ICTR-05-89-AR11bis
03-05-2013
(552/A - 507/A)

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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 Mehmet Güney** **Judge Arlette Ramaroson** **Judge Andrésia Vaz** **Judge Khalida Rachid Khan**
Registrar:	**Mr. Bongani Majola**
Decision of:	**3 May 2013**

BERNARD MUNYAGISHARI

v.

THE PROSECUTOR

*Case No. ICTR-05-89-AR11*bis

DECISION ON BERNARD MUNYAGISHARI'S THIRD AND FOURTH MOTIONS FOR ADMISSION OF ADDITIONAL EVIDENCE AND ON THE APPEALS AGAINST THE DECISION ON REFERRAL UNDER RULE 11 *BIS*

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Mr. George Mugwanya
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Mr. François Nsanzuwera
Ms. Erica Bussey

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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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of appeals filed by Mr. Bernard Munyagishari[1] and the Office of the Prosecutor of the Tribunal ("Prosecution")[2] against the 6 June 2012 decision of the Referral Chamber Designated under Rule 11 *bis* ("Referral Chamber") which referred Mr. Munyagishari's case to the authorities of the Republic of Rwanda ("Rwanda") for trial before the High Court of Rwanda.[3]

I. BACKGROUND

2. According to the Indictment, Mr. Munyagishari served as Secretary General of the National Republican Movement for Democracy and Development ("MRND") for Gisenyi city and President of the *Interahamwe* for Gisenyi prefecture from 1992 through 1994.[4] Mr. Munyagishari is charged before the Tribunal with conspiracy to commit genocide, genocide or alternatively complicity in genocide, and murder and rape as crimes against humanity.[5]

3. On 6 June 2012, the Referral Chamber issued the Impugned Decision, ordering that Mr. Munyagishari's case be referred for trial before the High Court of Rwanda, subject to the following conditions:

> 1. A written guarantee by the President of the Kigali Bar Association to the President of this Tribunal or the [Mechanism for International Criminal Tribunals ("Residual Mechanism" or "MICT")], that the Accused, should he remain indigent, will be assigned a lawyer with previous international experience. It shall be within the discretion of the President of this Tribunal or the Residual Mechanism to determine whether prospective counsel has sufficient international experience. ["First Condition"]
>
> 2. A binding concession in writing from the Prosecutor General of Rwanda ["Prosecutor General"] to the President of this Tribunal or the Residual Mechanism that joint criminal enterprise shall not be included as a mode of liability pursued against the Accused. ["Second Condition"]
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> 3. A written and binding assurance by the Prosecutor General of Rwanda to the President of this Tribunal or the Residual Mechanism:

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[1] Notice of Appeal Filed by Bernard Munyagishari's Defence, originally filed in French on 19 June 2012, English translation filed on 5 September 2012 ("Munyagishari Notice of Appeal"); Appellant's Brief Filed by Bernard Munyagishari's Defence originally filed in French on 5 November 2012, English translation filed on 3 December 2012 ("Munyagishari Appeal Brief").
[2] Prosecutor's Notice of Appeal pursuant to Rule 11 bis (H), 20 June 2012 ("Prosecution Notice of Appeal"); Prosecutor's Appellant's Brief, 29 June 2012 ("Prosecution Appeal Brief").
[3] *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012 ("Impugned Decision"), pp. 54-56.
[4] *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Indictment, 8 September 2005 ("Indictment"), para. 2.
[5] Indictment, p. 2.

- that Articles 54 and 55 of [Law N° 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure ("Code of Criminal Procedure")] *could* not be used to compel witnesses testifying in the transfer case to testify in a subsequent domestic case on the basis of their evidence in the transfer case; ["First Requirement"] or
- that Articles 54 and 55 of the Code of Criminal Procedure *would* not be used to compel witnesses testifying in the transfer case to testify in a subsequent domestic case on the basis of their evidence in the transfer case; ["Second Requirement"] or
- that any witnesses who testify in the transfer case and who may be then compelled to testify in subsequent domestic cases pursuant to Articles 54 and 55 of the Code of Criminal Procedure shall also be granted the same immunities contained within Article 13 of the [Organic Law N° 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 [Rwanda], as amended by Organic Law N° 03/2009/OL. of 26/05/2009 Modifying and Complementing the Organic Law N° 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 [Rwanda] ("Transfer Law")] while participating in such domestic cases. ["Third Requirement"] [collectively, "Third Condition"]

4. The appointment of an independent organisation as monitor either instead of, or in addition to, the [Tribunal] legal staff who are currently acting as the Tribunal's monitors before or as soon as practicable after the transfer of the Accused to Rwanda.[6]

4. Mr. Munyagishari and the Prosecution filed their notices of appeal against the Impugned Decision on 19 and 20 June 2012, respectively. On 28 June 2012, the Pre-Appeal Judge granted Mr. Munyagishari an extension of time to file his appeal brief within 15 days of the date on which he is served with the French translation of the Impugned Decision.[7] On 29 June 2012, the Prosecution filed its Appeal Brief. On 12 September 2012, the Pre-Appeal Judge allowed Mr. Munyagishari to file his response brief within 10 days of the date on which he is served with the French translation of the Impugned Decision.[8]

5. The French translation of the Impugned Decision was filed on 19 October 2012. Mr. Munyagishari filed his response brief to the Prosecution's appeal on 31 October 2012[9] and his Appeal Brief on 5 November 2012. Also on 5 November 2012, the Prosecution filed its reply brief

[6] Impugned Decision, pp. 54, 55 (internal citation omitted). *See also The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 9 November 2011 ("Request for Referral").
[7] Decision on Bernard Munyagishari's Motion for Extension of Time and Other Relief, 28 June 2012, para. 9.
[8] Decision on Bernard Munyagishari's Second Motion for Extension of Time for the Filing of His Response Brief, 12 September 2012 ("Decision on Munyagishari's Second Motion for Extension of Time"), para. 5. Mr. Munyagishari had previously been granted leave to file his response brief within 10 days of the date on which he was served with the French translation of the Prosecution Appeal Brief. *See* Decision on Bernard Munyagishari's Motion for Translation and Extension of Time for the Filing of His Response Brief, 4 July 2012, para. 8. The French version of the Prosecution Appeal Brief was served on Mr. Munyagishari on 5 September 2012. *See* Decision on Munyagishari's Second Motion for Extension of Time, para. 2.
[9] Bernard Munyagishari's Response to the Prosecutor's Appellant's Brief, originally filed in French on 31 October 2012, English translation filed on 12 November 2012 ("Munyagishari Response Brief").

to Mr. Munyagishari's response brief.[10] On 14 November 2012, the Prosecution filed its response brief to Mr. Munyagishari's appeal,[11] to which Mr. Munyagishari replied on 19 November 2012.[12]

6. Mr. Munyagishari filed motions for additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules") on 7 November and 14 December 2012.[13] The Appeals Chamber dismissed both motions on 25 February 2013.[14] Mr. Munyagishari filed a third motion for additional evidence on 11 February 2013.[15] The Prosecution responded to the Third Motion for Additional Evidence on 25 February 2013.[16] Mr. Munyagishari filed a reply on 1 March 2013.[17] On 4 April 2013, Mr. Munyagishari filed a fourth motion for additional evidence.[18] The Prosecution filed a response to the Fourth Motion for Additional Evidence on 17 April 2013,[19] to which Mr. Munyagishari replied on 1 May 2013.[20]

7. The Appeals Chamber will first consider Mr. Munyagishari's Third and Fourth Motions for Additional Evidence, before turning to the merits of the appeals against the Impugned Decision.

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[10] Prosecutor's Reply Brief, 5 November 2012 ("Prosecution Reply Brief").
[11] Prosecutor's Response Brief, 14 November 2012 ("Prosecution Response Brief").
[12] Reply by Bernard Munyagishari's Defence to the Prosecutor's Response to the Defence Appeal Brief, originally filed in French on 19 November 2012, English translation filed on 7 January 2013 ("Munyagishari Reply Brief").
[13] Bernard Munyagishari's Defence Motion for Admission of Evidence Under Rule 115 of the Rules of Procedure and Evidence, confidential, originally filed in French on 7 November 2012, English translation filed on 3 December 2012 ("First Motion for Additional Evidence"); Bernard Munyagishari's Second Defence Motion for Admission of Evidence Under Rule 115 of the Rules of Procedure and Evidence, originally filed in French on 14 December 2012, English translation filed on 17 January 2013.
[14] Decision on Bernard Munyagishari's First and Second Motions for Admission of Additional Evidence, 25 February 2013 ("Decision on First and Second Motions for Additional Evidence"), para. 45.
[15] Bernard Munyagishari's Third Defence Motion for Admission of Evidence Under Rule 115 of the Rules of Procedure and Evidence, originally filed in French on 11 February 2013, English translation filed on 19 February 2013 ("Third Motion for Additional Evidence").
[16] Prosecutor's Response to "Bernard Munyagishari's Third Defence Motion for Admission of Evidence under Rule 115 of the Rules of Procedure and Evidence", 25 February 2013 ("Response to Third Motion for Additional Evidence").
[17] Bernard Munyagishari's Defence Reply to the Prosecutor's Response to Its Third Motion Filed Under Rule 115 of the Rules of Procedure and Evidence, originally filed in French on 1 March 2013, English translation filed on 15 March 2013 ("Munyagishari Reply to Prosecution Response to Third Motion for Additional Evidence").
[18] *Quatrième Requête de la Défense de Bernard Munyagishari aux fins d'admission des [sic] moyens de preuve en application de l'article 115 du Règlement de procédure et de preuve*, 4 April 2013 ("Fourth Motion for Additional Evidence").
[19] Prosecutor's Response to "*Quatrième Requête de la Défense de Bernard Munyagishari aux fins d'admission des [sic] moyens de preuve en application de l'article 114 [sic] du Règlement de procédure et de preuve*", 17 April 2013 ("Response to Fourth Motion for Additional Evidence").
[20] *Réplique de la Défense de Bernard Munyagishari à la Réponse du Procureur relative à la Quatrième Requête déposée en application de l'article 115 du Règlement de procédure et de preuve*, 1 May 2013 ("Munyagishari Reply to Prosecution Response to Fourth Motion for Additional Evidence").

II. THIRD AND FOURTH MOTIONS FOR ADDITIONAL EVIDENCE

8. In his Third Motion for Additional Evidence, Mr. Munyagishari requests that, pursuant to Rule 115 of the Rules, the Appeals Chamber admit as additional evidence an article published in *New Times* newspaper on 6 February 2013 ("*New Times* Article") and a communiqué from *Hirondelle* News Agency of 7 February 2013 ("*Hirondelle* Communiqué") (collectively, "Media Reports").[21] The Media Reports describe statements by Mr. Martin Ngoga, Prosecutor General of Rwanda, regarding the alleged absence of a monitoring mechanism for the Tribunal cases referred to France and the impact that this may have on Rwanda's cooperation with the monitors appointed by the Tribunal to observe the proceedings in the *Uwinkindi* case which was referred to Rwanda ("Tribunal Monitors").[22] In his Fourth Motion for Additional Evidence, Mr. Munyagishari requests the admission as additional evidence on appeal of a report of Amnesty International entitled "Rwanda - Justice in Jeopardy: The First Instance Trial of Victoire Ingabire" published on 25 March 2013 ("Amnesty International Report"), which, he submits, reveals serious deficiencies of the Rwandan judicial system.[23]

9. As a preliminary matter, the Appeals Chamber notes that Rule 115(A) of the Rules provides that a motion for additional evidence shall be filed no later than 30 days from the date of filing of the brief in reply, unless good cause is shown for a delay. This provision is equally applicable to appeals from referral decisions under Rule 11 *bis* of the Rules.[24] The Third and Fourth Motions for Additional Evidence were therefore filed after the expiry of the prescribed time limit. Mr. Munyagishari submits that the fact that the Media Reports are dated "7 February 2013" and relate to an event that occurred on the same date constitute good cause for the delay.[25] Likewise, he points out that the Amnesty International Report was only published on 25 March 2013.[26] The Prosecution does not object to the Third and Fourth Motions for Additional Evidence on the basis of its late filing.[27] The Appeals Chamber considers that the publication of the materials sought to be admitted as additional evidence after the expiration of the time limit for the filing of motions under Rule 115 of the Rules constitutes good cause for accepting the Third and Fourth Motions for Additional Evidence as validly filed.

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[21] Third Motion for Additional Evidence, paras. 14, 35, Annexes 1, 2. Mr. Munyagishari erroneously argues that the *New Times* Article was published on, and is dated 7 February 2013. *See ibid.*, paras. 19, 20, fn. 19.
[22] Third Motion for Additional Evidence, Annexes 1, 2.
[23] Fourth Motion for Additional Evidence, paras. 11, 16, 52, Annex 1.
[24] *See* Decision on First and Second Motions for Additional Evidence, para. 5.
[25] Third Motion for Additional Evidence, French original version, paras. 19, 20.
[26] Fourth Motion for Additional Evidence, paras. 21, 24.
[27] *See* Response to Third Motion for Additional Evidence, paras. 1-6; Response to Fourth Motion for Additional Evidence, paras. 1-8.

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A. Applicable Law

10. Rule 115 of the Rules provides for the admission of additional evidence on appeal where a party is in possession of material that was not before the trial chamber and which represents additional evidence of a fact or issue litigated at trial.[28] Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial in any form, or discoverable through the exercise of due diligence. The applicant must also show that the additional evidence is relevant and credible.[29] Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it *could* have been a decisive factor in reaching the referral decision.[30]

11. Furthermore, where the evidence is relevant and credible, but was available during the referral proceedings under Rule 11*bis* of the Rules or could have been discovered through the exercise of due diligence, the Appeals Chamber may allow it to be admitted on appeal provided the moving party can establish that its exclusion *would* amount to a miscarriage of justice.[31] That is, it must be demonstrated that, had the additional evidence been adduced during the proceedings at first instance, it *would* have had an impact on the referral decision.[32]

B. Third Motion for Additional Evidence

1. Submissions

12. Mr. Munyagishari submits that the Media Reports provide new and relevant information concerning Rwanda's readiness to comply with the requirements set out by the Tribunal in referring cases to Rwanda and to enable the Tribunal Monitors to perform their duties.[33] He contends that the Media Reports were not available in the proceedings before the Referral Chamber and support his appeal against the Impugned Decision.[34] Mr. Munyagishari argues that *New Times* is a "renowned Rwandan newspaper", that *Hirondelle* News Agency is a "reputed agency in judicial circles", and that the contents of the Media Reports are corroborative.[35] For this reason, he submits that the Media Reports should be found credible.[36]

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[28] *See* Decision on First and Second Motions for Additional Evidence, para. 5, and references contained therein.
[29] *See* Rule 115(B) of the Rules. *See also Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-A, Decision on Augustin Bizimungu's Rule 92*bis* Motion and on His Rule 115 Motion for Admission of Additional Evidence, 11 June 2012, para. 8.
[30] *See* Decision on First and Second Motions for Additional Evidence, para. 5, and references contained therein.
[31] *See* Decision on First and Second Motions for Additional Evidence, para. 6, and references contained therein.
[32] *See* Decision on First and Second Motions for Additional Evidence, para. 6, and references contained therein.
[33] Third Motion for Additional Evidence, paras. 15, 18, 32.
[34] Third Motion for Additional Evidence, paras. 18, 19, 33, *referring to* his ninth ground of appeal.
[35] Third Motion for Additional Evidence, para. 24.
[36] Third Motion for Additional Evidence, paras. 25, 33.

13. Mr. Munyagishari submits that the Media Reports show that Rwanda "seemingly intends to stop cooperating" with the Tribunal Monitors.[37] According to Mr. Munyagishari, this "is significant and relevant to the instant case because the [Tribunal Monitors] cannot perform their duties without Rwanda's cooperation".[38] Mr. Munyagishari contends that since the establishment of a monitoring mechanism was the *sine qua non* of the referral of his case to Rwanda, had the Referral Chamber been aware of the Media Reports, they would have been a decisive factor in denying the motion for referral.[39]

14. The Prosecution responds that the Third Motion for Additional Evidence should be dismissed in its entirety as Mr. Munyagishari merely advances speculative and premature concerns that could or would not have had any impact on the Referral Chamber's decision to refer his case to Rwanda.[40] The Prosecution submits that Rwanda's alleged suspension of its cooperation with the Tribunal Monitors is not likely to arise given that both the Tribunal and the MICT are engaged in monitoring the cases referred to France, that Rwandan authorities recently confirmed their cooperation with the Tribunal and the MICT, and that any perceived violation by Rwanda of the conditions of referral could be adequately addressed through revocation.[41]

15. In reply, Mr. Munyagishari submits that the Prosecution's argument with respect to the monitoring of cases referred to France is without relevance.[42] In his view, what is relevant is that the Media Reports, which post-date the Rwandan authorities' assurances in December 2012 to the President of the MICT, show that the Prosecutor General of Rwanda has "threatened to cease cooperating" with the Tribunal Monitors.[43] Underscoring that efficient monitoring was the *sine qua non* of the referral, Mr. Munyagishari submits that, had the Media Reports been available before the Referral Chamber, it would have considered them and, as a result, would not have ordered the referral.[44]

2. Discussion

16. The Appeals Chamber considers that the information contained in the Media Reports was not available in the proceedings before the Referral Chamber. The Appeals Chamber is also satisfied that the Media Reports are relevant to the instant case to the extent that they provide information on the conduct of judicial proceedings in a transferred case in Rwanda. The Appeals

[37] Third Motion for Additional Evidence, para. 29. *See also ibid.*, paras. 28, 32.
[38] Third Motion for Additional Evidence, para. 29.
[39] Third Motion for Additional Evidence, para. 32. *See also ibid.*, para. 33.
[40] Response to Third Motion for Additional Evidence, paras. 2, 6. *See also ibid.*, para. 5.
[41] Response to Third Motion for Additional Evidence, paras. 2-5.
[42] Munyagishari Reply to Prosecution Response to Third Motion for Additional Evidence, para. 7.
[43] Munyagishari Reply to Prosecution Response to Third Motion for Additional Evidence, paras. 7, 8.
[44] Munyagishari Reply to Prosecution Response to Third Motion for Additional Evidence, paras. 11, 12.

Chamber also considers that the Media Reports bear sufficient indicia of credibility to be considered admissible as additional evidence on appeal.

17. Turning to whether the information contained in the Media Reports could have been a decisive factor in reaching the Impugned Decision, the Appeals Chamber notes the evidence adduced in this case attesting to Rwanda's unequivocal willingness to try the case and cooperate with the Tribunal to that effect.[45] The Appeals Chamber also observes that there is no information before it indicating that the Tribunal Monitors are not able to carry out their mandate in Rwanda or that Rwanda has stopped cooperating with them. In this context, the Appeals Chamber considers that the concerns raised by Mr. Munyagishari upon his reading of the Media Reports are speculative. The Appeals Chamber further emphasizes that the Referral Chamber conditioned the referral of Mr. Munyagishari's case to Rwanda on the appointment of monitors before or as soon as practicable after his transfer, and expressly requested Rwanda to assist the appointed monitors in carrying out their mandate.[46] The Referral Chamber clearly stated that should the conditions of referral be violated, the referral will be subject to revocation pursuant to Rule 11 *bis* of the Rules.[47] In these circumstances, the Appeals Chamber considers that the information contained in the Media Reports could not have had any impact on the Referral Chamber's decision to refer the case to Rwanda.

3. Conclusion

18. In light of the foregoing, the Appeals Chamber does not consider that, had the Media Reports been adduced in the proceedings before the Referral Chamber in this case, they could have been a decisive factor in reaching the Impugned Decision. Mr. Munyagishari's request to have them admitted as additional evidence is therefore denied.

C. Fourth Motion for Additional Evidence

1. Submissions

19. Mr. Munyagishari submits that the Amnesty International Report contains relevant information related to violations of the rights of the accused that have taken place in the trial of Victoire Ingabire, which casts serious doubts on Rwanda's willingness and ability to ensure that he

[45] *See The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Brief for the Republic of Rwanda as *Amicus Curiae*, 19 January 2012 ("Rwanda *Amicus Curiae* Brief"); Letter by the Prosecutor General of Rwanda of 6 August 2012 addressed to Tribunal Presidents Joensen and MICT President Meron. *See also* Impugned Decision, para. 222.
[46] Impugned Decision, paras. 214, 215, 220, *and* Disposition, p. 55.
[47] Impugned Decision, Disposition, p. 56.

will receive a fair trial.[48] He contends that the report was not available in the proceedings before the Referral Chamber, is credible given its source, and supports his appeal against the Impugned Decision.[49]

20. Mr. Munyagishari submits that, while the Amnesty International Report primarily relates to Ms. Ingabire's case, it demonstrates that the guarantees enshrined in Rwandan laws are not sufficient to ensure respect for the presumption of innocence and that there is a real risk that his presumption of innocence will not be respected in Rwanda.[50] Mr. Munyagishari also argues that the report shows that the equality of arms was not respected by the High Court of Rwanda in Ms. Ingabire's trial, which, in his view, calls into question Rwanda's willingness and/or ability to treat the defence and the prosecution equally.[51] According to Mr. Munyagishari, the Amnesty International Report further reveals that the presence of international observers is not a sufficient guarantee for a fair trial.[52] Mr. Munyagishari concludes that, had the information contained in the Amnesty International Report been available in the proceedings before the Referral Chamber, the Referral Chamber would not have concluded that Rwanda is able to guarantee him a fair trial, and would not have decided to refer the case to Rwanda.[53]

21. The Prosecution responds that the Fourth Motion for Additional Evidence should be denied.[54] It submits that the information contained in the Amnesty International Report is similar to the information that Mr. Munyagishari sought to have admitted in connection with his First Motion for Additional Evidence, a motion which the Appeals Chamber denied on the ground that the proceedings in the *Ingabire* case could have no bearing on the Impugned Decision.[55] The Prosecution contends that the Amnesty International Report is therefore irrelevant to the Impugned Decision and that its exclusion would not amount to a miscarriage of justice.[56]

22. In reply, Mr. Munyagishari reiterates that the Amnesty International Report satisfies all requirements to be admitted as additional evidence on appeal pursuant to Rule 115 of the Rules.[57]

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[48] Fourth Motion for Additional Evidence, paras. 16, 18. *See also ibid.*, paras. 32, 42. *See also* Munyagishari Reply to Prosecution Response to Fourth Motion for Additional Evidence, paras. 10-12.
[49] Fourth Motion for Additional Evidence, paras. 19-25, 28-31, 50, *referring to* his fourth, seventh, and ninth grounds of appeal. *See also* Munyagishari Reply to Prosecution Response to Fourth Motion for Additional Evidence, paras. 5-9.
[50] Fourth Motion for Additional Evidence, paras. 33-36. *See also ibid.*, paras. 16-18, 41, 42, 47.
[51] Fourth Motion for Additional Evidence, paras. 37, 38. *See also ibid.*, paras. 16-18, 41, 42, 47.
[52] Fourth Motion for Additional Evidence, paras. 17, 18, 39, 40. *See also ibid.*, paras. 41, 48.
[53] Fourth Motion for Additional Evidence, para. 49. *See also ibid.*, paras. 45, 50.
[54] Response to Fourth Motion for Additional Evidence, paras. 1, 8.
[55] Response to Fourth Motion for Additional Evidence, para. 4, *referring to* Decision on First and Second Motions for Additional Evidence, para. 29. *See also* Response to Fourth Motion for Additional Evidence, paras. 1, 5-7.
[56] Response to Fourth Motion for Additional Evidence, para. 8.
[57] Munyagishari Reply to Prosecution Response to Fourth Motion for Additional Evidence, para. 13.

2. Discussion

23. The Appeals Chamber notes that the trial of Ms. Ingabire was conducted in part when Mr. Munyagishari's case was pending before the Referral Chamber and that issues pertaining to her trial in Rwanda were raised before the Referral Chamber.[58] The Appeals Chamber considers, however, that for the purposes of assessing a motion brought under Rule 115 of the Rules, the views expressed in the Amnesty International Report published on 25 March 2013 were not available at trial. The Appeals Chamber is also satisfied that the Amnesty International Report is relevant to the extent that it provides information on the conduct of judicial proceedings in Rwanda, and that it bears sufficient indicia of credibility to be considered admissible as additional evidence on appeal.

24. However, the Appeals Chamber finds that the Amnesty International Report could not have been a decisive factor in reaching the Impugned Decision. The Appeals Chamber reiterates that, unlike the *Ingabire* case, Mr. Munyagishari's case in Rwanda would be subject to independent monitoring and to additional protections and guarantees under Rwandan laws applicable to cases transferred from the Tribunal.[59] A further distinguishing factor is the fact that any referral of Mr. Munyagishari's case for trial in Rwanda would be subject to revocation.[60] The Appeals Chamber therefore considers that the differences between the case of Ms. Ingabire in Rwanda and the cases transferred from the Tribunal for trial in Rwanda are such that the information regarding the conduct of the *Ingabire* case provided in the Amnesty International Report could not have had any impact on the Impugned Decision.[61]

3. Conclusion

25. Based on the above, the Appeals Chamber does not consider that, had the Amnesty International Report been adduced in the proceedings before the Referral Chamber in this case, it could have been a decisive factor in reaching the Impugned Decision. Mr. Munyagishari's request to have it admitted as additional evidence is accordingly denied.

[58] *See* Impugned Decision, para. 183.
[59] *See* Decision on First and Second Motions for Additional Evidence, paras. 29, 37.
[60] *See* Decision on First and Second Motions for Additional Evidence, para. 37, *referring to* Impugned Decision, Disposition, p. 56.
[61] *See* Decision on First and Second Motions for Additional Evidence, para. 37, *referring to Uwinkindi* Appeal Decision of 19 April 2012, pp. 2, 3.

III. APPEALS

26. Mr. Munyagishari challenges the Referral Chamber's decision to refer his case to Rwanda on ten grounds and requests the Appeals Chamber to reverse the Impugned Decision and order that he be tried before the Tribunal.[62] The Prosecution challenges two of the conditions prescribed in the Impugned Decision, requesting that they be set aside.[63] The Appeals Chamber addresses the appeals in turn.

A. Applicable Law

27. Rule 11 *bis* of the Rules allows a designated trial chamber ("referral 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, the referral 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.[64] 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.[65] The referral 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").[66]

28. The referral chamber has the discretion to decide whether to refer a case to a national jurisdiction, and the Appeals Chamber will only intervene if the referral chamber's decision was based on a discernible error.[67] To demonstrate such error, an appellant must show that the referral 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

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[62] *See* Munyagishari Notice of Appeal, paras. 8-32; Munyagishari Appeal Brief, paras. 23-99.
[63] *See* Prosecution Notice of Appeal, paras. 1-3; Prosecution Appeal Brief, paras. 3-40.
[64] *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 ("*Uwinkindi* Appeal Decision"), para. 22; *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; *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.
[65] *Uwinkindi* Appeal Decision, para. 22; *Hategekimana* Appeal Decision, para. 4; *Kanyarukiga* Appeal Decision, para. 4; *Munyakazi* Appeal Decision, para. 4.
[66] *Uwinkindi* Appeal Decision, para. 22; *Hategekimana* Appeal Decision, para. 4; *Kanyarukiga* Appeal Decision, para. 4; *Munyakazi* Appeal Decision, para. 4.
[67] *Uwinkindi* Appeal Decision, para. 23; *Hategekimana* Appeal Decision, para. 5; *Kanyarukiga* Appeal Decision, para. 5; *Munyakazi* Appeal Decision, para. 5.

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 Chamber is able to infer that the referral chamber must have failed to exercise its discretion properly.[68]

B. Mr. Munyagishari's Appeal

29. Mr. Munyagishari advances ten grounds of appeal against the Impugned Decision, namely that the Referral Chamber erred: (i) in refusing to order the Prosecution to file an amended indictment (Ground 1);[69] (ii) in ruling that his case could be referred to a national jurisdiction based on the erroneous conclusions that the rank of the accused did not preclude the transfer of the case and that he was not among the most senior leaders (Ground 2);[70] (iii) in ruling that referral to Rwanda will not lead to undue delay (Ground 3);[71] (iv) in relation to the presumption of innocence (Ground 4);[72] (v) in holding that his conviction in *Gacaca* proceedings had been vacated and finding, as a result, that a new trial in Rwanda will not violate the *non bis in idem* principle (Ground 5);[73] (vi) with respect to the conditions of detention in Rwanda (Ground 6);[74] (vii) with respect to the availability of defence witnesses (Ground 7);[75] (viii) with respect to the right to an effective defence (Ground 8);[76] (ix) in holding that his rights will be safeguarded by monitors (Ground 9);[77] and (x) in holding that the conditions imposed by the Referral Chamber on the Kigali Bar Association ("KBA") and the Prosecutor General of Rwanda will safeguard his rights.[78]

1. Failure to order the Prosecution to file an amended indictment (Ground 1)

30. The Referral Chamber observed that the Indictment charges Mr. Munyagishari with participation in a joint criminal enterprise and noted the Prosecution's declaration "that it would no longer pursue joint criminal enterprise as a mode of liability if the case were to be transferred to Rwanda."[79] The Referral Chamber also noted the Prosecution's position that this concession would not apply if the case would remain with the Tribunal.[80] The Referral Chamber held that it was not

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[68] *Uwinkindi* Appeal Decision, para. 23. *See also Hategekimana* Appeal Decision, para. 5; *Kanyarukiga* Appeal Decision, para. 5; *Munyakazi* Appeal Decision, para. 5; *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006, para. 9.
[69] Munyagishari Notice of Appeal, paras. 8, 9; Munyagishari Appeal Brief, paras. 23-29.
[70] Munyagishari Notice of Appeal, paras. 10-12; Munyagishari Appeal Brief, paras. 30-46.
[71] Munyagishari Notice of Appeal, paras. 13, 14; Munyagishari Appeal Brief, paras. 47-53.
[72] Munyagishari Notice of Appeal, paras. 15, 16; Munyagishari Appeal Brief, paras. 54-59.
[73] Munyagishari Notice of Appeal, paras. 17-19; Munyagishari Appeal Brief, paras. 60-65.
[74] Munyagishari Notice of Appeal, paras. 20-22; Munyagishari Appeal Brief, paras. 66-70.
[75] Munyagishari Notice of Appeal, paras. 23-25; Munyagishari Appeal Brief, paras. 71-78.
[76] Munyagishari Notice of Appeal, paras. 26, 27; Munyagishari Appeal Brief, paras. 79-86.
[77] Munyagishari Notice of Appeal, paras. 28, 29; Munyagishari Appeal Brief, paras. 87-92.
[78] Munyagishari Notice of Appeal, paras. 30, 31; Munyagishari Appeal Brief, paras. 93-97.
[79] Impugned Decision, para. 16. *See also ibid.*, para. 15.
[80] Impugned Decision, para. 16.

necessary to amend the Indictment to effect the Prosecution's concession, noting that a concession from the Prosecution "is more efficient than formally amending the Indictment" and that Mr. Munyagishari's rights would not be prejudiced.[81] Nevertheless, the Referral Chamber decided to make the referral of Mr. Munyagishari's case contingent upon the Second Condition, that is, a "binding concession in writing from the Prosecutor General of Rwanda to the President of this Tribunal or the Residual Mechanism that joint criminal enterprise shall not be included as a mode of liability pursued against [Mr. Munyagishari]."[82]

31. Mr. Munyagishari submits that the Referral Chamber erred in law in refusing to order the Prosecution to amend the Indictment to reflect the Prosecution's decision not to pursue joint criminal enterprise as a mode of liability if his case were to be referred to Rwanda.[83] While Mr. Munyagishari acknowledges the Tribunal's jurisprudence establishing that formal amendment of the indictment is not necessary when the Prosecution withdraws specific charges, he points out that this case law relates to cases heard before the Tribunal, where the Prosecution continues to be the prosecuting authority.[84] He argues that, because the Prosecutor of the Tribunal will no longer be the prosecuting authority in the referred case, the Referral Chamber should have ordered the amendment of the Indictment to avoid any prejudice to him and to enable him to understand the charges against him.[85] In support of his contention, Mr. Munyagishari refers to the *Uwinkindi* case, where the Appeals Chamber ordered that the indictment be amended prior to referral in order to cure several identified defects.[86] He also submits that Rwanda's Transfer Law does not permit the Prosecutor General of Rwanda to make any material amendments to a Tribunal indictment.[87] In his view, the imposition of the Second Condition reflects that the Referral Chamber "was well aware of the problems which an Indictment containing allegations which were no longer included in the charges [...] could create".[88] He further submits that the Referral Chamber exceeded its powers in imposing the Second Condition.[89]

32. The Prosecution responds that the Referral Chamber correctly determined that it was not necessary to amend the Indictment in the circumstances.[90] With respect to Mr. Munyagishari's reliance on the *Uwinkindi* case, the Prosecution submits that the Indictment in the present case was

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[81] Impugned Decision, para. 17.
[82] Impugned Decision, para. 17, Disposition, p. 55. *See also supra*, para. 3.
[83] Munyagishari Notice of Appeal, paras. 8, 9; Munyagishari Appeal Brief, heading "Ground 1" at p. 4, paras. 23-29. *See also* Munyagishari Reply Brief, para. 6.
[84] Munyagishari Appeal Brief, paras. 23, 24.
[85] Munyagishari Appeal Brief, para. 25.
[86] Munyagishari Appeal Brief, para. 26, *referring to Uwinkindi* Appeal Decision, para. 88.
[87] Munyagishari Appeal Brief, para. 26, *referring to* Transfer Law, Art. 4.
[88] Munyagishari Appeal Brief, para. 27.
[89] Munyagishari Appeal Brief, para. 28, *referring to* his tenth ground of appeal.
[90] Prosecution Response Brief, para. 5.

never found to be defective, nor did Mr. Munyagishari challenge it as such.[91] The Prosecution argues that its concession concerning joint criminal enterprise was made in response to Mr. Munyagishari's observation that the Indictment "did not clearly identify the category of [joint criminal enterprise] on which the Prosecution relied" and in order to "avoid any potential delay in resolution of his referral application".[92] In the Prosecution's view, the Indictment is therefore ready for referral to Rwanda.[93] The Prosecution further submits that the Second Condition was properly imposed because it was reasonably related to Munyagishari's fair trial rights since it ensures that "the abandoned mode will not be reintroduced" upon referral.[94]

33. The Appeals Chamber recalls that it held in the *Uwinkindi* case that it was necessary to remedy defects in the indictment prior to Mr. Jean Uwinkindi's transfer to Rwanda "so that the Rwandan Prosecutor General's Office may file its own adapted indictment 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."[95] The Appeals Chamber considers that the circumstances of the present case differ insofar as Mr. Munyagishari's Indictment has not been found to be defective.

34. According to the Prosecution's concession, Mr. Munyagishari would not be prosecuted in Rwanda on the basis of joint criminal enterprise. The Indictment, however, charges Mr. Munyagishari with participation in a joint criminal enterprise.[96] Unless it were amended, the Indictment would, therefore, not inform him clearly of the charges he faces, in violation of his right to be so informed. The Second Condition is not an adequate substitute for an indictment that contains the charges against Mr. Munyagishari, and the amendment of the Indictment prior to referral would ensure the necessary clarity of pleading. The Appeals Chamber, therefore, finds that in deciding that formal amendment of the Indictment was not necessary, the Referral Chamber gave too much weight to the principle of judicial economy and failed to give sufficient weight to Mr. Munyagishari's right to be informed of the exact nature and cause of the charges on the basis of which he will be prosecuted.

35. For the foregoing reasons, the Appeals Chamber finds that the Referral Chamber erred in considering that it was unnecessary to order the Prosecution to amend the Indictment to give effect

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[91] Prosecution Response Brief, para. 7.
[92] Prosecution Response Brief, para. 7.
[93] Prosecution Response Brief, para. 7. *See also ibid.*, para. 8 (where the Prosecution submits that a formal amendment would have been an "unnecessary procedural formality [...] to confirm what the Prosecutor already had said.").
[94] Prosecution Response Brief, para. 10.
[95] *Uwinkindi* Appeal Decision, para. 88 (footnote omitted; emphasis added), *referring to 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.

to its concession that joint criminal enterprise as a mode of liability would not be pursued if the case were to be referred to Rwanda.

36. The Appeals Chamber, therefore, grants Mr. Munyagishari's first ground of appeal, and sets aside the Second Condition. The Appeals Chamber further orders the Prosecution to amend Mr. Munyagishari's Indictment to reflect the withdrawal of the pleading of joint criminal enterprise as a mode of liability.

2. Gravity of crimes charged and alleged level of responsibility (Ground 2)

37. The Referral Chamber recalled that the Tribunal is bound by the resolutions passed by the Security Council and noted in particular that Resolutions 1503 and 1534 contemplated the transfer of cases involving "intermediate or lower ranked", and not "the most senior leaders", to national jurisdictions.[97] However, the Referral Chamber noted that Rule 11 *bis* of the Rules does not stipulate that a referral chamber shall consider the level of responsibility of the accused and proceeded to find that Mr. Munyagishari's argument that his status precluded the transfer of his case was "baseless."[98] The Referral Chamber further held that, in any event, "[it] does not consider [Mr. Munyagishari] to have been one of the 'most senior leaders' during the Rwandan genocide."[99]

38. Mr. Munyagishari submits that the Referral Chamber erred in concluding that his case could be transferred to a national jurisdiction based on its findings that the rank of the accused does not preclude the transfer of the case and that he was not among the most senior leaders.[100] In particular, Mr. Munyagishari submits that the Referral Chamber "erred in law in violation of Resolutions 1503 and 1534 of the Security Council when it held that the rank of the accused did not preclude the transfer of the case to Rwanda".[101] He contends that Resolutions 1503 and 1534 allow the Tribunal to transfer only cases involving intermediate and lower-rank accused.[102] Mr. Munyagishari adds that Article 6(3) of the MICT Statute "confirms that Resolution 1534 [...] demands that the [Referral] Chamber should consider the gravity of the crimes charged and the level of responsibility of the accused."[103]

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[96] *See, e.g.*, Indictment, paras. 23, 43, 50.
[97] Impugned Decision, para. 20 (internal quotations omitted), *referring to* U.N. Security Council Resolution 1503 (2003) of 28 August 2003 (S/RES/1503 (2003)) ("Resolution 1503") *and* U.N. Security Council Resolution 1534 (2004) of 26 March 2004 (S/RES/1534 (2004)) ("Resolution 1534").
[98] Impugned Decision, para. 20.
[99] Impugned Decision, para. 21.
[100] Munyagishari Notice of Appeal, paras. 10-12; Munyagishari Appeal Brief, heading "Ground 2" at p. 6, paras. 30-46. *See also* Munyagishari Reply Brief, paras. 7-11.
[101] Munyagishari Appeal Brief, para. 35. *See also ibid.*, paras. 30-34.
[102] Munyagishari Appeal Brief, para. 34. *See also ibid.*, paras. 31-33; Munyagishari Reply Brief, para. 7.
[103] Munyagishari Appeal Brief, para. 33. The Appeals Chamber notes that Mr. Munyagishari acknowledges that the MICT Statute is not operative in his case. *See idem.*

39. In support of his assertion that the Referral Chamber erred in finding that he was not among the most senior leaders, Mr. Munyagishari contends that the Referral Chamber erred in fact by: (i) failing to consider that his Indictment was confirmed after Resolution 1534 was adopted;[104] (ii) failing to consider "the facts of the case, the position, functions and the authority alleged in the Indictment";[105] and (iii) conducting erroneous comparisons of his case with other cases.[106] In his view, the control and authority which the Prosecution alleges he wielded place him in the category of accused to be tried before the Tribunal.[107]

40. The Prosecution responds that the Referral Chamber correctly dismissed Mr. Munyagishari's arguments with respect to Resolutions 1503 and 1534, noting that the Security Council left it to the discretion of the Tribunal as to how best to implement the logic behind the transfers.[108] The Prosecution also submits that Mr. Munyagishari's argument concerning the Statute of the MICT is new and cannot be raised for the first time on appeal, adding that, in any event, this statute is inapplicable because the Request for Referral was filed before the commencement date of the MICT.[109] The Prosecution further argues that, even if Mr. Munyagishari were correct that referral is limited to those of low or intermediate rank, the Referral Chamber properly determined that his case was subject to referral because he was not one of the "most senior leaders" during the Rwandan genocide.[110]

41. The Appeals Chamber finds that the Referral Chamber did not err in concluding that it was not required to consider Mr. Munyagishari's level of responsibility in determining whether to refer his case to Rwanda. The Referral Chamber was bound to apply Rule 11 *bis* of the Rules, which does not include as a requirement that a referral chamber consider the level of responsibility of the accused. As for the Security Council resolutions cited by Mr. Munyagishari, in Resolution 1503, the Security Council urged the Tribunal to develop a strategy to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, but it left the implementation of that strategy to the Tribunal.[111] By Resolution 1534, the Security Council called on the Tribunal, in reviewing and confirming any new indictments, to ensure that such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the

[104] Munyagishari Appeal Brief, para. 37. Mr. Munyagishari argues that, given that the indictments adopted after Resolution 1534 were to target only the most senior leaders, he "can only be included in the category of the most senior leaders, since he should, otherwise, not have been charged before the [Tribunal]." *See idem.*
[105] Munyagishari Appeal Brief, para. 38.
[106] Munyagishari Appeal Brief, paras. 39-41. *See also* Munyagishari Reply Brief, para. 9.
[107] Munyagishari Appeal Brief, para. 43. *See also ibid.*, para. 44; Munyagishari Reply Brief, para. 10.
[108] Prosecution Response Brief, para. 13, *referring to* Impugned Decision, para. 20.
[109] Prosecution Response Brief, para. 14.
[110] Prosecution Response Brief, para. 15 (internal quotations omitted). *See also ibid.*, paras. 16, 17.
[111] *See* Resolution 1503, pp. 2, 3, para. 6.

Tribunal.[112] The Security Council further requested the Tribunal to report on the implementation of its strategy to transfer cases of intermediate and lower rank accused to competent national jurisdictions.[113] Thus, contrary to Mr. Munyagishari's contention, these resolutions do not require that referral to national jurisdictions be limited to cases of accused with a certain level of responsibility.

42. Lastly, the Appeals Chamber notes that Mr. Munyagishari did not raise his argument on the basis of the MICT Statute before the Referral Chamber. In any event, the argument is without merit because the MICT Statute is inapplicable to his referral. For these reasons, the Appeals Chamber holds that the Referral Chamber applied the correct legal principle.

43. In view of the fact that there was no legal requirement for the Referral Chamber to consider the level of the accused, it is not necessary to examine Mr. Munyagishari's argument that the Referral Chamber erred in fact in holding that he was not one of the most senior leaders. Any such error would not have had any impact on the Impugned Decision.

44. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's second ground of appeal.

3. Undue delay (Ground 3)

45. Mr. Munyagishari submits that the Referral Chamber erred in ruling that referral of the case to Rwanda will not lead to undue delay.[114] In particular, he contends that the Referral Chamber failed to properly assess the impact of: (i) the late filing of the Prosecution's Request for Referral, filed more than five months after his arrest; (ii) the duration of the referral proceedings; (iii) the replacement of counsel who were familiar with the case and were ready for the commencement of the trial; and (iv) the impossibility of obtaining confidential material from other cases at this stage.[115] Mr. Munyagishari also submits that the Referral Chamber failed to consider these factors cumulatively.[116] He further avers that the Referral Chamber failed to consider other pertinent factors, such as the problems associated with the establishment of a monitoring mechanism.[117]

46. The Prosecution responds that Mr. Munyagishari does not demonstrate how the Referral Chamber erred in concluding that litigation relating to a referral does not necessarily result in undue

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[112] Resolution 1534, p. 2, para. 5.
[113] Resolution 1534, p. 2, para. 6.
[114] Munyagishari Notice of Appeal, paras. 13, 14; Munyagishari Appeal Brief, heading "Ground 3" at p. 11, paras. 47-53.
[115] Munyagishari Appeal Brief, paras. 48-51, 53. *See also* Munyagishari Reply Brief, paras. 12-15. Mr. Munyagishari argues that the Prosecution could have filed its request for the referral of his case prior to his arrest. *See* Munyagishari Appeal Brief, para. 48.
[116] Munyagishari Appeal Brief, para. 51.
[117] Munyagishari Appeal Brief, para. 52.

delay and in finding that Mr. Munyagishari had failed to show any undue delay in this case.[118] The Prosecution contends that the Referral Chamber did not err in its assessment of the individual factors relied upon by Mr. Munyagishari and that it did consider their cumulative effect prior to finding that referral would not cause undue delay.[119] The Prosecution also submits that the difficulties that the Registry of the Tribunal ("Registry") experienced in implementing monitoring in the *Uwinkindi* case will not be repeated.[120] Moreover, the Prosecution argues that "[t]here is no reason to believe that the monitoring mechanism for Munyagishari's case will be any less effective than [that] already in place for Uwinkindi's case."[121]

47. The Appeals Chamber notes that the Referral Chamber specifically addressed and rejected Mr. Munyagishari's arguments regarding the impact of the following factors on the proceedings: (i) the late filing of the Prosecution's Request for Referral; (ii) the postponement of his trial during the litigation pursuant to Rule 11 *bis* of the Rules; (iii) the consequence of the change of counsel; and (iv) the fact that he was not given access to confidential documents in other Tribunal cases.[122] The Appeals Chamber recalls that the purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and arguments submitted before the trial or referral chamber.[123] Mr. Munyagishari merely repeats on appeal the same arguments he made before the Referral Chamber without demonstrating that the Referral Chamber's rejection thereof constituted an error.

48. In respect of Mr. Munyagishari's argument that the Referral Chamber failed to address these factors as a whole, the Appeals Chamber notes that there is no indication in the Impugned Decision that the Referral Chamber considered the factors together.[124] However, the Appeals Chamber is, in any event, satisfied that any assessment of the cumulative effect of the factors would have led to the same result, that is, that there would not be any undue delay.[125] Accordingly, the Appeals Chamber finds that any error in this respect would not have had any impact on the Referral Chamber's conclusion that referral of the case to Rwanda will not lead to undue delay.

49. Lastly, since Mr. Munyagishari did not make submissions before the Referral Chamber regarding specific "problems relating to the establishment of the mechanism for monitoring the trial

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[118] Prosecution Response Brief, para. 20.
[119] Prosecution Response Brief, paras. 21-29, *referring to* Impugned Decision, paras. 33-38. The Prosecution submits that, in the exercise of its discretion, it elected to wait to file a referral request until the conditions in Rwanda were, in its view, suitable to support a referred case. *See* Prosecution Response Brief, paras. 22, 23.
[120] Prosecution Response Brief, para. 31 (where the Prosecution also submits that "[a]s the reports attached to Munyagishari's Rule 115 motion demonstrate, the *Uwinkindi* monitoring mechanism is working").
[121] Prosecution Response Brief, para. 31.
[122] Impugned Decision, paras. 33-37.
[123] *See, e.g.*, *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Judgement, 14 December 2011 ("*Ntawukulilyayo* Appeal Judgement"), para. 32; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 837.
[124] *See* Impugned Decision, paras. 33-37.

in Rwanda"[126] as a potential cause for undue delay,[127] the Appeals Chamber finds no error in the Referral Chamber not considering this matter *proprio motu*.

50. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's third ground of appeal.

4. Presumption of innocence (Ground 4)

51. Mr. Munyagishari takes issue with the Referral Chamber's statement that "[a]t this stage, [it] is not concerned that [his] presumption of innocence would not be protected"[128] on the ground that the Referral Chamber "should have established that the principle of presumption of innocence of the Accused would indeed be respected, but failed to do so."[129] In particular, Mr. Munyagishari submits that the Referral Chamber failed to consider Rwanda's statement that "the same regulations presently in effect for the detention of persons convicted by the United Nations Special Court for Sierra Leone will apply to any accused or prisoners referred by the Tribunal".[130] According to him, this position violates the presumption of innocence and contradicts Rwanda's subsequent statement, which the Referral Chamber accepted, that persons awaiting trial are kept separate from convicted persons.[131]

52. Mr. Munyagishari also contends that the Referral Chamber erred in failing to find that the comments made by Rwandan authorities and in the media did not amount to a violation of the presumption of innocence.[132] In this regard, he submits that the Referral Chamber's failure to consider the "repeated violations of the presumption of innocence by Rwandan authorities as a real

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[125] Impugned Decision, paras. 35-37.
[126] Munyagishari Appeal Brief, para. 52.
[127] *See The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Response by Bernard Munyagishari's Defence to the Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence, originally filed in French on 1 February 2012, English translation filed on 28 March 2012 ("Munyagishari Response to Request for Referral"), paras. 31-36, 146-160; *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, T. 12 April 2012 ("Oral Arguments"). The Appeals Chamber observes that, in response to the Prosecution's claim during oral arguments that any delay in the present case should be attributed to the Defence, Mr. Munyagishari referred to the difficulties in "secur[ing]" observers for the *Uwinkindi* trial in Rwanda and to the necessity to find a monitoring agreement for his case as well. He did not, however, elaborate on this point. *See* Oral Arguments, pp. 41, 42. In any event, the Appeals Chamber notes that the Referral Chamber nonetheless considered at length the hurdles involved in the establishment and implementation of the monitoring mechanism in the *Uwinkindi* case when determining whether a monitoring mechanism in the present case would be a basis, *inter alia*, to be satisfied that Mr. Munyagishari will receive a fair trial in Rwanda. *See* Impugned Decision, paras. 207-214.
[128] Munyagishari Notice of Appeal, para. 15, fn. 4, *referring to* Impugned Decision, para. 55; Munyagishari Appeal Brief, heading "Ground 4" at p. 13, paras. 54-59.
[129] Munyagishari Appeal Brief, para. 54. *See also* Munyagishari Reply Brief, para. 16.
[130] Munyagishari Appeal Brief, para. 55, *referring to* Rwanda *Amicus Curiae* Brief, para. 23. *See also* Munyagishari Appeal Brief, paras. 68, 70; Munyagishari Reply Brief, paras. 25, 26.
[131] Munyagishari Appeal Brief, para. 55, *referring to* Impugned Decision, para. 53 *and The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Prosecutor's Consolidated Brief in Reply, 29 February 2012, Annex F (Affidavit of Paul Rwarakabije, Commissioner General of Rwandan Correctional Services, dated 13 February 2012 ("Affidavit of Commissioner General of Rwandan Correctional Services").
[132] Munyagishari Appeal Brief, para. 56.

risk that [his] presumption of innocence [...] will not be protected" constitutes an error of fact.[133] He adds that its failure "to find that the repeated violations by Rwandan authorities amounted, in and of themselves, to a violation of the presumption of innocence" constitutes an error of law.[134]

53. In response, the Prosecution submits that the Referral Chamber was correct in not being concerned that Mr. Munyagishari's right to be presumed innocent would not be protected.[135] In the Prosecution's opinion, the Referral Chamber reasonably concluded that the comments made in the media and by Rwandan public authorities in unrelated cases did not show that Mr. Munyagishari would not receive a fair trial.[136] With respect to the alleged contradiction in Rwanda's submissions, the Prosecution avers that the "distinction [...] is manufactured not real."[137] Specifically, it argues that the two statements are not inconsistent and that, in any event, Mr. Munyagishari does not explain how Rwanda's statement detracts from the finding that his right to the presumption of innocence will be respected.[138]

54. The Appeals Chamber notes that the Referral Chamber's statement that it was "not concerned that [Mr. Munyagishari's] presumption of innocence would not be protected" was made at the conclusion of its assessment of the parties' arguments and, particularly, after the Referral Chamber noted that "any transfer of this case would be accompanied by independent monitoring in accordance with Rule 11 *bis*(D)(iv)" of the Rules.[139] When this statement is read in its proper context, the Impugned Decision reflects that the Referral Chamber duly considered whether Mr. Munyagishari's right to be presumed innocent would be protected in practice in Rwanda.[140]

55. Further, the Appeals Chamber recalls that "[t]here is a presumption that a Trial Chamber has evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence."[141] The Appeals Chamber fails to see a contradiction between Rwanda's statement that the regulations in effect for detention of persons convicted by the Special Court for Sierra Leone will apply to accused in cases referred by the Tribunal[142] and the statement of the Commissioner General of Rwandan Correctional Services that

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[133] Munyagishari Appeal Brief, para. 58.
[134] Munyagishari Appeal Brief, para. 58. *See also ibid.*, para. 57.
[135] Prosecution Response Brief, para. 33.
[136] Prosecution Response Brief, para. 36.
[137] Prosecution Response Brief, para. 37.
[138] Prosecution Response Brief, para. 39. The Prosecution also refers to the *Uwinkindi* case, where the referral chamber found that adequate conditions of detention were guaranteed by the Transfer Law and that Mr. Uwinkindi would be detained in appropriate conditions if his case were referred to Rwanda. *See ibid.*, para. 40.
[139] Impugned Decision, para. 55. *See also ibid.*, paras. 52-54.
[140] *See* Impugned Decision, paras. 52-55.
[141] *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010, para. 195. *See also Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-01-63-A, Judgement, 18 March 2010, para. 121.
[142] Rwanda *Amicus Curiae* Brief, para. 23.

in Mpanga and in the Kigali Central Prison convicted persons are separated from those awaiting trial.[143] In the view of the Appeals Chamber, Rwanda's statement concerning the application of the "same regulations" in no way implies that transferred accused awaiting trial will not benefit from the presumption of innocence. The Appeals Chamber accordingly finds no indication that the Referral Chamber disregarded Rwanda's statement.

56. Finally, the Appeals Chamber observes that the Referral Chamber examined whether the comments made by Rwandan media and public authorities violated Mr. Munyagishari's right to be presumed innocent.[144] Holding that "judges are trained and experienced professionals capable of separating comments made by public officials from evidence presented in the courtroom", the Referral Chamber concluded that these comments, in and of themselves, do not violate Mr. Munyagishari's right to the presumption of innocence.[145] Mr. Munyagishari merely expresses his disagreement with the Referral Chamber's conclusion in this regard without showing how the Referral Chamber erred in so finding.

57. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's fourth ground of appeal.

5. *Non bis in idem* (Ground 5)

58. The Referral Chamber, having analysed certain *Gacaca* records submitted by the Prosecution, found that it was "undisputed that Munyagishari ha[d] been previously convicted *in absentia* in Gacaca proceedings in Rwanda."[146] Relying on the Prosecution's contention that the *Gacaca* Court of Appeal had nullified the convictions entered by the lower *Gacaca* Court of Kayove Sector, the Referral Chamber found that the invalidation of Mr. Munyagishari's convictions by a higher court "mean[t] that a trial of [Mr. Munyagishari] before Rwanda's High Court or Supreme Court would not violate the principle of *non bis in idem*."[147]

59. Mr. Munyagishari submits that the Referral Chamber erred in finding that it was "undisputed" that he had previously been "convicted" *in absentia* in *Gacaca* proceedings in Rwanda.[148] He contends that the document on which the Referral Chamber based its finding "only indicates that the Judgement delivered at first instance was amended and that the decision was nullified" and "contains no information as to the guilt of the Accused and attests that no sentence

[143] Affidavit of Commissioner General of Rwandan Correctional Services, para. 2.
[144] Impugned Decision, para. 54.
[145] Impugned Decision, para. 54.
[146] Impugned Decision, para. 56, *referring to The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Prosecutor's Filing of Additional Information, 5 March 2012 ("Prosecution Information"), paras. 1-3.
[147] Impugned Decision, para. 60. *See also* Impugned Decision, para. 56.
[148] Munyagishari Appeal Brief, para. 60, *referring to* Impugned Decision, para. 56. *See also* Munyagishari Notice of Appeal, para. 17; Munyagishari Appeal Brief, heading "Ground 5" at p. 16, paras. 61-65.

was pronounced".[149] This, Mr. Munyagishari submits, "tends to lead to the conclusion that [he] was acquitted in the *Gacaca* first instance proceedings."[150] He argues that because it is not clear what the outcome of the first instance *Gacaca* proceedings was, the Referral Chamber did not possess sufficient evidence allowing it to consider that he had previously been convicted and that his conviction had been nullified.[151]

60. The Prosecution responds that Mr. Munyagishari's argument that it is unclear whether he was convicted or acquitted during the *Gacaca* proceedings was not raised before the Referral Chamber, and that Mr. Munyagishari should be barred from raising it for the first time on appeal.[152] In any event, the Prosecution contends that the Referral Chamber did not err in finding, based on the *Gacaca* Appeal Judgement, that the *in absentia* conviction had been set aside.[153] It also argues that the Referral Chamber properly relied on the *Gacaca* records which the Prosecution had submitted.[154] In the Prosecution's view, it was reasonable for the Referral Chamber to determine that, if referral was allowed, Mr. Munyagishari's trial before the High Court of Rwanda would not violate the principle of *non bis in idem* since "the lower court judgement was quashed by the Gacaca Appeals Court, and thus no longer existed."[155]

61. In reply, Mr. Munyagishari submits that he raised the issue of his conviction by the *Gacaca* courts during Oral Arguments.[156]

62. The Appeals Chamber notes that, during Oral Arguments, Mr. Munyagishari referred to the lack of clarity of the *Gacaca* Appeal Judgement and expressly submitted that the absence of indication of any penalty "presupposes that the *Gacaca* court did not impose any conviction."[157] While Mr. Munyagishari made these submissions in support of his claims concerning the deficiency of the conduct of proceedings in Rwanda rather than in relation to the application of the *non bis in*

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[149] Munyagishari Appeal Brief, para. 60 (internal references omitted), *referring to* Prosecution Information, Annex A (Kayove *Gacaca* Court of Appeal Judgement of 3 February 2012) ("*Gacaca* Appeal Judgement").
[150] Munyagishari Appeal Brief, para. 61. Mr. Munyagishari explains that he "is not in a position to say what the verdict was in the [lower] *Gacaca* court because [he] has never been able to obtain the Judgement." *See idem. See also* Munyagishari Reply Brief, paras. 20, 21.
[151] Munyagishari Appeal Brief, paras. 62, 65. As a result, Mr. Munyagishari contends, the Referral Chamber violated the *onus probandi incumbit actori* principle and erred in concluding that the vacatur of the judgement does not violate the principle of *non bis in idem* since "the invalidation of an acquittal could well undermine the principle." *See ibid.*, para. 62. *See also ibid.*, paras. 63-65.
[152] Prosecution Response Brief, para. 44. The Prosecution argues that Mr. Munyagishari did not respond to the Prosecution's disclosure of the *Gacaca* records and only "vaguely asserted that there were some unspecified 'errors' or 'surprising' issues in the judgement" during Oral Arguments. *See idem.*
[153] Prosecution Response Brief, paras. 45, 48.
[154] Prosecution Response Brief, para. 46. The Prosecution also submits that the Referral Chamber did not reverse the burden of proof but correctly held that it bore the burden of proving that Mr. Munyagishari's trial in Rwanda would be fair. *See ibid.*, para. 47.
[155] Prosecution Appeal Brief, para. 48.
[156] Munyagishari Reply Brief, para. 19, *referring to* Oral Arguments, p. 25.
[157] Oral Arguments, p. 25. *See also ibid.*, pp. 24, 26.

idem principle, the Appeals Chamber considers that Mr. Munyagishari did not fail to raise the arguments before the Referral Chamber. Therefore, he is not barred from raising them on appeal. In light of Mr. Munyagishari's submissions during Oral Arguments, the Appeals Chamber further finds that the Referral Chamber erred in stating that it was "undisputed" that Mr. Munyagishari had been previously "convicted" in *Gacaca* proceedings in Rwanda.

63. In particular, the Appeals Chamber notes that the *Gacaca* Appeal Judgement submitted by the Prosecution does not indicate whether Mr. Munyagishari was convicted or acquitted by the *Gacaca* Court of Kayove Sector. It merely states, in relevant part, that:

> The Gacaca court has no jurisdiction to try Munyagishari Bernard case. Trying his case would amount to violating the law. He will be tried by the High Court of the Republic.[158]
>
> [...]
>
> The Gacaca Court of Appeal of Kayove notes that it lacks jurisdiction to try the accused as he faces charges carried against him by the Prosecution authorities. Therefore, the present Gacaca Court vacates the decision previously taken by the Gacaca Court of Kayove Sector, as it was in violation of [Organic Law N° 11/2007 of 16 March 2007].[159]

64. In the absence of any other material establishing that Mr. Munyagishari was convicted by the *Gacaca* Court of Kayove Sector, the Referral Chamber, therefore, erred in relying on its understanding that Mr. Munyagishari had been convicted by the lower *Gacaca* court in reaching its conclusion that his trial in Rwanda following his transfer would not violate the principle of *non bis in idem*.[160]

65. The Appeals Chamber, however, considers that the issue of whether Mr. Munyagishari was convicted or acquitted by the *Gacaca* Court of Kayove Sector is irrelevant in the present case as it is not disputed that the *Gacaca* Appeal Judgement vacated the decision of the *Gacaca* Court of Kayove Sector based on lack of jurisdiction.[161] The Appeals Chamber recalls 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.[162] Where a *Gacaca* conviction has been vacated on appeal, further

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[158] *Gacaca* Appeal Judgement, p. 705 (Registry pagination).
[159] *Gacaca* Appeal Judgement, p. 704 (Registry pagination).
[160] The Appeals Chamber considers that Mr. Munyagishari's argument regarding the burden of proof is ill-founded as the Impugned Decision clearly reflects that the Referral Chamber reached its findings on the basis of the Prosecution's submissions. The fact that the Referral Chamber may have erred in reaching its conclusions does not demonstrate that it failed to place the burden of proof on the Prosecution in the context of assessing the Prosecution's application for referral pursuant to Rule 11 *bis* of the Rules.
[161] *See* Munyagishari Appeal Brief, paras. 60, 62; Prosecution Response Brief, para. 48.
[162] *See The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009, para. 16. *See generally* Article 9 of the Statute; International Covenant on Civil and Political Rights (adopted 19 December 1966, 999 UNTS 171) ("ICCPR"), Art. 14(7) ("No one shall be liable to be tried or punished again for an offence for which he has already been *finally convicted or acquitted* in accordance with the law and penal procedure of each country") (emphasis added); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 22 November 1984), Art. 4(2) ("The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance

proceedings against the individual will not violate the *non bis in idem* principle,[163] as Mr. Munyagishari concedes.[164] He fails to show how an acquittal that is vacated on appeal should lead to a different result. Accordingly, the Appeals Chamber finds that Mr. Munyagishari has not demonstrated that, notwithstanding the erroneous reliance on his alleged prior conviction, the Referral Chamber erred in finding that his trial before the High Court of Rwanda would not violate the principle of *non bis in idem*.

66. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's fifth ground of appeal.

6. Conditions of detention (Ground 6)

67. Mr. Munyagishari submits that the Referral Chamber erred in considering that it was limited to assessing the legal framework governing detention in Rwanda.[165] He argues that the legal framework does not, in and of itself, ensure that the conditions of detention accord with internationally recognized standards.[166]

68. Mr. Munyagishari further contends that the Referral Chamber should not have concluded that his conditions of detention will meet international standards given the evidence that, despite the legal framework which the Referral Chamber found satisfactory, international standards are not met in the prison system of Rwanda.[167] In this regard, he submits that the Referral Chamber attached disproportionate weight to the Affidavit of Commissioner General of Rwandan Correctional Services and did not correctly assess the evidence contradicting it, including the statement of Rwanda as to the segregation of detainees.[168] He adds that the Referral Chamber erred in disregarding the concerns of the United Nations Human Rights Committee that "there appeared to be no guarantee that [...] accused will be held separately from convicted persons" on the pretext that those concerns had to do with the entire prison system in Rwanda.[169]

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with the law and penal procedure of the State concerned [...] if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case"); American Convention on Human Rights (adopted on 22 November 1969) ("ACHR"), Art. 8(4) ("An accused person *acquitted by a nonappealable judgment* shall not be subjected to a new trial for the same cause") (emphasis added).

[163] *Uwinkindi* Appeal Decision, paras. 41-44. *See also Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-I, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 ("*Uwinkindi* Referral Decision"), paras. 27-35.

[164] *See* Munyagishari Appeal Brief, para. 62.

[165] Munyagishari Notice of Appeal, para. 20; Munyagishari Appeal Brief, heading "Ground 6" at p. 17, paras. 66-70. *See also* Munyagishari Reply Brief, para. 23.

[166] Munyagishari Appeal Brief, para. 66. Mr. Munyagishari submits that the Appeals Chamber has never limited the assessment of the conditions of detention to the legal framework. *See idem.*

[167] Munyagishari Appeal Brief, para. 67. *See also* Munyagishari Reply Brief, para. 27.

[168] Munyagishari Appeal Brief, para. 68. *See also ibid.*, para. 70.

[169] Munyagishari Appeal Brief, para. 68, *referring to* Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Rwanda, CCPR/C/RWA/CO/3, 7 May 2009, para. 15.

69. In response, the Prosecution argues that the Referral Chamber's approach was consistent with settled jurisprudence[170] and that, in any event, the Referral Chamber considered the argument that international standards would not be followed in practice.[171] The Prosecution also submits that Mr. Munyagishari has failed to show that the Referral Chamber erred in its assessment of the submissions and evidence before it relating to the conditions of detention.[172]

70. The Referral Chamber correctly recalled that it was required to ascertain whether the laws governing detention incorporate relevant international standards.[173] The Referral Chamber then stated that it was "therefore limited to an assessment of the applicable legal framework."[174] Concluding that "the Transfer Law, supplemented by the Rwandan law on prisoner rights [are] in line with international human rights standards",[175] the Referral Chamber turned to consider Mr. Munyagishari's submissions that the international human rights law will not be implemented in practice.[176] The Referral Chamber dismissed those submissions as "speculative" or "based on little credible evidence."[177]

71. The Impugned Decision clearly reflects that the Referral Chamber properly considered Mr. Munyagishari's submissions pertaining to the practical implementation of the legal framework governing detention in Rwanda. The Referral Chamber's statement that it is "limited to an assessment of the applicable legal framework" has to be read in this context.

72. Turning to Mr. Munyagishari's contention regarding the assessment of the submissions and evidence allegedly showing that international standards governing detention are not met in Rwanda, the Appeals Chamber recalls that it has already rejected Mr. Munyagishari's claim concerning the alleged contradictory statements of Rwandan authorities on the question of segregation of detainees.[178] It further considers that Mr. Munyagishari has failed to show that the Referral

[170] Prosecution Response Brief, para. 50, *referring to Uwinkindi* Appeal Decision, para. 37.
[171] Prosecution Response Brief, paras. 51, 52.
[172] Prosecution Response Brief, paras. 55, 56.
[173] Impugned Decision, para. 80, *referring to Uwinkindi* Appeal Decision, para. 37.
[174] Impugned Decision, para. 80.
[175] Impugned Decision, para. 80. The Referral Chamber also noted that the Transfer Law requires that any person transferred to Rwanda "shall be detained in accordance with the minimum standards of detention as provided in the United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173." *See ibid.*, para. 73, *referring to* Transfer Law, Art. 23(1).
[176] Impugned Decision, paras. 81-84.
[177] Impugned Decision, paras. 81, 82. The Referral Chamber further noted that both Rule 11 *bis*(D)(iv) of the Rules and Article 23(2) of the Transfer Law provide for a monitoring mechanism which, in accordance with the jurisprudence, extends to detention conditions, and that the referral is subject to revocation "if adequate conditions are not provided". *See ibid.*, para. 81.
[178] *See supra*, para. 55.

Chamber "attached disproportionate weight"[179] to the Affidavit of Commissioner General of Rwandan Correctional Services.

73. Likewise, Mr. Munyagishari fails to demonstrate that the Referral Chamber committed an error in considering that the Human Rights Committee's statement and the other evidence pointing to the "poor running"[180] of the Rwandan penitentiary system were irrelevant to the extent that they concerned the entire Rwandan prison system and not the separate facilities that have been established for accused transferred from the Tribunal.[181] The Appeals Chamber recalls in this regard that the Referral Chamber's scrutiny was limited to whether it was satisfied that Mr. Munyagishari will be detained in appropriate conditions if his case were to be referred to Rwanda. The Referral Chamber correctly held that information pertaining to the practical implementation of the legal framework applicable to Rwandan detainees not subject to the Transfer Law was not relevant to this determination.

74. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's sixth ground of appeal.

7. Attendance of defence witnesses (Ground 7)

75. Mr. Munyagishari submits that the Referral Chamber erred in ruling that he will obtain the attendance and examination of his witnesses under the same conditions as those testifying for the prosecution.[182] He contends that the Referral Chamber failed to ensure that "in practice, he can obtain the actual attendance of witnesses on his behalf under conditions which are clearly identical to those of Prosecution witnesses."[183] Mr. Munyagishari submits that the Referral Chamber should have concluded that he could not be guaranteed the attendance of witnesses on his behalf as required in light of its findings: (i) that there are gaps in the immunities given to defence witnesses; (ii) that these gaps may interfere with his ability to obtain witnesses; (iii) that potential defence witnesses face concrete difficulties; and (iv) that only the abolition of the genocide ideology law could reassure witnesses.[184] In his view, this should have led the Referral Chamber to conclude that it was impossible to refer his case to Rwanda.[185]

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[179] Munyagishari Appeal Brief, para. 68.
[180] Munyagishari Appeal Brief, para. 70.
[181] *See* Impugned Decision, para. 84.
[182] Munyagishari Notice of Appeal, para. 23; Munyagishari Appeal Brief, heading "Ground 7" at p. 20, paras. 71-78.
[183] Munyagishari Appeal Brief, para. 73. *See also ibid.*, para. 78.
[184] Munyagishari Appeal Brief, paras. 74, 75. *See also ibid.*, para. 76. In support of his submission, Mr. Munyagishari submits that a referral chamber "can reasonably deny referral notwithstanding the existence of the legal framework, when it considers that the Accused may face difficulties in securing the attendance of witnesses that would jeopardize his right to a fair trial." *See ibid.*, para. 75, *referring to Uwinkindi* Appeal Decision, para. 64.
[185] Munyagishari Appeal Brief, para. 74. Mr. Munyagishari also argues that the Referral Chamber exceeded its jurisdiction in imposing conditions to ensure the respect of his right to obtain witnesses. *See idem.* The Appeals

76. Mr. Munyagishari further submits that the Referral Chamber erroneously disregarded the submitted affidavits of defence witnesses who, "being aware of all Rwandan laws and all possibilities of protection, stated, nonetheless, that they would not testify before Rwandan courts."[186] Citing the Referral Chamber's finding that "it constitutes 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", Mr. Munyagishari submits that the Referral Chamber erred in concluding that he will "not necessarily rely on alternative modes of obtaining testimony."[187] In this respect, he contends that had the Referral Chamber "properly analyzed" the affidavits of the defence witnesses that he submitted, it would have concluded that all defence witnesses, if they agree to testify, will testify via one of the alternative modes.[188] According to him, the Referral Chamber improperly considered the effect of the defence witnesses' fear on their willingness to testify and, consequently, "came to wrong conclusions".[189]

77. The Prosecution responds that it was "entirely appropriate for the [Referral] Chamber to focus on the immunities and protections afforded by Rwanda's existing framework", particularly given the fact that there is no past experience to draw upon.[190] The Prosecution also submits that the Referral Chamber had a reasonable basis to conclude that Mr. Munyagishari, regardless of witnesses' fears, will be able to secure the attendance of witnesses,[191] and reasonably determined that there will not be an inequality of arms.[192] In this regard, the Prosecution argues that the fact that defence witnesses may fear testifying before Rwandan courts does not automatically imply that the majority of defence witnesses would appear by means substantially different from those for the prosecution.[193] In the Prosecution's view, it was reasonable for the Referral Chamber to leave these fact-based assessments to be addressed, if necessary, by the High Court of Rwanda and, "if that proves ineffective, by Rule 11 *bis*'s monitoring and revocation provisions."[194]

Chamber will address this argument in its discussion of Mr. Munyagishari's tenth ground of appeal *infra*. *See infra*, Section III.A.10.

[186] Munyagishari Appeal Brief, para. 76, *referring to* Munyagishari Response to Request for Referral, Annex 51, confidential. *See also* Munyagishari Appeal Brief, para. 77.

[187] Munyagishari Appeal Brief, para. 77, *referring to* Impugned Decision, para. 134.

[188] Munyagishari Appeal Brief, para. 77.

[189] Munyagishari Appeal Brief, para. 78.

[190] Prosecution Response Brief, para. 64. The Prosecution also submits, referring to the *Uwinkindi* Appeal Decision, that "it is sufficient for a Chamber to rely on the existence of such a legal framework as a primary basis for determining whether adequate protections are provided to ensure a fair trial." *See* Prosecution Response Brief, para. 64, *referring to Uwinkindi* Appeal Decision, para. 64.

[191] Prosecution Response Brief, para. 65. The Prosecution argues in this regard that the Referral Chamber addressed the full range of defence witnesses' fears and explained why they were not obstacles to referral. *See idem*.

[192] Prosecution Response Brief, para. 67.

[193] Prosecution Response Brief, para. 67. The Prosecution argues that the alternatives provided under Rwandan law "could, with appropriate logistical support, allow Munyagishari to both face the witnesses and hear their testimony *viva voce*." *See ibid.*, para. 68.

[194] Prosecution Response Brief, para. 69.

78. In reply, Mr. Munyagishari submits that the fact that the Referral Chamber decided to impose conditions on the Prosecutor General of Rwanda in order to ensure that his rights would be protected shows that it was not satisfied that he would obtain the appearance of witnesses under the same conditions as those of the prosecution.[195]

79. The Appeals Chamber recalls that the role of a referral chamber in assessing the availability of defence witnesses' testimony is to determine the likelihood that the accused will be able to secure their appearance on his behalf under the same conditions as those testifying against him.[196] The Impugned Decision reflects that, in fulfilling this task, the Referral Chamber did not limit its assessment to the applicable legal framework but examined at length Mr. Munyagishari's submission that his right to obtain the attendance and examination of his witnesses under the same conditions as those testifying for the prosecution will not be respected in practice in Rwanda.[197] Although he disagrees with the Referral Chamber's conclusion that it was satisfied that Rwanda had the capacity to ensure and respect this right, Mr. Munyagishari does not demonstrate that the Referral Chamber erred in reaching any of the findings which underpinned that conclusion.[198]

80. Likewise, Mr. Munyagishari fails to show how the Referral Chamber erred in its assessment of the witnesses' affidavits. While these affidavits reveal the refusal of certain potential defence witnesses residing outside Rwanda to testify in Rwanda, the Appeals Chamber finds no error in the Referral Chamber's observation that it did not consider that Mr. Munyagishari's defence "will necessarily rely on alternate modes of obtaining testimony to the extent that it will necessarily render the trial unfair."[199] In the Appeals Chamber's view, the Referral Chamber was correct in considering that it would be speculative to conclude at this stage and on the basis of the few affidavits provided that, as Mr. Munyagishari contends, all defence witnesses will testify by alternative modes of testimony. The Appeals Chamber further notes that, should this happen and Mr. Munyagishari's right to obtain the attendance and examination of his witnesses under the same conditions as those testifying for the prosecution be impaired to the extent that it renders his trial in Rwanda unfair, the referral of the case may be revoked.

81. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's seventh ground of appeal.

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[195] Munyagishari Reply Brief, para. 28, *referring to* Impugned Decision, para. 124.
[196] *Uwinkindi* Appeal Decision, para. 61.
[197] *See* Impugned Decision, paras. 97-135.
[198] *See* Impugned Decision, para. 139.
[199] Impugned Decision, para. 134.

8. Effective defence (Ground 8)

82. Mr. Munyagishari submits that the Referral Chamber erred in ruling that his right to an effective defence will be guaranteed in Rwanda.[200] In particular, he contends that, having acknowledged the unique challenges of this case, the Referral Chamber failed to ensure that Rwanda will provide sufficient funds to his defence counsel, in particular to finance work outside Rwanda.[201] In this regard, he asserts that a referral chamber must "ensure that national jurisdictions provide adequate and sufficient remuneration in order to guarantee an efficient and effective defence of the accused."[202] In Mr. Munyagishari's view, the Referral Chamber also shifted the burden of proof by "accepting the Prosecutor's allegations and the affidavits of Rwandan civil servants whose interest in the referral of the case is clear, without any tangible evidence that sufficient resources will be made available to ensure [his] defence".[203] In addition, he argues that for his current counsel to be able to transfer his knowledge of the case to a new counsel, the Tribunal or Rwanda must provide the means for the two counsel to work together for a period of time.[204]

83. The Prosecution responds that the Referral Chamber reasonably determined that Rwanda had sufficient funds allocated to its legal aid system and explicitly took into account that preparation of Mr. Munyagishari's defence may well entail considerable work outside Rwanda.[205] The Prosecution argues that a review of the Impugned Decision also reflects that the Referral Chamber did not shift the burden of proof.[206] The Prosecution further submits that the Referral Chamber cannot be faulted for not considering the issue of transfer of information between counsel as Mr. Munyagishari raises it for the first time on appeal.[207] The Prosecution adds that, in any event, counsel before the Tribunal have ethical obligations to deliver the case file to subsequent counsel.[208] It also submits that, should Mr. Munyagishari encounter difficulties in the "smooth transfer of his

[200] Munyagishari Notice of Appeal, para. 26; Munyagishari Appeal Brief, heading "Ground 8" at p. 23, paras. 79-86.
[201] Munyagishari Appeal Brief, paras. 81-83, 86. *See also* Munyagishari Reply Brief, para. 31. Mr. Munyagishari alleges that the Referral Chamber was informed that assigned counsel in Rwanda "seem to be bound to provide *pro bono* representation" and that it accepted affidavits in which there was "no mention of specific remuneration for Defence Counsel." *See* Munyagishari Appeal Brief, para. 83. Mr. Munyagishari also submits that the Referral Chamber "exceeded its powers when it imposed the assignment of an experienced Counsel on the Kigali Bar, subject to the approval of the President of the Tribunal or the Residual Mechanism." *See ibid.*, para. 80, *referring to ibid.*, paras. 93-97 (internal reference omitted). This argument is addressed under Mr. Munyagishari's tenth ground of appeal *infra*. *See infra*, Section III.A.10.
[202] Munyagishari Appeal Brief, para. 83.
[203] Munyagishari Appeal Brief, para. 84.
[204] Munyagishari Appeal Brief, para. 85. Mr. Munyagishari also submits that the Referral Chamber "did not consider it necessary to dwell on the practical difficulties of the transfer of information between Counsel working in different geographical jurisdictions that are far apart." *See idem.*
[205] Prosecution Response Brief, paras. 70-73.
[206] Prosecution Response Brief, para. 75.
[207] Prosecution Response Brief, para. 77.
[208] Prosecution Response Brief, para. 77.

[Tribunal] case file to successor counsel, adequate remedies exist to bring these concerns to the attention of the [Tribunal] Registrar or the High Court in Rwanda."[209]

84. In the Appeals Chamber's view, the Referral Chamber appropriately considered that the Transfer Law, Rwandan law, and Rwandan practice ensure the right of indigent accused to be assigned legal assistance without payment.[210] The Referral Chamber examined Mr. Munyagishari's submission that the Rwandan legal aid system was not adequately funded, finding that his factual assertions failed to rebut the affidavits of the Minister of Justice of Rwanda and the Secretary-General of the Rwandan Supreme Court.[211] The Referral Chamber concluded that Rwanda had appropriate funding for the legal representation of transferred accused.[212] It did so "mindful of the unique challenges presented in this case, and, in particular, the existence of prospective witnesses outside of Rwanda."[213] Mr. Munyagishari does not demonstrate that the Referral Chamber shifted the burden of proof or erred in accepting in good faith the assurances of the Minister of Justice of Rwanda and the Secretary-General of its Supreme Court that appropriate funding will be provided.[214] Moreover, it bears noting that the Referral Chamber emphasized that "[s]hould Rwanda fail to provide sufficient funding so as to infringe on the fair trial rights of [Mr. Munyagishari], the case is subject to revocation".[215]

85. The Appeals Chamber observes that, although Mr. Munyagishari submitted before the Referral Chamber that the change of counsel if his case were transferred would cause him serious prejudice,[216] he did not expressly raise a claim regarding the difficulties of transferring knowledge of the case to successor counsel during the proceedings before the Referral Chamber. The Appeals Chamber therefore considers that Mr. Munyagishari has waived his right to raise the issue on appeal. The Appeals Chamber nonetheless recalls that counsel representing Mr. Munyagishari

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[209] Prosecution Response Brief, para. 78.
[210] Impugned Decision, paras. 140, 146.
[211] Impugned Decision, paras. 151-153.
[212] Impugned Decision, para. 153.
[213] Impugned Decision, para. 153.
[214] *See* Impugned Decision, para. 153. The Appeals Chamber emphasizes that the Referral Chamber was not obligated to itemize the provisions of Rwanda's budget once it had learned that there is financial support for representation. *See also Uwinkindi* Appeal Decision, para. 71; *Prosecutor v. Mitar Rašević and Savo Todović*, Case Nos. IT-97-25/1-AR11*bis*.1 and IT-97-25/1-AR11*bis*.2, Decision on Savo Todović's Appeals Against Decisions on Referral Under Rule 11*bis*, 4 September 2006 ("*Todović* Appeal Decision"), para. 59; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11*bis*, 7 April 2006 ("*Mejakić et al.* Appeal Decision"), para. 70 ("Moreover, the Referral Bench was not legally required to make a finding on whether the funding of the Appellants' defence would be adequate to cover current counsel's fees and other expenses incurred by investigators"); *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005, para. 44; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stanković* Appeal Decision"), para. 21.
[215] Impugned Decision, para. 153. *See also ibid.*, para. 170.
[216] *See* Munyagishari Response to Referral Request, para. 123. *Cf.* Oral Arguments, p. 27.

before the Tribunal are subject to clear professional obligations in this respect,[217] something which Mr. Munyagishari also recognizes.[218]

86. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's eighth ground of appeal.

9. Monitoring (Ground 9)

87. The Referral Chamber held that it would be in the interests of justice to ensure that there is an adequate system of monitoring in place if Mr. Munyagishari's case is to be referred to Rwanda.[219] The Referral Chamber recalled that the African Commission on Human and Peoples' Rights ("ACHPR") was selected by the referral chamber in the *Uwinkindi* case to monitor Mr. Uwinkindi's trial, finding it a "trustworthy agency".[220] Noting the subsequent decision by the President of the Tribunal to appoint two Tribunal legal staff as interim monitors while negotiations were ongoing with the ACHPR, the Referral Chamber expressed its view that Mr. Munyagishari's rights would be best safeguarded by a monitoring mechanism composed of an independent organisation.[221] For this reason, the Referral Chamber ordered that an independent organization be appointed as monitor, either instead of, or in addition to, the Tribunal legal staff who are currently acting as monitors of cases referred to Rwanda.[222]

88. Mr. Munyagishari submits that the Referral Chamber erred in ruling that his rights will be safeguarded by monitors without ensuring that an adequate monitoring mechanism had been put in place.[223] Recalling the problems relating to the appointment of monitors in the *Uwinkindi* case,[224] he argues that "the Tribunal is yet to find any solution to the present case" and that "it is totally unknown who will ensure observation and monitoring of the case when the case is transferred to Rwanda."[225] For these reasons, and since the Referral Chamber did "not approve the appointment of [Tribunal] staff as monitors," Mr. Munyagishari contends that the Referral Chamber should not have relied on the monitoring mechanism as a safeguard for his rights.[226] Noting that the Referral Chamber "seems to envisage" his transfer to Rwanda before the actual appointment of monitors,[227] Mr. Munyagishari also argues that, without monitors on the ground in Rwanda, there can be no

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[217] *See* Code of Professional Conduct for Defence Counsel, 8 June 1998, Arts. 6, 9, 14.
[218] *See* Munyagishari Appeal Brief, para. 85.
[219] Impugned Decision, para. 208.
[220] Impugned Decision, para. 210, *referring to Uwinkindi* Referral Decision, paras. 210-213, 219.
[221] Impugned Decision, paras. 211, 212.
[222] Impugned Decision, para. 214.
[223] Munyagishari Notice of Appeal, para. 28; Munyagishari Appeal Brief, heading "Ground 9" at p. 26, paras. 87-92. *See also* Munyagishari Reply Brief, para. 32.
[224] Munyagishari Appeal Brief, paras. 87, 88.
[225] Munyagishari Appeal Brief, para. 88.
[226] Munyagishari Appeal Brief, para. 89.
[227] Munyagishari Appeal Brief, para. 90, *referring to* Impugned Decision, para. 214.

possibility of revoking the referral and that he "will be deprived of the only protection mechanism available to him, and on which mechanism the [Referral] Chamber based its Decision."[228]

89. The Prosecution responds that Mr. Munyagishari "places too much emphasis on the identity of the monitor [...] and too little emphasis on the substantive protections the monitoring mechanism affords to him".[229] In this respect, it refers to the Referral Chamber's confidence that should the Registry's negotiations with the ACHPR prove unsuccessful, other organizations may prove effective alternatives, as well as to the monitoring guidelines and provisions that will apply if Mr. Munyagishari's case is referred to Rwanda.[230] The Prosecution also argues that the *Uwinkindi* monitoring mechanism "has been functioning in practice" with regular reports being submitted to the Presidents of the Tribunal and the MICT.[231] In the Prosecution's view, the Referral Chamber "reasonably found that an adequate monitoring system would be in place at the time of transfer".[232]

90. The Appeals Chamber considers Mr. Munyagishari's argument regarding the appointment of monitors in the *Uwinkindi* case to be speculative. Moreover, the Appeals Chamber finds his argument that there is as yet not "any solution to the present case" with respect to monitoring to be equally unmeritorious. In light of the pending appeal against the Impugned Decision, it is reasonable that arrangements for the monitoring of his case have not yet been finalized. The Appeals Chamber also fails to see how, in light of the monitoring modalities imposed by the Referral Chamber,[233] the fact that Mr. Munyagishari has not yet been informed of which organization will provide the monitoring would affect any of his rights.

91. Likewise, Mr. Munyagishari fails to demonstrate how his transfer to Rwanda before the actual appointment of monitors would deprive him of the protection of the monitoring mechanism envisioned by the Referral Chamber given the Referral Chamber's express order that, if not appointed before his transfer, the monitoring organization should be appointed "as soon as practicable" after his transfer.[234] The Appeals Chamber also emphasizes that revocation of a referral ordered pursuant to Rule 11 *bis*(F) of the Rules may be ordered *proprio motu* and is not conditional on the existence or observations of a monitoring mechanism.[235] In conclusion, the Appeals

[228] Munyagishari Appeal Brief, para. 90, *referring to* Impugned Decision, paras. 85, 111, 118, 138. Mr. Munyagishari also notes that he did not have the opportunity to express his opinion on monitoring mechanisms other than that of the ACHPR. He does not, however, allege any specific error on the part of the Referral Chamber in this respect. *See* Munyagishari Appeal Brief, para. 91.
[229] Prosecution Response Brief, para. 81.
[230] Prosecution Response Brief, paras. 82, 83, 85.
[231] Prosecution Response Brief, para. 84.
[232] Prosecution Response Brief, para. 85.
[233] *See* Impugned Decision, Disposition, p. 55. *See also ibid.*, para. 218.
[234] Impugned Decision, Disposition, p. 55. *See also ibid.*, paras. 214, 220 ("shortly after the transfer").
[235] *See also* Rule 14(C) of the MICT Rules of Procedure and Evidence.

Chamber cannot find fault in the Referral Chamber's treatment of the monitoring mechanism as an additional safeguard of Mr. Munyagishari's rights.

92. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's ninth ground of appeal.

10. Conditions imposed to safeguard Mr. Munyagishari's rights (Ground 10)

93. Mr. Munyagishari submits that by imposing conditions on and requiring guarantees from the Prosecutor General of Rwanda and the KBA, the Referral Chamber "directly interfered in the proceedings of the national trial and thus exceeded its discretion."[236] He argues that no provision in the Statute empowers a referral chamber to intervene in a State's domestic system and that "such intervention will be contrary to the provisions of the Charter of the United Nations."[237] He contends that, "[h]aving found that Rwanda's legal framework and the circumstances in Rwanda do not sufficiently guarantee a fair trial for [him] and that further guarantees were necessary," the Referral Chamber should have denied referral to Rwanda.[238]

94. The Prosecution responds that the Referral Chamber "was satisfied with Rwanda's capacity and willingness to prosecute his case consistent with internationally recognized fair trial standards."[239] The Prosecution submits that it appealed the imposition of two of the three conditions imposed by the Referral Chamber "because they were not necessary or relevant to ensuring Munyagishari's fair trial rights and, thus, were beyond the Chamber's authority".[240] However, the Prosecution argues, the remaining condition was within the Referral Chamber's discretion to impose because it is reasonably related to safeguarding Mr. Munyagishari's fair trial rights[241] and has "now been fulfilled by Rwanda".[242]

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[236] Munyagishari Appeal Brief, para. 97. *See also* Munyagishari Notice of Appeal, para. 31, *referring to* Impugned Decision, paras. 17, 124, 149; Munyagishari Appeal Brief, heading "Ground 10" at p. 27, para. 93, fns. 159, 160, *referring to* Impugned Decision, paras. 17, 124, 149.
[237] Munyagishari Appeal Brief, para. 94. *See also ibid.*, para. 95.
[238] Munyagishari Appeal Brief, para. 96. *See also ibid.*, para. 74.
[239] Prosecution Response Brief, para. 89.
[240] Prosecution Response Brief, para. 90, *referring to* Prosecution Appeal Brief.
[241] Prosecution Response Brief, para. 90. *See also ibid.*, para. 92. The Prosecution refers to the following condition: a "binding concession in writing from the Prosecutor General of Rwanda to the President of this Tribunal or the Residual Mechanism that joint criminal enterprise shall not be included as a mode of liability pursued against the Accused" *See ibid.*, paras. 91, 94, *referring to* Impugned Decision, para. 17, Disposition, p. 55. The Prosecution also refers to the Referral Chamber's request that Rwanda report about the progress of the study commissioned regarding Article 13 of the Rwandan Constitution. *See* Prosecution Response Brief, paras. 91, 93, *referring to* Impugned Decision, para. 97, Disposition, p. 56. The Appeals Chamber will not entertain the Prosecution's argument regarding this request by the Referral Chamber as Mr. Munyagishari does not challenge the Impugned Decision in this regard. *See* Munyagishari Notice of Appeal, para. 31, *referring to* Impugned Decision, paras. 17, 124, 149; Munyagishari Appeal Brief, para. 93, fns. 159, 160, *referring to* Impugned Decision, paras. 17, 124, 149.
[242] Prosecution Response Brief, para. 91, *referring to* Letter of Prosecutor General of Rwanda of 6 August 2012 addressed to Tribunal President Joensen and MICT President Meron.

95. While a referral chamber enjoys broad discretion in considering requests for referral pursuant to Rule 11 *bis* of the Rules, it nonetheless must be satisfied prior to ordering referral, *inter alia*, that the accused will receive a fair trial and that he will be accorded the rights set out in Article 20 of the Statute.[243] The Appeals Chamber has held that:

> 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.[244]

A referral chamber may, thus, issue any orders that are reasonably necessary to ensure the paramount objective that the accused will receive a fair trial in the referred case. The Appeals Chamber is of the opinion that such orders may include the imposition of conditions on the referral. In this regard, the Appeals Chamber emphasizes that referral of a case pursuant to Rule 11 *bis* of the Rules is carried out in close cooperation with the State in question and with its explicit agreement.

96. The Impugned Decision does not order Rwanda to comply with the conditions imposed on the referral by the Referral Chamber. To the contrary, the option is open to Rwanda not to accept the referred case should it not wish to accept the attendant conditions. Thus, the Appeals Chamber finds that Mr. Munyagishari has not demonstrated that the Referral Chamber exceeded its discretion by imposing conditions on the referral. The Appeals Chamber likewise finds no merit in Mr. Munyagishari's claim that the conditions at issue are contrary to the Charter of the United Nations.

97. The Appeals Chamber, therefore, dismisses Mr. Munyagishari's tenth ground of appeal.

11. Conclusion

98. Based on the foregoing, the Appeals Chamber grants Mr. Munyagishari's first ground of appeal and sets aside the Second Condition. Accordingly, the Appeals Chamber orders the Prosecution to amend Mr. Munyagishari's Indictment to reflect the withdrawal of the pleading of joint criminal enterprise as a mode of liability. The Appeals Chamber dismisses Mr. Munyagishari's appeal in all other respects.

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[243] *See supra*, Section II.A.

[244] *Stanković* Appeal Decision, para. 50. *See also Uwinkindi* Appeal Decision, para. 28; *Todović* Appeal Decision, para. 104; *Mejakić et al.* Appeal Decision, para. 92.

C. Prosecution's Appeal

99. The Prosecution advances one ground of appeal against the Impugned Decision challenging the Referral Chamber's decision to subject the referral of Mr. Munyagishari's case to the High Court of Rwanda to the following two conditions:[245]

> 1. A written guarantee by the President of the Kigali Bar Association to the President of this Tribunal or the Residual Mechanism, that the Accused, should he remain indigent, will be assigned a lawyer with previous international experience. It shall be within the discretion of the President of this Tribunal or the Residual Mechanism to determine whether prospective counsel has sufficient international experience.
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> [...]
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> 3. A written and binding assurance by the Prosecutor General of Rwanda to the President of this Tribunal or the Residual Mechanism:
>
> - that Articles 54 and 55 of the Code of Criminal Procedure *could* not be used to compel witnesses testifying in the transfer case to testify in a subsequent domestic case on the basis of their evidence in the transfer case; or
> - that Articles 54 and 55 of the Code of Criminal Procedure *would* not be used to compel witnesses testifying in the transfer case to testify in a subsequent domestic case on the basis of their evidence in the transfer case; or
> - that any witnesses who testify in the transfer case and who may be then compelled to testify in subsequent domestic cases pursuant to Articles 54 and 55 of the Code of Criminal Procedure shall also be granted the same immunities contained within Article 13 of the Transfer Law while participating in such domestic cases.[246]

100. The Prosecution submits that, while a referral chamber's discretion to impose conditions on the referral State is broad, it is not unlimited.[247] At minimum, it argues, conditions imposed should "be relevant or reasonably related to the fundamental objective of ensuring that, if referral is allowed, the trial in the referral State will be fair."[248] If the conditions imposed are irrelevant or unrelated to this objective, the Prosecution contends that they should be set aside as an abuse of discretion.[249] In this context, the Prosecution also submits that a referral chamber may not "intrude too far on the sovereign interests of the national jurisdiction."[250] In the Prosecution's view, the Referral Chamber acted beyond its authority in imposing the two above-mentioned conditions, thereby abusing its discretion and committing a discernible error.[251] The Prosecution accordingly requests that the Appeals Chamber set aside the First Condition and the Third Condition.[252]

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[245] Prosecution Notice of Appeal, paras. 1-3; Prosecution Appeal Brief, paras. 3-40.
[246] Impugned Decision, pp. 54, 55 (emphasis in the original).
[247] Prosecution Appeal Brief, paras. 10, 11.
[248] Prosecution Appeal Brief, para. 11. *See also ibid.*, paras. 12-14.
[249] Prosecution Appeal Brief, para. 11.
[250] Prosecution Appeal Brief, para. 13. *See also ibid.*, paras. 12, 14, 15.
[251] Prosecution Notice of Appeal, para. 2; Prosecution Appeal Brief, paras. 3, 4, 25, 38, 39.
[252] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 5, 40.

1. First Condition

101. The Referral Chamber premised its decision to impose the First Condition on sixteen affidavits provided by Mr. Munyagishari concerning "potential defence witnesses, all of whom are located outside of Rwanda, stating that they are unwilling to testify in Rwanda."[253] On this basis, the Referral Chamber held that preparation of the defence "may well entail considerable work outside of Rwanda" and concluded that:

> [g]iven the unique challenges posed by this particular case, the Chamber considers that the Accused should be assigned a defence lawyer, whether through legal aid, if indigent, or at his own expense, if not, with previous international experience, particularly in eliciting testimony from witnesses based abroad.[254]

The Referral Chamber also considered it necessary that the defence team include a lawyer with "familiarity with video-link technology"[255] and envisioned "that such a lawyer can be a current or prospective member of the Kigali Bar."[256] The Referral Chamber conditioned the transfer of Mr. Munyagishari's case on assignment of such counsel, to be guaranteed in writing by the President of the KBA,[257] and noted that it "shall be within the discretion of the President of this Tribunal or the Residual Mechanism to determine whether prospective counsel has sufficient international experience."[258]

102. The Prosecution submits that "[t]here is no recognized right under international law for an indigent accused to be appointed only a lawyer who has prior international experience, which the Referral Chamber more clearly defined as previous experience in eliciting testimony from international witnesses and familiarity with video-link technology."[259] According to the Prosecution, no international legal instrument or convention requires that appointed counsel possess such experience, nor has any international tribunal imposed any similar requirement for appointment as defence counsel.[260] The Prosecution refers in particular to Rule 44 of the Rules, which only states that counsel shall be considered qualified to represent a suspect or accused,

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[253] Impugned Decision, para. 148. *See also ibid.*, para. 135 (where the Referral Chamber considered that the Defence had "demonstrated that a considerable number of prospective witnesses live outside of Rwanda").
[254] Impugned Decision, para. 148. *See also ibid.*, para. 135.
[255] Impugned Decision, para. 135.
[256] Impugned Decision, para. 149. *See also ibid.*, para. 135.
[257] Impugned Decision, para. 149. *See also ibid.*, p. 54.
[258] Impugned Decision, para. 149, *and* Disposition, pp. 54, 55.
[259] Prosecution Appeal Brief, para. 18. *See also* Prosecution Notice of Appeal, para. 1(a), *referring to* Impugned Decision, para. 135; Prosecution Appeal Brief, paras. 20-25.
[260] Prosecution Appeal Brief, paras. 18, 19. The Prosecution also refers to the *Ndimbati* case where the referral chamber "declined to condition its referral order on the appointment of a foreign or international lawyer to the defence team", holding that it was not for the referral chamber "to decide whether Rwandan or foreign lawyers would most effectively" present the accused's defence. *See ibid.*, para. 23, *referring to The Prosecutor v. Aloys Ndimbati*, Case No. ICTR-95-1F-R11*bis*, Decision on the Prosecutor's Request for the Referral of the Case of Aloys Ndimbati to Rwanda, 25 June 2012 ("*Ndimbati* Referral Decision"), paras. 47, 49. *See also* Prosecution Reply Brief, para. 12.

provided he is admitted to the practice of law in a State, or is a University professor of law.[261] The Prosecution also refers to Article 13 of the Tribunal's Directive on the Assignment of Defence Counsel and the equivalent provisions applicable to other existing international criminal courts, all of which, the Prosecution submits, "are substantively the same and likewise make clear that the key requirement is that counsel have relevant experience at either the international or national level."[262] The Prosecution argues that these instruments reflect the prevailing standard.[263]

103. The Prosecution further submits that eliciting testimony from witnesses abroad does not require any unique skill because "the fundamental legal skills are the same."[264] In its view, this condition on the KBA's selection of Mr. Munyagishari's appointed counsel has no legitimate basis, and by imposing it the Referral Chamber committed a discernible error warranting appellate intervention.[265]

104. Mr. Munyagishari responds that the Referral Chamber interfered in Rwanda's internal affairs in imposing the First Condition, thereby abusing its discretion and exceeding its jurisdiction.[266] Mr. Munyagishari, however, submits that the Referral Chamber properly evaluated the skills that his assigned counsel should necessarily have and was correct in considering that the quality of his defence in Rwanda was a cause for concern.[267] Mr. Munyagishari contends that, lacking confidence in the ability of the KBA and Rwanda to ensure him an effective defence, the Referral Chamber should have concluded that it was not satisfied that he will receive a fair trial in Rwanda and, accordingly, rejected the Prosecution's Request for Referral.[268]

105. In reply, the Prosecution submits that Mr. Munyagishari's contention that the Referral Chamber was not satisfied that Rwanda's legal framework is adequate to protect his right to a fair trial is wrong because the Referral Chamber, in fact, expressed its satisfaction with Rwanda's

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[261] Prosecution Appeal Brief, para. 19.
[262] Prosecution Appeal Brief, para. 19. *See also ibid.*, fn. 24, and references contained therein.
[263] Prosecution Appeal Brief, para. 20.
[264] Prosecution Appeal Brief, para. 24. *See also ibid.*, para. 25. The Prosecution points out that "the record establishes that Rwandan courts and, by extension, members of the KBA already have been using [video-link] technology in domestic cases." *See* Prosecution Reply Brief, para. 10, *referring to* Rwanda *Amicus Curiae* Brief, paras. 17-19, Annex G.
[265] Prosecution Appeal Brief, paras. 25, 39. The Prosecution also submits that if the First Condition is set aside, "the Referral Chamber's further requirement that it shall be 'within the discretion of the President of the Tribunal or the Residual Mechanism to determine whether prospective counsel has sufficient experience' should likewise be set aside." *See ibid.*, fn. 32, *referring to* Impugned Decision, para. 148.
[266] Munyagishari Response Brief, paras. 9, 16, 24. *See also* Munyagishari Appeal Brief, paras. 93-97.
[267] Munyagishari Response Brief, paras. 13-15.
[268] Munyagishari Response Brief, paras. 16, 23.

"capacity and willingness to prosecute his case consistent with internationally recognized fair trial standards."[269]

106. The Appeals Chamber recalls that Rule 11 *bis*(C) of the Rules requires a referral chamber to satisfy itself, *inter alia*, that the accused will receive a fair trial in the referral State. Any conditions imposed by the referral chamber in the exercise of its broad discretion under Rule 11 *bis* of the Rules must therefore be reasonably related to this objective.[270]

107. The Appeals Chamber observes that there is no requirement before this Tribunal or in relevant international legal instruments that counsel have "previous international experience".[271] Pursuant to Rule 44 of the Rules, a counsel shall be considered qualified to represent a suspect or accused before the Tribunal provided that he is admitted to the practice of law in a State, or is a university professor of law.[272]

108. The Referral Chamber premised its imposition of the First Condition on a finding that preparation of Mr. Munyagishari's defence may entail considerable work outside Rwanda.[273] However, the Referral Chamber did not explain why counsel considered qualified to represent an accused before the Tribunal within the meaning of Rule 44 of the Rules would not be qualified to represent Mr. Munyagishari in Rwanda unless counsel possessed international experience. The Appeals Chamber also notes that the Referral Chamber found that "the KBA's membership consists of a sufficient number of competent, qualified and experienced lawyers".[274] Consequently, the Appeals Chamber is not persuaded that the First Condition is reasonably necessary to ensure a fair trial of Mr. Munyagishari before the High Court of Rwanda. The Referral Chamber, therefore, abused its discretion in imposing this condition on the referral of Mr. Munyagishari's case to Rwanda and thereby committed a discernible error.

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[269] Prosecution Reply Brief, para. 4, *referring to* Impugned Decision, para. 220. *See also* Prosecution Reply Brief, paras. 2, 3.
[270] *See Todović* Appeal Decision, paras. 104, 105; *Mejakić et al.* Appeal Decision, paras. 92-94. *See also supra*, para. 95.
[271] *See, e.g.*, ICCPR, Art. 14(3)(d); African Charter on Human and Peoples' Rights (adopted 27 June 1981), Art. 7(1)(c); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section H(e)(1), (2). *See also* Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950), Art. 6(3)(c); Rules of the European Court of Human Rights, Rule 36(4)(a); ACHR, Art. 8(2)(d).
[272] *See also* Directive on the Assignment of Counsel, Art. 13 (which requires that assigned counsel to indigent suspects or accused be admitted to practice law in a State or be a professor of law at a university or a similar academic institution, that they have at least seven years' relevant experience, and speak at least one of the working languages of the Tribunal).
[273] Impugned Decision, para. 148. *See also ibid.*, para. 135.
[274] Impugned Decision, para. 146. The Referral Chamber also considered "the legislative provisions permitting the expedited temporary accreditation of foreign lawyers to appear before Rwandan courts to be a positive move towards ensuring the right of transferees to defend themselves through the counsel of their choice." *See ibid.*, para. 147. It noted that this may be a relevant consideration in the event that Mr. Munyagishari's status as indigent would change, in which case it would be possible for the President of the KBA to accredit temporarily Mr. Munyagishari's counsel "provided that they hold a law degree and are in good standing with their bar." *See idem.*

109. The Referral Chamber stated that it was "persuaded to refer this case only subject to the conditions" it imposed.[275] However, the Appeals Chamber has found that the First Condition is not reasonably necessary to ensure a fair trial and that the Referral Chamber erred in imposing this condition.[276] The Appeals Chamber nonetheless recalls the Referral Chamber's finding that "an adequately funded legal aid system will afford [Mr. Munyagishari], who has been declared indigent, with legal assistance without payment by qualified, competent and experienced lawyers"[277] and the Referral Chamber's confidence that Mr. Munyagishari "will receive adequate legal representation in practice so as to ensure a fair trial."[278] In these circumstances, the Appeals Chamber is persuaded that all necessary findings for a referral pursuant to Rule 11 *bis* of the Rules have been made and that the Referral Chamber's error in imposing the First Condition does not prevent the referral of Mr. Munyagishari's case to Rwanda.

110. The Appeals Chamber grants this aspect of the Prosecution's appeal and, accordingly, sets aside the First Condition.

2. Third Condition

111. The Referral Chamber premised its decision to impose the Third Condition on a finding that "witnesses in Rwanda are exposed to a gap in immunity", and, in particular, held that "the Defence submissions demonstrate that a witness in Rwanda may be compelled to testify in other domestic cases, pursuant to Articles 54 and 55 of the Code of Criminal Procedure, as a result of the evidence adduced during his or her testimony in a transfer proceeding."[279] The Referral Chamber found that the Prosecution, Government of Rwanda, and KBA had "failed to demonstrate that this position is incorrect or that immunity afforded to witnesses by Article 13 of the Transfer Law would apply in domestic cases."[280] In the Referral Chamber's view, "this potential loophole in the existing legal framework may create objectively reasonable fears among defence witnesses in Rwanda and interfere with the ability of the Accused to obtain witnesses as guaranteed by Article 20(4)(e) of the [Tribunal] Statute and Article 13(10) of the Transfer Law."[281] The Referral Chamber held that this "fear of prosecution is a product of both the laws criminalising genocide ideology and the differences between the protections afforded to witnesses in transferred cases as opposed to domestic cases."[282] Noting that Rwanda is in the process of amending – not repealing – the laws

[275] Impugned Decision, para. 220. *See also ibid.*, para. 170.
[276] *See supra*, para. 108.
[277] Impugned Decision, para. 170.
[278] Impugned Decision, para. 157.
[279] Impugned Decision, para. 123, *referring to* Code of Criminal Procedure.
[280] Impugned Decision, para. 123.
[281] Impugned Decision, para. 124.
[282] Impugned Decision, para. 124.

criminalising genocide ideology, it further held that "these objectively justified fears would be eliminated" by the imposition of the Third Condition.[283] In the Referral Chamber's opinion, imposition of the Third Condition "should increase the likelihood of the attendance of witnesses and therefore contribute to guaranteeing the Accused's right to the attendance and examination of his witnesses under the same conditions as those of the prosecution".[284]

112. The Prosecution submits that the Third Condition "goes too far" and, in any event, is not necessary to secure Mr. Munyagishari's fair trial rights.[285] In particular, the Prosecution contends that the First and Third Requirements oblige Rwanda's Prosecutor General to make a binding interpretation of Rwanda's laws that is beyond his authority since it is a judicial function reserved for Rwanda's Supreme Court.[286] The Prosecution argues that it was unreasonable and plainly unjust for the Referral Chamber to condition the referral of Mr. Munyagishari's case on the Prosecutor General's submission of a binding declaration that is beyond his authority to make.[287]

113. With respect to the Second Requirement, the Prosecution submits that the "only justification the Chamber offered [...] was the gap in immunity it believed existed for witnesses who testified in transferred cases and might subsequently be compelled to provide testimony in other domestic cases."[288] This is a scenario, the Prosecution argues, which does not exist because the Transfer Law provides immunity for statements and deeds of witnesses in the course of trial for a referred case.[289] The Prosecution submits that there is no basis to conclude that potential defence witnesses might be afraid to testify "because, as an 'indirect consequence of appearing as a witness in the transfer case,' they might subsequently be compelled to provide testimony in a domestic case where the Transfer Law's immunity may not attach".[290] According to the Prosecution, the record contains "not a shred of evidence" to support the Referral Chamber's conclusion that any such fears of the witnesses "were 'objectively justified'".[291]

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[283] Impugned Decision, para. 124.
[284] Impugned Decision, para. 125.
[285] Prosecution Appeal Brief, para. 27.
[286] Prosecution Appeal Brief, heading "D" at p. 11, paras. 28, 30. In support of its contention, the Prosecution refers to the Appeals Chamber's finding in the *Munyakazi* Appeal Decision that, "[w]hile Rwandan courts may take note of [a declaration by Rwanda to the effect, *inter alia*, that no person transferred from the Tribunal would be sentenced to serve life imprisonment with solitary confinement], it is not binding on them, and they are free to adopt an alternative interpretation of these laws." *See ibid.*, para. 29, *referring to Munyakazi* Appeal Decision, para. 18. *See also* Prosecution Reply Brief, para. 16; *Munyakazi* Appeal Decision, para. 14.
[287] Prosecution Appeal Brief, para. 31. The Prosecution also submits that the Referral Chamber "erred by taking into account irrelevant considerations relating to the Prosecutor General's opinion about what the laws might mean and failing to give sufficient weight to the judiciary's definitive role in declaring what Rwandan law means." *See idem.*
[288] Prosecution Appeal Brief, para. 33.
[289] Prosecution Appeal Brief, para. 34.
[290] Prosecution Appeal Brief, para. 34.
[291] Prosecution Appeal Brief, para. 35, *referring to* Impugned Decision, para. 124. *See also* Prosecution Reply Brief, paras. 17, 18. The Prosecution also argues that "not one of the 16 prospective defence witnesses who submitted

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114. The Prosecution further submits that a written assurance from the Prosecutor General would be "entirely ineffectual" because Rwanda's laws relating to compelled witness testimony are equally available to the defence as well as to the prosecution.[292] The Prosecution adds that "even if this unlikely scenario were to arise at some later date, adequate remedies would be available to address any concerns".[293] The Prosecution also contends that, in the event that Rwandan officials apply the relevant laws in a way that interferes with Mr. Munyagishari's right to a fair trial, the Tribunal's monitoring mechanism and revocation procedures would provide further safeguards.[294] In failing to consider these "readily available and adequate alternatives", the Prosecution argues, the Referral Chamber abused its discretion, giving "undue weight to an unfounded scenario that has no demonstrable connection to Munyagishari's ability to obtain a fair trial in Rwanda."[295]

115. Mr. Munyagishari responds that the Referral Chamber was correct in finding that witnesses in Rwanda are exposed to a gap in immunity which creates objectively reasonable fears among Defence witnesses in Rwanda and interferes with the Defence's ability to obtain the attendance of witnesses.[296] He argues that the remedies identified by the Prosecution depend on the Rwandan authorities' good will and are not appropriate.[297] Mr. Munyagishari also submits that, having found that Rwanda's legal framework has loopholes that may impact his rights, the Referral Chamber should not have tried to remedy the deficiencies identified but should have concluded that Rwanda's legal framework was insufficient to guarantee his right to a fair trial, and accordingly rejected the Prosecution's Request for Referral.[298]

116. According to Article 25 of the Transfer Law, the law acts as *lex specialis* in referred cases. Article 13 of the Transfer Law provides that "[w]ithout prejudice to the relevant laws on contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial." This provision concerns immunity from *prosecution* for deeds or words during the trial in a referred case. The law does not offer immunity from any order to compel testimony of a witness

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affidavits to the effect that they would be unwilling to travel to Rwanda to provide testimony in the referred case mentioned the possibility that they might subsequently be compelled to provide testimony in a domestic case. Certainly, none of these prospective defence witnesses expressed any fear that this might occur." *See* Prosecution Appeal Brief, para. 35 (internal citation omitted).

[292] Prosecution Appeal Brief, para. 36. *See also* Prosecution Reply Brief, para. 19.

[293] Prosecution Appeal Brief, para. 37. *See also* Prosecution Reply Brief, para. 20. The Prosecution submits that such remedies include: (a) seeking assistance from Rwanda's witness protection services; (b) applying for additional protective measures from the presiding judge; (c) obtaining a binding judicial interpretation as to whether Article 13 of the Transfer Law applies in this context; or (d) electing to testify by one of the alternative means allowed by Rwandan law. *See* Prosecution Appeal Brief, para. 37.

[294] Prosecution Appeal Brief, para. 37.

[295] Prosecution Appeal Brief, para. 38.

[296] Munyagishari Response Brief, paras. 18, 19. Mr. Munyagishari also submits that the Referral Chamber interfered in Rwanda's internal affairs in imposing the Third Condition, thereby abusing its discretion and exceeding its jurisdiction. *See* Munyagishari Response Brief, paras. 9, 21, 24.

[297] Munyagishari Response Brief, para. 20.

[298] Munyagishari Response Brief, paras. 21, 23. *See* Munyagishari Appeal Brief, para. 96.

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who testified in a referred case and is present in Rwanda, whether such an order is issued pursuant to Articles 54 and 55 of the Code of Criminal Procedure[299] or Articles 66 and 74 of the Law Relating to Evidence and its Production.[300] A witness present in Rwanda may therefore be prosecuted based on his deeds or words in a domestic case in which he would have been compelled to testify as a result of his testimony in the referred case. The Referral Chamber was, therefore, correct in considering that a witness testifying in the transferred case may potentially risk prosecution as an indirect consequence of appearing as a witness in the transferred case.[301]

117. The Impugned Decision reflects that the Referral Chamber's primary concern was to ensure that Mr. Munyagishari will receive a fair trial, which in the present context meant assessing the likelihood that his right to obtain the attendance of witnesses on his behalf under the same conditions as those testifying against him would be guaranteed.[302] The Referral Chamber noted that previous requests for referral had been denied due to fears of defence witnesses of testifying before Rwandan courts.[303] However, it was satisfied that following the amendments to the Transfer Law in 2009 and improvements in witness protection, "there now exist adequate safeguards to address the fears of witnesses and increase the likelihood of their appearance."[304] Similar conclusions were reached by referral chambers in the *Munyarugarama*, *Ndimbati*, *Ryandikayo*, *Ntaganzwa*,

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[299] Article 54 of the Code of Criminal Procedure provides:

> 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 Code of Criminal Procedure provides:

> 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 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.

[300] Article 66 of Law N° 15/2004 of 12/06/2004 Relating to Evidence and Its Production provides:

> Facts, which a party seeks to prove by using witnesses, shall be indicated in a precise and succinct manner. If the court finds that the facts are pertinent, relevant and admissible, it can, on it's [*sic*] own motion, order their testimony. The court can also order, at its own discretion, the proof of facts that seem to be conclusive, if they are not forbidden by the law.

Article 74 of this Law provides: "Witnesses who default to appear in court without valid reasons can be condemned to pay a fine not exceeding 100.000 Rwandan francs. In case of a subsequent failure to attend to court without valid reasons, the fine can be doubled."

[301] Impugned Decision, paras. 122-125.

[302] Impugned Decision, paras. 136-139.

[303] Impugned Decision, para. 117.

[304] Impugned Decision, para. 117, *referring to Munyakazi* Appeal Decision, paras. 32, 37, 40; *Kanyarukiga* Appeal Decision, paras. 23, 26-28, 31, 35; *Hategekimana* Appeal Decision, paras. 15, 21, 22, 26.

Sikubwabo, *Kayishema*, and *Uwinkindi* cases,[305] and were explicitly considered and affirmed on appeal in the *Uwinkindi* case.[306]

118. There is indeed a theoretical possibility that witnesses compelled to testify in domestic proceedings following their testimony in a transferred case may be prosecuted. Nevertheless, they would in such a situation not be prosecuted based on their testimony in the transferred case, but on their testimony in the domestic case. The Appeals Chamber observes that the possible fear of prosecution arising from the "potential gap in immunity" identified by the Referral Chamber is not substantiated in the present case. There was no evidence before the Referral Chamber that any potential defence witness present in Rwanda expressed fear of such prosecution.[307] The Referral Chamber's statement that "this potential loophole [...] may create objectively reasonable fears among defence witnesses in Rwanda and interfere with the ability of [Mr. Munyagishari] to obtain witnesses"[308] was therefore purely speculative. In the absence of any evidence that the "potential loophole" would hinder Mr. Munyagishari's ability to obtain the attendance of witnesses, the Appeals Chamber finds that the Third Condition was not reasonably necessary to ensure his fair trial rights. Accordingly, the Appeals Chamber finds that the Referral Chamber erred in the exercise of its discretion in imposing the Third Condition. In these circumstances, the Appeals Chamber finds it unnecessary to discuss the Prosecution's remaining arguments or the details of the three requirements composing the Third Condition.

119. The Appeals Chamber notes that the Referral Chamber stated that the transfer of Mr. Munyagishari's proceedings would "necessarily have to be conditioned on any one" of the three requirements composing the Third Condition,[309] and that it was "persuaded to refer this case only subject to the conditions" that it imposed.[310] The Appeals Chamber, however, considers that since the concern justifying the Third Condition was speculative, the setting aside of the Third

[305] *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 28 June 2012, paras. 32-35, 68; *Ndimbati* Referral Decision, paras. 39-42; *The Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 20 June 2012, paras. 42-45; *The Prosecutor v. Ladislas Ntaganzwa*, Case No. ICTR-96-9-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 8 May 2012, paras. 40-44, 90; *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 26 March 2012, paras. 57-93, 157; *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 22 February 2012, paras. 59-84, 94, 95, 163; *Uwinkindi* Referral Decision, paras. 84-114, 132, 223.

[306] *Uwinkindi* Appeal Decision, paras. 62-65.

[307] The Appeals Chamber notes that the affidavits submitted by Mr. Munyagishari in support of his claim that Rwanda cannot guarantee his right to obtain the attendance of witnesses on his behalf on the same conditions as those testifying for the prosecution were provided by witnesses residing outside Rwanda. *See* Munyagishari Response to Referral Request, Annexes 49, 51, confidential. According to the Referral Chamber, witnesses residing outside Rwanda cannot be compelled to testify. *See* Impugned Decision, para. 126.

[308] Impugned Decision, para. 124.

[309] Impugned Decision, para. 125. *See also ibid.*, para. 137.

Condition does not prevent the referral of the case, the necessary findings pursuant to Rule 11 *bis* of the Rules having been made.[311] In this regard, the Appeals Chamber emphasizes: the Referral Chamber's finding that there now exist adequate safeguards to address the fears of witnesses and increase the likelihood of their appearance;[312] the Referral Chamber's "full faith" that, should the legal framework and protective measures fail to ensure the attendance of defence witnesses, "the Rwandan judiciary as well as the independent monitor shall handle the matter appropriately";[313] and the Referral Chamber's reliance on the revocation mechanism should the implementation of the legal framework fail to protect Mr. Munyagishari's rights.[314]

120. The Appeals Chamber grants this aspect of the Prosecution's appeal and, accordingly, sets aside the Third Condition.

3. Conclusion

121. Based on the foregoing, the Appeals Chamber grants the Prosecution's appeal and sets aside the First and Third Conditions.

IV. DISPOSITION

122. For the foregoing reasons, the Appeals Chamber:

DENIES Mr. Munyagishari's Third and Fourth Motions for Additional Evidence;

GRANTS Mr. Munyagishari's first ground of appeal and, accordingly, **SETS ASIDE** the Second Condition;

ORDERS the Prosecution to file an amended indictment reflecting the withdrawal of the pleading of joint criminal enterprise as a mode of liability no later than 13 May 2013;

DENIES Mr. Munyagishari's appeal in all other respects;

GRANTS the Prosecution's appeal and, accordingly, **SETS ASIDE** the First and Third Conditions;

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[310] Impugned Decision, para. 220.
[311] *See also supra*, para. 109.
[312] Impugned Decision, para. 117. *See also ibid.*, paras. 102 ("In the view of the Chamber, the legal immunities contained in the Transfer Law and the provisions delineating robust protective mechanisms constitute an adequate legal framework to ensure the attendance of defence witnesses in Rwanda."), 110 ("Rwanda has made efforts to develop and expand the protection services available to witnesses. The Chamber considers these improvements complementary to Rwanda's amendment to its Transfer Laws regarding witness immunity and is satisfied that they will facilitate the attendance of defence witnesses.").
[313] Impugned Decision, para. 118. *See also ibid.*, paras. 102, 111, 138.
[314] Impugned Decision, paras. 111, 118, 134, 138.

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AFFIRMS the referral of Mr. Munyagishari's case to Rwanda; and

STAYS the transfer of Mr. Munyagishari to Rwanda pending the filing of the amended indictment.

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

Done this third day of May 2013,
At Arusha,
Tanzania.

Judge Theodor Meron
Presiding

[Seal of the Tribunal]

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Case Name:	The Prosecutor vs.	**Case Number:**	ICTR-
Dates:	Transmitted: **03 MAY 2013**	Document's date: **03 May 2013**	
No. of Pages:	**46**	**Original Language:** ☐ English ☐ French ☐ Kinyarwanda	
Title of Document:	**DECISION ON BERNARD MUNYAGISHARI'S THIRD AND FOURTH MOTIONS FOR ADMISSION OF ADDITIONAL EVIDENCE AND ON THE APPEALS AGAINST THE DECISION ON REFERRAL UNDER RULE 11 BIS**		

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