

MICT-12-25-AR14.1
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UNITED
NATIONS



Mechanism for International Criminal Tribunals

Case No.: MICT-12-25-AR14.1

Date: 4 October 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: 4 October 2016

PROSECUTOR

v.

JEAN UWINKINDI

PUBLIC

**DECISION ON AN APPEAL CONCERNING
A REQUEST FOR REVOCATION OF A REFERRAL**

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Richard Karegyesa
Mr. Cheickh Bangoura
Ms. Thembile Segoete

Counsel for Mr. Jean Uwinkindi:

Mr. Gatera Gashabana

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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of an appeal filed by Mr. Jean Uwinkindi (“Uwinkindi”) on 11 February 2016¹ against a decision of the Trial Chamber of the Mechanism (“Trial Chamber”), dismissing his request to revoke the referral of his case to the Republic of Rwanda (“Rwanda”).² The Prosecutor of the Mechanism (“Prosecution”) filed a response on 26 February 2016,³ and Uwinkindi filed a reply on 9 March 2016.⁴

I. BACKGROUND

2. Uwinkindi, a former pastor of the Kayenzi Pentecostal Church in Nyamata Sector, Kanzenze Commune, Kigali-Rural Prefecture, was charged with genocide and extermination as a crime against humanity before the International Criminal Tribunal for Rwanda (“ICTR”).⁵ These charges related to alleged attacks at his church, area roadblocks, Rwankeri Cellule, Kayenzi hill, the Cyugaro swamps, and the Kanzenze communal offices.⁶ Uwinkindi was arrested in Uganda on 30 June 2010 and was transferred to the ICTR on 2 July 2010.⁷

3. On 28 June 2011, pursuant to Rule 11*bis* of the ICTR Rules of Procedure and Evidence, an ICTR referral chamber (“Referral Chamber”) ordered that Uwinkindi’s case be referred for trial before the High Court of the Republic of Rwanda (“Rwandan High Court” and “Rwanda”, respectively).⁸ On 16 December 2011, the ICTR Appeals Chamber affirmed the order of the Referral Chamber⁹ and Uwinkindi was transferred into the custody of Rwandan authorities on 19 April 2012.¹⁰

4. On 13 May 2015, the President of the Mechanism considered Uwinkindi’s statements, as reported in the Monitoring Report for March 2015, as a request for revocation of the order referring

¹ Appeal Brief from the Defence of Jean Uwinkindi, 25 February 2016 (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 (“Annexes to Appeal Brief”).

² *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Decision on Uwinkindi’s Request for Revocation, 22 October 2015 (“Impugned Decision”), paras. 1, 42.

³ Prosecution Response to *Mémoires d’appel [sic] de la défense de Jean Uwinkindi*, 26 February 2016 (“Response Brief”). The Registry distributed the Response Brief on 29 February 2016. See Decision on Uwinkindi’s Motion for Extension of Time to File His Reply Brief, 8 March 2016, p. 1.

⁴ Defence Reply to Prosecution Response, 23 March 2016 (original French version filed on 9 March 2016) (“Reply Brief”).

⁵ *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.

⁶ ICTR Appeal Decision, para. 2.

⁷ *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”), para. 3.

⁸ ICTR Referral Decision, pp. 57-59.

⁹ ICTR Appeal Decision, para. 89.

¹⁰ *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.

his case to Rwanda and assigned the matter to the Trial Chamber.¹¹ On 1 October 2015, the Trial Chamber dismissed Uwinkindi's request for a stay of proceedings before the Rwandan High Court pending the resolution of his revocation request and his request for oral arguments.¹² On 22 October 2015, the Trial Chamber issued the Impugned Decision dismissing Uwinkindi's request to revoke the referral of his case to Rwanda.¹³ In particular, the Trial Chamber concluded that Uwinkindi had failed to show that the conditions for referral of his case were no longer met and that it was in the interests of justice to revoke the referral order.¹⁴

5. Uwinkindi filed his Notice of Appeal on 20 November 2015¹⁵ and an appeal brief on 5 December 2015.¹⁶ Following determinations by the Pre-Appeal Judge as to the timing and validity of filings,¹⁷ the Appeals Chamber ordered, *inter alia*, Uwinkindi to re-file his appeal brief.¹⁸ On 11 February 2016, Uwinkindi filed the operative Appeal Brief, submitting seven grounds of appeal alleging errors of law and fact committed by the Trial Chamber. Between 2 March 2016 and 23 June 2016, Uwinkindi filed six motions for the admission of additional evidence on appeal pursuant to Rule 142 of the Rules of Procedure and Evidence of the Mechanism ("Rules").¹⁹ The briefing in respect of these motions concluded on 16 August 2016,²⁰ and the Appeals Chamber dismissed the motions on 22 September 2016.²¹

¹¹ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Decision on Request for Revocation of an Order Referring a Case to the Republic of Rwanda and Assigning a Trial Chamber, 13 May 2015, pp. 2, 3; Impugned Decision, para. 3. See *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for March 2015, 12 May 2015 ("Monitoring Report for March 2015"), paras. 76, 78, 118, 120, 123.

¹² *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R.14.1, Decision on Uwinkindi's Motion for a Stay of Proceedings before the High Court of Rwanda, an Oral Hearing, and Other Related Matters, 1 October 2015, para. 27. See also *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R.14.1, Decision on Uwinkindi's Request for Certification to Appeal the Decision Denying his Request for Stay of Proceedings and for Oral Hearing, 22 October 2015, p. 3.

¹³ Impugned Decision, para. 42.

¹⁴ Impugned Decision, para. 41.

¹⁵ Notice of Appeal from the Defence of Jean Uwinkindi, 27 November 2015 (original French version filed on 20 November 2015) ("Notice of Appeal"). See also Decision on Motions to Strike Notice of Appeal and Appeal Brief, 4 February 2016 ("Decision of 4 February 2016"), paras. 8, 10.

¹⁶ *Mémoires d'appel de la défense de Jean Uwinkindi*, 5 December 2015.

¹⁷ Decision on Applications for Translations and Extensions of Time, 17 December 2015; Order Relating to Urgent Motion to Strike Appeal Brief, 17 December 2015. See also Order Designating a Pre-Appeal Judge, 15 December 2015.

¹⁸ Decision of 4 February 2016, para. 15.

¹⁹ 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); 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); 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); 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 2016 (confidential; original French version filed on 30 March 2016); Motion by Jean Uwinkindi Defence for Admission of Additional Evidence, 17 June 2016 (confidential; original French version filed on 8 June 2016); Motion by Jean Uwinkindi Defence for Admission of Additional Evidence, 8 July 2016 (confidential; original French version filed on 23 June 2016).

²⁰ 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

6. On 30 December 2015, while Uwinkindi's appeal was pending before the Mechanism, the Rwandan High Court convicted him of genocide and crimes against humanity and sentenced him to life imprisonment.²² Uwinkindi has since filed a notice of appeal in Rwanda against the judgement of the Rwandan High Court.²³

II. STANDARD OF REVIEW

7. The Appeals Chamber recalls that where an appeal is filed against a decision denying a request for revocation of a referral, the issue before the Appeals Chamber is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but whether the trial chamber has correctly exercised its discretion in reaching that decision.²⁴ A party challenging such a decision must show that the trial chamber: (i) misdirected itself either as to the legal principle to be applied, or as to the law which is relevant to the exercise of its discretion; (ii) gave weight to irrelevant considerations or failed to give sufficient weight to relevant considerations; (iii) made an error as to the facts upon which it has exercised its discretion; or (iv) its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the trial chamber must have failed to exercise its discretion properly.²⁵

III. DISCUSSION

8. Uwinkindi challenges the Trial Chamber's assessment of: (i) the applicable law; (ii) the conditions of his detention; (iii) the alleged violation of the principles of *non bis in idem* and *res judicata* as well as the Rwandan law relevant to the transfer of cases to Rwanda; (iv) the alleged violation of his right to be represented by counsel of his own choice; (v) the alleged violation of the equality of arms principle; (vi) issues related to defence remuneration; and (vii) the alleged

17 March 2016, 19 April 2016 (confidential); 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); 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). See also *Éléments 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).

²¹ Decision on Requests for Admission of Additional Evidence on Appeal, 22 September 2016, para. 78.

²² *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for December 2015, 28 January 2016, pp. 6, 7. See Appeal Brief, para. 153; Reply Brief, para. 30.

²³ See *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for February 2016, 23 March 2016, para. 10; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for July 2016, 30 August 2016, para. 3bis.

²⁴ *Prosecutor v. Radovan Stanković*, Case No. MICT-13-51, Decision on Stanković's Appeal against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, 21 May 2014 ("*Stanković* Decision of 21 May 2014"), para. 12.

²⁵ *Stanković* Decision of 21 May 2014, para. 12.

violation of his right to be tried before an independent and impartial tribunal. These challenges are addressed below in turn.

A. Ground 1: Applicable Law

9. In assessing the revocation request, the Trial Chamber identified the basis for jurisdiction as well as the factors relevant to determining whether revocation was appropriate pursuant to Article 6(6) of the Statute of the Mechanism (“Statute”).²⁶ In particular, it stated:

[A]n order for the referral of a case before a national jurisdiction issued by the ICTR may be revoked “where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice”. In making this assessment, the Trial Chamber is mindful that the Mechanism’s role is not to act as an independent level of appellate review for the national proceedings, but rather to determine primarily whether the conditions for a fair trial in the domestic jurisdiction no longer exist. 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 of the national proceedings. The Trial Chamber is also of the view that a party should not wilfully obstruct national proceedings in a transferred case in an effort to have the case revoked by the Mechanism. In accordance with the Referral Decision, revocation pursuant to Article 6(6) of the Statute is a remedy of last resort.²⁷

10. Uwinkindi submits that the Trial Chamber erred in its consideration of the applicable law.²⁸ He contends that, by stating that it was not the Trial Chamber’s role to act as a level of appellate review for national proceedings but determine primarily whether the conditions for a fair trial are respected, the Trial Chamber ignored the Mechanism’s primacy over national courts.²⁹ He further argues that the Trial Chamber erred in concluding that he deliberately obstructed the conduct of the proceedings and in finding that appropriate remedies were available in Rwanda for any procedural irregularities.³⁰

11. The Prosecution responds that Uwinkindi fails to demonstrate that the Trial Chamber made an error of law.³¹ The Prosecution also submits that Uwinkindi’s claim that the Trial Chamber erred in considering that he had deliberately obstructed the proceedings lacks merit and is not supported by the record.³²

²⁶ Impugned Decision, paras. 7-9.

²⁷ Impugned Decision, para. 9 (references omitted).

²⁸ Notice of Appeal, paras. 11-13, *referring to* Impugned Decision, paras. 7-9; Appeal Brief, paras. 20-30.

²⁹ Notice of Appeal, paras. 11, 13; Appeal Brief, paras. 20, 26, 27.

³⁰ Notice of Appeal, paras. 12, 13; Appeal Brief, paras. 21, 28, 29. Uwinkindi makes several general claims of error without providing any supporting reference. *See* Appeal Brief, paras. 23-25. The Appeals Chamber dismisses these unsubstantiated allegations without further consideration as they are not capable, individually or collectively, to substantiate a contention that the Trial Chamber erred in the exercise of its discretionary powers. Furthermore, the Appeals Chamber considers the arguments raised in paragraphs 22 and 30 of the Appeal Brief elsewhere. *See infra* Grounds 2 and 7.

³¹ Response Brief, paras. 5, 6, 8.

³² Response Brief, para. 10.

12. The Appeals Chamber finds that Uwinkindi does not show how the Trial Chamber's articulation of the law applicable to its consideration of his revocation request in any way conflicts with the Mechanism's primacy over national courts as set forth in Article 5(2) of the Statute.³³ In particular, the Trial Chamber's statement that "the Mechanism's role is not to act as an independent level of appellate review for the national proceedings, but rather to determine primarily whether the conditions for a fair trial in the domestic jurisdiction no longer exist" is entirely consistent with Article 6(6) of the Statute and Rule 14(C) of the Rules, which govern the Mechanism's authority to revoke cases referred to national jurisdictions.

13. Furthermore, Uwinkindi's submissions that, in its summary of the applicable law, the Trial Chamber concluded that he deliberately obstructed the conduct of proceedings or that appropriate remedies were available in Rwanda for any procedural irregularities are misconceived. In referring to the applicable law, the Trial Chamber merely observed that the existence of domestic remedies, or lack thereof, was relevant to its consideration of the revocation request.³⁴ Likewise, it only noted that a party should not wilfully obstruct national proceedings in a transferred case in an effort to have the case revoked by the Mechanism but made no such finding in respect of Uwinkindi's case.³⁵

14. Based on the foregoing, the Appeals Chamber dismisses Ground 1 of Uwinkindi's appeal.

B. Ground 2: Conditions of Detention

15. In considering Uwinkindi's challenges to the nature of his arrest and pre-trial detention, the Trial Chamber found that Uwinkindi failed to substantiate his claim that he was improperly questioned by the judicial police and the National Public Prosecution Authority in Rwanda ("Rwandan Prosecution") on 21 and 23 April 2012 in the absence of counsel.³⁶ It further observed that Uwinkindi's submissions did not reveal that he had challenged before the Rwandan High Court the length of his pre-trial detention and determined that Uwinkindi had not shown that a violation of his rights could not be addressed or remedied by the Rwandan High Court or in any subsequent appellate proceedings.³⁷ Moreover, the Trial Chamber observed that revoking Uwinkindi's referral to Rwanda and trying him before the Mechanism would only serve to prolong his pre-trial detention.³⁸

³³ See also Rule 15 of the Rules.

³⁴ See Impugned Decision, para. 9.

³⁵ See Impugned Decision, para. 9.

³⁶ Impugned Decision, para. 12.

³⁷ Impugned Decision, para. 14.

³⁸ Impugned Decision, para. 14.

16. Uwinkindi submits that the Trial Chamber erred in finding that he had failed to produce evidence of being improperly questioned by Rwandan authorities on 21 and 23 April 2012 in the absence of counsel in violation of Rule 40 of the Rules and Article 39 of the Rwandan Code of Criminal Procedure.³⁹ Uwinkindi further argues that the Trial Chamber erred when concluding that he had failed to challenge the length of his detention in Rwanda as he had requested provisional release before the Rwandan High Court and the Rwandan *Tribunal de grande instance*.⁴⁰ Uwinkindi also contends that the Trial Chamber erred in concluding that any violation of his rights concerning the length of his pre-trial detention could be remedied in Rwanda as the issue, having been settled in the Rwandan courts, is *res judicata*.⁴¹ Finally, Uwinkindi argues that, by stating that any trial before the Mechanism would only serve to prolong his detention, the Trial Chamber provided a pretext for the Rwandan High Court to hold an “expedited trial” in violation of his rights, which has resulted in his conviction and a sentence of life imprisonment.⁴²

17. The Prosecution responds that, contrary to Uwinkindi’s submission, the Trial Chamber did not make findings on the legality of his arrest or subsequent detention in Rwanda.⁴³ Rather, it correctly considered that Uwinkindi’s arguments do not reveal that he challenged his pre-trial detention before the Rwandan High Court, and that any violation could be remedied through appellate proceedings.⁴⁴ The Prosecution further responds that Uwinkindi simply repeats arguments raised before the Trial Chamber and fails to demonstrate error in the Impugned Decision.⁴⁵

18. With respect to Uwinkindi’s contention that the Trial Chamber erred in concluding that he failed to substantiate that he was improperly questioned by Rwandan authorities in April 2012, the Appeals Chamber observes that, in the proceedings before the Trial Chamber, Uwinkindi generally referred to transcripts from interviews on 21 and 23 April 2012, which he argued proved that he

³⁹ Appeal Brief, paras. 31, 34-36, *referring, inter alia, to* Law No. 30/2013 of 24 May 2013 relating to the Code of Criminal Procedure, published in Rwandan Official Gazette no. 27 of 8 July 2013 (“Rwandan Code of Criminal Procedure”), Articles 37-40, 89, 90, 96-104. *See also* Notice of Appeal, para. 17, *referring, inter alia, to* Impugned Decision, para. 12. Uwinkindi argues that Article 39 of the Rwandan Code of Criminal Procedure provides that: (i) the right of an accused to legal counsel arises simultaneously to the time of his arrest and is unconditional; (ii) the creation of a police report of arrest inconsistent with this right to counsel and “only increases arbitrariness and thereby causes prejudice likely to lead to an unfair trial”; and (iii) the judicial police should not only inform the suspect of reasons for arrest but also offer him the possibility to exercise the right to counsel. Appeal Brief, paras. 34, 35.

⁴⁰ Notice of Appeal, paras. 16, 17, *referring, inter alia, to* Impugned Decision, para. 14; Appeal Brief, paras. 32, 38, 40, 41; Reply Brief, para. 14. In this respect, Uwinkindi submits that his pre-trial detention, which lasted for more than one year, violated Article 104 of the Rwandan Code of Criminal Procedure. *See* Appeal Brief, paras. 38-42. *See also* Notice of Appeal, para. 15. Uwinkindi also argues that his pre-trial detention violated Articles 40 and 90 of the Rwandan Code of Criminal Procedure. Appeal Brief, paras. 36, 43.

⁴¹ Appeal Brief, paras. 30, 39; Reply Brief, para. 14.

⁴² Appeal Brief, paras. 33, 43, 44.

⁴³ Response Brief, para. 12.

⁴⁴ Response Brief, paras. 13, 14.

⁴⁵ Response Brief, para. 15.

was not assisted by a lawyer.⁴⁶ However, Uwinkindi does not substantiate that he provided the relevant transcripts or any other record of these interviews to the Trial Chamber.⁴⁷ Furthermore, the Trial Chamber, having reviewed the record of Uwinkindi's interview with the Rwandan Prosecution on 23 April 2012, which in fact was submitted before the Trial Chamber by the Prosecution, determined that it showed "that Uwinkindi was informed of his right to have a legal counsel present" and that "the interview was subsequently suspended until counsel was assigned".⁴⁸ On appeal, Uwinkindi does not show that the Trial Chamber erred in this determination or in its observation that he failed to provide any materials to support his claim of being improperly questioned by Rwandan authorities in the absence of counsel.

19. Uwinkindi also does not demonstrate that the Trial Chamber erred in stating that his submissions did not reveal that he challenged the length of his pre-trial detention before the Rwandan High Court. In particular, Uwinkindi does not show that he pointed to any litigation in Rwanda concerning this issue when making his submissions before the Trial Chamber.⁴⁹ On appeal, Uwinkindi highlights, for the first time, Rwandan court decisions of 30 August and 20 October 2012 concerning his request for provisional release in order to show that he challenged the duration of his detention.⁵⁰

20. The Appeals Chamber recalls that, in the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could have reasonably done so in the first

⁴⁶ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Brief in Support of Jean Uwinkindi's Request for Revocation of Referral Order, 26 August 2015 (original French version filed on 5 August 2015) ("Brief at Trial"), para. 29, n. 22.

⁴⁷ Notably, the Prosecution argued before the Trial Chamber that Uwinkindi's reference to evidence of him being questioned on 21 April 2012 did not exist. See *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"), para. 45. In his reply, Uwinkindi did not refute this position and only pointed to evidence that the April 2012 interviews occurred by referring to the annexes the Prosecution presented in connection with its Response Brief at Trial. See *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, *Réplique de la Défense aux conclusions en réponse du Procureur suivant Décision du 09 octobre 2014*, 14 October 2015 ("Reply Brief at Trial"), n. 48, referring to Response Brief at Trial, Annex 3, RP. 1284-1281 (Rwandan Statement of Arrest, dated 19 April 2012) ("Statement of Arrest"), Annex 4, RP. 1280-1272 (Rwandan *Pro Justitia* Statement, dated 23 April 2012) ("*Pro Justitia* Statement"). The Appeals Chamber has reviewed the annexes referred to by Uwinkindi, which reflect that Uwinkindi was arrested on 19 April 2012 by Rwandan authorities and read his rights and that Uwinkindi was not interviewed on 23 April 2012 as he was in the process of selecting counsel. Statement of Arrest, RP. 1281; *Pro Justitia* Statement, RP. 1275, 1274.

⁴⁸ Impugned Decision, n. 40.

⁴⁹ See Appeal Brief, paras. 30, 40, 41, n. 12; Reply Brief, para. 14, n. 15. Specifically, in the Reply Brief, Uwinkindi points to "Annex 32" in the filing *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, *Transmission des éléments de preuve à l'appui de nos diverses écritures*, 9 September 2015 ("Annexes to Brief in Support of the Revocation Request"), which was filed before the Trial Chamber. See Reply Brief, para. 14, n. 15. However, this document only identifies annexes numbered 1 through 30 and none of them are the decisions that he points to on appeal. See Annexes to Brief in Support of the Revocation Request, RP. 1546-1543. Having reviewed Uwinkindi's submissions before the Trial Chamber as they concerned his pre-trial detention, the Appeals Chamber has not found any references to decisions issued by Rwandan courts on this subject. See also Brief at Trial, paras. 30-33.

⁵⁰ See Appeal Brief, paras. 30, 40, 41, n. 12; Reply Brief, para. 14, n. 15.

instance.⁵¹ Providing supporting references for the first time on appeal to an unreferenced and unsubstantiated argument made before a Trial Chamber is not a proper means of challenging the Impugned Decision. The Appeals Chamber observes that Uwinkindi, who has not provided copies of or text from the relevant decisions in support of his submissions on appeal, fails to substantiate any violation of his rights as it concerns his pre-trial detention.⁵²

21. In addition, Uwinkindi does not show any error in the Trial Chamber's finding that any violation of his rights related to the length of his pre-trial detention, if established, could be addressed or appropriately remedied by the Rwandan High Court or in any subsequent appellate proceedings. Uwinkindi argues that he has already litigated the issue of the pre-trial detention before the Rwandan High Court and the Rwandan *Tribunal de grande instance*, lost, and cannot litigate it further in view of the principle of *res judicata*. However, the Appeals Chamber finds that his argument does not demonstrate any error in the Trial Chamber's finding. To the contrary, it shows that the issue could be, and indeed was, addressed in Rwanda.

22. Finally, Uwinkindi fails to substantiate how the Trial Chamber's statement that "the revocation of [his] referral and any subsequent trial before the Mechanism would only serve to prolong [his] pre-trial detention"⁵³ has led in any way to an unfair, expedited trial before the Rwandan High Court. That the Rwandan High Court convicted and sentenced him to life imprisonment two months after the Impugned Decision was issued does not demonstrate that his trial was unfair or expedited in violation of his rights. Uwinkindi's contention ignores the fact that his proceedings before the Rwandan High Court lasted for over a year and seven months, and he makes no attempt to demonstrate how his trial in Rwanda was expedited following the issuance of the Impugned Decision.⁵⁴

23. Based on the foregoing, the Appeals Chamber dismisses Ground 2 of Uwinkindi's appeal.

⁵¹ See *Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016 ("*Orić* Decision"), para. 14. See also *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015 ("*Nyiramasuhuko et al.* Appeal Judgement"), para. 63 and references cited therein.

⁵² Furthermore, while Uwinkindi refers, *inter alia*, to several Articles of the Rwandan Code of Criminal Procedure that he says were violated in relation to his pre-trial detention, he has only annexed the cover and signature pages of that version of the criminal code of procedure and none of the relevant articles. See Annexes to Appeal Brief, RP. 3010-3002. Uwinkindi fails to substantiate any alleged violation of any article of the Rwandan Code of Criminal Procedure based on his pre-trial detention.

⁵³ Impugned Decision, para. 14.

⁵⁴ See *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for May 2014, 4 July 2014, para. 4; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for January 2016, 24 February 2016, para. 2.

C. Ground 3: *Non bis in idem* and Transfer Law

24. The Trial Chamber recalled that “the *non bis in idem* principle aims to protect a person who has been finally convicted or acquitted from being tried for the same offence again”.⁵⁵ It determined that, to the extent that Uwinkindi was not convicted for the crime of complicity in genocide by the ICTR, his prosecution before the Rwandan High Court on the basis of this charge did not violate the *non bis in idem* principle.⁵⁶

25. Uwinkindi submits that the Trial Chamber erred in law when it ruled, in violation of Article 7 of the Statute and Rule 16 of the Rules, that the *non bis in idem* principle only protects an individual from being “tried again for the same acts”.⁵⁷ He further submits that the count of complicity in genocide was withdrawn from the operative ICTR indictment (“ICTR Indictment”)⁵⁸ but that he was nonetheless prosecuted on this basis before the Rwandan High Court in violation of: (i) the principles of *non bis in idem* and *res judicata*; and (ii) Article 5 of the Rwandan Transfer Law of 16 June 2013 (“Transfer Law”).⁵⁹

26. The Prosecution responds that Uwinkindi merely repeats submissions made before the Trial Chamber and fails to demonstrate that the Trial Chamber erred in finding no violation of the *non bis in idem* principle.⁶⁰

27. Article 7(1) of the Statute prescribes that “[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the ICTY, the ICTR or the Mechanism” and Rule 16 of the Rules provides for a remedy in the event of a violation of this principle.⁶¹ In this respect, the Appeals Chamber has emphasized that Article 7(1) of the Statute expressly “refers to acts on the basis of which the person was tried, in the sense that a final judgment was rendered” and does not prohibit subsequent prosecutions in national jurisdictions where the accused has not been tried to final judgement before the relevant international jurisdiction.⁶²

⁵⁵ Impugned Decision, para. 17.

⁵⁶ Impugned Decision, paras. 15-17.

⁵⁷ Appeal Brief, para. 45.

⁵⁸ Notice of Appeal, paras. 18, 19, referring to Impugned Decision, para. 17; Appeal Brief, para. 47. The Appeals Chamber understands Uwinkindi’s references to an amended indictment of 23 November 2011 to concern his amended indictment of 16 December 2011. See Appeal Brief, n. 19. See also *The Prosecutor v. Jean Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Amended Indictment, 16 December 2011.

⁵⁹ Appeal Brief, paras. 47, 48; Reply, para. 15. As for the principle of *res judicata*, Uwinkindi submits that this was breached by the inclusion of the charge of complicity in genocide in his indictment before the Rwandan High Court despite its withdrawal from his ICTR Indictment. Appeal Brief, para. 48, n. 19.

⁶⁰ Response Brief, paras. 16-18.

⁶¹ See also *Orić* Decision, para. 6.

⁶² *Orić* Decision, para. 13.

28. In this context, the Appeals Chamber finds that Uwinkindi does not demonstrate an error in the Impugned Decision. As Uwinkindi did not stand trial before the ICTR, he was not tried to final judgement before the ICTR on the basis of any of the acts for which he was prosecuted in Rwanda.⁶³ Likewise, the fact that he was charged before the Rwandan High Court for complicity in genocide, a charge that was no longer included in his ICTR Indictment, does not demonstrate a violation of the *non bis in idem* principle.⁶⁴

29. The Appeals Chamber further finds that Uwinkindi fails to establish that the non-inclusion of the charge of complicity in genocide in his ICTR Indictment prohibited its inclusion in his indictment before the Rwandan High Court in view of the *res judicata* principle. *Res judicata* arises only when there is an identity of parties, identity of issues, and importantly a final determination of those issues in the previous decision by a court competent to decide them.⁶⁵ Notably, the litigation before the ICTR concerning the inclusion of complicity in genocide in Uwinkindi's indictment did not result in a final determination and the Rwandan Prosecution was not a party to it.⁶⁶

30. Furthermore, Uwinkindi does not demonstrate that his prosecution before the Rwandan High Court for the crime of complicity in genocide violates Article 5 of the Transfer Law. This provision, *inter alia*, requires that "a person whose case is transferred by the ICTR and the Mechanism to Rwanda shall be liable to be prosecuted only for crimes falling within the jurisdiction of the ICTR". The Appeals Chamber notes that the ICTR had jurisdiction to try an accused for the crime of complicity in genocide pursuant to Article 2(3)(e) of the ICTR Statute. Consequently, Uwinkindi's prosecution in Rwanda for the crime of complicity in genocide did not contravene Article 5 of the Transfer Law.

31. In light of the foregoing, the Appeals Chamber dismisses Ground 3 of Uwinkindi's appeal.

⁶³ Cf. *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 4 July 2001 (original French version filed on 31 May 2000), paras. 75-77.

⁶⁴ Cf. *Orić* Decision, para. 13.

⁶⁵ See *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion for Redacted Versions of Decisions Issued under Rule 75(H) of the ICTY Rules, 18 July 2016, p. 4 and references cited therein; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on the Kingdom of Belgium's Application to File an *Amicus Curiae* Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, 12 February 2001, para. 11.

⁶⁶ Specifically, Trial Chamber III of the ICTR subsequently confirmed the initial indictment against Uwinkindi but ordered the Prosecution to amend it to clearly indicate what facts could support Uwinkindi's involvement in the crime of complicity in genocide; the decision did not require the Prosecution to drop the charge. See *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Confirmation of Indictment, 3 September 2001, paras. 7, 9.

D. Ground 4: Right to be Represented by Counsel of his Own Choice

32. The Trial Chamber was not satisfied that the referral of Uwinkindi's case to Rwanda had to be revoked due to the alleged violation of Uwinkindi's right to effective legal representation.⁶⁷ The Trial Chamber considered that the right of an accused to be represented by counsel of his own choosing is not absolute and that, in the circumstances, the replacement of Uwinkindi's counsel did not prevent the possibility of a fair trial.⁶⁸ The Trial Chamber noted that, upon his transfer to Rwanda, Uwinkindi was assigned counsel he chose under Rwanda's legal aid scheme but that, due to the changed terms of remuneration, the counsel rejected a revised offer from the Rwandan Ministry of Justice to represent Uwinkindi.⁶⁹ Following the counsel's failure to attend two consecutive hearings, the Rwandan High Court instructed that the proceedings continue and that new counsel be appointed.⁷⁰ The Trial Chamber found that Uwinkindi had failed to show that it was unreasonable for the Rwandan High Court to appoint new counsel to represent him.⁷¹ It also considered that Uwinkindi had failed to substantiate that the newly appointed counsel had insufficient years of experience.⁷²

33. The Trial Chamber further considered whether the newly appointed counsel provided Uwinkindi effective representation.⁷³ In this respect, it found that Uwinkindi "unjustifiably refused to cooperate with his newly appointed counsel" and failed to advance any convincing explanation as to why the counsel should be withdrawn.⁷⁴ The resulting "impasse" in the proceedings was attributed to Uwinkindi's refusal to communicate with his new counsel.⁷⁵ As to the fact that the Rwandan High Court heard witnesses in March 2015 when Uwinkindi was not assisted by counsel, the Trial Chamber found that the Rwandan High Court subsequently took sufficient measures to ensure that Uwinkindi had benefited from effective legal representation, specifically by recalling the witnesses who were examined when he was not represented by counsel and by affording additional time for the new counsel to prepare.⁷⁶ The Trial Chamber further determined that, for the purposes of requesting the revocation of the referral, Uwinkindi could not rely on a breakdown in

⁶⁷ Impugned Decision, para. 29.

⁶⁸ Impugned Decision, paras. 24, 25.

⁶⁹ Impugned Decision, paras. 18, 25.

⁷⁰ Impugned Decision, paras. 18, 19, 25.

⁷¹ Impugned Decision, para. 25.

⁷² Impugned Decision, para. 25.

⁷³ Impugned Decision, para. 26.

⁷⁴ Impugned Decision, para. 26, referring to *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for February 2015, 24 March 2015, paras. 9-12, 20, 22, 23; Monitoring Report for March 2015, paras. 16, 17, 20; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for April 2015, 24 June 2015, paras. 30, 33, 36, 47.

⁷⁵ Impugned Decision, para. 26.

⁷⁶ Impugned Decision, paras. 26, 27.

communication with counsel caused by his own “unilateral actions”.⁷⁷ The Trial Chamber also rejected as unsubstantiated Uwinkindi’s argument that counsel on the list presented to him to choose from in September 2015 were biased or incompetent.⁷⁸

34. Uwinkindi submits that the Trial Chamber erred in finding that his right to be assisted by counsel of one’s choosing is “not an absolute right”⁷⁹ and in failing “to denounce the grave violations perpetrated by the [Rwandan] High Court in denying him [this] right”.⁸⁰ He also argues that the Trial Chamber erred in finding that he had no right to refuse the newly assigned counsel⁸¹ and that it was reasonable for the Rwandan High Court to assign new counsel to represent him.⁸² Uwinkindi further maintains that the Trial Chamber erred in finding that the replacement of his counsel did not obstruct the conduct of a fair trial⁸³ and in considering that there was hope of remedying the violations of his fair trial rights in Rwanda.⁸⁴ In addition, he contends that the Trial

⁷⁷ Impugned Decision, para. 27.

⁷⁸ Impugned Decision, para. 28.

⁷⁹ Appeal Brief, paras. 49, 50. *See also* Appeal Brief, para. 76; Reply Brief, paras. 19, 21; Annexes to Appeal Brief, Annex 2, RP. 3001-2995 (Constitution of the Republic of Rwanda of 4 June 2003, as amended in January 2011) (“Rwandan Constitution”). In this regard, Uwinkindi argues that the Trial Chamber violated Article 18 paragraph 3 of the Rwandan Constitution, which in his view takes precedence over decisions rendered by international courts. *See* Appeal Brief, para. 50. Uwinkindi also relies on Article 16 of the Rwandan Constitution, providing for equality before law, and Article 39 of the Rwandan Code of Criminal Procedure, which in his view enshrines the absolute nature of the rights of the Defence. *See* Reply Brief, paras. 19-21, 23. As Uwinkindi’s undeveloped submissions fail to substantiate that the Trial Chamber erred in light of these provisions of Rwandan law, the Appeals Chamber will not consider them further.

⁸⁰ Appeal Brief, para. 76.

⁸¹ Appeal Brief, para. 55.

⁸² Appeal Brief, paras. 51, 74, 75, 81, 82. *See also* Reply Brief, paras. 12, 13. Uwinkindi also contends that the Trial Chamber made an error of fact in finding that his counsel was obliged to continue representing him despite the termination of their contract as, in his view, the contract “exclude[d] any kind of representation following [its] termination”. *See* Appeal Brief, para. 53; Reply Brief, para. 24, *referring to Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for January 2015, 3 March 2015 (“Monitoring Report of January 2015”). However, the Appeals Chamber observes that, in support of his contention, Uwinkindi only refers generally to the relevant monitoring report. The only relevant reference therein is to the monitor’s comments on her meeting with the Permanent Secretary of the Ministry of Justice of 15 January 2015 which suggest that the Ministry of Justice and the President of the Rwanda Bar Association were of the view that, pursuant to their contract, counsel had an obligation to continue to represent Uwinkindi until the end of the three month notice period. *See* Monitoring Report for January 2015, paras. 32, 37. The Appeals Chamber therefore finds that there is nothing in the cited monitoring report supporting Uwinkindi’s contention, which is otherwise unsubstantiated and which, as such, will not be considered further.

⁸³ Appeal Brief, paras. 53, 67, 72, 73, 75. Uwinkindi also complains of “the fact that it was impossible for him to cross-examine the witnesses” and relies in this respect on the transcripts of the hearings held before the Rwandan High Court of Rwanda on 15, 20, 22, and 27 October 2015. *See* Appeal Brief, para. 72. The Appeals Chamber notes that this argument does not appear to have been raised before the Trial Chamber. In this regard, Uwinkindi’s final submission to the Trial Chamber predates the re-hearing of witnesses in the Rwandan proceedings. *See, e.g.*, Reply Brief at Trial. *See also Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Disclosure to the Chamber and the Prosecution of Additional Material on the Jean Uwinkindi Case Before the High Court (Hearings of 15 and 20 October 2015), 11 November 2015 (original French version filed on 22 October 2015). Given that the issue was not properly raised before the Trial Chamber, the Appeals Chamber finds that Uwinkindi cannot claim that the Trial Chamber committed an error in failing to address it. His argument in this regard is accordingly dismissed. *Cf. Prosecutor v. Mitar Rašević and Savo Todović*, Case Nos. IT-97-25/1-AR11bis.1 & IT-97-25/1-AR11bis.2, Decision on Savo Todović’s Appeals Against Decisions on Referral under Rule 11bis, 4 September 2006, para. 68; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis, 7 April 2006, para. 74.

⁸⁴ Appeal Brief, paras. 54, 57, 60, 61, 69, 71, 149. Uwinkindi also submits that the Trial Chamber erred in finding that “the recalling of witnesses [by the Rwandan High Court] was different from the contested witness examination in

Chamber made errors of fact in finding that the newly assigned counsel⁸⁵ and counsel on the list presented to him in September 2015 were sufficiently experienced.⁸⁶

35. The Prosecution responds that the Trial Chamber did not err in finding no violation of Uwinkindi's right to legal representation.⁸⁷ In this regard, the Prosecution submits that the Trial Chamber correctly found that the right to counsel of one's own choosing is not absolute⁸⁸ and that Uwinkindi failed to demonstrate that the replacement of his counsel prevented the possibility of a fair trial.⁸⁹ The Prosecution also submits that Uwinkindi fails to demonstrate any error of fact by the Trial Chamber and that he misrepresents the Trial Chamber's findings.⁹⁰

36. In considering Uwinkindi's complaint of an alleged breach of his right to choose his counsel, the Trial Chamber recalled that the Appeals Chambers of the *ad hoc* Tribunals have consistently recognised that individuals lacking the means to remunerate counsel do not have an absolute right to a counsel of their own choosing.⁹¹ Contrary to Uwinkindi's submissions, the Trial Chamber did not err in this respect. Consistent with international human rights law and the case law of the *ad hoc* Tribunals, this right is necessarily subject to certain limitations where, as in the present case, free legal aid is relied upon and the interests of justice require the accused to be defended by counsel assigned to him despite his wishes.⁹²

37. As to the assignment of new counsel over Uwinkindi's objections, the Trial Chamber considered that "[w]hen deciding on the assignment of counsel some weight is accorded to the accused's preference, but such preference may be overridden if it is in the interests of justice to do

March 2015". See Appeal Brief, para. 56. The Appeals Chamber will not address this submission further since the Trial Chamber made no such finding.

⁸⁵ Appeal Brief, paras. 52, 65, 67, 74-78, 149.

⁸⁶ Appeal Brief, paras. 58, 62, 74, 74bis, 78, 79, 81. The Appeals Chamber notes the typographical error in the numbering of paragraphs in the Appeal Brief as two paragraphs are numbered as "74". The second paragraph will be referred to in this Decision as 74bis. Reply Brief, para. 28. Uwinkindi also submits that he faced difficulties with prosecution and defence witnesses as they were "not prepared" when they came to testify in court, some gave the impression of being intimidated and one refused to testify. See Appeal Brief, paras. 149-151; Reply Brief, para. 26. However, Uwinkindi's submissions in this respect are entirely undeveloped and unsubstantiated and fail to demonstrate any error committed by the Trial Chamber. Consequently, the Appeals Chamber will not consider them further.

⁸⁷ Response Brief, paras. 19-37.

⁸⁸ Response Brief, paras. 21-23. The Prosecution also contends that Uwinkindi's reliance on Article 39 of the Code of Criminal Procedure is also misplaced as that provision applies only to persons held in custody by the Judicial Police. See Response Brief, paras. 29, 30.

⁸⁹ Response Brief, para. 28.

⁹⁰ Response Brief, paras. 24-27, 31-34.

⁹¹ See Impugned Decision, para. 24 and references cited therein.

⁹² See *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010, para. 35; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007, paras. 14, 17. See *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 23 November 2001 (signed on 1 June 2001), para. 61; *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000, para. 33. See also *Dvorski v. Croatia* [2015] ECHR 927, paras. 78, 79.

so”.⁹³ In this respect, the Trial Chamber considered that the counsel initially assigned to Uwinkindi rejected a revised offer to continue representing him and failed to appear in court at two consecutive hearings.⁹⁴ On 21 January 2015, the Rwandan High Court ordered the appointment of new counsel to represent Uwinkindi over his objections, and, on 6 February 2015, it ordered the continuation of the proceedings.⁹⁵ Uwinkindi maintained his objection to the appointment of new counsel and to his case file being handed over to them.⁹⁶ Uwinkindi refused to cooperate with the new counsel even after the Supreme Court dismissed his appeal on this issue and confirmed their appointment.⁹⁷ The Rwandan High Court subsequently allowed Uwinkindi to choose new counsel from a list of approved counsel but Uwinkindi refused to do so arguing, *inter alia*, that all 68 lawyers on that list were incompetent.⁹⁸ The Rwandan High Court then decided that the newly assigned counsel, who had in the meantime familiarized themselves with the case file, should continue to represent Uwinkindi and noted that “[Uwinkindi’s] refusal to communicate with [them] did not prevent [them] from analyzing the charges, assessing the evidence, and making written submissions on behalf of the accused”.⁹⁹ The Trial Chamber found that Uwinkindi did not show that it was unreasonable for the Rwandan High Court to appoint new counsel to represent him.¹⁰⁰ It also found that “Uwinkindi unjustifiably refused to cooperate with his newly appointed counsel” and that the “impasse” in the proceedings was attributable to Uwinkindi’s own actions.¹⁰¹ The Appeals Chamber considers that avoiding interruptions or adjournments corresponds to an interest of justice which may well justify the appointment of counsel against the accused’s wishes.¹⁰² The Appeals Chamber therefore finds that the Trial Chamber made no error in finding that, in these circumstances, there were relevant and sufficient grounds for overriding Uwinkindi’s wishes as to his choice of legal representation.

38. Turning to whether the replacement of Uwinkindi’s counsel obstructed the conduct of a fair trial, the Appeals Chamber notes that the Trial Chamber examined whether Uwinkindi could benefit from effective legal assistance despite the issues with his legal representation.¹⁰³ The Trial Chamber considered that the Rwandan High Court took measures to safeguard Uwinkindi’s fair trial rights and, in particular, allowed additional time for the newly assigned counsel to prepare for trial, recalled the witnesses who were heard when Uwinkindi was not represented, allowed Uwinkindi to

⁹³ Impugned Decision, para. 24.

⁹⁴ Impugned Decision, para. 25.

⁹⁵ Impugned Decision, paras. 18-20.

⁹⁶ Impugned Decision, paras. 20, 21.

⁹⁷ Impugned Decision, paras. 20, 21, 26.

⁹⁸ Impugned Decision, para. 21.

⁹⁹ Impugned Decision, paras. 20, 21, 27.

¹⁰⁰ Impugned Decision, para. 25.

¹⁰¹ Impugned Decision, para. 26.

¹⁰² *Croissant v. Germany* [1992] ECHR 60, para. 28.

choose counsel from a list when he refused to cooperate with the newly assigned counsel, and when he declined to do so, the Rwandan High Court confirmed the appointment of the newly assigned counsel and noted that, despite Uwinkindi's refusal to talk to them, they could make submissions on his behalf.¹⁰⁴ Furthermore, the Trial Chamber noted that the proceedings were not definitively concluded and that any breach of Uwinkindi's fair trial rights due to the lack of legal representation in certain hearings could be remedied in Rwanda.¹⁰⁵ The Appeals Chamber finds that Uwinkindi has failed to demonstrate error in the Trial Chamber's conclusions in this respect.

39. Finally, the Appeals Chamber notes that, in support of his submission that the Trial Chamber erred in finding that the newly assigned counsel and counsel on the list of approved counsel were able and sufficiently experienced to represent him, Uwinkindi relies on an *amicus curiae* brief of the Kigali Bar Association and a report by Mr. Martin Witteveen.¹⁰⁶ A review of the *Amicus Curiae* Brief shows nothing that supports Uwinkindi's submissions. To the contrary, in its *Amicus Curiae* Brief, the Kigali Bar Association states that "in today's Rwanda, accused persons are, in practice [...] able to secure adequate legal representation by competent and experienced lawyers including, where necessary [...] through legal aid".¹⁰⁷

40. As to the Witteveen Report, the Appeals Chamber observes that the Trial Chamber did not expressly refer to it in the Impugned Decision even though it was included in the written submissions and was raised in Uwinkindi's arguments before the Trial Chamber.¹⁰⁸ The Appeals Chamber recalls that the Trial Chamber is presumed to have evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular

¹⁰³ Impugned Decision, paras. 26, 27.

¹⁰⁴ Impugned Decision, para. 27.

¹⁰⁵ Impugned Decision, para. 27.

¹⁰⁶ Appeal Brief, paras. 74bis, 78. See also Annexes to Appeal Brief, Annex 11, RP. 2914-2892 (*Amicus Curiae* Brief of the Kigali Bar Association, dated 26 April 2011) ("*Amicus Curiae* Brief"), Annex 12, RP. 2891-2874 (Additional Expert Report by Martin Witteveen, dated 3 June 2015) ("*Witteveen Report*"). Uwinkindi also relies on the first instance referral decision issued in the *Munyagishari* case to support his arguments that the Trial Chamber erred in considering that counsel appointed to him had sufficient experience. See Appeal Brief, paras. 52, 63, 74bis, referring, *inter alia*, to *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11bis, 6 June 2012 para. 149 ("*Munyagishari Referral Decision*"). See also Notice of Appeal para. 21. However, the aspect of the *Munyagishari Referral Decision* cited by Uwinkindi regarding the requirement that Munyagishari's referral be conditioned on the provision of counsel with previous international experience was overturned on appeal. *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11bis, 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 11bis, 3 May 2013, paras. 108-110. Consequently, Uwinkindi's submissions in this respect fail to demonstrate any error by the Trial Chamber.

¹⁰⁷ See *Amicus Curiae* Brief, RP. 2913.

¹⁰⁸ Annexes to Brief in Support of the Revocation Request, RP. 1406-1389 (the copy of the Witteveen Report as submitted by Uwinkindi on appeal). See also *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Disclosure of Additional Evidence and Material to the Trial Chamber, pursuant to Rule 72(D) of the Rules of Procedure and Evidence, 22 October 2015 (original French version filed on 28 September 2015), para. 25, n. 13; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Disclosure to the Chamber and the Prosecution of the Decision Rendered by

piece of evidence.¹⁰⁹ There may be an indication of disregard when evidence, which is clearly relevant to the findings, is not addressed in the Trial Chamber's reasoning.¹¹⁰ The Appeals Chamber notes that the Witteveen Report discusses Uwinkindi's case and makes observations regarding his lack of legal representation during the presentation of witnesses, the contractual problems between Uwinkindi's counsel and the Ministry of Justice, his various requests for adjournment of the trial proceedings, and the Rwandan High Court's decision in March 2015 to continue hearing witnesses despite the lack of legal representation.¹¹¹ Given the information contained therein, the Appeals Chamber finds that the Trial Chamber erred in failing to address the Witteveen Report in the Impugned Decision.

41. This error, however, does not invalidate or undermine the Trial Chamber's finding that Uwinkindi failed to demonstrate that either the new counsel assigned to represent him or counsel on the list presented to him lack sufficient experience. In this regard, the Appeals Chamber considers that the observations made in the Witteveen Report are repetitive of evidence the Trial Chamber examined and, in particular, of the various monitoring reports on the proceedings in Rwanda between April 2012 and June 2015.¹¹² The Witteveen Report expresses concerns about the lack of adequate legal representation in the period from March to June 2015 and "during the most critical phase of the trial [namely] the hearing of witnesses" when "[t]he new defence attorneys, although present in the court room, never represented Uwinkindi and [were] not in the possession of the case file".¹¹³ In this respect, the Trial Chamber observed that, on 9 June 2015, the Rwandan High Court decided "that the witnesses should be re-heard" and on 29 September 2015, the Rwandan High Court "issued a decision indicating that [new counsel] had received the case file and familiarized themselves with it".¹¹⁴ The Witteveen Report, dated 3 June 2015, was written prior to the developments considered in the Trial Chamber's decision.

42. In light of the above considerations, the Appeals Chamber finds that Uwinkindi has failed to demonstrate that the Trial Chamber erred in finding no violation of Uwinkindi's fair trial rights.

the High Court at the Public Hearing of 29 September 2015, pursuant to Rule 72(D) of the Rules of Procedure and Evidence, 28 October 2015 (original French version filed on 9 October 2015), para. 25, n. 13.

¹⁰⁹ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, ("*Kvočka et al.* Appeal Judgement") para. 23. See also, e.g., *Nyiramasuhuko et al.* Appeal Judgement, para. 1308; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgement"), para. 864.

¹¹⁰ *Kvočka et al.* Appeal Judgement, para. 23. See also, e.g., *Nyiramasuhuko et al.* Appeal Judgement, para. 1308; *Đorđević* Appeal Judgement, para. 864; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-A, Judgement, 8 May 2012, para. 127; *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012, para. 161.

¹¹¹ See Witteveen Report, RP. 2888, 2886-2884 (paras. 15, 19-25).

¹¹² See, e.g., Impugned Decision, nn. 56-58, 60-86, 106, 119. See, e.g., Witteveen Report, RP. 2885 (para. 23, n. 16), relying exclusively on "the monitor reports of December of 2014 [2x], January, February and March of 2015", which were available to the Trial Chamber.

E. Ground 5: Equality of Arms¹¹⁵

43. In assessing Uwinkindi's contentions regarding his right to have adequate facilities for the preparation of his defence, the Trial Chamber recalled that the principle of equality of arms requires a judicial body to ensure that neither party is put at a disadvantage when presenting its case.¹¹⁶ It also noted that this principle does not require material equality between the parties in terms of financial and human resources.¹¹⁷ The Trial Chamber then observed the legal aid funding that was available in Rwanda at the time of Uwinkindi's transfer, a new flat-rate remuneration policy for assigned counsel, the availability of additional funding for defence investigations as well as a provision in the Rwandan Code of Criminal Procedure that provides that judicial police shall be responsible for gathering evidence for the prosecution and the defence.¹¹⁸

44. In dismissing Uwinkindi's specific contention that a decision of the Rwandan High Court of 16 May 2013, denying his request for the appointment of investigators and legal assistants impaired the effective preparation of his defence, the Trial Chamber noted the funding that had already been provided to Uwinkindi's counsel for the conduct of defence investigations.¹¹⁹ It further found, *inter alia*, that Uwinkindi failed to explain why the funding was insufficient, what steps he took, if any, to use the services of the judicial police, and whether he submitted a more detailed budget proposal for the conduct of defence investigations as requested.¹²⁰

45. In concluding that Uwinkindi failed to show that the conditions for referral of the case were no longer met and that it was in the interests of justice to revoke the referral order, the Trial Chamber further noted a new practice direction on types of, and conditions for, funding for additional defence investigations and considered that Uwinkindi's trial was on-going and that his new counsel should be able to request funding for additional investigations.¹²¹

¹¹³ Witteveen Report, RP. 2886, 2885 (paras. 21, 23).

¹¹⁴ See Impugned Decision, paras. 20, 21.

¹¹⁵ The Appeals Chamber observes that Uwinkindi develops Ground 5 of his Notice of Appeal in Ground 6 of his Appeal Brief, and Ground 6 of his Notice of Appeal under Ground 5 of his Appeal Brief. The Appeals Chamber addresses Uwinkindi's arguments in the order presented in his Appeal Brief.

¹¹⁶ Impugned Decision, para. 33.

¹¹⁷ Impugned Decision, para. 33.

¹¹⁸ Impugned Decision, para. 33. The Trial Chamber later recalled that the Referral Chamber was satisfied that legal aid would be provided to Uwinkindi and that he would be afforded equality of arms. Impugned Decision, para. 35.

¹¹⁹ Impugned Decision, para. 35. The Trial Chamber also recalled submissions from the Ministry of Justice as to the total amount of money provided to Uwinkindi for the conduct of his defence as of 15 January 2015. See Impugned Decision, n. 147.

¹²⁰ Impugned Decision, para. 35.

¹²¹ Impugned Decision, para. 36, *referring to* the practice direction issued by the Chief Justice of Rwanda on 6 August 2015 ("Practice Direction").

46. Uwinkindi generally contends that the Trial Chamber failed to sufficiently consider that the proceedings against him in Rwanda violated the principle of equality of arms¹²² and that he was denied the fair trial guarantee of being able to call witnesses under the same conditions as the Rwandan Prosecution.¹²³ Concerning the equality of arms principle, Uwinkindi argues that he drew the Trial Chamber's attention to: (i) the "enormous disparity between the Defence's facilities and those of the [Rwandan] Prosecution"; and (ii) "the fact" that his Defence was "granted modest remuneration and derisory funds for investigations and that it lacked support staff".¹²⁴ He contends that these allegations were corroborated by aspects of the Witteveen Report that he presented to the Trial Chamber but that the Trial Chamber failed to examine it.¹²⁵

47. He also argues that the Trial Chamber erred in finding that his counsel should be able to demand funds for additional defence investigations based on the Practice Direction.¹²⁶ Specifically, he submits that the Practice Direction enters into force upon publication in the official gazette and that the copy relied upon by the Trial Chamber appeared to have been a draft.¹²⁷

48. Uwinkindi further contends that the Trial Chamber erred in relying on a provision of the Rwandan Code of Criminal Procedure concerning the availability of judicial police to assist the defence in the conduct of investigations.¹²⁸ He submits that the Rwandan Prosecution authorities cannot gather evidence on his behalf after his transfer and stresses that a review of his case file demonstrates that the judicial police conducted no investigations on his behalf.¹²⁹

49. The Prosecution responds that Uwinkindi has not substantiated that the Practice Direction governing the funding of additional defence investigations, was not in force or that the Trial Chamber erred in noting it.¹³⁰ It further argues that he has shown no error in the Trial Chamber's findings that he had failed to demonstrate what steps, if any, he took to use the services of the

¹²² Appeal Brief, paras. 101, 102, 112.

¹²³ Appeal Brief, paras. 109, 110. As to Uwinkindi's submissions concerning his inability to obtain witnesses under the same conditions as the Rwandan Prosecution, he argues that he "drew the Trial Chamber's attention to the crucial problem of Defence witnesses residing abroad, for which a solution has not yet been found". See Appeal Brief, para. 110. He further suggests that the Trial Chamber failed to take into account that the Ministry of Justice obstructed decisions rendered by the Rwandan High Court on 16 May and 5 September 2013. See Appeal Brief, para. 111.

¹²⁴ Appeal Brief, paras. 101, 102.

¹²⁵ Notice of Appeal, para. 32; Appeal Brief, paras. 101-105.

¹²⁶ Notice of Appeal, para. 34; Appeal Brief, paras. 84, 87-91, 93-98; Reply Brief, para. 31.

¹²⁷ Notice of Appeal, para. 34; Appeal Brief, paras. 87, 88; Reply Brief, paras. 31, 32. Uwinkindi also submits that his counsel's submissions on 12 November 2015 reveal that he was neither aware of nor was he able to benefit from this Practice Direction. Appeal Brief, paras. 92, 93, 95, 97, 98. He further questions what impact the Practice Direction, which did not concern his situation, could have had in light of an interlocutory decision of 16 May 2013 that the Ministry of Justice refused to implement and in light of the fact that his judgement was issued on 30 December 2015. Appeal Brief, para. 95; Reply Brief, para. 31. In reply, Uwinkindi also contends that the provisions of the Practice Direction violate the principle of liberty in the conduct of his investigations. Reply Brief, paras. 31, 32.

¹²⁸ Appeal Brief, paras. 106-108.

¹²⁹ Notice of Appeal, para. 31; Appeal Brief, para. 107.

¹³⁰ Response Brief, para. 40.

judicial police and that he had not substantiated his claim that the decision denying his request for the appointment of investigators and legal assistance impaired the effective preparation of his defence.¹³¹

50. The Appeals Chamber finds that Uwinkindi fails to substantiate his general contentions that the Trial Chamber failed to sufficiently consider that the proceedings against him in Rwanda violated the principle of equality of arms and that he was denied the fair trial guarantee of being able to call witnesses under the same conditions as the prosecution. In particular, Uwinkindi makes no reference to the record demonstrating that the Trial Chamber misdirected itself as to the law it applied or erred as to the facts upon which it relied.

51. As to his allegations that the Trial Chamber ignored his arguments relating to the inequality of arms in his case, the Appeals Chamber observes that Uwinkindi initially argued before the Trial Chamber that the “gap between the means of the Defence and that of the Prosecution is so great that a fair trial is not possible” and that “the Defence is in a state of neglect” without any references substantiating his position.¹³² In his subsequent submission of supporting material, Uwinkindi expressly pointed to paragraphs 21, 51, and 63 of the Witteveen Report in support of these contentions.¹³³

52. Having reviewed Uwinkindi’s submissions before the Trial Chamber and the paragraphs of the Witteveen Report identified by Uwinkindi, the Appeals Chamber notes that paragraph 21 of the Witteveen Report contains Witteveen’s observation “that, since January 2015, and during the most critical phase of the trial, the hearing of witnesses, Uwinkindi is without any defence”. As noted above, the issue of lack of representation during the hearing of witnesses was considered at length by the Trial Chamber on the basis of other information, reflecting that witnesses were re-heard after Uwinkindi’s new counsel had received the case file and familiarized themselves with it.¹³⁴ The Appeals Chamber has dismissed Uwinkindi’s appeal as to this issue above.¹³⁵

53. In addition, paragraph 51 of the Witteveen Report indicates in material respects that the “defence is by far the weakest link in the justice sector in Rwanda” and that, while the Rwandan Prosecution and Rwandan judiciary have “received extensive assistance in capacity building from donors, the Rwanda[] Bar Association hardly received any assistance”, which has resulted in “an

¹³¹ Response Brief, para. 41.

¹³² Brief at Trial, paras. 83-86. In particular, the Appeals Chamber notes that Uwinkindi indicated to the Trial Chamber the assistance the Rwandan Prosecution received from the ICTR and the Mechanism. *See* Brief at Trial, paras. 84, 85.

¹³³ *See* Annexes to Brief in Support of the Revocation Request RP. 1545, *referring, in particular, to* paragraphs 21, 51, and 63 of the Witteveen Report in support of paragraphs 80 to 86 of the Brief at Trial.

¹³⁴ *See supra* paras. 38, 41.

¹³⁵ *See supra* paras. 38, 41, 42.

organizational immaturity and incapability of dealing with genocide cases [...] when international standards are required.” Paragraph 63 concludes the Witteveen Report with the recommendation that, in order to ensure a fair trial, jurisdictions extraditing defendants to Rwanda should provide defence counsel with proven knowledge, experience and resources to conduct the defence and investigations, including investigations abroad, in addition to a Rwandan defence attorney funded by the Minister of Justice.

54. The Appeals Chamber considers that these aspects of the Witteveen Report were of clear relevance to, *inter alia*, the Trial Chamber’s consideration of the principle of equality of arms, specifically bearing on its findings as to the availability of adequate means for the preparation of the defence.¹³⁶ The Appeals Chamber recalls that a trial chamber need not refer to every piece of evidence considered provided that there is no indication that it completely disregarded any particular piece of evidence; such disregard may be shown where evidence that is clearly relevant to the findings is not addressed by the trial chamber’s reasoning.¹³⁷ The Appeals Chamber finds that the Trial Chamber’s failure to expressly address in the Impugned Decision the observations made in paragraphs 51 and 63 of the Witteveen Report, as highlighted by Uwinkindi, constitutes an error.

55. The Appeals Chamber observes, however, that paragraphs 51 and 63 of the Witteveen Report concern issues related to Uwinkindi’s trial which were extensively considered by the Trial Chamber on the basis of other information that was before it.¹³⁸ Furthermore, the Witteveen Report highlights the exceptional funding that Uwinkindi’s defence had received in comparison with other genocide cases in Rwanda – around 80,000,000 Rwandan francs as of November 2014.¹³⁹ Moreover, it notes several aspects related to Uwinkindi’s contentions regarding his right to have adequate facilities for the preparation of his defence that were considered by the Trial Chamber, namely, that: (i) the Minister of Justice rejected a defence budget to travel to countries to speak with prospective witnesses as “unrealistic” and requested an amended budget which the defence never filed; and (ii) that the Rwandan High Court rejected Uwinkindi’s application to hire an

¹³⁶ Impugned Decision, paras. 33-36. The Appeals Chamber has previously considered and rejected Uwinkindi’s contentions concerning the Witteveen Report’s implications on the Trial Chamber’s conclusions concerning his right to legal assistance. *See supra* paras. 40, 42.

¹³⁷ *See supra* para. 40.

¹³⁸ Compare Witteveen Report, RP. 2886-2884 (paras. 19-25) with Impugned Decision, paras. 18-29, 33.

¹³⁹ Witteveen Report, RP. 2886, 2885 (para. 22). The Appeals Chamber observes that the Trial Chamber also highlighted information reported in January 2015 that Uwinkindi’s defence had received 83,000,000 Rwandan francs at that point. Impugned Decision, n. 147.

investigator.¹⁴⁰ On appeal, Uwinkindi has not shown that the Trial Chamber erred in its consideration of these issues.¹⁴¹

56. In this respect, the Appeals Chamber considers that, notwithstanding the clear relevance of the aspects of the Witteveen Report highlighted by Uwinkindi, a consideration of the report as a whole does not substantiate Uwinkindi's contentions as to inequality of arms, and specifically, the inadequacy of the means available for the presentation of the defence in his case.¹⁴² To the contrary, Uwinkindi's proceedings in Rwanda, as reflected in the report, appear to have been relatively generously funded. Likewise, the Witteveen Report does not assess, for example, the means available to Uwinkindi, such as the ability of the judicial police to assist in the collection of defence evidence, which the Trial Chamber considered when analysing Uwinkindi's submissions concerning the equality of arms and the adequacy of the facilities available for the preparation of his defence. Consequently, the Appeals Chamber finds that the Trial Chamber's failure to consider the aspects of the Witteveen Report highlighted by Uwinkindi on appeal does not demonstrate that it abused its discretion when ultimately rejecting Uwinkindi's contentions concerning the equality of arms in his case.

57. As regards the Trial Chamber's reference to the Practice Direction as setting out the conditions for funding additional defence investigations and clarifying the types of available funding, the Trial Chamber relied on the submissions of the Prosecution and the Government of Rwanda and a copy of the Practice Direction submitted by the Prosecution.¹⁴³ However, the Appeals Chamber observes that the Practice Direction indicates that it "shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda" ("Official Gazette")¹⁴⁴ and that Uwinkindi argued before the Trial Chamber that the record does not demonstrate that the Practice Direction had entered into force.¹⁴⁵ Uwinkindi repeats this argument on appeal.

58. The Appeals Chamber observes that Uwinkindi's contention that the record does not demonstrate that the Practice Direction entered into force is unrefuted.¹⁴⁶ The Appeals Chamber has

¹⁴⁰ Compare Witteveen Report, RP. 2885 (n. 17) with Impugned Decision, paras. 33, 35, 36.

¹⁴¹ In this respect, the Appeals Chamber considers that Uwinkindi simply sets forth allegations with references in the record without demonstrating that the Trial Chamber misdirected itself as to the law it applied or erred as to the facts upon which it relied.

¹⁴² Furthermore, and although the Witteveen Report takes a critical view of the competence of Uwinkindi's counsel as well as his conduct during Uwinkindi's trial and his submissions before the Mechanism, these issues were not raised in Uwinkindi's contentions before the Trial Chamber. Compare Witteveen Report, RP. 2888, 2887 (paras. 14, 15) with Brief at Trial, paras. 80-86. They do not provide a basis for challenging the Impugned Decision. See *supra* para. 20.

¹⁴³ Impugned Decision, paras. 33, 36, nn. 138, 151. See also Impugned Decision, para. 32.

¹⁴⁴ See Response Brief at Trial, Annex 18, RP. 1184 (Practice Direction).

¹⁴⁵ See Reply Brief at Trial, paras. 52, 53, 63.

¹⁴⁶ See Response Brief, para. 40. See also Response Brief at Trial, para. 43; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Republic of Rwanda's Response to Jean Uwinkindi's Request for Revocation of the Referral Order, 4 September 2015 ("Government Response at Trial"), paras. 4, 5.

found nothing in the record referred to by the Trial Chamber, the parties, or the Government of Rwanda indicating that the Practice Direction was published in the Official Gazette. However, the Appeals Chamber finds that Uwinkindi has not demonstrated that the Trial Chamber erred in noting the existence of the Practice Direction, as it only referred to it as setting out conditions for funding additional investigations and clarifying the types of funding for such investigations, in addition to other types of funding and resources already available to Uwinkindi for the conduct of his defence.¹⁴⁷ Thus, the Trial Chamber did not consider that the Practice Direction created any types of additional funding and merely observed that Uwinkindi's new counsel should be able to request funding for additional investigations since his trial was then still ongoing.¹⁴⁸ Accordingly, the Appeals Chamber finds that the Trial Chamber's reference to the Practice Direction does not demonstrate that it incorrectly exercised its discretion in ultimately concluding that Uwinkindi had not shown that the conditions for referral of the case were no longer met and that it was in the interests of justice to revoke the referral order.

59. With respect to Uwinkindi's submission that the Trial Chamber erred in finding that the judicial police were available to conduct investigations for his defence,¹⁴⁹ the Appeals Chamber observes that the Trial Chamber relied on references to the Rwandan Code of Criminal Procedure that were not disputed by Uwinkindi at trial.¹⁵⁰ Notwithstanding the opportunity to do so, Uwinkindi fails to substantiate the contention that he advances on appeal that the prosecution authorities could not gather evidence on his behalf after his transfer.¹⁵¹ Likewise, his argument that the judicial police had not gathered any evidence on his behalf, an argument made for the first time

¹⁴⁷ Impugned Decision, paras. 33, 36. In this respect, the Trial Chamber noted that Rwanda had made a budgetary provision of 100 million Rwandan francs to fund legal aid for transferred cases, instituted in 2014 a flat-rate remuneration policy, and the availability of judicial police to assist the defence in the conduct of investigations. *See* Impugned Decision, para. 33. *See also* Impugned Decision, para. 35.

¹⁴⁸ Impugned Decision, para. 36. The Appeals Chamber further finds that Uwinkindi's subsidiary contention that his counsel was neither aware of nor was he able to benefit from this Practice Direction and his queries as to the possible impact of the Practice Direction in light of the conduct of the Ministry of Justice and the issuance of his judgement fail to demonstrate any error on the part of the Trial Chamber.

¹⁴⁹ Impugned Decision, para. 33.

¹⁵⁰ *See* Impugned Decision, paras. 33, 35, nn. 140, 143. In particular, the Prosecution, at trial, submitted Article 20 of the Rwandan Code of Criminal Procedure, which provides that the judicial police "shall be responsible for [...] gathering incriminating and exculpatory evidence". *See* Response Brief at Trial, Annex 22 (Excerpts of the Rwandan Code of Criminal Procedure). *See also* Response Brief at Trial, Annex 5, RP. 1273-1263 (*Public Prosecution v. Jean Uwinkindi*, Case No. RP 0002/12/HCCI, Decision of 16 May 2013), RP. 1269 (para. 16) (noting Article 19 of a previous version of the Rwandan Code of Criminal Procedure, which also made the judicial police responsible for "gathering evidence for the prosecution and defence").

¹⁵¹ *See* Notice of Appeal, para. 31. *See, e. g.*, Reply Brief at Trial, paras. 44-53. The Appeals Chamber observes that submissions before the Trial Chamber reflected the availability of the judicial police to conduct investigations on Uwinkindi's behalf after his transfer. *See* Response Brief at Trial, para. 40, *referring, inter alia, to Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (September 2012), 12 October 2012, para. 13, *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (1 to 31 March 2013), 12 April 2013, para. 20.

on appeal, fails to demonstrate any error in the Trial Chamber's conclusion that Uwinkindi had not shown what steps if any he took to use the services of the judicial police.¹⁵²

60. Based on the foregoing, the Appeals Chamber dismisses Ground 5 of Uwinkindi's appeal.

F. Ground 6: Defence Remuneration

61. The Trial Chamber considered that it was not within its purview to scrutinize the Rwandan legal aid budget, inquire into its sufficiency, or verify its administration and disbursement.¹⁵³ It also held that it was not in a position to decide on the fees that should be paid to counsel representing accused in transfer cases.¹⁵⁴ In this respect, it accepted that over 60 qualified counsel have expressed their willingness to represent indigent accused in cases transferred to Rwanda under the "new remuneration policy", which ensured Uwinkindi's right to free legal assistance.¹⁵⁵

62. Uwinkindi argues that the Trial Chamber erred in finding that it was not within its purview to scrutinize the budget allocated for legal aid and determine whether the amount was sufficient.¹⁵⁶ To the contrary, he submits that the Trial Chamber was obliged to ensure that a suitable and sufficient remuneration system was in place to ensure an effective defence and that it erred by not fulfilling this obligation.¹⁵⁷ He further argues that the Trial Chamber simply accepted the submissions from the Prosecution that the funding allocated for Uwinkindi's defence was sufficient and consequently "reversed the burden of proof".¹⁵⁸ In this regard, he contends that the Trial Chamber failed to examine evidence and arguments demonstrating that the funds allocated to his defence, and, in particular, the flat fee structure, were insufficient "and derisory" given the specific needs of his case.¹⁵⁹ In Uwinkindi's view, the individual and cumulative effects of the Trial

¹⁵² The record reflects that Uwinkindi and his counsel were aware of the legal provisions that allowed them to use the judicial police to conduct investigations on their behalf but that they decided against relying on such assistance. *See Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Public Report of the Court Monitor for the Uwinkindi Case June 2012, 5 November 2012, paras. 12-14.

¹⁵³ Impugned Decision, para. 34.

¹⁵⁴ Impugned Decision, para. 34.

¹⁵⁵ Impugned Decision, para. 34.

¹⁵⁶ Notice of Appeal, p. 8; Appeal Brief, p. 20, para. 120. In this respect, Uwinkindi submits that the position taken by the Trial Chamber is manifestly inconsistent with ICTR jurisprudence, which recognizes sufficient defence legal aid funding as a pre-condition for transfer. *See* Appeal Brief, para. 121, referring to *Munyagishari* Referral Decision, para. 153 ("Should Rwanda fail to provide sufficient funding so as to infringe on the fair trial rights of the Accused, the case is subject to revocation in accordance with Rule 11 *bis* (F).").

¹⁵⁷ Appeal Brief, paras. 122, 126.

¹⁵⁸ Appeal Brief, paras. 114, 116, 117, 127, 128.

¹⁵⁹ Appeal Brief, paras. 115, 118, 119, 123-125, 127, 129. In this respect, Uwinkindi submits that the Trial Chamber: (i) did not examine all of the correspondence addressed to the Ministry of Justice regarding "the planned budget and other related specifications"; (ii) failed to recognize that the claim that the Rwanda Bar Association adopted the Ministry's flat-fee structure is contradicted in the "*Amicus Curiae* of 2010"; (iii) failed to ensure that the "financial means would be guaranteed to allow counsel to work on preparing the case-file outside of Rwanda"; and (iv) endorsed the "flat-fee structure" which, in Uwinkindi's view, amounts to "manifestly derisory funds" for defence counsel. *See* Notice of Appeal, para. 30; Appeal Brief, paras. 119, 125, 128.

Chamber's errors, including endorsing the flat-fee structure, resulted in a miscarriage of justice and demonstrate that the Trial Chamber incorrectly exercised its discretionary powers.¹⁶⁰

63. The Prosecution responds that Uwinkindi fails to demonstrate that the Trial Chamber erred in finding that it was not within its purview to scrutinize the legal aid budget.¹⁶¹

64. The Appeals Chamber finds that Uwinkindi demonstrates no error in the Trial Chamber's statement that it was not within its purview to scrutinize the Rwandan legal aid budget, inquire into its sufficiency, or verify its administration and disbursement, particularly in light of the conclusion that the circumstances in Rwanda ensured Uwinkindi's right to free legal assistance.¹⁶²

65. Likewise, Uwinkindi in no way substantiates his claim that the Trial Chamber applied an incorrect burden of proof or that the Trial Chamber, without scrutiny, accepted submissions from the Prosecution that sufficient funding was allocated to Uwinkindi's defence.¹⁶³ In this respect, the Appeals Chamber observes that the Trial Chamber considered the legal aid scheme available at the time of Uwinkindi's transfer, noted the flat-rate policy adopted in relation to remuneration of counsel in 2014 and the amount of funding reportedly provided to defence counsel as of 15 January 2015, as well as that Uwinkindi's new counsel should be able to request funding for additional investigations since his trial was then still ongoing.¹⁶⁴ It also accepted that over 60 qualified counsel have expressed their willingness to represent indigent accused in transfer cases in Rwanda under the new remuneration policy ensuring Uwinkindi's right to free legal assistance.¹⁶⁵

¹⁶⁰ Notice of Appeal, para. 30; Appeal Brief, paras. 130-132.

¹⁶¹ Response Brief, paras. 38, 39.

¹⁶² See *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2013, para. 71 (recalling that a Referral Chamber must "satisf[y] itself that the State would supply defence counsel to accused who cannot afford their own representation" and is "not obligated [...] to itemize the provisions of the [State's] budget once it has learned there is financial support for that representation"). See also *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-AR11bis.1 & IT-97-25/1-AR11bis.2, Decision on Savo Todović's Appeals against Decisions on Referral under Rule 11bis, 4 September 2006, para. 59; *Prosecutor v. Željko Mežakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis, 7 April 2006, para. 70; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005, para. 21.

¹⁶³ The Appeals Chamber notes in this respect that: (i) Uwinkindi fails to substantiate with references his contention that the Trial Chamber did not examine correspondence addressed to the Ministry of Justice and that, in any event, a review of the Impugned Decision and the references in it demonstrate otherwise (see Impugned Decision, para. 30 and references cited therein); (ii) Uwinkindi's contention that the Bar Association did not adopt the Ministry's flat-fee structure is clearly contradicted by the evidence relied upon by the Trial Chamber (see Impugned Decision, para. 33, n. 139, referring to Monitoring Report for January 2015, paras. 33, 61, 62); (iii) Uwinkindi fails to demonstrate any error in the Trial Chamber's findings through his contention that the Trial Chamber failed to ensure financial means to allow his counsel to prepare "the case-file outside of Rwanda"; and (iv) Uwinkindi fails to demonstrate that the Trial Chamber's discussion of the flat-fee structure in Rwanda was in error.

¹⁶⁴ Impugned Decision, paras. 33, 35, 36, n. 147.

¹⁶⁵ Impugned Decision, para. 34. The Appeals Chamber notes that the President of the Rwanda Bar Association sent a list containing 66 names of lawyers to the Minister of Justice and that the letter was sent after the issuance of the Witteveen Report. See Government Response at Trial, para. 3, n. 3. The Appeals Chamber further notes that Uwinkindi

The Appeals Chamber therefore finds that Uwinkindi demonstrates no error in the Trial Chamber's application of the burden of proof or in its reasoning.

66. For the foregoing reasons, the Appeals Chamber dismisses Ground 6 of Uwinkindi's appeal.

G. Ground 7: Right to be Tried before an Independent and Impartial Tribunal

67. The Trial Chamber found that Uwinkindi failed to show that the conditions for the referral of his case were no longer met due to an alleged lack of judicial impartiality and that it was in the interests of justice to revoke the order of referral on this basis.¹⁶⁶ In coming to this conclusion, the Trial Chamber considered and dismissed Uwinkindi's argument that his fair trial rights were violated when the Rwandan High Court fined defence counsel for failing to appear in court and appointed new counsel to represent him.¹⁶⁷ The Trial Chamber also considered and dismissed Uwinkindi's contention that his right to be tried by an impartial tribunal had been violated finding that he had failed to demonstrate that any such violation could not be addressed or remedied in any subsequent appellate proceedings.¹⁶⁸ The Trial Chamber reached the same conclusion with respect to Uwinkindi's submission that the Rwandan High Court's failure to sanction the Rwandan Prosecution for inappropriate remarks amounted to bias.¹⁶⁹

68. Uwinkindi submits that the Trial Chamber erred by failing to find a violation of his right to be tried by an independent and impartial tribunal and "endors[ing] the untimely interferences of the Ministry of Justice and the Presiding Judge's aversion towards [him]".¹⁷⁰ He challenges in particular the Trial Chamber's findings concerning the Rwandan High Court's imposition of a fine on defence counsel,¹⁷¹ the Rwandan High Court's dismissal of his request for a stay pending the determination of his appeal against the decision to continue the proceedings despite the uncertainty with his legal representation,¹⁷² and the alleged bias by the Presiding Judge of the Rwandan High Court against him.¹⁷³

raises, without support, a new argument in the Reply Brief that the "recruitment of 60 attorneys was rendered void" and dismisses it without further consideration. *See* Reply Brief, para. 28.

¹⁶⁶ Impugned Decision, paras. 38-40.

¹⁶⁷ Impugned Decision, para. 38.

¹⁶⁸ Impugned Decision, paras. 39, 40.

¹⁶⁹ Impugned Decision, paras. 39, 40.

¹⁷⁰ Notice of Appeal, p. 9; Appeal Brief, paras. 22, 135, 136, 144, 147.

¹⁷¹ Appeal Brief, paras. 133, 135, 143; Reply Brief, para. 34.

¹⁷² Appeal Brief, paras. 133, 139-142. Uwinkindi specifically purports to rely on the "suspensive effect of the appeal" and complains that "[c]ontrary to all expectations, the [Rwandan] High Court preferred to ignore this principle and unfairly sanctioned Defence Counsel who, nevertheless, decided to request a stay of proceedings before the Supreme Court". *See* Appeal Brief, paras. 142, 143. *See also* Notice of Appeal, para. 37.

¹⁷³ Appeal Brief, paras. 135, 145, 146.

69. The Prosecution responds that the Trial Chamber reasonably concluded that Uwinkindi failed to show a violation of his right to be tried before an independent and impartial tribunal requiring the revocation of his case.¹⁷⁴ The Prosecution further responds that the Trial Chamber correctly took into account the possibility and availability of remedies for procedural irregularities in Rwanda in considering whether to revoke the referral.¹⁷⁵

70. In dismissing Uwinkindi's arguments about the imposition of a fine on defence counsel, the Trial Chamber relied on the "specific circumstances which triggered the sanction and subsequent replacement of counsel."¹⁷⁶ The Trial Chamber noted that the Rwandan High Court heard submissions on Uwinkindi's request for a stay of the proceedings and ruled that Uwinkindi could either continue with his counsel or request an adjournment for the appointment of new counsel.¹⁷⁷ Uwinkindi confirmed that he wanted his counsel to assist him until the proceedings were completed as it would not be in his interest to proceed and have defence counsel replaced during the presentation of evidence.¹⁷⁸ The Rwandan High Court decided to continue the proceedings.¹⁷⁹ Uwinkindi's counsel then expressed the intention to appeal this decision, maintaining that Uwinkindi could not have a fair trial in these circumstances, and requested a stay of the proceedings until the appeal was determined.¹⁸⁰ The Rwandan High Court dismissed this request, as well as a request by Uwinkindi's counsel to "provisionally withdraw" in order to prepare this appeal, and ordered a short break before resuming with the testimony of Rwandan Prosecution witnesses.¹⁸¹ Following the break, however, Uwinkindi's counsel did not appear in court and Uwinkindi stated that he agreed with his counsel's decision not to appear and that he was not prepared to proceed unrepresented.¹⁸² The Rwandan Prosecution submitted that Uwinkindi's counsel breached the code of conduct and that Uwinkindi "should not be a victim" of his counsel's deliberate obstruction of the proceedings.¹⁸³ The Rwandan High Court found that defence counsel intended to delay the trial and fined them each 500,000 Rwandan francs.¹⁸⁴ The Rwandan High Court then adjourned the hearing since Uwinkindi was not assisted by counsel.¹⁸⁵

¹⁷⁴ Response Brief, paras. 43, 44.

¹⁷⁵ Response Brief, para. 45.

¹⁷⁶ Impugned Decision, para. 38, *referring, inter alia, to* Monitoring Report for January 2015, para. 28.

¹⁷⁷ Impugned Decision, para. 19, *referring to* Monitoring Report for January 2015, paras. 6, 16. *See also* Monitoring Report for January 2015, paras. 7, 9-16.

¹⁷⁸ Impugned Decision, para. 19, *referring to* Monitoring Report for January 2015, paras. 17, 19. *See also* Monitoring Report for January 2015, paras. 13, 15.

¹⁷⁹ Impugned Decision, para. 19, *referring to* Monitoring Report for January 2015, paras. 17, 19.

¹⁸⁰ Impugned Decision, para. 19; Monitoring Report for January 2015, paras. 20-22.

¹⁸¹ Monitoring Report for January 2015, paras. 24, 25.

¹⁸² Impugned Decision, para. 19; Monitoring Report for January 2015, paras. 25, 26.

¹⁸³ Monitoring Report for January 2015, para. 27.

¹⁸⁴ Impugned Decision, para. 19, *referring to* Monitoring Report for January 2015, para. 28. Counsel were sanctioned with the maximum fine allowed under Article 15 of the Rwandan Code of Civil Procedure, which provided for

71. With regard to Uwinkindi's submissions on his counsel's fines, the Appeals Chamber recalls that, before the Trial Chamber, Uwinkindi argued that the Rwandan High Court exhibited partiality by imposing the fines on his counsel.¹⁸⁶ As noted above, the Trial Chamber considered the specific circumstances at issue and concluded that Uwinkindi had not shown a violation of his right to be tried by an independent and impartial tribunal.¹⁸⁷ On appeal, Uwinkindi argues that the Trial Chamber erred in considering that he was being tried by an impartial tribunal given that the Rwandan High Court "unfairly sanctioned" his counsel.¹⁸⁸ The Appeals Chamber reiterates that as "professional judges, members of the Rwandan judiciary benefit from a presumption of independence and impartiality".¹⁸⁹ Thus, their personal impartiality must be presumed until there is proof to the contrary.¹⁹⁰ This presumption cannot be easily rebutted and it is for the party alleging bias to rebut it on the basis of adequate and reliable evidence.¹⁹¹ In this respect, there is a high threshold to reach and the reasonable apprehension of bias must be firmly established.¹⁹² The Appeals Chamber does not accept Uwinkindi's contention that the sanction on his counsel evinces bias on the part of the judges of the Rwandan High Court. Uwinkindi has therefore failed to rebut the presumption of impartiality and thereby show that the Trial Chamber erred in this respect.

72. As to Uwinkindi's complaint that the Rwandan High Court's dismissal of his request for a stay of proceedings pending determination of a contested matter on appeal evinced the court's bias, the Appeals Chamber considers that Uwinkindi did not clearly argue this before the Trial Chamber¹⁹³ and his cursory submissions on appeal fail to demonstrate any error in the Trial Chamber's consideration of his right to be tried by an independent and impartial judiciary.

73. Similarly, Uwinkindi does not show any error on the part of the Trial Chamber in dismissing his claims of alleged bias on the part of the Presiding Judge. In this respect, the Trial Chamber considered that Uwinkindi's allegations were rejected by a specialized chamber of the Rwandan High Court and noted that Uwinkindi's cursory submissions were insufficient to show a violation of

"punishment for delaying a hearing" and stated that "any party who intentionally delays the hearing or who seeks the appeal as [...] delaying tactics, shall be charged a civil fine". See Monitoring Report for January 2015, n. 12.

¹⁸⁵ Monitoring Report for January 2015, para. 28.

¹⁸⁶ Impugned Decision, para. 37.

¹⁸⁷ See Impugned Decision, paras. 19, 37, 38, referring to Monitoring Report for January 2015, para. 28.

¹⁸⁸ Appeal Brief, p. 22, para. 141, 143, 144.

¹⁸⁹ *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, para. 24.

¹⁹⁰ See, e.g., *The Prosecutor v. Yussuf Muniyaki*, Case No. ICTR-97-36A-A, Judgement, 28 September 2011, para. 115; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, para. 43. See also *Kyprianou v. Cyprus* [2005] ECHR 873, para. 119.

¹⁹¹ See *Nyiramasuhuko et al.* Appeal Judgement, paras. 95, 405 and references cited therein; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement"), para. 45.

¹⁹² *Niyitegeka* Appeal Judgement, para. 45 and references cited therein.

¹⁹³ See Brief at Trial, paras. 67, 68, 70.

his fair trial rights.¹⁹⁴ Uwinkindi's general allegations on appeal, which are unsupported by any evidence,¹⁹⁵ fail to demonstrate conduct that would lead a reasonable observer to apprehend bias against Uwinkindi.

74. In light of the foregoing, the Appeals Chamber dismisses ground 7 of Uwinkindi's appeal.

IV. DISPOSITION

75. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** Uwinkindi's appeal in its entirety.

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

Done this 4th day of October 2016,
At The Hague,
The Netherlands



Judge Burton Hall, Presiding

[Seal of the Mechanism]



¹⁹⁴ Impugned Decision, paras. 39, 40, n. 162 and references cited therein.

¹⁹⁵ In support of his allegations of bias made on appeal, Uwinkindi relies on the transcript of the proceedings before the Rwandan High Court of 23 September 2015. See Appeal Brief, para. 145, n. 40; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-R14.1, Disclosure of Additional Evidence and Material to the Trial Chamber, Pursuant to Rule 72(D) of the Rules of Procedure and Evidence, 22 October 2015 (original French version filed on 28 September 2015), Annex 1, RP. 1901-1891 (*Procès verbal d'audience du 23 septembre*, 18 April 2016, which was distributed by the Registry on 5 September 2016). Having reviewed this transcript, the Appeals Chamber finds that it does not support Uwinkindi's allegations.



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