UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Patrick Robinson** **Judge Mehmet Güney** **Judge Andrésia Vaz** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Decision of:	**16 December 2011**

JEAN UWINKINDI

v.

THE PROSECUTOR

Case No. ICTR-01-75-AR11bis

DECISION ON UWINKINDI'S APPEAL AGAINST THE REFERRAL OF HIS CASE TO RWANDA AND RELATED MOTIONS

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal filed by Mr. Jean Uwinkindi[1] against the 28 June 2011 decision of the Referral Chamber designated under Rule 11*bis* ("Referral Chamber").[2]

I. BACKGROUND

2. According to the Indictment, Mr. Uwinkindi was a pastor of the Kayenzi Pentecostal Church located in Nyamata Sector, Kanzenze Commune, Kigali-Rural Prefecture, and the "President of a self-styled 'Security Committee'" at the church.[3] He is charged before the Tribunal with genocide and extermination as a crime against humanity, principally related to alleged attacks at his church, area roadblocks, Rwankeri Cellule, Kayenzi hill, the Cyugaro swamps, and the Kanzenze communal offices.[4]

3. On 28 June 2011, the Referral Chamber ordered that Mr. Uwinkindi's case be referred to the authorities of the Republic of Rwanda for trial before the High Court of Rwanda ("High Court").[5] On 13 July 2011, Mr. Uwinkindi filed his Notice of Appeal. On 14 July 2011, the Pre-Appeal Judge granted Mr. Uwinkindi an extension of time to file his appeal brief within 15 days of the filing of the Kinyarwanda translation of the Impugned Decision.[6] In addition, considering the length of the Impugned Decision and the complexity of the issues on appeal, the Pre-Appeal Judge authorized Mr. Uwinkindi and the Prosecution to exceed the word limits for the Appeal Brief and Response Brief, respectively, by 6,000 words.[7]

4. Mr. Uwinkindi filed his Appeal Brief on 8 September 2011. On 15 September 2011, the Pre-Appeal Judge granted the Prosecution a 10-day extension of time to respond.[8] The Prosecution filed

[1] Defence Notice of Appeal Against the Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 13 July 2011 ("Notice of Appeal"); Defence Appeal Brief Against the Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 8 September 2011 ("Appeal Brief").
[2] *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 ("Impugned Decision").
[3] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, Amended Indictment, 23 November 2010 ("Indictment"), para. 3.
[4] Indictment, p. 1, paras. 7-17.
[5] Impugned Decision, p. 57 (disposition).
[6] Decision on Request for Translation and Extension of Time, 14 July 2011, para. 6.
[7] Decision on Request for Extension of Word Limit, 5 September 2011, pp. 1, 2.
[8] Decision on the Prosecution's Request for an Extension of Time to File Its Response Brief, 15 September 2011, pp. 1, 2.

its Response Brief on 28 September 2011.[9] Mr. Uwinkindi filed his Reply Brief on 4 October 2011.[10]

II. PRELIMINARY MATTERS

A. Motion to Expunge

5. In the Impugned Decision, the Referral Chamber requested the Government of Rwanda to report to the President of the Tribunal, within 60 days of the decision, on "the progress of the study commissioned by the Rwandan Minister of Justice regarding Article 13 of the Rwandan Constitution and any consequential action, including amendment thereto, contemplated by Rwanda."[11] Article 13 relates to the criminalization in Rwanda of "revisionism, negationism and trivialization of genocide."[12] On 22 August 2011, the Prosecutor General of Rwanda filed his report with the President of the Tribunal.[13]

6. On 25 August 2011, Mr. Uwinkindi filed a motion seeking to expunge portions of the Report that, in his view, exceeded the scope of the Referral Chamber's request for information related to Article 13 of the Rwandan Constitution.[14] In particular, Mr. Uwinkindi objects to portions of the Report relating, *inter alia*, to: proposed legislation regarding foreign judges participating in domestic trials; the African Union's endorsement of Rwanda as an appropriate venue for the prosecution of the former President of Chad, Hissène Habré; and the extradition of a Rwandan national from Norway for trial in Rwanda.[15] Mr. Uwinkindi requests leave to respond to information in the Report relating to actions taken with respect to Article 13 of the Rwandan Constitution.[16] The Prosecution opposes the Motion to Expunge.[17]

7. The Appeals Chamber recalls that an appeal from a decision rendered under Rule 11*bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules") "shall be heard expeditiously on the

[9] Prosecutor's Response Brief, 28 September 2011 ("Response Brief").
[10] Defence Reply to the Prosecutor's Response Brief to the Defence Appeal Brief Against the Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 4 October 2011 ("Reply Brief").
[11] Impugned Decision, p. 59 (disposition).
[12] Impugned Decision, para. 95, *citing* Article 13 of the Rwandan Constitution.
[13] *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-R11*bis*, Letter dated 19 August 2011 from Mr. Martin Ngoga, Prosecutor General of the Republic of Rwanda, to Hon. Khalida Rachid Khan, President of the Tribunal, 22 August 2011 ("Report").
[14] Defence Extremely Urgent Motion to Expunge from the Record Submissions by the Government of Rwanda Made Beyond the Scope of the Referral Chamber's Request, 25 August 2011 ("Motion to Expunge").
[15] Motion to Expunge, paras. 8-11, 15.
[16] Motion to Expunge, paras. 13-15.
[17] Prosecutor's Opposition to Defence Extremely Urgent Motion to Expunge from the Record Submissions by the Government of Rwanda Allegedly Made Beyond the Scope of the Referral Chamber's Request, 26 August 2011, paras. 5-12. Mr. Uwinkindi did not file a reply.

basis of the *original record* of the Trial Chamber."[18] The Appeals Chamber notes that the Report was filed after the issuance of the Impugned Decision. Thus, it was neither part of the Referral Chamber's original record, nor was it considered by the Referral Chamber in reaching the Impugned Decision. In addition, neither party has sought to admit the Report as additional evidence pursuant to Rule 115 of the Rules. The Appeals Chamber, therefore, will not consider it in determining the appeal.[19] As a result, there is no need to expunge any part of the Report from the case file or to allow Mr. Uwinkindi to respond to it.[20]

8. For the foregoing reasons, Mr. Uwinkindi's Motion to Expunge is denied.

B. Motion for Hearing

9. On 16 September 2011, Mr. Uwinkindi requested the Appeals Chamber to allow oral submissions in this appeal.[21] He notes that the parties jointly agreed that an oral hearing would have been beneficial in the first instance, but that "[t]he issue was simply ignored" by the Referral Chamber.[22] According to Mr. Uwinkindi, oral argument is warranted given the extensive record, the complexity of the appeal, and the historic nature of the referral.[23] The Prosecution does not oppose the request to the extent that the Appeals Chamber may deem oral submissions useful for the consideration of this appeal.[24]

10. Rule 117(A) of the Rules provides that an appeal of a decision taken under Rule 11*bis* of the Rules "may be determined entirely on the basis of written briefs."[25] The Appeals Chamber recalls that the word limits for the parties' briefs have been extended to account for the complexity of the appeal.[26] The Appeals Chamber is satisfied that the written briefs and the original record before the Referral Chamber form an adequate basis for the consideration of this appeal.

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[18] Rule 117(A) of the Rules (emphasis added).
[19] *See Prosecutor v. Radovan Stankovi}*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stankovi}* Appeal Decision"), para. 37; *Prosecutor v. Gojko Jankovi}*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005 ("*Jankovi}* Appeal Decision"), para. 73; *Prosecutor v. Paško Ljubiči}*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal Against Decision on Referral Under Rule 11*bis*, 4 July 2006, para. 26. *See also Karemera et al. v. The Prosecutor*, Case No. ICTR 98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse, 19 June 2009, para. 23.
[20] *Cf. Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Decision on Motion to Expunge Documents from the Appeal Case File, 19 August 2011, paras. 5, 6.
[21] Defence Request for an Oral Hearing, 16 September 2011 ("Motion for Hearing"), para. 11.
[22] Motion for Hearing, para. 7.
[23] Motion for Hearing, paras. 8-10.
[24] Prosecutor's Response to the "Defence Request for an Oral Hearing", 23 September 2011, para. 4. Mr. Uwinkindi did not file a reply.
[25] *See also* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006 ("Practice Direction on the Filing of Written Submissions"), paras. 4-7.
[26] *See supra* para. 3; *infra* para. 16.

11. For the foregoing reasons, Mr. Uwinkindi's Motion for Hearing is denied.

C. Request to Exceed Word Limit of Reply Brief and Prosecution's Motion to Strike

12. In his Reply Brief, Mr. Uwinkindi sought leave to exceed the word limit of his Reply Brief to the present length of 5,420 words.[27] In support of his request, Mr. Uwinkindi referred to the length of the Impugned Decision, the complexity of the appeal, and the Pre-Appeal Judge's prior extension of the word limits for the parties' Appeal and Response Briefs.[28] In the alternative, he requested leave to withdraw his Reply Brief and re-file it in compliance with the 3,000 word limit.[29]

13. The Prosecution requested the Appeals Chamber to strike the Reply Brief because it was filed out of time without a showing of good cause, and because Mr. Uwinkindi failed to request an extension of the word limit prior to filing his brief.[30] The Prosecution submits that "Mr. Uwinkindi's lax approach towards the governing Practice Directions should not be tolerated."[31]

14. In response, Mr. Uwinkindi requests that the Motion to Strike be denied in its entirety.[32] He acknowledges that his Reply Brief was filed out of time, but notes that it was late by only two hours and nine minutes, and that this delay did not impact the overall consideration of this appeal.[33] Mr. Uwinkindi recalls the complexity of the issues on appeal, the prior extension of word limits by the Pre-Appeal Judge, and the limited period of time in which he had to file his Reply Brief.[34] Mr. Uwinkindi submits that he intended to file his Reply Brief on time and that "[i]t was only at the very last minute the Defence team realised it would need an extremely limited amount of extra time to complete the task before it."[35] He further notes that on the day of the filing, communication between members of his Defence team was difficult, in part because team members were located in various cities.[36] Mr. Uwinkindi asserts that the Prosecution's proposed remedy for the minimal delay is "disproportionate and draconian."[37] With respect to the extension of word limits, Mr. Uwinkindi submits that, given the short deadline for filing a reply, it was impractical to request the

[27] Reply Brief, paras. 1-5. The Appeals Chamber observes that in his request, Mr. Uwinkindi refers to his Reply Brief as comprising 5,420 words, while the final word count at the end of the Reply Brief indicates that it contains only 5,365 words. *See* Reply Brief, p. 17.
[28] Reply Brief, paras. 3-5.
[29] Reply Brief, para. 6.
[30] Prosecutor's Motion to Strike Reply Brief, 4 October 2011 ("Motion to Strike"), paras. 1-7. *See also* Prosecutor's Reply to Defence Response to the Prosecutor's Motion to Strike Reply Brief, 7 October 2011 ("Reply: Motion to Strike"), paras. 1-9.
[31] Motion to Strike, para. 6. *See also* Reply: Motion to Strike, paras. 7, 8.
[32] Response to the Prosecutor's Motion to Strike Reply Brief, 6 October 2011 ("Response: Motion to Strike"), para. 18.
[33] Response: Motion to Strike, paras. 6, 12-13.
[34] Response: Motion to Strike, paras. 9, 11.
[35] Response: Motion to Strike, para. 11.
[36] Response: Motion to Strike, para. 11.
[37] Response: Motion to Strike, para. 8.

extension in advance.[38] He contends that he made the request in the most practicable manner by placing it in the body of the Reply Brief.[39]

15. In accordance with paragraph 7 of the Practice Direction on the Filing of Written Submissions, a party has four days from the filing of the response brief in which to file a reply. In addition, a reply is limited to 3,000 words.[40] Mr. Uwinkindi concedes that his Reply Brief was filed out of time and exceeds the word limit, and that it therefore does not comply with the relevant Practice Directions. The Appeals Chamber may, nonetheless, "recognize as validly done any act done after the expiration of a time-limit so prescribed."[41] In addition, it may allow a party to exceed the word limit where a party seeks advance authorization and demonstrates exceptional circumstances for the oversized filing.[42]

16. The Appeals Chamber recalls that the Pre-Appeal Judge has previously recognized the complexity of this appeal and has, as a result, allowed the parties extensions of time and word limits with respect to their Appeal and Response Briefs.[43] In these circumstances, the Appeals Chamber is satisfied that good cause exists for Mr. Uwinkindi's brief delay in filing his Reply Brief, which had no impact on the consideration of this appeal. Furthermore, although Mr. Uwinkindi should have sought approval in advance for his oversized filing, the Appeals Chamber is satisfied that the filing should be allowed in view of the previous extension of word limits, the absence of oral argument, and the complexity of the issues raised on appeal.

17. For the foregoing reasons, the Appeals Chamber grants Mr. Uwinkindi's requests to recognize his Reply Brief as validly filed and to accept the oversized filing. The Prosecution's Motion to Strike is denied.

D. Motion to File an *Amicus Curiae* Brief

18. On 29 November 2011, the International Criminal Defence Attorneys Association ("ICDAA") filed a request to file an *amicus curiae* brief in connection with Mr. Uwinkindi's present appeal.[44] The ICDAA requests leave to appear as *amicus curiae* based on its "recognized

[38] Response: Motion to Strike, paras. 16, 17.
[39] Response: Motion to Strike, paras. 16, 17.
[40] *See* Practice Direction on the Filing of Written Submissions, para. 8; Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006 ("Practice Direction on the Length of Briefs"), para. C(2)(c).
[41] Practice Direction on the Filing of Written Submissions, para. 19.
[42] Practice Direction on the Length of Briefs, para. C(5).
[43] *See supra* paras. 3, 4.
[44] Request for Permission to File an *Amicus Curiae* Brief by the International Criminal Defence Attorneys Association (ICDAA), Concerning Defence Appeal of the Referral Chamber's Referral of the Case of Jean-Bosco [*sic*] Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Rules, 29 November 2011 ("Motion to File an *Amicus Curiae* Brief").

expertise on fair trial requirements for persons charged with international crimes."[45] Specifically, the ICDAA seeks to: make submissions on the Prosecutor General's Report; present "new material" that became available after it made its submissions before the Referral Chamber; and elaborate on its earlier submissions.[46]

19. Pursuant to Rule 74 of the Rules, the Appeals Chamber "may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber." The Appeals Chamber is not convinced that granting leave to the ICDAA to present submissions before the Appeals Chamber in this case would assist in the consideration of the appeal. As explained above, the Appeals Chamber will not consider the Prosecutor General's Report.[47] Moreover, the ICDAA's proposed discussion of "new material" is vague and unconvincing as to its relevance to the proper determination of this appeal, and the ICDAA's original submissions before the Referral Chamber are already part of the record.

20. For the foregoing reasons, the Motion to File an *Amicus Curiae* Brief is denied.

III. APPEAL

21. Mr. Uwinkindi advances 14 grounds of appeal against the Impugned Decision.[48] In this decision, the Appeals Chamber considers Mr. Uwinkindi's submissions that the Referral Chamber erred in its assessment of: (i) the burden and standard of proof (Ground 1);[49] (ii) the cumulative impact of the various breaches of his right to a fair trial (Ground 2);[50] (iii) the conditions of detention (Ground 3);[51] (iv) the principle of *non bis in idem* (Ground 4);[52] (v) the application of

[45] Motion to File an *Amicus Curiae* Brief, para. 21. The ICDAA submits that it is an international non-governmental organization with recognized expertise in the field of international criminal justice and the rule of law. *See* Motion to File an *Amicus Curiae* Brief, paras. 3-11. The ICDAA further notes that it has been granted *amicus curiae* status in several cases before the Tribunal, and that it was granted *amicus curiae* status before the Referral Chamber in this case. *See* Motion to File an *Amicus Curiae* Brief, paras. 12-17.
[46] Motion to File an *Amicus Curiae* Brief, paras. 17, 18, 28, 35. The Prosecution filed a response to the Motion to File an *Amicus Curiae* Brief on 12 December 2011. *See* Prosecutor's Response to "Request for Permission to File an *Amicus Curiae* Brief by the International Criminal Defence Attorneys Association (ICDAA) Concerning Defence Appeal of the Referral Chamber's Referral of the Case of Jean-Bosco Uwinkindi to Rwanda Pursuant to Rule 11*bis* of the Rules", 12 December 2011 ("Prosecutor's Response to Motion to File an *Amicus Curiae* Brief"). In view of the urgency of Mr. Uwinkindi's appeal, the Appeals Chamber has not considered this response and thus there is no need to await a reply. In so doing, the Appeals Chamber is satisfied that no prejudice has been suffered by either the Prosecution or the ICDAA.
[47] *See supra* para. 7.
[48] In his Notice of Appeal, Mr. Uwinkindi advances 16 grounds of appeal. *See* Notice of Appeal, paras. 4-64. However, in his Appeal Brief, Mr. Uwinkindi states that he is no longer pursuing his Fifth and Seventh Grounds of Appeal. *See* Appeal Brief, paras. 23, 28. *See also* Notice of Appeal, paras. 14-17, 22.
[49] Notice of Appeal, paras. 4-6; Appeal Brief, paras. 1-5.
[50] Notice of Appeal, para. 7; Appeal Brief, para. 6.
[51] Notice of Appeal, para. 8; Appeal Brief, paras. 7-9.
[52] Notice of Appeal, paras. 9-13; Appeal Brief, paras. 10-22.

Article 59 of the Rwandan Code of Criminal Procedure ("RCCP") (Ground 6);[53] (vi) the availability and protection of witnesses (Grounds 8-10);[54] (vii) the right to an effective defence (Ground 11);[55] (viii) the independence and impartiality of the judiciary (Grounds 12-14);[56] and (ix) the mechanisms for monitoring and revocation (Grounds 15 and 16).[57]

A. Applicable Law

22. Rule 11*bis* of the Rules allows a designated trial chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. In assessing whether a State is competent within the meaning of Rule 11*bis* of the Rules to accept a case from the Tribunal, a designated trial chamber must consider whether the State in question has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[58] The penalty structure within the State must provide an appropriate punishment for the offences for which the accused is charged, and conditions of detention must accord with internationally recognized standards.[59] The trial chamber must also consider whether the accused will receive a fair trial, including whether the accused will be accorded the rights set out in Article 20 of the Tribunal's Statute ("Statute").[60]

23. The trial chamber has the discretion to decide whether to refer a case to a national jurisdiction, and the Appeals Chamber will only intervene if the trial chamber's decision was based on a discernible error.[61] To demonstrate such error, an appellant must show that the trial chamber: 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; gave weight to irrelevant considerations; failed to give sufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; or reached a decision that was so unreasonable and plainly unjust that the Appeals

[53] Notice of Appeal, paras. 18-21; Appeal Brief, paras. 24-27.
[54] Mr. Uwinkindi advances two separate grounds related to the availability of defence witnesses and one ground in connection with the witness protection program. *See* Notice of Appeal, paras. 23-46; Appeal Brief, paras. 29-63.
[55] Notice of Appeal, para. 47; Appeal Brief, paras. 64-68.
[56] Mr. Uwinkindi advances three separate but related grounds concerning his line of defence, the independence and impartiality of the Rwandan judiciary, and the deteriorating "political climate" in Rwanda. *See* Notice of Appeal, paras. 48-55; Appeal Brief, paras. 69-80.
[57] In his Appeal Brief, Mr. Uwinkindi presents his Fifteenth and Sixteenth Grounds of Appeal together. *See* Appeal Brief, paras. 81-114. *See also* Notice of Appeal, paras. 56-64.
[58] *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 4 December 2008 ("*Hategekimana* Appeal Decision"), para. 4; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008 ("*Kanyarukiga* Appeal Decision"), para. 4. *See also The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 9 October 2008 ("*Munyakazi* Appeal Decision"), para. 4.
[59] *Hategekimana* Appeal Decision, para. 4; *Kanyarukiga* Appeal Decision, para. 4; *Munyakazi* Appeal Decision, para. 4.
[60] *Hategekimana* Appeal Decision, para. 4; *Kanyarukiga* Appeal Decision, para. 4; *Munyakazi* Appeal Decision, para. 4.
[61] *Hategekimana* Appeal Decision, para. 5; *Kanyarukiga* Appeal Decision, para. 5; *Munyakazi* Appeal Decision, para. 5.

Chamber is able to infer that the trial chamber must have failed to exercise its discretion properly.[62]

B. Burden and Standard of Proof (Ground 1)

24. Mr. Uwinkindi challenges the Referral Chamber's application of the burden and standard of proof in determining whether he will receive a fair trial upon the transfer of his case to Rwanda.[63] In particular, he argues that the Referral Chamber failed to address which party bears the burden of proof.[64] In Mr. Uwinkindi's opinion, "principle and common sense" dictate that the burden rests squarely on the Prosecution.[65] Mr. Uwinkindi submits that, by failing to expressly note that the Prosecution bears the burden of proof, there exists a risk that the Referral Chamber placed an inappropriate burden on the Defence "to adduce evidence that [he] will *not* receive a fair trial in Rwanda."[66]

25. Furthermore, Mr. Uwinkindi contends that the language of Rule 11*bis*(C) of the Rules sets a high standard of proof for referral, namely that a chamber must be satisfied that an accused *will* receive a fair trial.[67] According to Mr. Uwinkindi, this means that the Prosecution must "exclude any real possibility that any of [his] fair trial rights might be breached."[68] Mr. Uwinkindi argues that the Referral Chamber applied a lower threshold and, in support of his assertion, highlights several passages in the Impugned Decision where the language suggests that the Referral Chamber determined it need only be satisfied that Mr. Uwinkindi would likely receive a fair trial.[69]

26. In sum, Mr. Uwinkindi asserts that the Impugned Decision should be reversed because the Referral Chamber failed to satisfy itself that the "Prosecut[ion] had adduced sufficient evidence to exclude any possibility that is more than merely fanciful of a breach of any of [his] fair trial rights."[70]

27. The Prosecution responds that the Referral Chamber correctly applied the standard of proof in determining that the accused *will* receive a fair trial and correctly placed the burden of proof on

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[62] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006, para. 9. *See also Hategekimana* Appeal Decision, para. 5; *Kanyarukiga* Appeal Decision, para. 5; *Munyakazi* Appeal Decision, para. 5.
[63] Appeal Brief, paras. 1-5. *See also* Reply Brief, paras. 8-14.
[64] Appeal Brief, para. 1.
[65] Appeal Brief, para. 1.
[66] Appeal Brief, para. 1.
[67] Appeal Brief, para. 2.
[68] Appeal Brief, para. 3. *See also* Appeal Brief, paras. 2, 5; Reply Brief, para. 9.
[69] Appeal Brief, para. 4, *citing* Impugned Decision, paras. 99, 102, 103, 132, 196, 223-225.
[70] Appeal Brief, para. 5. *See also* Appeal Brief, para. 115.

the Prosecution.[71] It further contends that the Referral Chamber did not require Mr. Uwinkindi to demonstrate that he would *not* receive a fair trial in Rwanda.[72]

28. The Appeals Chamber is not convinced that the Referral Chamber erred in failing to address the issue of which party bears the burden of proof, or that it placed an inappropriate burden on the Defence in this respect. In its submissions, the Prosecution acknowledged that it bore the burden of proof to demonstrate that Mr. Uwinkindi's trial in Rwanda will be fair.[73] The Appeals Chamber considers that, in cases where the Prosecution requests referral, it bears the burden of proof to demonstrate that the conditions set out in Rule 11*bis* of the Rules are met. However, the Appeals Chamber recalls that a designated trial chamber may also rely on any information and orders it reasonably finds necessary in determining whether the proceedings following the transfer will be fair.[74] A review of the Impugned Decision as a whole reflects that the Referral Chamber correctly regarded the burden of proof as falling on the Prosecution and also acted within its discretion in relying on other information or its own orders to satisfy itself that Mr. Uwinkindi's trial in Rwanda will be fair.

29. With regard to Mr. Uwinkindi's claim that the Referral Chamber failed to apply the correct standard of proof, the Appeals Chamber considers that the language identified by Mr. Uwinkindi as equivocal must be viewed in the context of the entire decision.[75] In this respect, the Appeals Chamber notes that the Referral Chamber demonstrated awareness of the applicable standard[76] and clearly concluded that "the case of the Accused, if referred, will be prosecuted consistent with internationally recognised fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments."[77] In reaching this conclusion, the Referral Chamber also considered that the monitoring mechanism is a means of ensuring that the fair trial rights of Mr. Uwinkindi will be respected.[78] Accordingly, the Appeals Chamber can identify no error in the Referral Chamber's application of the relevant standard of proof for referral.

30. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's First Ground of Appeal.

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[71] Response Brief, paras. 8-17.
[72] Response Brief, para. 10.
[73] Response Brief, para. 10.
[74] *Stankovi}* Appeal Decision, para. 50. *See also* Impugned Decision, para. 16.
[75] *See Stankovi}* Appeal Decision, para. 28.
[76] Impugned Decision, para. 15.
[77] Impugned Decision, para. 223.
[78] Impugned Decision, para. 223.

C. Cumulative Impact of Fair Trial Rights Concerns (Ground 2)

31. Mr. Uwinkindi submits that the Referral Chamber identified numerous difficulties in relation to holding his trial in Rwanda, and determined that each, individually, would not result in an unfair trial.[79] Mr. Uwinkindi contends, however, that the Referral Chamber erred in failing to consider whether the cumulative effect of these various concerns would impact the fairness of his trial.[80] The Prosecution responds that because Mr. Uwinkindi has failed to identify any individual error, there can be no cumulative error.[81]

32. Although the Referral Chamber examined the question of whether Mr. Uwinkindi will receive a fair trial by considering issues individually, the Appeals Chamber considers that the Referral Chamber also reached its conclusions in the Impugned Decision based upon the totality of the evidence and arguments before it.[82] The Appeals Chamber recalls that a trial chamber has the obligation to provide a reasoned opinion, but is not required to articulate its reasoning in detail.[83] Although the Referral Chamber did not expressly discuss the cumulative impact of its various concerns, it is reasonable to assume in the circumstances of this case that the Referral Chamber took this into account. Moreover, beyond asserting that the Referral Chamber did not assess their cumulative impact, Mr. Uwinkindi's submissions fail to demonstrate how these concerns, taken together, could render his trial unfair.

33. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Second Ground of Appeal.

D. Conditions of Detention (Ground 3)

34. Mr. Uwinkindi submits that the Referral Chamber erred in assessing the conditions of his possible detention in Rwanda.[84] Specifically, Mr. Uwinkindi argues that the Referral Chamber failed to properly consider his submissions relating to the conditions of detention.[85] He further argues that the Referral Chamber wrongly relied on the existence of a custom-built facility at the Kigali Central Prison, despite undisputed evidence that this facility will close in the coming

[79] Appeal Brief, para. 6, *citing* Impugned Decision, paras. 31, 32, 39, 86-88, 90, 95, 100, 110, 111, 131, 159, 160.
[80] Appeal Brief, para. 6.
[81] Response Brief, para. 151.
[82] *See* Impugned Decision, para. 222 ("Upon assessment of the submissions of the parties and the *amici curiae*, the Chamber has concluded that the case of this Accused should be referred to the authorities of the Republic of Rwanda for his prosecution before the competent national court for charges brought against him by the Prosecutor in the Indictment.").
[83] *See, e.g.*, *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 152.
[84] Appeal Brief, paras. 7-9.
[85] Appeal Brief, para. 8.

months.[86] Moreover, Mr. Uwinkindi submits that Rule 11*bis* of the Rules does not provide for the Tribunal's monitoring of detention conditions.[87] Even if monitoring were permitted, he submits that the Referral Chamber erred in finding that it could rely on monitoring to satisfy itself of the adequacy of the detention conditions, without specifying how monitoring reports could lead to an effective remedy for any reported abuse.[88] Mr. Uwinkindi further claims that after the end of the Tribunal's mandate, monitoring safeguards will no longer exist.[89]

35. The Prosecution responds that the Referral Chamber reasonably determined that Mr. Uwinkindi will be detained in appropriate conditions if his case is referred to Rwanda.[90]

36. The Appeals Chamber finds no evidence to suggest that the Referral Chamber failed to take proper account of Mr. Uwinkindi's submissions concerning the conditions of detention in Rwanda. The Referral Chamber expressly noted his submission that "if convicted in Rwanda, the Accused would, in practice, be detained under conditions that fall far below internationally recognised minimum standards" and he could be subjected to "existing inhuman living conditions."[91] Mr. Uwinkindi's mere references to his submissions before the Referral Chamber,[92] without further elaboration, are insufficient to substantiate his argument on appeal,[93] and do not demonstrate that the Referral Chamber committed a discernible error.

37. The Appeals Chamber recalls that, in assessing the conditions of detention, a designated trial chamber should ascertain whether the laws governing detention incorporate relevant international standards regarding the treatment of prisoners.[94] In this respect, the Appeals Chamber notes that, in assessing the conditions of detention in Rwanda, the Referral Chamber discussed the guarantee in the Transfer Law[95] that any person transferred would be detained in accordance with the minimum standards of detention adopted by United Nations General Assembly Resolution 43/173, and that

[86] Appeal Brief, para. 8.
[87] Appeal Brief, para. 9.
[88] Appeal Brief, para. 8.
[89] Appeal Brief, para. 9.
[90] Response Brief, paras. 34-45.
[91] Impugned Decision, para. 54 (internal quotations omitted).
[92] *See* Appeal Brief, para. 8.
[93] *See Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010 ("*Nshogoza* Appeal Judgement"), para. 18; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009 ("*Haraqija and Morina* Appeal Judgement"), para. 26.
[94] *See Jankovi}* Appeal Decision, paras. 74, 75.
[95] The Appeals Chamber observes that there are two laws relevant to the transfer of cases from the Tribunal to Rwanda. The first law was adopted in March 2007. *See* Organic Law No 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States ("2007 Transfer Law"). Certain provisions of the 2007 Transfer Law were modified in May 2009. *See* Organic Law No 03/2009/OL. of 26/05/2009 Modifying and Complementing the Organic Law No 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and Other States ("2009 Amendment"). The Appeals Chamber will refer to these provisions collectively as the "Transfer Law".

the detention would be subject to monitoring by a representative of the Tribunal or the International Committee of the Red Cross.[96] Mr. Uwinkindi has not demonstrated that the Referral Chamber's consideration of this legal framework was a discernible error.

38. With respect to the monitoring of the detention conditions, the Appeals Chamber finds Mr. Uwinkindi's assertions unpersuasive. The Appeals Chamber recalls that the conditions of detention are a relevant consideration in assessing the fairness of domestic criminal proceedings.[97] Thus, it was within the inherent authority of the Referral Chamber to extend the monitoring to this aspect of the referral of his case.[98] Mr. Uwinkindi's challenge to the effectiveness of this monitoring by referring to the finite mandate of the Tribunal fails to account for the role that the International Residual Mechanism for Criminal Tribunals ("Residual Mechanism") will play in ensuring oversight of referred cases.[99] Moreover, the Appeals Chamber is not satisfied that the Referral Chamber erred in not identifying the measures that would be taken if it received a report of mistreatment, as such measures could only be determined in a specific context.

39. The Appeals Chamber considers Mr. Uwinkindi's assertions with regard to the Referral Chamber's reliance on the existence of the Kigali Central Prison to be equally unpersuasive. The Referral Chamber heard submissions from the Prosecution that "Rwanda's detention facilities located at Kigali and Mpanga meet international standards"[100] and expressly noted that the Mpanga prison facilities were currently housing convicted persons from the Special Court for Sierra Leone.[101] Therefore, even if the Kigali facility were to close, the Referral Chamber had a reasonable basis to conclude that another acceptable facility in accordance with international standards would be made available. Accordingly, Mr. Uwinkindi has not demonstrated that the Referral Chamber erred in examining the conditions of detention.

40. Consequently, Mr. Uwinkindi's Third Ground of Appeal is dismissed.

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[96] Impugned Decision, para. 58. *See also* 2007 Transfer Law, art. 23.
[97] *Stankovi}* Appeal Decision, para. 34.
[98] *See Stankovi}* Appeal Decision, para. 50 ("The question, then, is how much authority the Referral Bench has in satisfying itself that the accused will receive a fair trial. In the view of the Appeals Chamber, the answer is straightforward: whatever information the Referral Bench reasonably feels it needs, and whatever orders it reasonably finds necessary, are within the Referral Bench's authority so long as they assist the Bench in determining whether the proceedings following the transfer will be fair.").
[99] *See* Impugned Decision, p. 59 (disposition) ("NOTES that upon the conclusion of the mandate of the Tribunal, all obligations of the parties, the monitors and Rwanda will be subject to the directions of the International Residual Mechanism for Criminal Tribunals.").
[100] Impugned Decision, para. 52 (internal citation omitted).
[101] Impugned Decision, n. 63.

E. *Non Bis In Idem* (Ground 4)

41. Mr. Uwinkindi submits that the Referral Chamber erred in concluding that the principle of *non bis in idem* would not be violated if his case were referred to Rwanda for trial.[102] Specifically, Mr. Uwinkindi notes that he has already been convicted *in absentia* by two *Gacaca* courts, and asserts that the Referral Chamber failed to address his argument that even though the *Gacaca* convictions *appeared* to have been vacated, they in fact had not been lawfully vacated.[103] In this respect, Mr. Uwinkindi asserts that in order for the Referral Chamber to find that there are no *non bis in idem* concerns, it must be satisfied, based on the Prosecution's submissions and after addressing his arguments, that the *Gacaca* convictions have been lawfully overturned.[104] In addition, Mr. Uwinkindi contends that the Referral Chamber failed to consider the domestic prosecution of Mr. Léonidas Nshogoza for corruption and genocide denial in the context of its analysis of Rwanda's respect for the *non bis in idem* principle.[105] In particular, Mr. Uwinkindi notes that the Referral Chamber appeared to recognize this case as an example of the violation of this principle, but addressed it only in the context of the impartiality of the judiciary.[106]

42. The Prosecution responds that the Referral Chamber reasonably concluded that the principle of *non bis in idem* would not be violated in the event of Mr. Uwinkindi's transfer because his convictions by the *Gacaca* courts had been lawfully vacated.[107]

43. The Appeals Chamber observes that in the Impugned Decision, the Referral Chamber noted that it "has observed closely the chain of events relating to the vacation of the Gacaca convictions against ŦMr. Uwinkindiğ"[108] and concluded that those convictions had been vacated.[109] The Appeals Chamber is satisfied that it was within the discretion of the Referral Chamber to accept that the convictions had been vacated by the relevant *Gacaca* appellate courts. In reaching this conclusion, the Appeals Chamber considers that Mr. Uwinkindi has not demonstrated that the Referral Chamber failed to consider whether these convictions were lawfully vacated. Mr. Uwinkindi's references to submissions made before the Referral Chamber, without further elaboration,[110] are insufficient to demonstrate error on appeal.[111]

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[102] Appeal Brief, paras. 10-22. *See also* Reply Brief, paras. 15-21.
[103] Appeal Brief, paras. 11-15.
[104] Appeal Brief, para. 13.
[105] Appeal Brief, paras. 16-19.
[106] Appeal Brief, paras. 17-19, 21.
[107] Response Brief, paras. 18-29.
[108] Impugned Decision, para. 31. *See also* Impugned Decision, n. 43.
[109] Impugned Decision, para. 35.
[110] Appeal Brief, para. 13.

44. The Appeals Chamber also considers unpersuasive Mr. Uwinkindi's assertions with regard to the domestic prosecution of Mr. Nshogoza. The Appeals Chamber notes that the Referral Chamber discussed the case of Mr. Nshogoza generally in its analysis of the *non bis in idem* principle but did not appear to make any specific conclusions about whether it was an example of the violation of the principle in Rwanda.[112] The Appeals Chamber notes that the Referral Chamber based its conclusion that the *non bis in idem* principle would not be violated on the vacation of the *Gacaca* court convictions and the existence of the monitoring mechanism.[113] On appeal, Mr. Uwinkindi has not shown how the prosecution of Mr. Nshogoza in Rwanda violates the principle of *non bis in idem*.

45. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Fourth Ground of Appeal.

F. Article 59 of the Rwandan Code of Criminal Procedure (Ground 6)

46. Article 59 of the RCCP provides that "[p]ersons against whom the Prosecution has evidence to suspect that they were involved in the commission of an offence cannot be heard as witnesses."[114] The Referral Chamber identified six reasons why this provision was problematic:

> First, it is not clear that this provision would permit the Accused to testify in his own Defence. Second, as this provision allows the exclusion of a witness'[s] evidence on the suspicion of the prosecutor rather than a legal ground, it violates the principle of the presumption of innocence. Third, the law provides no indication that the judge may override the prosecutor's indications that a witness may have participated in an offence. Fourth, the law does not specify the type of "offence" that might warrant exclusion of a witness. Fifth, because this provision could be applied in an arbitrary manner by the prosecutor, it could have a chilling impact on the willingness of defence witnesses to testify. Finally, this article may be detrimental not only to the interests of the defence but to those of the prosecution, as many of the cases before this Tribunal rely to varying extents on the testimony of accomplice witnesses.[115]

47. Despite these concerns, the Referral Chamber observed that Article 13(10) of the Transfer Law[116] guaranteed the right of an accused "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him or her, and that Article 25 of the Transfer Law states that in the event of an inconsistency between the Transfer Law and any other

[111] *See Nshogoza* Appeal Judgement, para. 18; *Haraqija and Morina* Appeal Judgement, para. 26.
[112] Impugned Decision, paras. 34, 35.
[113] *See* Impugned Decision, para. 35.
[114] Impugned Decision, para. 36 (internal citation omitted). *See also* Law No 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure, O.G. Special No of 30/07/2004, art. 59.
[115] Impugned Decision, para. 39.
[116] The Referral Chamber refers to Article 13(9) of the Transfer Law. *See* Impugned Decision, para. 40. The Appeals Chamber notes that this is a reference to the original text of the 2007 Transfer Law; however, Article 13 of the 2007 Transfer Law was amended by Article 2 of the 2009 Amendment. In light of this amendment, the relevant fair trial right guarantee mentioned by the Referral Chamber was changed to Article 13(10).

law, the provisions of the Transfer Law will prevail."[117] Accordingly, the Referral Chamber was "confident" that Article 59 of the RCCP would not be applied in any referred case.[118]

48. Mr. Uwinkindi submits that the Referral Chamber erred in finding that the combined operation of Articles 13(10) and 25 of the Transfer Law provides reasonable assurance that Article 59 of the RCCP would not be applied in his transfer case. He contends that the provisions of the Transfer Law are insufficient to overcome the impact of Article 59 of the RCCP on his right to a fair trial because, *inter alia*, the two instruments are not inconsistent.[119]

49. The Prosecution responds that the Referral Chamber reasonably determined that Article 59 of the RCCP would not be applied in a referred case because the primacy of the Transfer Law guarantees the right of the defence to obtain and examine witnesses under the same conditions as prosecution witnesses.[120] The Prosecution further contends that Article 59 of the RCCP does not "in practice" prevent the accused or accomplices from testifying.[121] In particular, it notes that the Kigali Bar Association confirmed that, in Rwanda, "accused persons have been testifying in their own defence and calling witnesses, including accomplices, to refute allegations against them."[122] In addition, the Prosecution observes that witnesses disqualified from testifying under Article 59 of the RCCP "can still be heard as a court informer, although his or her evidence has to be supported by other evidence."[123]

50. The parties do not dispute that, on its face, Article 59 of the RCCP could bar the presentation of evidence by an accused or any defence witnesses who are suspected of involvement in an offence.[124] The Appeals Chamber notes, however, that the Referral Chamber interpreted Article 59 of the RCCP as being inconsistent with Article 13(10) of the Transfer Law and therefore inapplicable in any case transferred to Rwanda by the Tribunal pursuant to Article 25 of the Transfer Law. Implicit in this ruling is the Referral Chamber's conclusion that, in light of the Transfer Law, Mr. Uwinkindi would not be precluded from presenting the evidence of a witness suspected of involvement in an offence or presenting evidence on his own behalf. In this respect, the Appeals Chamber recalls that the Rules of the Tribunal guarantee an accused the right to appear

[117] Impugned Decision, para. 40.
[118] Impugned Decision, para. 40.
[119] Appeal Brief, paras. 24-27. *See also* Reply Brief, paras. 22, 23.
[120] Response Brief, paras. 30-32.
[121] Response Brief, para. 33.
[122] Response Brief, para. 33 (internal citation omitted).
[123] Response Brief, para. 33.
[124] *See* Reply Brief, paras. 22, 23; Response Brief, para. 33.

as a "witness" in his own defence.[125] It further notes that parties before the Tribunal are permitted to, and do, rely on accomplice witnesses or other witnesses who are suspected of being involved in the commission of crimes.[126]

51. The Appeals Chamber observes that the Transfer Law is not as clear as it could be in relation to the right of all parties to present evidence of witnesses without limitation in any referred case, and notes that Article 59 of the RCCP is ambivalent as to whether the proscription it contains applies equally to witnesses called by prosecutors in Rwanda. The Appeals Chamber is nonetheless satisfied that it was within the discretion of the Referral Chamber to conclude that Article 59 of the RCCP would not be applied in any referred case and that the Transfer Law guaranteed the accused the requisite fair trial rights with regard to the presentation of witness evidence.

52. In reaching this conclusion, the Appeals Chamber takes specific note of the provisions ordered by the Referral Chamber for monitoring the case,[127] and recalls that, should the interpretation of the Transfer Law set forth herein be proven incorrect, the Tribunal in any event retains the right to revoke the reference of this case to the Rwandan courts. In this respect, the Appeals Chamber notes that although the Referral Chamber requested the African Commission on Human and Peoples' Rights ("ACHPR") to monitor the referred case and submit reports every three months after its initial report,[128] nothing in the Impugned Decision precludes the ACHPR from making more frequent or interim reports, as appropriate. In this context, the Appeals Chamber considers that the submission of monitoring reports on a monthly basis is warranted until the President of the Tribunal or Residual Mechanism decides otherwise. The Appeals Chamber is confident that, should there be any violation of Mr. Uwinkindi's fair trial rights, including Mr. Uwinkindi's rights to call witnesses and to testify on his own behalf, it would be reported forthwith and a request for revocation of the referral would be made immediately.

53. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Sixth Ground of Appeal.

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[125] Rule 85(C) of the Rules. *See also Prosecutor v. Vidoje Blagojevi} and Dragan Joki}*, Case No. IT-02-60-A, Judgement, 9 May 2007, para. 27; *Prosecutor v. Stanislav Gali}*, Case No. IT-98-29-A, Judgement, 30 November 2006, paras. 19, 22.
[126] *See* Impugned Decision, para. 39. *Cf. Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-01-63-A, Judgement, 18 March 2010, paras. 42-48.
[127] *See infra* paras. 77-85.
[128] Impugned Decision, pp. 58, 59 (disposition). *See also* Impugned Decision, paras. 213, 214.

G. Availability and Protection of Witnesses (Grounds 8, 9, and 10)

54. Mr. Uwinkindi submits that the Referral Chamber erred in its assessment of the ability of the defence to secure the attendance of witnesses inside and outside of Rwanda.[129] In particular, he argues that the Referral Chamber improperly analyzed the legitimacy of witness fears rather than limiting its analysis to an assessment of the likelihood that the accused will be able to call defence witnesses under the same conditions as prosecution witnesses.[130]

55. With respect to witnesses inside Rwanda, Mr. Uwinkindi contends that the Referral Chamber mistakenly relied on "misleading" evidence that defence witnesses have appeared before the High Court in other trials without facing subsequent prosecution or threats to illustrate the likelihood that defence witnesses will appear at his trial.[131] Given the difficulties faced by witnesses who have testified for the defence in several Tribunal cases and the particular fears of being prosecuted for genocide or genocide ideology in connection with their testimony, Mr. Uwinkindi asserts that the Referral Chamber's failure to acknowledge his submissions that "the High Court has not presided over a single genocide case at first instance" amounts to an error in law.[132] He also submits that the Referral Chamber erred in assessing the High Court's ability to compel testimony pursuant to Article 50 of the RCCP by failing to appreciate that this provision relates to pre-trial and investigative activities, not court proceedings.[133]

56. Mr. Uwinkindi further argues that the Referral Chamber erred in placing excessive weight on the immunity provided for defence witnesses from prosecution for genocide and genocide denial under the Transfer Law, while failing to consider the witnesses' broader fears, such as possible torture, disappearance, murder, loss of survivor benefits, or reprisal against family members.[134] Moreover, he contends that, even with guarantees of immunity from prosecution, the Referral Chamber failed to appreciate that defence witnesses' lack of faith in the Rwandan Government's assurances would deter them from testifying.[135] He also argues that the Referral Chamber failed to consider that the ability of the Rwandan Government to prosecute contempt may be used to circumvent other immunities.[136]

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[129] Appeal Brief, paras. 29-63. *See also* Reply Brief, paras. 24-37.
[130] Appeal Brief, paras. 30, 35, 42, 50; Reply Brief, paras. 33, 34.
[131] Appeal Brief, para. 29.
[132] Appeal Brief, paras. 29, 33-36.
[133] Appeal Brief, para. 37.
[134] Appeal Brief, paras. 34-36, 38-40, 48, 49.
[135] Appeal Brief, paras. 31, 35, 36, 42.
[136] Appeal Brief, paras. 45-47; Reply Brief, paras. 36, 37.

57. With regard to witnesses outside Rwanda, Mr. Uwinkindi submits that the Referral Chamber erred in failing to consider the discouraging effect on defence witnesses' appearances that results from travel arrangements being facilitated by a unit of the national prosecuting authority,[137] and that his witnesses abroad are refugees, who would lose asylum status if they returned to Rwanda to testify.[138] He contends that the use of alternative means for securing defence evidence is insufficient to overcome the unwillingness of witnesses to testify because, *inter alia*: it would place him at a disadvantage in presenting his case; the witnesses would still be afraid to appear due to repercussions to family members living in Rwanda; and the Referral Chamber failed to assess whether video-link facilities were available in many of the countries where his potential witnesses are located.[139]

58. Moreover, Mr. Uwinkindi contends that the Referral Chamber erred in finding that Rwanda's witness protection programme provides an adequate protection framework for defence witnesses inside and outside the country because defence witnesses would be unwilling to avail themselves of the services of the new Witness Protection Unit because of the need to apply for its assistance through the Office of the Prosecutor General.[140] He further notes that evidence suggests that the unit is not yet operational, and argues that the related monitoring programme does not possess the powers necessary to provide sufficient assurances to witnesses.[141]

59. The Prosecution responds that the Referral Chamber reasonably concluded that Rwanda will provide for the availability and protection of defence witnesses.[142] It submits that Mr. Uwinkindi fails to demonstrate any discernible error in the Referral Chamber's findings regarding the availability of witnesses, arguing, *inter alia*, that the Referral Chamber's assessment properly: considered witness concerns beyond the fear of prosecution and arrest in connection with their testimony;[143] and relied on the plain text of the Transfer Law's immunity provisions and complementary "positive developmentFsğ" in Rwandan laws and witness protection services as demonstrating Rwanda's commitment to protecting defence witnesses.[144] In addition, the Prosecution contends that, notwithstanding several mistaken citations, the Referral Chamber reasonably considered the High Court's ability to secure the attendance of defence witnesses in

[137] Appeal Brief, paras. 32, 40, 41.
[138] Appeal Brief, para. 51.
[139] Appeal Brief, paras. 52-58.
[140] Appeal Brief, paras. 59-63.
[141] Appeal Brief, paras. 59-63.
[142] Response Brief, paras. 46-95.
[143] Response Brief, paras. 48, 53, 64.
[144] Response Brief, paras. 54-63, 65-70.

genocide cases that were not trials in the first instance, and the availability of a compulsory process to compel witness testimony under Article 50 of the RCCP.[145]

60. The Prosecution further submits that the Referral Chamber properly assessed Rwanda's witness protection services and use of alternative means of securing defence witness testimony.[146] It argues that the Referral Chamber correctly found the establishment of the Witness Protection Unit as part of the judiciary to be a "positive step in closing the perceived Fproblemsğ identified in earlier Rule 11*bis* proceedings."[147] The Prosecution also argues that Mr. Uwinkindi presents merely speculative challenges to the use of alternative means for securing defence witness testimony, and fails to show discernible error in the Referral Chamber's consideration of the "specific and concrete steps" Rwanda has taken to amend its laws to bolster logistical and technological support for these alternatives.[148]

61. The Appeals Chamber observes that, in assessing the availability of defence witness testimony, the Referral Chamber correctly noted that its role was not to determine whether the witnesses' fears were well-founded, but instead to focus on the likelihood that Mr. Uwinkindi will be able to secure their appearance on his behalf under the same conditions as those testifying against him.[149] The Appeals Chamber further considers that the Referral Chamber emphasized the need for adequate legal safeguards to address the subjective fears that might discourage witnesses from testifying,[150] and demonstrated awareness of the range of fears expressed by Mr. Uwinkindi's potential defence witnesses about appearing at a trial in Rwanda. In particular, the Referral Chamber noted that most witnesses feared prosecution under Rwanda's genocide ideology law, while others feared that they would be killed, abducted, transferred to prisons away from their families, or persecuted in prison as a repercussion for their testimony, or that their family members would be subjected to retaliation.[151]

62. The Appeals Chamber considers that the Referral Chamber acted within its discretion in finding that the recent amendments to relevant laws and enhancements to witness protection services constitute sufficient assurances to address defence witnesses' concerns and to help secure their appearance. Notably, with regard to securing witnesses' appearances, the Referral Chamber considered: (i) defence and *amicus curiae* submissions indicating past cases in which defence

[145] Response Brief, paras. 71-75.
[146] Response Brief, para. 79.
[147] Response Brief, paras. 76-87 (internal citations omitted).
[148] Response Brief, paras. 88-95 (internal citations omitted).
[149] Impugned Decision, paras. 85, 90.
[150] Impugned Decision, para. 103.
[151] Impugned Decision, paras. 88-90.

witnesses have been subjected to prosecutions, intimidation, and actual or threatened violent reprisals for testifying; and (ii) previous findings by the Appeals Chamber in Rule 11*bis* decisions confirming fear of these consequences as obstacles to securing defence witness testimony.[152] Despite the similarity between the concerns expressed by defence witnesses in this case and those in previous referral cases, the Referral Chamber acted within its discretion in finding it "logical to assume that with the amendments made to Ŧthe Transfer Lawğ regarding witness immunity, the creation of a new witness protection programme, and the safeguards imposed by the Chamber on Rwanda," the Appeals Chamber's previous findings that witnesses may be unwilling to testify are "no longer a compelling reason for denying referral."[153]

63. The Appeals Chamber further considers that, in making its finding on the availability of witnesses, the Referral Chamber noted the safeguards in Rwandan law to facilitate the attendance of witnesses living in Rwanda. In particular, it considered that enhanced immunities provided for defence witnesses under the recently amended Transfer Law would likely allay witnesses' expressed unwillingness to testify for fear of prosecution under Rwanda's genocide denial laws.[154] The Referral Chamber also considered the 36 genocide cases in which defence witnesses have testified before the High Court as evidence of defendants' ability to secure the attendance of his or her witnesses.[155] Although Mr. Uwinkindi correctly notes that the High Court did not in fact conduct these trials in the first instance,[156] the Appeals Chamber sees no error in the Referral Chamber's reliance on the underlying fact that the trials occurred. The fact that fewer witnesses testified for the defence than for the prosecution "alone does not indicate the lack of Ŧağ fair trial for the Accused."[157] Significantly, the Referral Chamber further considered the obligation of witnesses in Rwanda to testify and the ability to compel witness testimony,[158] and recognized that

[152] Impugned Decision, paras. 99, 100.
[153] Impugned Decision, para. 100.
[154] Impugned Decision, paras. 94, 95. *See also* Impugned Decision, para. 90. Mr. Uwinkindi's unsupported contention that contempt prosecutions would be used to circumvent this immunity is mere speculation and is dismissed.
[155] Impugned Decision, para. 100.
[156] *See* Response Brief, paras. 71-73. *See also The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Republic of Rwanda's Response to a 6 June 2011 Order to Provide Further Information Regarding 36 Genocide Cases at the High Court, 21 June 2011, paras. 3-43.
[157] Impugned Decision, para. 97.
[158] Impugned Decision, para. 104. Although the Referral Chamber cited an incorrect legal provision in this respect, the Appeals Chamber notes that Articles 54, 55, and 57 of the RCCP provide a compulsory process and sanctions for the failure of witnesses to appear. *See* Article 54 of the RCCP ("A public prosecutor can summon by using written notice, summons to appear or warrant bringing by force, any person he or she thinks has some important information to give. The summoned person is given a copy of the summoning document. Witnesses are summoned through the administrative organs, by using court bailiffs or security organs although they can as well appear voluntarily. Any person summoned in accordance with the law is obliged to appear. Persons who, by the nature of their trade or profession, are custodians of secrets are exempted from testifying as regards those secrets."); Article 55 of the RCCP ("A public prosecutor can issue a warrant to bring by force any witness who has defaulted to appear. Any witness who is legally summoned and fails to appear without any lawful reason, or who refuses to discharge the obligation of testifying can be handed over to court without any further formalities. A witness who defaults to appear after being

Rwanda has concluded a number of mutual legal assistance agreements, which would facilitate obtaining the testimony of witnesses abroad.[159]

64. The Referral Chamber acted within the scope of its discretion in relying on the existence of such a legal framework as a primary basis for determining whether an accused will be able to secure the attendance of reluctant witnesses.[160] The Appeals Chamber has previously held that a designated trial chamber could reasonably deny referral notwithstanding the existence of this framework, largely due to the specific finding that the accused may face difficulties in securing the attendance of witnesses to the extent that it would jeopardize his right to a fair trial.[161] However, it is equally within the discretion of a trial chamber to find that the ability to compel testimony is a factor which can be taken into account in addressing the subjective fears of defence witnesses. The Appeals Chamber is satisfied that the Referral Chamber had a reasonable basis to conclude that Mr. Uwinkindi will be able to secure the attendance of witnesses.

65. Moreover, the Appeals Chamber is not satisfied that Mr. Uwinkindi has demonstrated that the Referral Chamber erred in concluding that protective measures for witnesses are *prima facie* guaranteed. The Referral Chamber considered the existence of witness protection services, including a service administered by the Office of the Prosecutor General and a new witness protection unit created for referred cases under the auspices of the Rwandan judiciary, as increasing the likelihood that defence witnesses will appear.[162] Although the Referral Chamber raised some concerns about the involvement of the Office of the Prosecutor General in obtaining the assistance of the judiciary's witness protection services, in the view of the Appeals Chamber, the Referral Chamber reasonably concluded that the recent improvements in Rwandan witness protection services "may go some distance in guaranteeing that witness safety will be monitored directly by the Rwandan judiciary" and that this factor, coupled with Tribunal-appointed monitors, would address witness protection concerns that may arise.[163]

66. The Appeals Chamber notes, however, that the existence of witness protection services and a regime for obtaining compulsory process is not necessarily a panacea for securing the testimony

summoned for the second time or who, after being called by warrant to bring him or her by force advances legitimate reasons is absolved from punishment."); Article 57 of the RCCP ("A witness who fails to appear to testify without advancing any justifiable excuse after being summoned in accordance with the law or refuses to take an oath or to testify after being ordered to do so can be sentenced to a maximum punishment of one month and a fine which does not exceed fifty thousand francs (50.000) or one of them. If need be, public force can order his or her arrest following a warrant to bring him or her by force issued by a public prosecutor charged with investigation of the case.").

[159] Impugned Decision, para. 108. *See also Hategekimana* Appeal Decision, para. 25.

[160] *Cf. Stankovi}* Appeal Judgement, para. 26.

[161] *See Hategekimana* Appeal Decision, paras. 22-25, 30.

[162] Impugned Decision, paras. 128-131.

of defence witnesses who have obtained refugee status in countries outside Rwanda. It would be unreasonable to require refugees, for whom a well-founded fear of persecution upon returning to Rwanda has been determined, to appear as witnesses in Rwanda before the High Court. The Referral Chamber considered, however, that the Transfer Law allows for alternative methods of obtaining testimony from witnesses abroad: by deposition, video-link, or a judge sitting in a foreign jurisdiction.[164] Given the variety of alternative means available under the Transfer Law for securing such testimony, the Appeals Chamber is not convinced that the Referral Chamber committed a discernible error by failing to determine whether video-link was technically feasible in each of the countries where Mr. Uwinkindi's potential witnesses are located.

67. The Appeals Chamber further notes that it would be a violation of the principle of equality of arms if the majority of defence witnesses appeared by means substantially different from those for the Prosecution.[165] However, the Appeals Chamber notes that Mr. Uwinkindi has not identified how many of his potential witnesses might fall into this category or that it constitutes a sufficiently significant part of his possible evidence. It cannot be said that hearing a portion of evidence from either party by alternative means *per se* amounts to a violation of an accused's rights. The relevant inquiry is a fact-based assessment that is best left to a chamber with a fully developed record as to the nature of the evidence against the accused, and with specific knowledge of the nature of the proposed defence case and the relevant sources of evidence.

68. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Eighth, Ninth, and Tenth Grounds of Appeal.

H. Right to an Effective Defence (Ground 11)

69. Mr. Uwinkindi submits that the Referral Chamber erred in finding that he would be able to mount an effective defence in the event that his case were referred to Rwanda.[166] In particular, Mr. Uwinkindi argues that the Referral Chamber lacked sufficient evidence to conclude that there were reasonable funds available for the conduct of his trial.[167] Mr. Uwinkindi further submits that the Referral Chamber erred in failing to conclude that "the Rwandan regime tends in practice to intimidate and silence the defence in high profile genocide cases".[168] He notes the Referral Chamber's acknowledgement that working conditions in Rwanda are difficult and that there is

[163] Impugned Decision, paras. 131, 132. *Contra Munyakazi* Appeal Decision, para. 37.
[164] *See* Impugned Decision, paras. 109, 112, 113.
[165] *See Munyakazi* Appeal Decision, para. 42.
[166] Appeal Brief, paras. 64-68.
[167] Appeal Brief, paras. 64, 65.
[168] Appeal Brief, para. 68.

evidence of harassment and threats against lawyers.[169] Against this backdrop, Mr. Uwinkindi contends that the Referral Chamber erred in relying on the guarantees of the Transfer Law alone to allay its concerns that the right to an effective defence may not be guaranteed.[170]

70. The Prosecution responds that the Referral Chamber correctly determined that Mr. Uwinkindi's right to an effective defence will be secured in Rwanda.[171] It contends that the Referral Chamber acted within the bounds of established Rule 11*bis* jurisprudence, and properly accepted Rwanda's assurances with respect to the sufficiency of its funds.[172] It further asserts that Mr. Uwinkindi's assertions regarding the alleged lack of funds are speculative, and that he improperly fails to consider that additional funds can be made available to him if necessary to secure effective legal representation after the transfer of his case.[173]

71. The Appeals Chamber recalls that a Referral Chamber must "satisfy 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.[174] The Referral Chamber explicitly noted that: the Transfer Law guarantees an indigent accused the right to legal aid;[175] Rwanda has budgeted funds for this purpose;[176] and this was all that the Referral Chamber was required to consider in finding that Mr. Uwinkindi would be guaranteed adequate representation.[177] The Appeals Chamber can also identify no error in the Referral Chamber's reliance on the provisions of the Transfer Law in addressing Mr. Uwinkindi's concerns related to the difficulties of working in Rwanda.[178]

72. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Eleventh Ground of Appeal.

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[169] Appeal Brief, paras. 66, 68. Mr. Uwinkindi illustrates this harassment in part by pointing to the prosecution of Mr. Léonidas Nshogoza. *See* Appeal Brief, para. 68.
[170] Appeal Brief, para. 67.
[171] Response Brief, paras. 96-107.
[172] Response Brief, para. 99.
[173] Response Brief, paras. 97, 101-105, 107.
[174] *See Stanković* Appeal Decision, para. 21.
[175] Impugned Decision, para. 135, *citing* Article 13(6) of the Transfer Law.
[176] Impugned Decision, para. 141.
[177] Impugned Decision, para. 144.
[178] *See* Impugned Decision, paras. 152-161. The Appeals Chamber notes that the examples cited by Mr. Uwinkindi are not related to trials conducted in accordance with the Transfer Law and its accompanying immunities and protections. The Appeals Chamber further considers that Mr. Uwinkindi's suggestion that the Transfer Law would not be applied in practice is purely speculative and is dismissed. *See* Appeal Brief, paras. 67, 68.

I. Independence and Impartiality of the Judiciary (Grounds 12, 13, and 14)

73. Mr. Uwinkindi submits that the Referral Chamber erred in assessing the independence and impartiality of the Rwandan judiciary.[179] In particular, he contends that the Government of Rwanda has a firm policy of aggressively prosecuting anyone who attempts to "rewrite" the history of the genocide, and that it has a record of interfering with the judiciary.[180] Mr. Uwinkindi submits that, given the political sensitivity of his line of defence, namely to argue that the mass graves found near the Kayenzi Pentecostal Church were of Hutu victims of the Rwandan Patriotic Front,[181] and the significance of his case as the first referral from the Tribunal to Rwanda,[182] the risk of intimidation of witnesses and interference in his case is particularly high.[183] He further argues that the Referral Chamber erred in refusing to examine evidence of the deteriorating political climate in Rwanda and how this may further impact the independence and impartiality of the judiciary.[184]

74. The Prosecution responds that the Referral Chamber correctly concluded that Mr. Uwinkindi will be able to pursue his line of defence.[185] It further submits that Mr. Uwinkindi's unsubstantiated allegations of executive interference in the judiciary fail to rebut the presumption of the judges' impartiality,[186] and that the Referral Chamber reasonably distinguished Mr. Uwinkindi's case from the "handful of high profile political or politically sensitive cases" in which the defence and *amici* suspected executive interference.[187]

75. The Appeals Chamber notes that, in examining the independence and impartiality of the Rwandan judiciary, the Referral Chamber extensively examined the relevant legal framework and its operation in practice, including, *inter alia*, applicable international law, the competence and qualification of judges, and allegations of corruption.[188] The Referral Chamber acknowledged that there were individual cases of external influence and corruption, but found that there was no evidence to suggest that they were cases similar to Mr. Uwinkindi's.[189] The Appeals Chamber can identify no error in this approach. Furthermore, the Appeals Chamber notes that the Referral Chamber was aware of Mr. Uwinkindi's proposed line of defence,[190] and acted within its discretion

[179] Appeal Brief, paras. 69-80.
[180] Appeal Brief, para. 70. *See also* Appeal Brief, para. 75.
[181] *See* Impugned Decision, para. 162.
[182] Appeal Brief, para. 75.
[183] Appeal Brief, paras. 71-73, 76.
[184] Appeal Brief, para. 80. *See also* Reply Brief, paras. 38-40.
[185] Response Brief, paras. 108-112.
[186] Response Brief, paras. 113-134.
[187] Response Brief, para. 119 (internal quotations omitted). *See also* Response Brief, paras. 120-131.
[188] Impugned Decision, paras. 170-196.
[189] Impugned Decision, paras. 185, 196.
[190] Impugned Decision, para. 162.

in finding that he would be able to pursue his line of defence in view of the immunity provisions in the Transfer Law and the impartiality and independence of Rwandan judges.[191] Mr. Uwinkindi fails to support his contention that his case is uniquely susceptible to interference. Finally, Mr. Uwinkindi has failed to point to any evidence of the purported "deteriorating political climate" in Rwanda or to substantiate its connection to his case, and thus he has not demonstrated on appeal any error in the Referral Chamber's failure to take this factor into account.

76. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Twelfth, Thirteenth, and Fourteenth Grounds of Appeal.

J. Monitoring and Revocation (Grounds 15 and 16)

77. In the Impugned Decision, the Referral Chamber found that "it would be in the interest of justice to ensure that there is an adequate system of monitoring in place if this case is to be transferred to Rwanda."[192] The Referral Chamber took note that the ACHPR, an independent organ established under the African Charter on Human and Peoples' Rights, had expressed an interest in monitoring proceedings at the cost of the Tribunal or the Residual Mechanism, and, given the ACHPR's experience, it concluded that the ACHPR would be a "trustworthy agency" to monitor the proceedings in this case in Rwanda.[193] Accordingly, it requested the Registrar of the Tribunal to appoint the ACHPR as a monitor for Mr. Uwinkindi's trial in Rwanda and to make arrangements to that effect.[194]

78. The Referral Chamber requested the ACHPR, *inter alia*, "to appoint at least two or more experienced professionals who will conduct full-time monitoring of the proceedings" and to "submit a regular report every three months on the status of proceedings to the President through the Registrar upon commencement of the trial and until the completion of the trial and the appellate process for the Accused and through to the enforcement of sentence, if any."[195]

79. The Referral Chamber further noted the possibility of revocation of the referral under Rule 11*bis*(F) of the Rules, but considered it "a remedy of last resort" given its possible impact on Mr. Uwinkindi's right to an expeditious trial.[196] The Referral Chamber considered that it would be the duty of the trial monitors to make an appropriate request, if necessary, to the President of the

[191] Impugned Decision, paras. 166, 167.
[192] Impugned Decision, para. 208.
[193] Impugned Decision, para. 219. *See also* Impugned Decision, paras. 210-213.
[194] Impugned Decision, para. 221. *See also* Impugned Decision, p. 57 (disposition).
[195] Impugned Decision, para. 213. *See also* Impugned Decision, pp. 57, 58 (disposition).
[196] Impugned Decision, para. 217.

Tribunal through the Registrar.[197] The Referral Chamber also expressly granted Mr. Uwinkindi standing to bring perceived violations of his rights to the attention of the Tribunal and to seek appropriate orders, including revocation.[198]

80. Mr. Uwinkindi submits that the Referral Chamber erred in relying on the possibility of the monitoring of his case and revocation of the referral as guarantees that his trial in Rwanda will be fair.[199] Mr. Uwinkindi submits that the Referral Chamber lacked sufficient evidence of the ACHPR's willingness and ability to engage in the type and scope of monitoring envisioned and ordered by the Referral Chamber,[200] and exceeded its authority in so ordering, given that the ACHPR is an independent international body not subject to the Tribunal's jurisdiction.[201] He also contends that the Referral Chamber placed excessive weight on the ACHPR monitoring mechanism in its evaluation of his right to a fair trial under Rule 11*bis* of the Rules.[202]

81. Mr. Uwinkindi further argues that the Referral Chamber "effectively excludFedğ" the viability of invoking the remedy of revocation by characterizing it as a remedy of last resort.[203] Moreover, Mr. Uwinkindi submits that the procedures for invoking it are insufficient, given, *inter alia*, that he: (i) does not speak either English or French; (ii) is not provided with an option to view the monitoring reports submitted by the ACHPR; and (iii) lacks direct standing to make an application for revocation, and the Referral Chamber's assumption that the ACHPR will do so on his behalf fails to appreciate the ACHPR's role as a neutral trial monitor, not his advocate.[204]

82. The Prosecution responds that the Referral Chamber did not err in fashioning robust monitoring and revocation mechanisms.[205] In particular, the Prosecution states that the Referral Chamber had the discretion to order the ACHPR to conduct the monitoring and specify the scope of its monitoring duties, based on its authority to require monitoring under Rule 11*bis*(D)(iv) of the

[197] Impugned Decision, para. 219.
[198] Impugned Decision, p. 59 (disposition).
[199] Appeal Brief, paras. 81-114. *See also* Reply Brief, paras. 41-53.
[200] Appeal Brief, paras. 82-90.
[201] Appeal Brief, paras. 86, 87.
[202] Appeal Brief, paras. 91-102.
[203] Appeal Brief, para. 104. *See also* Appeal Brief, paras. 103, 105-109.
[204] Appeal Brief, paras. 107, 110-113.
[205] Response Brief, paras. 135-150.

Rules.[206] It further argues that Mr. Uwinkindi fails to demonstrate any error in the Referral Chamber's characterization and application of the revocation remedy to his case.[207]

83. The Appeals Chamber finds no error in the Referral Chamber relying to a considerable degree on the monitoring mechanism it had fashioned in ensuring that Mr. Uwinkindi's trial will be fair and, if not, that proceedings would be revoked.[208] The Appeals Chamber recalls that a designated trial chamber has the discretion to order monitoring, and that it may take such a mechanism into account in concluding that the trial will be fair.[209] Moreover, the Appeals Chamber considers that a trial chamber has the authority to dictate the scope of the monitoring and the frequency and nature of the reporting.[210]

84. The Appeals Chamber is also satisfied that the Referral Chamber acted within its discretion in ordering the specific scope and guidelines imposed for the ACHPR's monitoring in this case. Although the Appeals Chamber notes that the Tribunal lacks the authority to compel an independent organization which is neither a party nor an organ of the Tribunal to conduct monitoring,[211] Rule 11*bis*(D)(iv) of the Rules authorizes a designated trial chamber to order the Registrar to send monitors. In this case, the Referral Chamber specifically requested the Registrar to enter into a suitable agreement with the ACHPR and to seek further directions from the President of the Tribunal, should the arrangements prove ineffective.[212] Therefore, any difference between the monitoring ordered by the Referral Chamber and the initial expression of willingness by the ACHPR to provide monitoring can be resolved during this process or, if not, can be brought to the attention of the Tribunal for appropriate action.

85. As regards Mr. Uwinkindi's access to reports submitted through the monitoring mechanism, the Appeals Chamber observes that the Impugned Decision does not impose any limitation on Mr. Uwinkindi's access to such reports. The Appeals Chamber considers that, as a general matter, Mr. Uwinkindi shall have access to the monitoring reports unless the President of the Tribunal or

[206] Response Brief, paras. 143, 144. Moreover, the Prosecution contends that the Referral Chamber adequately dealt with the funding of the monitoring mechanism since the financial arrangements were stipulated in the ACHPR's letter indicating that it would conduct the monitoring at the Tribunal's expense as well as in the Referral Chamber's order to the Registrar to construct a formal agreement regarding the financial arrangements. Response Brief, para. 143.
[207] Response Brief, paras. 146-150.
[208] Impugned Decision, paras. 35, 60, 132, 139, 146, 159, 169, 196, 219. *See also* Impugned Decision, pp. 57, 58 (disposition).
[209] *See Stankovi}* Appeal Decision, para. 52.
[210] *See Stankovi}* Appeal Decision, paras. 50-52, 55.
[211] The Tribunal's coercive authority cannot exceed Chapter VII of the United Nations Charter, which imposes obligations on member states of the United Nations only. Although paragraph 4 of Security Council Resolution 955 (1994) requests voluntary financial, material, and expert assistance from organizations, it does not mandate this type of cooperation. *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28, 13 May 2004, para. 3.

Residual Mechanism determines that there is good cause to limit such access. Finally, the Appeals Chamber considers that Mr. Uwinkindi's assertion that there are insufficient means by which he can seek revocation fails to appreciate that the Referral Chamber granted him standing to personally request this remedy, and this contention is therefore dismissed.

86. Consequently, the Appeals Chamber dismisses Mr. Uwinkindi's Fifteenth and Sixteenth Grounds of Appeal.

K. Conclusion

87. The Appeals Chamber has dismissed Mr. Uwinkindi's appeal, and, therefore, his case may be referred to Rwanda in accordance with the Impugned Decision. In addition, the Appeals Chamber has found that monitoring reports should be submitted on a monthly basis until the President of the Tribunal or Residual Mechanism decides otherwise.

88. Finally, the Appeals Chamber recalls that, in a separate decision, it ordered Trial Chamber III of the Tribunal ("Trial Chamber") to direct the Prosecution to file a corrected indictment in Mr. Uwinkindi's case in order to remedy several defects which had been identified.[213] The Appeals Chamber considers it important that these defects be remedied prior to Mr. Uwinkindi's transfer to Rwanda so that the Rwandan Prosecutor General's Office may file its own adapted indictment[214] based on an instrument that gives proper notice and so that this case remains trial ready at the Tribunal in the event of any possible revocation of the order referring this case to Rwanda.

IV. DISPOSITION

89. For the foregoing reasons, the Appeals Chamber

DENIES Mr. Uwinkindi's Motion to Expunge;

DENIES Mr. Uwinkindi's Motion for Hearing;

DENIES the Prosecution's Motion to Strike;

DENIES the Motion to File an *Amicus Curiae* Brief;

DISMISSES Mr. Uwinkindi's appeal in all respects and **AFFIRMS** the Impugned Decision; and

STAYS the transfer of Mr. Uwinkindi to Rwanda pending the Trial Chamber's acceptance of the corrected indictment.

[212] Impugned Decision, para. 221. *See also* Impugned Decision, pp. 57, 58 (disposition).

[213] *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR72(C), Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 60.

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

Done this 16th day of December 2011,
At The Hague,
The Netherlands.

_____
Judge Theodor Meron
Presiding

[Seal of the Tribunal]

[214] The Appeals Chamber observes that, pursuant to Article 4 of the Transfer Law, "[t]he Prosecutor General's Office of the Republic [of Rwanda] shall adapt the ICTR indictment in order to make [it] compliant with the provisions of the Code of Criminal Procedure of Rwanda".