails to demonstrate how these excerpts *could* have been a decisive factor in reaching the Impugned Decision.

32. With respect to Uwinkindi's contentions that the [REDACTED] Report of [REDACTED] contradicts findings in the Impugned Decision as to the Rwandan judiciary's independence and impartiality, the Appeals Chamber observes that Uwinkindi points to parts of the report that discuss the likely influence of the Ministry of Justice on the Rwandan High Court's decisions to speed up trial proceedings at the end of 2014 and early 2015 in his case when judges themselves have allowed adjournments in previous years.[91] Uwinkindi also highlights opinions in the report that address, *inter alia*: (i) the author's concern as to the "ambiguous" approach of the Rwandan High Court to contractual issues with defence counsel;[92] (ii) the author being "worried" about the "motives" and "influence of the Minister [of Justice] and the Ministry" on court proceedings;[93] and

[84] Fifth Motion, para. 16, *referring to* [REDACTED] Report of [REDACTED], RP. 4215, 4214 (paras. 9-11). Furthermore, the paragraphs also include the author's opinions that the decision of the Minister of Justice "to keep the execution of the legal aid to himself [...] is not a very wise decision as it makes the whole thing too political" and positions "[the Minister of Justice] against the defen[c]e lawyers". In the author's view, the situation as it concerns legal aid policy in genocide cases is "messy". *See* [REDACTED] Report of [REDACTED], RP. 4215, 4214 (paras. 9, 10).
[85] *See supra* para. 27.
[86] *See* Impugned Decision, para. 33.
[87] *See* Impugned Decision, paras. 18, 19.
[88] *See* Impugned Decision, para. 35.
[89] *See* Impugned Decision, paras. 25, 28, 29, 35, 36.
[90] *See* Fifth Motion, para. 17.
[91] *See* Fifth Motion, para. 23, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4213 (paras. 19-21).
[92] *See* Fifth Motion, para. 21, *referring to* [REDACTED] Report of [REDACTED], RP. 4214 (para. 12).
[93] *See* Fifth Motion, paras. 22, 23, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4213 (paras. 17, 18).

(iii) the author's opinion that court rulings give a clear message to attorneys in other cases "by saying that if you cooperate, meaning, if you do not delay the case, you will be rewarded".[94]

33. As discussed above, evidence concerning the Rwandan High Court's treatment of Uwinkindi's right to counsel as well as judicial independence in Uwinkindi's case was before the Trial Chamber.[95] The Trial Chamber explicitly considered the Rwandan High Court's refusal in January 2015 to stay proceedings pending resolution of contractual disputes between the Ministry of Justice and Uwinkindi's counsel.[96] The Trial Chamber also considered that, thereafter, the Rwandan High Court sanctioned Uwinkindi's counsel for not appearing in court, instructed that new counsel be appointed in late January 2015, confirmed that Uwinkindi was not entitled to counsel of his own choosing, and immediately proceeded to hear witnesses in March 2015, none of whom was examined by Uwinkindi or his newly appointed counsel.[97] Consequently, these events, as noted in the [REDACTED] Report of [REDACTED], were considered by the Trial Chamber.

34. Moreover, the [REDACTED] Report of [REDACTED] fails to account for developments in Uwinkindi's case after [REDACTED] that were considered by the Trial Chamber. For example, the Trial Chamber noted that, in September 2015, the Rwandan High Court, *inter alia*: (i) allowed Uwinkindi to choose new counsel from a list of 68 counsel; (ii) upon his refusal, confirmed counsel appointed in January 2015; and (iii) reheard witnesses who testified in March 2015 when Uwinkindi was not adequately represented, after allowing his new defence counsel to prepare for trial.[98] Consequently, the circumstances considered in the [REDACTED] Report of [REDACTED] concern only part of the record as it concerned Uwinkindi's proceedings in Rwanda that were considered by the Trial Chamber.

35. Finally, the Appeals Chamber observes that much of the content of the [REDACTED] Report of [REDACTED] cited by Uwinkindi reflects the author's opinions.[99] These include [REDACTED]'s views that the judiciary's approach toward legal aid contractual disputes is "ambiguous",[100] his concerns regarding the lack of independence and "motives" of the Ministry of

[94] *See* Fifth Motion, para. 24, *referring to* [REDACTED] Report of [REDACTED], RP. 4212 (para. 26).
[95] *See supra* paras. 27, 31.
[96] *See* Impugned Decision, para. 19.
[97] *See* Impugned Decision, paras. 19, 20.
[98] *See* Impugned Decision, paras. 20, 21, 26, 27.
[99] *See* Fifth Motion, paras. 21-24.
[100] *See* Fifth Motion, para. 21, *referring to* [REDACTED] Report of [REDACTED], RP. 4214 (para. 12) ("The court's approach in this is, to put it mildly, ambiguous. They have consistently ruled that these are issues they will not interfere in and need to be discussed with the Minister. [...] What judges should have done is put more pressure on the Minister and decide the case could not continue and they would monitor the progress in the negotiations.").

Justice,[101] and belief that counsel would be "rewarded" for not causing delay.[102] Notwithstanding, it is also worth noting that the [REDACTED] Report of [REDACTED] expresses the author's support for "extraditions to Rwanda", his dismissal of "allegations that government authorities intervene in cases [and] unduly influence witnesses," and his "observation that Rwanda has a functioning justice system for genocide transfer cases."[103] While the author qualifies such assertions due to concerns about the handling of defence funding issues as well as his criticism of the available defence assistance in Rwanda, such statements nonetheless mitigate the potential impact of the [REDACTED] Report of [REDACTED] on the Trial Chamber's findings concerning Uwinkindi's right to be tried by an independent and impartial tribunal. Moreover, and as highlighted above, the Trial Chamber considered the circumstances surrounding Uwinkindi's proceedings in Rwanda upon which [REDACTED] relied, in part, to form these opinions. Having reviewed the Impugned Decision in light of the [REDACTED] Report of [REDACTED] as highlighted by Uwinkindi, the Appeals Chamber is not persuaded that the report *could* have been a decisive factor in reaching the Impugned Decision.

36. Based on the foregoing, the Appeals Chamber denies the admission of the [REDACTED] Report of [REDACTED] as additional evidence on appeal.

3. Rwandan High Court Judgement[104]

37. Uwinkindi seeks to admit the judgement rendered by the Rwandan High Court on 30 December 2015 in the proceedings against him.[105] He contends that the Rwandan High Court

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[101] *See* Fifth Motion, paras. 22, 23, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4213 (paras. 17, 18) ("The next thing I am worried about is the influence of the Minister and the Ministry has had on the proceedings. To an extent that I even question the independence of the judges"; and "[a] question of course is what were [the Minister of Justice's] motives and why he didn't leave it to the judges."). Uwinkindi also refers to portions of the [REDACTED] Report of [REDACTED] that discuss public statements from the Rwandan Chief Justice stating that "[t]here are people who want to tarnish the image of [the] judiciary" and "[o]thers try to delay court processes so that an impression is created that [the judiciary is] unable to handle those cases with international dimensions" without providing further elaboration. *See* Fifth Motion, n. 25, *referring, inter alia, to* [REDACTED] Report of [REDACTED], RP. 4212, 4211 (paras. 27, 28). Uwinkindi makes no submissions as to how these parts of report are relevant to or their impact on the Impugned Decision. For these reasons, the Appeals Chamber declines to further consider these aspects of the [REDACTED] Report of [REDACTED].

[102] *See* Fifth Motion, para. 24, *referring to* [REDACTED] Report of [REDACTED], RP. 4212 (para. 26) ("In light of the events as they have been unfolding in the last half year or so, there can be no doubt that the court has given a clear message in this judgement to the attorneys in the other cases by saying that if you cooperate, meaning: if you do not delay the case, you will get rewarded.").

[103] [REDACTED] Report of [REDACTED], RP. 4216, 4215 (para. 3).

[104] First Motion, Annex 5, RP. 3342-3298 (*The National Public Prosecution Authority v. Jean Uwinkindi*, Case No. RP0002/12/HCCI, The High Court Specialised Chamber for International and Cross-Border Crimes Sitting in Kigali, 30 December 2015) ("Rwandan High Court Judgement"). The French and English translations, filed on 4 and 24 March 2016, respectively, and transmitted on 23 May 2016. *See* RP. 67/3342*bis*-1/3342*bis* (French), 74/3342*ter*-1/3342*ter* (English).

[105] First Motion, paras. 18, 19, 40.

Judgement was unavailable and that his convictions and sentence of life imprisonment reflect the haste with which he was tried, particularly as the "issue of defence witnesses remained unresolved".[106] He further argues that the Rwandan High Court Judgement confirms views expressed by his defence that the Presiding Judge of the High Court "interrupted each of [Uwinkindi's] interventions".[107]

38. The Prosecution responds that Uwinkindi has made no attempt to identify with precision the specific factual findings in the Impugned Decision to which the Rwandan High Court Judgement relates or how it might impact the Impugned Decision.[108]

39. The Appeals Chamber finds that the Rwandan High Court Judgement, the authenticity of which is not challenged, is sufficiently credible for admission as additional evidence under Rule 142 of the Rules. In addition, as it was issued on 30 December 2015, there is no dispute that it was not available prior to the issuance of the Impugned Decision. Nonetheless, the Appeals Chamber reiterates that Uwinkindi bears the burden of identifying with precision the specific finding made by the Trial Chamber to which the proposed additional evidence pertains.[109] Uwinkindi has only generally pointed to his various grounds of appeal – to which all information included in the First Motion pertains – without specifying any particular finding in the Impugned Decision to which the Rwandan High Court Judgement relates.[110] Moreover, apart from referring to the disposition of the Rwandan High Court Judgement,[111] Uwinkindi does not point to any aspects of it supporting his particular arguments. Consequently, Uwinkindi has not demonstrated the relevance of or any potential impact the Rwandan High Court Judgement might have had upon the Impugned Decision. The Appeals Chamber therefore denies Uwinkindi's request to admit the Rwandan High Court Judgement as additional evidence on appeal pursuant to Rule 142 of the Rules.

4. Counsel Submissions[112]

40. Uwinkindi seeks to admit as additional evidence on appeal the following submissions made before the Rwandan High Court by his counsel Ngabonziza, in a document bearing a handwritten date of 12 November 2015:

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[106] First Motion, paras. 18, 19, 31, 38, 39. *See also* Consolidated Reply, paras. 27, 28.
[107] First Motion, para. 18.
[108] Prosecution's Consolidated Response of 19 April 2016, para. 11.
[109] *See Ngirabatware* Decision of 21 November 2014, para. 28.
[110] *See* First Motion, para. 30. *See also* First Motion, paras. 18, 19, 32, 35, 38, 39.
[111] First Motion, n. 16.
[112] First Motion, Annex 8, RP. 3080-3076 (*Conclusions de la défense d'Uwinkindi Jean (Maître Ngabonziza Joseph)* (confidential) ("Counsel Submissions").

> Let it be understood that the defence witnesses were not prepared. They came to the hearings without knowing how they could help Uwinkindi. They stated t[ha]t they were completely unaware of the purpose of their testimony.[113]

He contends that these submissions were unavailable at trial, and that they "require[] no comment, so manifest is the inability to resolve this issue."[114]

41. The Prosecution responds that Uwinkindi fails to identify the specific factual findings in the Impugned Decision to which this evidence relates and equally fails to show its impact.[115]

42. The Appeals Chamber considers that the Counsel Submissions, which bear Ngabonziza's signature, are reasonably capable of belief and are sufficiently credible for admission under Rule 142 of the Rules.[116] However, Uwinkindi has failed to identify the specific finding of fact made by the Trial Chamber or demonstrate how the proposed additional evidence might impact the Impugned Decision.[117] Consequently, the Appeals Chamber denies Uwinkindi's request to admit the Counsel Submissions as additional evidence on appeal pursuant to Rule 142 of the Rules.

5. Rwandan Constitution of 24 December 2015[118]

43. Uwinkindi seeks to admit as additional evidence on appeal Articles 29 and 95 of the Rwandan Constitution of 24 December 2015.[119] He contends that the new, vague, and sweeping language of Article 29 eliminates the "absolute and irrevocable nature of the rights of the Defence" that were enshrined in Articles 18 and 19 of the Rwandan Constitution of 4 June 2003,[120] and which were decisive in the decision to transfer his case to Rwanda.[121]

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[113] First Motion, para. 20.
[114] First Motion, para. 21. *See* Consolidated Reply, paras. 30-33. *See also* First Motion, paras. 31, 34.
[115] Prosecution's Consolidated Response of 19 April 2016, para. 12.
[116] Counsel Submissions, RP. 3076.
[117] *See supra*, para. 7.
[118] First Motion, Annex 9, RP. 3260-3103 (The Constitution of the Republic of Rwanda of 2003 Revised in 2015, Official Gazette No Special of 24/12/2015) ("Rwandan Constitution of 24 December 2015").
[119] First Motion, paras. 22-25, 38, 40. Article 29, *inter alia*, states: "Everyone has the right to due process of law, which includes the right: (1) to be informed of the nature and cause of charges and the right to defence and legal representation; (2) to be presumed innocent until proved guilty by a competent Court; (3) to appear before a competent Court; (4) not to be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute an offence under national or international law at the time it was committed. Offences and their penalties are determined by law; (5) not to be held liable for an offence he or she did not commit. Criminal liability is personal; (6) not to be punished for an offence with a penalty that is severer than the penalty provided for by the law at the time that offence was committed". Article 95 provides that "[t]he hierarchy of laws is as follows: (1) Constitution; (2) organic law; (3) international treaties and agreements ratified by Rwanda; (4) ordinary law; (5) orders". *See* Rwandan Constitution of 24 December 2015, RP. 3216, 3215, 3170, 3169. *See also* Consolidated Reply, para. 34.
[120] First Motion, paras. 22, 23, 38. Uwinkindi refers to the Constitution of 2013 in his submissions but he has annexed the Rwandan Constitution as of 4 June 2003 as amended through January 2011. *See* First Motion, Annex 10, RP. 3102-3100 (excerpts from the Constitution of the Republic of Rwanda of 4 June 2003 as Amended to Date, January 2011) ("Rwandan Constitution of 4 June 2003"). Article 18 of the Rwandan Constitution of 4 June 2003, *inter alia*, states: "[T]he right to defence [is] absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs". Article 19 of the same constitution, *inter alia*, states: "Every person accused of a crime shall

44. Uwinkindi further submits that Article 95 of the Rwandan Constitution of 24 December 2015, which sets forth the hierarchy of laws in Rwanda and places Rwandan Organic Law above international treaties and conventions ratified by Rwanda, creates a scenario where the Organic Law would "obliterate the last vestiges" of fair trial rights "enshrined in international judicial instruments ratified by Rwanda".[122]

45. The Prosecution responds that Uwinkindi fails to demonstrate how these legal provisions would have impacted the Impugned Decision.[123]

46. The Appeals Chamber finds that Articles 29 and 95 of the Rwandan Constitution of 24 December 2015, the authenticity of which is not challenged, are sufficiently credible for admission as additional evidence under Rule 142 of the Rules. As there is no dispute that Articles 29 and 95 of the Rwandan Constitution of 24 December 2015 were unavailable prior to the issuance of the Impugned Decision, the Appeals Chamber considers that they may be admitted as additional evidence on appeal if they are sufficiently relevant and *could* have been a decisive factor in reaching the Impugned Decision.

47. As regards Article 29 of the Rwandan Constitution of 24 December 2015, the Appeals Chamber notes that it concerns due process guarantees, including the right to defence representation, and is satisfied that it is relevant to material matters in the Impugned Decision.

48. However, Uwinkindi fails to demonstrate that the new provision changed any of his constitutional rights to his detriment in the proceedings against him. This is even more so given that the new Constitution entered into force just six days before the Rwandan High Court rendered its judgement in his case. In addition, the Appeals Chamber considers that the Transfer Law – which was also relied upon by the ICTR Referral Chamber and is *lex specialis* with regard to cases transferred to Rwanda[124] – remains in force and guarantees the presumption of innocence and the right to adequate time and facilities for the preparation of the defence.[125]

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be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair trial in which all the necessary guarantees for defence have been made available". *See* Rwandan Constitution of 24 December 2015, RP. 3101, 3100.

[121] First Motion, para. 23.

[122] First Motion, para. 25. *See also* Consolidated Reply, para. 35.

[123] Prosecution's Consolidated Response of 19 April 2016, para. 11.

[124] *See, e.g.*, *Munyagishari* Decision of 3 May 2013, para. 116.

[125] *See* ICTR Referral Decision, paras. 22, 135. *See also The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-01-75-I, Prosecutor's Request for the Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010, RP. 1487, 1486, 1474, 1473 (Law No. 11/2007 of 16/03/2007 Organic Law Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, 16 March 2007, Articles 13 (2) and (4), as amended by Law No. 03/2009/OL of 26/05/2009 Organic Law Modifying and Complementing the Organic Law No. 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and

49. Consequently, the Appeals Chamber finds that Uwinkindi failed to demonstrate that Article 29 of the Rwandan Constitution of 24 December 2015 *could* have been a decisive factor in the Impugned Decision. The Appeals Chamber therefore denies Uwinkindi's request to admit this provision as additional evidence on appeal pursuant to Rule 142 of the Rules.

50. With respect to Article 95 of the Rwandan Constitution of 24 December 2015, Uwinkindi fails to demonstrate that it is relevant to a material matter in his case or that it could have had any impact on the Impugned Decision. The Appeals Chamber therefore denies Uwinkindi's request to admit this provision as additional evidence on appeal pursuant to Rule 142 of the Rules.

6. Munyagishari Disqualification Motion[126]

51. Uwinkindi seeks to admit a motion filed by Munyagishari on 2 March 2016 before the Rwandan High Court requesting the disqualification of the Presiding Judge in his case who also participated in Uwinkindi's trial.[127] In his motion, Munyagishari complained that the Presiding Judge was hostile to an objection he made regarding the accuracy of the interpretation, made "vindictive and vexatious" determinations even though, in his view, she was disqualified, and allegedly changed the scheduling of his case without informing him whereas the prosecution was aware of the new schedule and went to court appropriately prepared.[128] Uwinkindi contends that the motion was not available during his revocation proceedings[129] and argues, *inter alia*, that it contradicts the conclusions in the Impugned Decision that his right to be tried by an independent and impartial judiciary was not violated.[130] Specifically, he asserts that the Munyagishari Disqualification Motion raises complaints about the judge treating objections as "a crime" and argues that the judge's "animosity" towards the defendant infringes the rights of the defence "to a fair trial and "looks like vindictive justice".[131] Uwinkindi contends that he made similar arguments when seeking this judge's recusal in his case.[132]

Other States, 26 May 2009, Article 2); Defence Reply to Prosecution Response, 23 March 2016 (original French version filed on 9 March 2016), RP. 3774 (Law No. 47/2013, Law Relating Transfer of Cases to the Republic of Rwanda, 16 June 2013, Articles 14(2) and (4)).

[126] Second Motion, Annex 2, RP. 3564-3559 (*Déclaration motivée de la récusation de Madame NGENDAKURIYO R. Alice, Présidente du siège dans RP 0012/13/HCCI*, 2 March 2016) ("Munyagishari Disqualification Motion"). The English translation of the Munyagishari Disqualification Motion was filed on 4 May 2016. *See* RP. 10/3576*bis*-1/3576*bis*.

[127] Second Motion, paras. 1*bis*-3*bis*, 30, 38-40, 42-46, 39*bis*, 41*bis*. *See also* Munyagishari Recusal Motion, RP. 3564.

[128] Munyagishari Disqualification Motion, RP. 6/3576*bis*-2//3576*bis*.

[129] Second Motion, paras. 40, 39*bis*.

[130] Second Motion, para. 38.

[131] Second Motion, para. 3*bis*.

[132] Second Motion, para. 3*bis*.

52. The Prosecution responds that Uwinkindi fails to identify the specific factual findings to which this material relates and contends that merely alleging bias and hostility in a different case is insufficient to show that this evidence would have impacted the Impugned Decision.[133]

53. There is no dispute as to the authenticity of the Munyagishari Disqualification Motion and that it was not available prior to the issuance of the Impugned Decision. The Munyagishari Disqualification Motion may be relevant to the Trial Chamber's consideration in the Impugned Decision of Uwinkindi's allegations of bias against the same judge in the context of his broader challenges that his right to be tried by an impartial tribunal was violated.[134] Consequently, the Munyagishari Disqualification Motion may be admitted if it *could* have been a decisive factor in reaching the Impugned Decision.

54. The allegations of bias raised in the *Munyagishari* case appear to concern specific incidents and decisions taken in that proceeding and do not substantiate Uwinkindi's allegations of bias in his own case. Although Munyagishari's submissions concern a judge who also sat on Uwinkindi's trial, the submissions in the Munyagishari Disqualification Motion are allegations. As such, it cannot be said that the submissions *could* have been decisive for the Trial Chamber in reaching its decision in Uwinkindi's case. The Appeals Chamber also observes that, in his later submissions, Uwinkindi annexed the decision of a Specialized Chamber of the Rwandan High Court dismissing Munyagishari's request.[135] Consequently, the Appeals Chamber denies Uwinkindi's request to admit the Munyagishari Disqualification Motion as additional evidence on appeal.

7. Munyagishari Letters[136]

55. Uwinkindi seeks to admit as additional evidence on appeal letters written by Munyagishari's counsel to the President of the Rwandan High Court requesting the disqualification of the Presiding Judge in his case who also participated in Uwinkindi's trial.[137] He submits that the Munyagishari

[133] Prosecution's Consolidated Response of 19 April 2016, para. 15.
[134] Impugned Decision, paras. 37-40.
[135] Sixth Motion, Annex 2, RP. 4281-4279 (The High Court, Specialised Chamber for International and Cross-Border Crimes, Case No. RP0003/16/HCCCI, 20 May 2016). The English translation of this decision was filed on 25 July 2016. *See* RP. 8/4336*ter*-6/4336*ter*.
[136] Sixth Motion, Annex 2, RP. 4287-4284 (Letter from Munyagishari's Counsel to President of the Rwandan High Court, dated 6 May 2016) ("Letter of 6 May 2016"), 4283-4282, 4291-4288 (Letter from Munyagishari's Counsel to President of the Rwandan High Court, dated 19 May 2016 annexing his submission dated 16 May 2016 outlining grounds for the Presiding Judge's disqualification) ("Letter of 19 May 2016") (collectively, "Munyagishari Letters"). The English translations were filed on 25 July 2016. *See* RP. 12/4336*ter*, 11/4336*ter* (Letter of 6 May 2016) and 10/4336*ter*-9/4336*ter*, 16/4336*ter*-13/4336*ter* (Letter of 19 May 2016). While Uwinkindi submits several other documents related to Munyagishari's proceedings, he only presents arguments concerning the Letter of 6 May 2016 and the Letter of 19 May 2016. *See* Sixth Motion, para. 18. Given the obligation of specifying with sufficient clarity the impact the proposed additional evidence could or would have had on the Impugned Decision, the Appeals Chamber will only consider the admissibility of these two documents.
[137] Sixth Motion, paras. 17-23, 26-32.

Letters are credible and relevant, and were unavailable prior to the filing of the Impugned Decision.[138] In particular, Uwinkindi argues that the letters raise the same complaints against the Presiding Judge that he had raised in his case, namely that the Presiding Judge: (i) prevented the hearing of Defence witnesses under the same conditions as Prosecution witnesses; (ii) did not allow sufficient time for conducting investigations; (iii) ordered the Defence to submit final briefs before it had completed investigations due to lack of funds; and (iv) took "up the cause of the Prosecution" in defending the attitude of a witness.[139] Uwinkindi argues that the Munyagishari Letters contradict several conclusions in the Impugned Decision.[140]

56. The Prosecution responds that Uwinkindi fails to demonstrate the relevance of the Munyagishari Letters or how they could have impacted the Impugned Decision.[141]

57. The Appeals Chamber observes that there is no dispute as to the authenticity of the Munyagishari Letters. The Appeals Chamber further considers that the Munyagishari Letters may be relevant to the Trial Chamber's consideration in the Impugned Decision of Uwinkindi's allegations of bias against the same judge in the context of his broader challenges that his right to be tried by an impartial tribunal was violated.[142] As there is no dispute that the Munyagishari Letters were unavailable during the proceedings before the Trial Chamber, they may be admitted if they *could* have been a decisive factor in reaching the Impugned Decision.[143]

58. Having reviewed the allegations identified by Uwinkindi in the Munyagishari Letters, the Appeals Chamber considers that the issues raised are particular to circumstances in the *Munyagishari* case [144] and also too vague in nature.[145] Moreover, Munyagishari's claims were

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[138] Sixth Motion, paras. 27, 29, 30.
[139] Sixth Motion, paras. 17, 18; Consolidated Reply, paras. 20, 21. Uwinkindi further argues that the letters corroborate Uwinkindi's concerns regarding the financing of investigations. Sixth Motion, para. 22.
[140] Sixth Motion, paras. 19-23, *referring to* Impugned Decision, paras. 9, 34, 36-41.
[141] Prosecution's Consolidated Response of 1 August 2016, paras. 19-22.
[142] *See supra* para. 53.
[143] The Sixth Motion, which seeks, *inter alia*, the admission of the Munyagishari Letters was filed on 23 June 2016 and after the deadline of not later than 30 days of the filing of the reply brief on appeal. *See* Rule 142(A) of the Rules. However, the Prosecution has not objected on this basis and because the letters came into existence in May 2016, the Appeals Chamber considers that good cause exists for the delayed filing seeking the admission of the letters.
[144] For example, the Munyagishari Letters include complaints concerning the Presiding Judge sustaining an objection by the Prosecution concerning the Defence's cross-examination of a particular witness and making "unsubstantiated claims that the Defence threatened, intimidated and angered the witness under cross-examination because [the Defence] allegedly asked the same questions too many times while counsel had to respect the witness". *See* Letter of 6 May 2016, RP. 12/4336*ter*. *See also* Letter of 19 May 2016, RP. 14/4336*ter*. The letters further raise allegations of the violation of the principle of equality of arms, highlighting as "the most concrete example" a decision, *inter alia*, providing the Defence six days instead of the requested 30 days "to carry out preliminary investigations in order to collect information to be able to identify potential defence witnesses." Letter of 6 May 2016, RP. 11/4336*ter*; Letter of 19 May 2016, RP. 15/4336*ter*. Likewise, the Letter of 19 May 2016 raises a particular complaint about an order requiring the Defence to make submissions on the indictment despite the fact that Munyagishari was not cooperating with counsel and that exculpatory evidence had not yet been found. *See* Letter of 19 May 2016, RP. 14/4336*ter*.
[145] *See, e.g.*, Letter of 19 May 2016, RP. 13/4336*ter* ("Furthermore, during the hearings, [the Presiding Judge] showed that she was not content with [Munyagishari]. This can be seen from the decisions where she always qualifies the

ultimately dismissed by a Specialized Chamber of the Rwandan High Court, which rejected his request to disqualify the Presiding Judge in his case.[146] Consequently, the Appeals Chamber is not persuaded that the Munyagishari Letters *could* have been a decisive factor in reaching the Impugned Decision and dismisses Uwinkindi's request to admit them as additional evidence on appeal.

8. Rwandan Letters[147]

59. Uwinkindi seeks to admit as additional evidence on appeal a declaration of the Rwandan government dated 24 February 2016 as well as letters from the Rwandan government dated 29 February 2016 and 1 March 2016 reflecting its intention to withdraw from the jurisdiction of the African Court on Human and Peoples' Rights ("AfCHPR").[148] He contends that the Rwandan Letters are credible and were unavailable at trial.[149] He further submits that they reflect Rwanda's intention to deny its nationals their fundamental right to appeal to the AfCHPR in cases when their rights are not respected by Rwandan courts and their internal remedies are exhausted.[150] In Uwinkindi's view, the ability to seek a remedy before the AfCHPR was a factor before the Referral Chamber in support of arguments that his fair trial rights would be guaranteed in Rwanda,[151] and that Rwanda's withdrawal from the AfCHPR contradicts the reasoning in paragraph 41 of the Impugned Decision as well as the Trial Chamber's general consideration that Uwinkindi could seek remedies through appellate proceedings.[152]

60. The Prosecution responds that Uwinkindi fails to identify how the Rwandan Letter of 1 March 2016 concerns any factual finding in the Impugned Decision or demonstrate how it would have impacted it.[153] Specifically, it contends that Rwanda's accession to the jurisdiction of the

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Prosecutor's arguments as founded while disregarding the interests of the accused and of justice. She has taken the same stance toward the accused's defence team.").

[146] *See supra* para. 54.

[147] Third Motion, Annex 1, RP. 4160 (Re: [REDACTED], 1 March 2016) ("Rwandan Letter of 1 March 2016"); Fourth Motion, Annex 1, RP. 4187 (Letter from the Embassy of the Republic of Rwanda, No. ARA/274/2016, 29 February 2016) ("Rwandan Letter of 29 February 2016"); Fourth Motion, Annex 2, RP. 4186, 4185 (Withdrawal for Review by the Republic of Rwanda from the Declaration Made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 24 February 2016) ("Rwandan Declaration of 24 February 2016") (collectively, "Rwandan Letters").

[148] Third Motion, paras. 10, 28; Fourth Motion, paras. 11, 43. *See also* Third Motion, paras. 11-26; Fourth Motion, paras. 12-22, 30-42.

[149] Third Motion, paras. 19, 20*bis*, 27; Fourth Motion, paras. 32, 36, 41. *See also* Third Motion, paras. 17, 18; Fourth Motion, paras. 30, 31.

[150] Third Motion, paras. 12-14, 18, 20, 23; Fourth Motion, paras. 15, 17, 21, 31, 33, 39. *See also* Consolidated Reply, para. 36.

[151] Third Motion, paras. 18, 25; Fourth Motion, para. 31.

[152] Third Motion, paras. 17, 20, 22, 25; Fourth Motion, paras. 34, 37, 38.

[153] Prosecution's Consolidated Response of 19 April 2016, paras. 17, 19. The Prosecution did not file any response to the Fourth Motion and therefore has not addressed Uwinkindi's arguments concerning the Rwandan Declaration of 24 February 2016 and the Rwandan Letter of 29 February 2016.

AfCHPR was not an issue before the Referral Chamber or the Trial Chamber and that Uwinkindi's arguments concerning the letter are speculative.[154]

61. The Appeals Chamber observes that there is no dispute as to the authenticity of the Rwandan Letters and that they were unavailable prior to the issuance of the Impugned Decision.[155] Consequently, the letters may be admitted if they are sufficiently relevant and *could* have been a decisive factor in reaching the Impugned Decision.

62. The Rwandan Letters reflect the Rwandan government's "withdrawal for review by [Rwanda] from the Declaration made under Article 34(6) of the Protocol of the African Charter on Human and Peoples' Rights on the establishment of the [AfCHPR]."[156] The Rwandan Declaration of 24 February 2016 further explains that, although Rwanda unilaterally acceded to the jurisdiction of the AfCHPR on 22 January 2013: (i) "a Genocide convict who is a fugitive from justice has [...] secured a right to be heard by the [AfCHPR], ultimately gaining a platform for re-invention and sanitization, in the guise of defending the human rights of the Rwandan citizens"; (ii) Rwanda "never envisaged that the kind of person described above would ever seek and be granted a platform" through Rwanda's accession to AfCHPR; and (iii) Rwanda "has set up strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues".[157]

63. While Uwinkindi submits that Rwanda's withdrawal impairs the fundamental right of its nationals to seek remedies before the AfCHPR, he points to no aspect of the Impugned Decision to which the Rwandan Letters pertain and fails to identify with precision which specific finding of fact made by the Trial Chamber the Rwandan Letters could impact. Moreover, the Appeals Chamber notes that paragraph 41 of the Impugned Decision emphasizes Uwinkindi's ability to "seek an appropriate remedy in *domestic* appellate proceedings for any potential violations of his fair trial rights".[158] Consequently, Uwinkindi fails to demonstrate that the Rwandan Letters *could* have been

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[154] Prosecution's Consolidated Response of 19 April 2016, para. 18. The Prosecution further posits that Rwanda's withdrawal from the AfCHPR would not have impacted the Impugned Decision given the safeguards applicable to Uwinkindi's case through independent monitoring and the prospect of revocation by the Mechanism. *See* Prosecution's Consolidated Response of 19 April 2016, para. 19.

[155] The Rwandan Declaration of 24 February 2016 is signed by Louise Mushikiwabo, Rwandan Minister of Foreign Affairs and Cooperation, and is dated 24 February 2016. *See* Rwandan Declaration of 24 February 2016, RP. 4185. The Rwandan Letter of 29 February 2016 bears the letterhead of the Embassy of the Republic of Rwanda in Ethiopia and is dated 29 February 2016. Rwandan Letter of 29 February 2016, RP. 4187. The Rwandan Letter of 1 March 2016 is addressed to the President of the AfCHPR, signed by Johnston Busingye, Rwandan Minister of Justice/Attorney General for Rwanda, and dated 1 March 2016. *See* Rwandan Letter of 1 March 2016, RP. 4160.

[156] Rwandan Letter of 29 February 2016, RP. 4187. *See also* Rwandan Letter of 1 March 2016, RP. 4160; Rwandan Declaration of 24 February 2015, RP. 4185.

[157] Rwandan Declaration of 24 February 2015, RP. 4185.

[158] Emphasis added. *See also* Impugned Decision, paras. 9 ("Such a determination must necessarily take due consideration of the possibility and availability of remedies for any procedural irregularities at the trial and appeal stage

decisive had they been considered by the Trial Chamber, and the Appeals Chamber dismisses his request to admit them as additional evidence on appeal.

9. *Igihe* Article[159]

64. Uwinkindi seeks to admit as additional evidence on appeal an article published on 18 May 2016 in the Rwandan publication *Igihe* that reported on statements made during the twenty-second commemoration of the Rwandan genocide.[160] Uwinkindi submits that the *Igihe* Article is credible, relevant, and was unavailable prior to the issuance of the Impugned Decision.[161] He contends that the article reports on statements made by Fidele Ndayisaba ("Ndayisaba"), Executive Secretary of the Unity and Reconciliation Commission, Pastor Tom Rwagasana ("Rwagasana"), the deputy spokesperson for the Association of Pentecostal Churches in Rwanda, and other religious leaders that call for individuals convicted in relation to the genocide, including Uwinkindi, to be stripped of their religious titles as priests, pastors, or sheikhs.[162] He argues that, given the influence these "eminent individuals have on the Rwandan community, the judicial milieu included", their statements are a "considerable violation" of his right to the presumption of innocence and right to be tried by an impartial and independent tribunal.[163] According to Uwinkindi, these statements are proof that fair trial guarantees in Rwanda are "nothing more than an illusion" and that, in particular, they "cast doubt" on his rights to have a "fair trial before the Supreme Court".[164] He argues that, in such a situation, the possibility of potential relief at the Supreme Court for violation of his fair trial rights, "as extolled by the Trial Chamber", is no longer possible.[165]

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of the national proceedings."), 14 ("Uwinkindi has also not shown that any possible violation, if established, could not be addressed or appropriately remedied by the [Rwandan] High Court or in any subsequent appellate proceedings."), 27 ("The Trial Chamber therefore considers that any potential violation of Uwinkindi's fair trial rights resulting from the lack of assistance of counsel in March 2015 could still be remedied at trial or on appeal."), 40 ("In relation to the hearings on 15 January and 6 February 2015, Uwinkindi fails to demonstrate that any possible violation of his right to be tried before an independent and impartial tribunal could not be addressed or appropriately remedied in any subsequent appellate proceedings. The same applies to Uwinkindi's reference to the [Rwandan] High Court's alleged failure to sanction the Prosecution for any inappropriate remarks, or its alleged bias.") (internal references omitted).

[159] *See* Sixth Motion, paras. 6-16, Annex 1, RP. 4322-4309 (Article in *Igihe* Newspaper, dated 18 May 2016). The English translation of Annex 1 was filed on 25 July 2016. *See* RP. 32/4336*ter*-21/4336*ter* ("*Igihe* Article").

[160] Sixth Motion, paras. 6-16, 27-32.

[161] Sixth Motion, paras. 27, 29.

[162] Sixth Motion, paras. 6-8.

[163] Sixth Motion, paras. 9-11, 14, 15, 30; Consolidated Reply, paras. 15-19.

[164] Sixth Motion, paras. 9, 14; Consolidated Reply, paras. 15, 16.

[165] Sixth Motion, para. 14.

65. The Prosecution responds, *inter alia*, that the *Igihe* Article should not be admitted as Uwinkindi fails to identify with precision the relevant finding or demonstrate how the reported utterances would have impacted the Impugned Decision.[166]

66. The Appeals Chamber considers that the *Igihe* Article is sufficiently credible for admission as additional evidence on appeal as there is no dispute as to its authenticity or the accuracy of its reporting on statements made by Ndayisaba, Rwagasana, and others during the twenty-second commemoration of the Rwandan genocide. Likewise, it is not contested that the article and its contents were unavailable prior to the issuance of the Impugned Decision. Consequently, the *Igihe* Article may be admitted if sufficiently relevant and if it *could* have been a decisive factor in reaching the Impugned Decision.[167]

67. With regard to the relevance of the *Igihe* Article, the Appeals Chamber observes that it reports on Ndayisaba's statements asking religious leaders to consider stripping pastors, priests, and sheikhs of their titles once they have been convicted of genocide-related crimes, given the "confusion" and "shock" that maintaining such titles causes to the community, and ensuing responses from representatives of various religious institutions.[168] The article further refers to statements of Pastor Rwagasana explaining that "the followers of his church had also asked that Pastor Jean Uwinkindi be stripped of his title because, in their opinion, he no longer deserved it after he was found guilty of the extermination of Tutsis during the genocide."[169] The *Igihe* Article also quotes Rwagasana as having said: "If a priest, a pastor, is implicated in the genocide of the Tutsis, he must be stripped of his title as this would do credit to our reputation as God's servants".[170]

68. The Appeals Chamber fails to see how statements made Ndayisaba, Rwagasana, or any other official of a church or a religious institution are relevant to or could have impacted the findings in the Impugned Decision concerning Uwinkindi's presumption of innocence and his ability to be tried before an impartial judiciary. To the extent the *Igihe* Article refers to Uwinkindi, it merely reflects that Uwinkindi had been convicted of genocide-related crimes and opinions held by members of a church that Uwinkindi should no longer hold the title of a Pastor as a consequence. The Appeals Chamber fails to see how such statements, or any of the others in the article, which

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[166] Prosecution's Consolidated Response of 1 August 2016, paras. 16, 17, 22.
[167] The Sixth Motion, which seeks, *inter alia*, the admission of the *Igihe* Article was filed on 23 June 2016 and after the deadline of not later than 30 days of the filing of the reply brief on appeal. *See* Rule 142(A) of the Rules. However, the Prosecution has not objected on this basis and because the article came into existence in May 2016, the Appeals Chamber considers that good cause exists for the delayed filing to seek its admission.
[168] *See, e.g., Igihe* Article, RP. 26/4336*ter*-28/4336*ter* (reporting on Ndayisaba's statements).
[169] *Igihe* Article, RP. 26/4336*ter*.
[170] *Igihe* Article, RP. 26/4336*ter*.

reflect the discussion of issues pertaining to certain religious institutions in Rwanda, reflect a violation of Uwinkindi's presumption of innocence in Rwandan courts of law or his ability to be tried by an impartial judiciary in seeking review of his conviction by the Rwandan High Court. Notably, the statements were not made by or directed at any members of the Rwandan judiciary. The Appeals Chamber therefore finds that Uwinkindi's arguments as to the impact of these statements on his presumption of innocence or the fairness of his proceedings before the Supreme Court are speculative.

69. Based on the foregoing, the Appeals Chamber finds that Uwinkindi has failed to demonstrate that the *Igihe* Article is relevant to and *could* have been a decisive factor in the Trial Chamber's analysis of his right concerning the presumption of innocence and of his right to be tried before an impartial judiciary. Consequently, the Appeals Chamber dismisses his request for its admission as additional evidence on appeal.

10. Uwinkindi's Transfer to Mpanga Prison

70. Uwinkindi seeks to admit as additional evidence on appeal the fact that Rwandan prison authorities transferred him to Mpanga Prison, more than 100 kilometres from Kigali.[171] According to Uwinkindi, the transfer occurred "without the knowledge of the Mechanism" and violates provisions of the Statute and UN Security Council Resolutions that require the Rwandan authorities to "cooperate without reservation with the Mechanism".[172] Uwinkindi contends that, as a result of his transfer, he has been "deprived of the facilities necessary for the preparation of his defence case", "of any form of contact with the Monitor, his Counsel before the Mechanism", and of the ability to "follow the proceedings before the Supreme Court and the Appeals Chamber of the Mechanism".[173] He submits that "this piece of evidence", arising from circumstances after the Impugned Decision, is reliable, relevant, and could have changed the outcome of the Trial Chamber's determination.[174]

71. The Prosecution did not respond to these submissions.[175]

72. The Appeals Chamber reiterates that the purpose of Rule 142 of the Rules is to address instances where a party is "in possession of material" that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.[176] As repeatedly held by the *ad*

[171] Fourth Motion, paras. 6, 23-29, 41.
[172] Fourth Motion, paras. 23, 24, 26-28.
[173] Fourth Motion, paras. 25, 28.
[174] Fourth Motion, paras. 29, 41.
[175] *See supra* n. 7.
[176] *See, e.g., Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Théoneste Bagosora's Motion for Admission of Additional Evidence, 7 February 2011 ("*Bagosora et al.* Decision of 7 February 2011"),

hoc Tribunals, a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of relevance and credibility.[177]

73. The Appeals Chamber notes that, in respect of his transfer to Mpanga Prison, Uwinkindi has not tendered any material that could be admitted as additional evidence. Consequently, the Appeals Chamber dismisses Uwinkindi's request to admit the fact of his transfer to Mpanga Prison as additional evidence on appeal.

11. Testimony from Uwinkindi and Munyagishari

74. Uwinkindi further requests that he and Munyagishari be allowed to testify before the Appeals Chamber.[178] Uwinkindi submits that he has first-hand information on the history and progress of his case and could provide the Appeals Chamber with "information of crucial importance" to properly evaluate the Rwandan judiciary's capability and willingness to ensure the rights of the accused.[179] He argues that Munyagishari, who is encountering the same difficulties he experienced before the Rwandan High Court, can also provide first-hand information on the treatment of the accused's rights in Rwanda, as well as the circumstances surrounding defence investigations and the ability to present defence evidence.[180]

75. The Prosecution did not respond to this aspect of Uwinkindi's submissions, which Uwinkindi emphasises in his reply.[181]

76. The Appeals Chamber has the authority to summon a witness, in appropriate circumstances, to testify before the Chamber so as to facilitate the effective conduct of appeal proceedings.[182]

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para. 8; *Renzaho* Decision of 27 September 2010, para. 3; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-01-70-A, Decision on Rukundo's Motion for the Admission of Additional Evidence on Appeal, 4 June 2010, para. 5; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on Request to Admit Additional Evidence, 2 October 2008 ("*Hategekimana* Decision of 2 October 2008"), para. 5; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006 ("*Nahimana et al.* Decision of 5 May 2006"), para. 20; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001 ("*Kupreškić et al.* Decision of 8 May 2001"), para. 5.

[177] *See, e.g., Bagosora et al.* Decision of 7 February 2011, para. 8; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Further Motion to Present Additional Evidence, 9 April 2009, para. 18; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009, para. 13; *Hategekimana* Decision of 2 October 2008, paras. 7, 8. *See also* Practice Direction on Requirements and Procedures for Appeals, MICT/10, 6 August 2013, para. 12(e), providing that a party applying to present additional evidence pursuant to Rule 142 of the Rules shall do so by way of a motion filed containing "an appendix with copies of the evidence the party is applying to present before the Appeals Chamber".

[178] First Motion, paras. 26-28, 31; Second Motion, paras. 31-35.

[179] First Motion, para. 28.

[180] Second Motion, paras. 33-35.

[181] *See* Consolidated Reply, para. 37.

However, Rule 142 of the Rules does not permit a party to merely request a particular person to be summoned as a witness to give evidence at the appellate stage.[183] Where a party seeks to call a witness at the appellate stage, it needs to provide a statement or other documentation of the potential witness's proposed evidence, which the Appeals Chamber may admit as additional evidence pursuant to Rule 142 of the Rules and on the basis of which it may determine whether calling the witness to testify on appeal is necessary.[184]

77. Uwinkindi has not provided the Appeals Chamber with any statement or other documentation from himself or Munyagishari that would be admissible as additional evidence and that would allow the Appeals Chamber to determine whether to call anyone to testify. Uwinkindi's submission as to what he and Munyagishari could testify to is insufficient.[185] The Appeals Chamber therefore denies Uwinkindi's request.

IV. DISPOSITION

78. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the First, Second, Third, Fourth, Fifth, and Sixth Motions.

79. The Appeals Chamber emphasizes that the present conclusion is in no way indicative of its consideration of the merits of Uwinkindi's appeal of the Impugned Decision. In other words, the appeal proceeds without the prayer for the admission of additional evidence.

Done in English and French, the English version being authoritative.

Done this 22nd day of September 2016,
At The Hague,
The Netherlands.

Judge Burton Hall, Presiding

[Seal of the Mechanism]

[182] *See, e.g., Bagosora et al.* Decision of 7 February 2011, para. 8; *Nahimana et al.* Decision of 5 May 2006, para. 20. *Kupreškić et al.* Decision of 8 May 2001, para. 5.
[183] *See, e.g., Bagosora et al.* Decision of 7 February 2011, para. 8; *Nahimana et al.* Decision of 5 May 2006, para. 20; *Kupreškić et al.* Decision of 8 May 2001, paras. 5, 10.
[184] *See, e.g., Bagosora et al.* Decision of 7 February 2011, paras. 8, 9; *Nahimana et al.* Decision of 5 May 2006, para. 20. *Cf. Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber, 30 June 2005 ("*Galić* Decision of 30 June 2005"), para. 87; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on the Request for Presentation of Additional Evidence, 18 November 2003, para. 13.
[185] *See* First Motion, para. 28; Second Motion, paras. 31-35. *Cf. Galić* Decision of 30 June 2005, paras. 86, 87.

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