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International Criminal Tribunal for Rwanda

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IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Date filed: 28 September 2011

JEAN UWINKINDI

v.

THE PROSECUTOR

Case No. ICTR-01-75-AR11bis

PROSECUTOR'S RESPONSE BRIEF

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I. Introduction

1. The Appellant Jean Uwinkindi appeals from the Chamber's decision allowing the Prosecutor's application for referral of his case to Rwanda for trial. Based on voluminous submissions from the parties and multiple *amici*, the Chamber determined that, if referred, Uwinkindi's case "will be prosecuted consistent with internationally recognized fair trial standards enshrined in the Statute of this Tribunal and other human rights instruments."[1] In support, the Chamber noted that Rwanda had:

- expanded the immunities available to witnesses in referred cases,[2] and proposed new legislation to clarify its genocide ideology law and allow international judges to sit on the panel of any referred case;[3]
- earmarked sufficient funding for free legal aid programmes;[4]
- established the competence, experience, and independence of its judiciary;[5]
- expanded and improved witness protection services;[6]
- taken concrete steps to secure the attendance of witnesses or presentation of evidence from abroad;[7] and
- provided satisfactory conditions of detention.[8]

2. To be sure, the Chamber identified a few lingering concerns with regard to discrete matters.[9] But, on balance, the Chamber found that those concerns were outweighed by Rwanda's progress in key areas and its demonstrated commitment to continued reform.[10] The Chamber's inclusion of "robust" conditions for monitoring

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[1] Decision, para. 223.
[2] Decision, paras. 90, 93, 99, 101, 154, 167.
[3] Decision, paras. 96, 114.
[4] Decision, paras. 139-40, 146.
[5] Decision, para. 166, 178, 196.
[6] Decision, paras. 101, 109-10, 129, 131.
[7] Decision, para. 108.
[8] Decision, paras. 51, 60.
[9] Decision, paras. 35, 39-40, 88, 95, 110, 131, 160-61.
[10] Decision, paras. 40, 88, 95, 114, 131, 161, 183, 223-24.

by the highly-respected ACHPR provided additional safeguards for Uwinkindi's fair trial rights.[11]

3. In scattershot manner, Uwinkindi challenges the Chamber's exercise of discretion. His Notice of Appeal raises no less than 16 separate alleged errors; his brief abandons two of those grounds.[12] A common theme in Uwinkindi's arguments is that the Chamber allegedly applied too lenient a standard. With no regard at all to the limited standard of review on appeal or the plain language of Rule 11 *bis*, Uwinkindi broadly alleges that the Chamber substituted mere hopes of what might happen for concrete guarantees that his right to a fair trial will be secure.[13]

4. The Chamber did no such thing. Its conclusions are supported by ample subsidiary findings drawn from the parties' and *amici*'s submissions. It addressed Uwinkindi's objections to referral but generally found them to be too speculative or vague to detract from the substantial progress that Rwanda had made overall.[14] None of Uwinkindi's multiple arguments – some of which are raised for the first time on appeal or presented only in skeletal form – demonstrates any abuse of discretion.

II. Submissions

A. The standard of review on appeal from a Chamber's referral decision is highly deferential.

5. Rule 11 *bis* grants Trial Chamber's broad discretion to decide whether to refer cases to a national jurisdiction.[15] In exercising this discretion, a Chamber is free to consider whatever information it reasonably deems necessary to satisfy itself that the trial in any referred case will be fair.[16]

6. The Appeals Chamber will intervene in a Chamber's exercise of discretion only where the appellant establishes that the referral decision was based on a

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[11] Decision, paras. 35, 60, 132, 146, 169, 183, 211, 223; p. 57-59.
[12] Brief, paras. 23, 28.
[13] Brief, para. 4.
[14] Decision, para. 60, 88, 104, 131, 161, 167, 185, 196.
[15] *Munyakazi*, para. 5.
[16] *Stanković*, para. 50.

discernable error.[17] To sustain this burden, the appellant "must show that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion, gave weight to irrelevant considerations, failed to give sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion; or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[18]

7. Additionally, with regard to subsidiary factual findings, the appellant must demonstrate that the Chamber's resolution of the parties' competing submissions was unreasonable.[19] In applying this standard, the Appeals Chamber extends a "high degree of deference" to the Chamber's findings.[20]

B. The Trial Chamber correctly focused on the probabilities that, if referral is allowed, Uwinkindi's trial in Rwanda will be fair.[21]

8. The Chamber articulated and applied the correct standard of review and burden of proof under Rule 11 *bis*.[22] The standard for referral is included in the Rule itself, which provides that the "Chamber shall satisfy itself that the accused *will* receive a fair trial in the courts of the State concerned."[23] By focusing on the fairness of a trial that has not yet occurred, the Rule anticipates application of a prospective standard, that is, one based on events that are likely to occur if referral is allowed.

9. Uwinkindi claims that the Chamber erred in allegedly failing to consider the submissions he made in paragraphs 10 to 25 of his Response, relating to the standard of review and burden of proof.[24] The Chamber thoroughly assessed all of the relevant submissions from the parties and *amici* bearing on Rwanda's ability to secure fair trial rights. It was not obliged to give a detailed answer to every

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[17] *Munyakazi*, para. 5.
[18] *Bagaragaza*, para. 9.
[19] *Rutaganda*, paras. 22, 353.
[20] *Rutaganda*, paras. 21, 330.
[21] Response to Ground 1.
[22] Decision, para. 15.
[23] Rule 11 *bis* (C) (emphasis added).
[24] Brief, paras. 1-2.

argument Uwinkindi raised.[25] And, its failure to explicitly mention paragraphs 10 to 25 of Uwinkindi's Response in its Decision does not mean those submissions were not considered.[26] In all events, Uwinkindi fails to explain how the Chamber's alleged failure to consider these submissions invalidates its Decision.[27]

10. Contrary to Uwinkindi's argument, the Chamber never shifted the burden of proof or requested him to "adduce evidence that [he] will *not* receive a fair trial in Rwanda."[28] The Chamber correctly held that the Prosecutor bore the burden of establishing that Uwinkindi's trial in Rwanda would be fair; Uwinkindi – at most – had a burden of persuasion to show that the Prosecutor's submissions should not be credited.[29]

11. Nor did the Chamber apply too lenient a standard of review in assessing the parties' and *amici*'s submissions.[30] Consistent with Rule 11 *bis*, the Chamber correctly focused on the probabilities that, if referral is allowed, Uwinkindi's trial in Rwanda will be fair. Uwinkindi's argument on appeal is inconsistent.[31] On the one hand, he agrees with the Prosecutor's submission that, because Rule 11 *bis* looks "forward to a trial that has not yet occurred," the standard for referral must be interpreted with reference to "likelihoods and probabilities."[32] On the other hand, he proposes a more onerous standard based on virtual certainties, claiming that "it was incumbent on the Prosecutor to adduce sufficient evidence to exclude any real possibility that any of the accused's fair trial rights might be breached."[33]

12. Uwinkindi's latter formulation is too strict and does not reflect the Rule's prospective language about a trial that has not yet occurred. The Rule cannot expect omniscience on the part of the Chamber, particularly where, as here, there is no past experience to draw upon in evaluating whether an accused will receive a

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[25] *Kvočka*, para. 23.
[26] *Gacumbitsi*, para. 74.
[27] *Kvočka*, para. 25.
[28] Brief, para. 1.
[29] Brief, para. 1.
[30] Brief, paras. 1-5.
[31] Brief, paras. 2-3.
[32] Brief, para. 2, Registry Page (RP) 4166-65, paras. 16-18.
[33] Brief, para. 3.

fair trial because no case has yet been referred to Rwanda. Likelihoods not certainties govern Rule 11 *bis* referral proceedings. That is the standard proposed in Uwinkindi's first formulation, and it is the standard the Chamber properly applied.

13. The eight examples Uwinkindi cites to illustrate how the Chamber allegedly applied the wrong standard actually prove this point.[34] His examples fall into two broad categories. The first category challenges the Chamber's reliance on Rwanda's legal framework for protecting fair trial rights;[35] the second category challenges the Chamber's reliance on monitoring and revocation as safeguards to those rights.

14. More particularly, Uwinkindi claims that, by focusing on Rwanda's legal framework, the Chamber impermissibly relied on its mere "hope" that Rwanda would adhere to its laws.[36] The Chamber's approach, however, was consistent with the approach adopted by the ICTY Appeal Chamber,[37] which has held that, for purposes of referral, a Chamber need only satisfy itself that legal framework applicable to proceedings against the accused in courts of the state concerned provide adequate protections to ensure a fair trial.[38] That is what the Chamber did here and "[t]hat is all it was required to do."[39] Its focus was on what *would* be the case under the legal framework available in the referral state, and not, as Uwinkindi claims, what it *hoped* would be the case.[40]

15. In this regard, the Chamber logically held that, because "it is impossible to evaluate the effectiveness of a reasonable law in the abstract," the "relevant Rwandan laws must be given a chance to operate before being held to be defective."[41] Nevertheless, the Chamber stated its expectation that Rwanda will fully implement its laws necessary to secure Uwinkindi's fair trial rights.[42]

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[34] Brief, paras. 4-5.
[35] Brief, para. 4 i-iii, vi-vii.
[36] Brief, para. 4 i.
[37] *Bagaragaza*, para. 9 (ICTY decisions on referral applicable to ICTR).
[38] *Mejakić*, para. 69.
[39] *Mejakić*, para. 69.
[40] Brief, para. 4 i; *Stanković*, para. 28.
[41] Decision, para. 103.
[42] Decision, paras. 99, 102-03, 223, 225 (cited in Brief, para. 4 i-vi, viii).

16. To ensure that this expectation would be realized, the Chamber relied on the safeguards provided by Rule 11 *bis*' monitoring and revocation provisions. Uwinkindi suggests, in his second category of examples, that this was improper.[43] But, settled jurisprudence holds that these safeguards are properly considered in assessing fair trial rights.[44]

17. In relying upon them here, the Chamber did not adopt a "wait and see what happens approach" as Uwinkindi contends.[45] Instead, it first satisfied itself based on the parties' and *amici*'s submissions that Uwinkindi's fair trial rights will be adequately secured by Rwanda's legal framework.[46] It then crafted a comprehensive monitoring mechanism to safeguard those rights, reserving for itself the ultimate power to revoke referral should any substantial violation occur. Supported as it is by the Rule's plain language and settled jurisprudence, Uwinkindi fails to demonstrate any discernable error in the Chamber's approach.

C. The Chamber correctly concluded that double jeopardy principles are inapplicable.[47]

18. The Chamber considered the parties' and *amici*'s submissions regarding the applicability of double jeopardy principles. It reasonably and correctly concluded that these principles did not bar referral because Uwinkindi's convictions had been vacated by a higher court, the Gacaca Courts of Appeal.[48] The Chamber also correctly held that the principle of *ne bis in idem*, as embodied in Article 14 (7) of the ICCPR, would not be violated by referral of Uwinkindi's case.[49]

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[43] Brief, para. 4 iii-v, vii (citing Decision, paras. 103, 132, 196, 224).
[44] *Stanković*, para. 52. The ICTY Appeals Chamber's holding is based on ICTY Rule 11 *bis*, which does not include the same expanded authority for monitoring and revocation that exists under the amended ICTR Rule 11 *bis*. Thus, the ICTY Appeals Chamber's holding is even more compelling when applied to the amended ICTR Rule.
[45] Brief, paras. 1-2.
[46] Decision, paras. 35, 60, 132, 146, 169, 183, 211, 223.
[47] Response to Ground 4.
[48] Decision, paras. 21, 35.
[49] Decision, paras. 29, 30, 35. The Chamber relied on General Comment No. 32 of the Human Rights Committee, establishing that the *ne bis in idem* principle is inapplicable where a higher court quashes a conviction. Decision, para. 30. This is consistent with the approach followed by other courts. *Poland v. Arizona*, 476 U.S. 147, 152 (1986) (jeopardy does not bar retrial where the accused's "original conviction has been nullified and 'the slate wiped clean'").

19. Uwinkindi challenges the Chamber's findings on two grounds: first, he claims his Gacaca convictions were not lawfully vacated; second, he claims the Chamber improperly rejected his contention that his case and Léonidas Nshogoza's case demonstrated that Rwanda did not respect double jeopardy principles.[50]

20. On the first point, Uwinkindi incorrectly submits that the Chamber did not address the essence of his arguments, namely that "no lawful annulment of the convictions could have taken place for lack of legal basis."[51] The Chamber, however, "observed closely the chain of events relating to the vacation of the Gacaca convictions" and provided a detailed summary of those events in its findings.[52]

21. Furthermore, contrary to his submission,[53] Uwinkindi's Gacaca convictions were vacated in accordance with Rwandan law. Pursuant to Article 2 of the Transfer Law, the High Court is the only competent Rwandan court to try Uwinkindi in first instance. Additionally, pursuant to Circular No. 1285/DG/2008, the Gacaca Sector Courts were advised to not commence trials against former community leaders, like Uwinkindi, who remained abroad.[54] Uwinkindi's Gacaca convictions, therefore, were invalid under Rwandan law and transgressed the Tribunal's supremacy under Article 8 of the ICTR Statute.

22. Having been alerted to this defect by the Prosecutor General, the Executive Secretary of the National Service of Gacaca Courts, pursuant to her authority under Article 50 of the Gacaca Law, advised the Presidents of the relevant Gacaca Courts of Appeal that Uwinkindi's *in absentia* convictions were improper.[55] Thereafter, the Gacaca Courts of Appeal, acting pursuant to their authority under Article 93 of the

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[50] Brief, paras. 10, 11, 16, 20.
[51] Brief, para. 14.
[52] Decision, para. 31, n. 43.
[53] Brief, para. 13.
[54] Uwinkindi's claim that the Circular does not apply to "cases for which judgement and sentence have already been delivered" is unmeritorious. Brief, para. 13. The Circular includes no such limitation, nor did the Rwandan courts impose one. RP 4494-93 (French).
[55] RP 4168-67, para. 12.

Gacaca Law, vacated Uwinkindi's convictions.[56] Even Uwinkindi "concedes that [his Gacaca convictions] appear to have been vacated by way of appeal review."[57]

23. The Prosecutor General's involvement in this chain of events does not suggest, as Uwinkindi submits, that his convictions were vacated because of political influence.[58] At most, as the Chamber observed, the chain of events suggests that there might have been "a lack of effective communication between the relevant judicial authorities" concerning Uwinkindi's initial prosecution in the Gacaca Sector Courts.[59] Nevertheless, even accepting that the Gacaca Courts of Appeal vacated his convictions "solely in response to an instruction from the prosecutor to remove a perceived obstacle to referral of this case,"[60] the Chamber reasonably concluded that, having been vacated in accordance with Rwandan law, the former convictions posed no barrier to referral.[61]

24. Nor did the Chamber commit any discernable error in rejecting Uwinkindi's reliance on *Nshogoza*'s case as proof that, if referral were allowed, Rwanda would not respect the principle of *ne bis in idem*.[62] The Chamber reasonably held that "proceedings in a single case do not provide conclusive evidence for the lack of impartiality of the entire Rwandan judiciary."[63]

25. The Chamber's holding is in keeping with the Appeals Chamber's precedent, recognizing that the presumption of impartiality cannot be "lightly rebutted."[64] It is incumbent on the party challenging a judge's impartiality to "adduce reliable and sufficient evidence" to rebut the presumption.[65]

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[56] RP 4168-67, para. 12.
[57] Brief, para. 14
[58] Brief, paras. 13-14.
[59] Decision, para. 33.
[60] Decision, paras. 31-32. Contrary to the Chamber's impression (and as it stated in footnote 43 of the Decision), the Prosecutor General merely requested that the convictions be invalidated; he did not instruct that they be invalidated. RP 4518 (Kinyarwandan).
[61] Decision, para. 35.
[62] Decision, para. 35.
[63] Brief, paras. 16-21; Decision, para. 35.
[64] Decision, para. 166.
[65] *Nahimana*, para. 48.

26. Here, contrary to Uwinkindi's argument, the Chamber did not "require [him] to provide conclusive evidence of impartiality."[66] Instead, it merely observed that one isolated case was not reliable or sufficient evidence to rebut the presumption of impartiality that attaches to all judges, including Rwandan judges.[67]

27. Uwinkindi's broader claim is that the Chamber erred by mistakenly focusing on impartiality instead of *ne bis in idem*.[68] In support, he claims that he and his *amici* cited *Nshogoza*'s case as an example of a violation of the *ne bis in idem* principle – not the impartiality of the judiciary.[69] But, this is not true,[70] and he cannot raise this claim for the first time on appeal.[71]

28. Moreover, any confusion in the Chamber's treatment of *Nshogoza's* case is attributable to Uwinkindi. He linked the alleged lack of judicial impartiality and independence to a perceived violation of the double jeopardy and *ne bis in idem* principles. In this regard, he claimed the Gacaca Appeals Courts' decisions vacating his convictions "constitute[d] clear examples of executive intrusion in independent judicial proceedings as well as interference in a judicial process."[72] It was in this context that the Chamber assessed the applicability of double jeopardy and *ne bis in idem* principles.[73] Having framed his argument in terms of judicial impartiality, Uwinkindi cannot now claim that the Chamber committed a discernable error by addressing his submissions in those terms.

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[66] Brief, para. 22.
[67] Decision, para. 166.
[68] Brief, para. 18.
[69] Brief, para. 17.
[70] The ICDAA cited *Nshogoza*'s case as a violation of the *ne bis in idem* principle, but Uwinkindi and the other amici did not. RP 2757, para. 56. Uwinkindi and IADL cited *Nshogoza*'s case in connection with their submissions on defence working conditions. RP 3659-58, paras. 155-157; RP 3718, para. G.2. HRW referred to the case only in the broader context of political interference in genocide cases RP 2488-87, paras. 99-100.
[71] *Rwamakuba*, para. 6.
[72] RP 4670, para. 44.
[73] The Chamber stated that "[i]t appear[ed]" from *Nshogoza*'s case that Rwanda had violated its laws prohibiting double jeopardy. Decision, para. 34. The record does not support this statement. The Gasabo High Court proceedings against Nshogoza were initiated and subsequently stayed before the Tribunal's contempt proceedings against Nshogoza commenced. RP 4434-21. It also is unclear whether the Gasabo High Court proceedings have resumed or ever will resume.

29. Equally without merit is Uwinkindi's suggestion that the Prosecutor failed to prove that the *ne bis in idem* principle would be respected by Rwanda in practice. The Prosecutor's submissions showed that Uwinkindi's Gacaca convictions did not violate *ne bis in idem* because the convictions were vacated and, thus, posed no obstacle to his trial before the High Court, if referral were allowed.[74] The Prosecutor, therefore, discharged his burden of showing that *ne bis in idem* would not be violated by referral of the case to Rwanda for trial.[75]

D. The Chamber correctly found that Article 59 of the Rwandan Criminal Code is inapplicable to referred cases.[76]

30. The Chamber reasonably determined that "Article 59 of the Rwanda Code of Criminal Procedure [(Criminal Code)] will not be applied in any transferred case."[77] Uwinkindi fails to demonstrate any abuse of discretion or discernable error. In four short paragraphs, he merely refers to the same sweeping assertions – already considered by the Chamber – about the ways he thinks Article 59 might impact his right to a fair trial.[78]

31. The Chamber rejected these assertions because Article 13(9) of the Transfer Law guarantees the defence the right to obtain the attendance and examination of witnesses under the same conditions as prosecution witnesses.[79] Nothing in the Transfer Law precludes an accused person, suspect, or accomplice from testifying in a case referred to Rwanda for trial.

32. Furthermore, as the Chamber correctly noted, Article 25 of the Transfer Law affirms the primacy of the Transfer Law over any other law in the event of a conflict.[80] Thus, should there be any conflict between application of Article 13(9) of

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[74] Decision, paras. 29, 30, 35.
[75] As shown in footnote 70, Uwinkindi did not cite *Nshogoza*'s case as a "second" example of the principle's alleged violation.
[76] Response to Ground 6.
[77] Decision, para. 40.
[78] Brief, paras. 24-27.
[79] Decision, para. 40.
[80] Decision, para. 40.

the Transfer Law and Article 59 of the Criminal Code, the Chamber correctly held that Article 13(9) would prevail.[81]

33. There is, in any event, no conflict between the two provisions because Article 59 does not, in practice, prevent accused persons or accomplices from testifying at trial. As the Kigali Bar Association explained, accused persons have been testifying in their own defence and calling witnesses, including accomplices, to refute allegations against them.[82] Even the suspect, who pursuant to Article 59 may not be heard as a witness, can still be heard as a court informer, although his or her evidence has to be supported by other evidence.[83] In practice, therefore, any person may be called to testify as a witness in domestic Rwandan criminal cases.[84] Article 13(9) of the Transfer Law simply confirms that this existing practice will apply in the trial of any referred case.

E. The Chamber reasonably determined that conditions of detention in Rwanda satisfied international standards.[85]

34. The Chamber reasonably determined that Uwinkindi "will be detained in appropriate conditions if his case is referred to Rwanda."[86] In support, it noted that the *Kanyarukiga* Referral Chamber found that "during trial, the accused would be detained in a custom-built remand facility at the Kigali Central Prison."[87]

35. Additionally, the Chamber observed that "adequate detention conditions are guaranteed by the Transfer Law[,]"[88] which provides that prisoners transferred by the Tribunal to Rwanda shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment.[89] The Transfer Law further provides that the International Red Cross or an "observer

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[81] Decision, para. 40.
[82] RP 4352-51, para. 51. Notably, the President of the Kigali Bar Association certified the veracity of all the statements contained in the association's *amicus* brief. RP 4347.
[83] RP 4352-51, para. 51.
[84] Rwandan Criminal Code, Article 54; RP 4352-49, paras. 51, 54, 57.
[85] Response to Ground 3.
[86] Decision, para. 60.
[87] Decision, para. 59.
[88] Decision, para. 60.
[89] Decision, para. 58.

appointed by the President of the ICTR" "shall have the right to inspect the conditions of detention of persons transferred to Rwanda by the ICTR."[90] When any such inspection occurs, the Red Cross or ICTR observer "shall submit a confidential report" of its findings to the Rwandan Minister of Justice and the Tribunal's President.[91]

36. In addition, the Chamber directed the Tribunal's monitor to "conduct regular prison visits" to ensure that conditions of detention "both during and after trial" remain satisfactory.[92]

37. The Chamber took note of Uwinkindi's submissions that Rwanda had announced it was building a new prison that would eventually replace Kigali Central Prison.[93] The Chamber, however, reasonably found that, because the new prison had not yet been built, Uwinkindi's concern that the new prison might not comply with international standards was "speculative."[94]

38. Uwinkindi raises three challenges to these findings. First, he asserts – without elaboration – that the Chamber allegedly failed to "take into account properly or at all relevant Defence submissions relating to the conditions of detention."[95] Apart from a footnote cross-referencing 22 paragraphs of his response brief, Uwinkindi fails to identify what precise evidence he claims the Chamber did not adequately consider.[96] This sort of cursory argument, merely referring the Appeals Chamber to an appellant's earlier filings, is insufficient.[97]

39. Even if considered, Uwinkindi's passing allegations show no abuse of discretion. Rwanda is party to "several human rights instruments, including the ICCPR, which prohibits unlawful and arbitrary deprivation of liberty (Article 9), requires that all persons deprived of their liberty shall be treated with humanity

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[90] Decision, para. 58.
[91] Decision, para. 58.
[92] Decision, para. 60, p. 58.
[93] Decision, para. 55.
[94] Decision, para. 60.
[95] Brief, para. 8.
[96] Brief, para. 8, n.8.
[97] *Nshogoza*, para. 18.

and respect (Article 10), and outlaws torture and cruel, inhuman or degrading treatment or punishment (Article 7)."[98]

40. In addition, Rwanda's laws governing the detention of an accused comply with internationally-recognized standards adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders.[99] Rwanda's submission to the Chamber included a detailed comparison of prisoner rights under both international standards and Rwandan law.[100] In all material respects, the rights afforded to prisoners under Rwandan law are identical to those recognized under prevailing international standards.[101]

41. Indeed, in 2009, the Special Court for Sierra Leone (SCSL) entered into an agreement with Rwanda for detention of persons convicted by that court.[102] Pursuant to this agreement, 9 convicts from SCSL are serving their sentences at Rwanda's Mpanga prison under conditions that meet international standards.[103] Rwanda has represented that the same regulations governing the detention of SCSL prisoners "also would apply to prisoners in any cases referred by the Tribunal."[104]

42. Second, Uwinkindi claims that the Chamber erred in rejecting his concern that, because Rwanda plans to build a new prison, its existing "custom-built remand facility" at Kigali Central Prison allegedly will "no longer be in place within the next few months."[105] The Chamber, however, took this information into account but found it unavailing because of the Transfer Law's detailed provisions for

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[98] *Kanyarukiga*, para. 85.
[99] Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
[100] RP 2674-63.
[101] RP 2683-82, para. 70.
[102] RP 2585, para. 5; RP 2570-65.
[103] RP 2585, para. 5.
[104] RP 2666, n. 171.
[105] Brief, para. 8. In fact, the Commissioner General of Rwanda Correctional Services recently stated that, because construction has not yet begun, the new prison will not be ready to open at the end of the year. *allAfrica.com*, "Rwanda Construction of Butamwa Prison Delayed by Contractor," 26 August 2011, http://allafrica.com /stories/201108260314.html (accessed 21 September 2011).

ensuring adequate detention conditions.[106] Given these provisions (and the other conventions Rwanda is party to), the Chamber reasonably determined that it was unduly speculative to believe that any newly-constructed facility would fail to comply with international standards. Rwanda's agreement for the detention of SCSL prisoners lends further support to the reasonableness of this determination.

43. Third, Uwinkindi claims that the Chamber erred in finding that it could rely on monitoring to remedy any potential deficiencies in the conditions of detention because, he contends, the Rule only envisions monitoring of the "'proceedings *in the courts* of the state."'[107] Uwinkindi, however, relies on language that appeared in the old version of the rule.[108] The current version of the Rule, adopted at the 23rd ICTR Plenary of 1 April 2011, includes no such limitation (assuming it ever existed). It states: "if the Trial Chamber so orders, the Registrar, shall send observers to *monitor the proceedings in the State concerned.*"[109] This amended language is broad enough to allow monitoring of all proceedings, including detention before and after trial.

44. The Chamber also reasonably rejected Uwinkindi's further contention that post-completion monitoring by the Residual Mechanism will be ineffective.[110] As the Chamber noted, Uwinkindi's assumption that there will be a break in monitoring is unsubstantiated. Article 6 of Resolution 1966 (2010) expressly obliges the Residual Mechanism to monitor and, if necessary, revoke referred cases.[111]

45. The Chamber, in all events, did not rely exclusively on monitoring under Rule 11 *bis*. It also relied on the inspection provisions available under Rwanda's Transfer Law.[112] In combination with Rule 11 *bis*' monitoring and revocation provisions, the Chamber reasonably determined that these provisions were

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[106] Decision, para. 60.
[107] Brief, para. 9 (quoting the pre-amendment version of Rule 11 *bis* (D) (iv) (emphasis added)).
[108] *See* Rule 11 *bis* (D) (iv) (pre-amendment).
[109] Rule 11 *bis* (D) (iv) (post-amendment).
[110] Decision, para. 215-16.
[111] RP 4134-33, paras. 102-03.
[112] Decision, para. 58.

adequate to ensure that Uwinkindi would be "detained in appropriate conditions if his case is referred to Rwanda."[113]

F. The Chamber reasonably determined that Rwanda will provide for the availability and protection of defence witnesses.[114]

46. The Chamber carefully evaluated the parties' and *amici*'s submissions relating to the availability and protection of defence witnesses. It reasonably concluded that the "immunities and protections provided to witnesses under the Transfer Law are adequate to ensure a fair trial of the Accused before the High Court of Rwanda."[115]

47. The immunities are complemented, the Chamber held, by "improvements made to the Rwandan [Witness and Victims] Support Unit [("WVSU")] and the creation of the Witness Protection Unit ("WPU") under the Judiciary. . . ."[116] The Chamber regarded WPU's creation "under the auspices of the judiciary" as a positive step aimed at addressing past concern that some witnesses might be reluctant to avail themselves of WVSU's services because it is a unit within the prosecutor's office.[117]

48. The Chamber also considered alleged witness fears relating to arrest and prosecution under Rwanda's Genocide Ideology Law.[118] While noting that the Transfer Law provides immunity to defence witnesses and counsel for anything said or done at trial, the Chamber observed that Rwanda had undertaken a study aimed at clarifying the scope of its existing ideology law.[119] It required Rwanda to report to the President on the status of that study.[120] According to Rwanda's subsequent report, the Commission assigned to study the matter has recommended that the existing ideology law be repealed and replaced with a new law.[121]

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[113] Decision, para. 60.
[114] Response to Grounds 8, 9, and 10.
[115] Decision, paras. 90, 93, 99, 101.
[116] Decision, para. 101.
[117] Decision, para. 131.
[118] Decision, para. 95.
[119] Decision, para. 95.
[120] Decision, para. 95 and p. 59.
[121] RP 5190. The Defence has filed a motion to expunge portions of Rwanda's report. That motion, which the Prosecutor has opposed, remains pending.

49. Added to this, the Chamber noted Rwanda's practical experience in 36 genocide cases over which the High Court presided.[122] Those cases demonstrated that the "defence in most cases was able to secure the attendance of witnesses even without the safeguards available to cases transferred from the Tribunal."[123]

50. No judicial system, however, "can guarantee absolute witness protection."[124] For any witnesses still unable or unwilling to travel to Rwanda, the Chamber noted that Rwanda has taken "specific and concrete steps to amend the law to secure the attendance or evidence from abroad."[125] It is party to "several mutual assistance agreements" with other countries, and its Criminal Code provides for compulsory attendance at trial.[126] Rwanda also has amended its Transfer Law to allow witnesses to testify by alternatives means,[127] and its Parliament is considering legislation that would allow foreign or international judges to sit on the panel of any referred case.[128]

1. Uwinkindi fails to demonstrate any discernable error in the Chamber's findings regarding the availability of witnesses.

51. Uwinkindi raises a number of challenges to the Chamber's factual findings both with respect to witnesses in Rwanda and those abroad.[129] His arguments largely overlap and fall into three broad categories. First, he alleges that the Chamber misconstrued the fears expressed by potential defence witnesses.[130] In this regard, he claims that the Chamber allegedly (a) placed too much reliance on the immunity provisions of Rwanda's Transfer Law to ameliorate witness fears;[131] (b) ignored witness fears for their family members;[132] (c) failed to adequately explain the impact of the pending legislative reform of the Genocide Ideology Law

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[122] Decision, para 64, n. 86.
[123] Decision, para. 100.
[124] Decision, para. 128.
[125] Decision, para. 108.
[126] Decision, para. 108.
[127] Decision, para. 109.
[128] Decision, para. 114; RP 5184-83, 5141-16.
[129] Brief, Ground 8, paras. 29-37; Ground 9, paras. 38-58.
[130] Brief, paras. 34, 38, 43, 48.
[131] Brief, paras. 31, 35, 40, 45.
[132] Brief, paras. 49, 57.

on its decision;[133] and (d) minimized the potential chilling effect that could result from the prosecution's involvement in arranging witness travel from abroad,[134] as well as the difficulties that such travel could pose to a witness' refugee status.[135] Second, he claims that the Chamber allegedly "erred in law" in failing to recognize that the 36 genocide cases were not trials in first instance before the High Court and, thus, allegedly were not an accurate reflection of Rwanda's practical experience in securing defence witness testimony.[136] Third, he contends that the Chamber allegedly misconstrued Article 50 of Rwanda's Criminal Code as allowing witnesses to be summonsed to provide testimony at trial as opposed to only during pre-trial investigation.[137]

a. Alleged witness fears.

52. Uwinkindi faults the Chamber for conflating what he describes as "two separate and distinct categories" of witness concerns.[138] But, he never drew this distinction before the Chamber[139] and cannot raise it for the first time on appeal.[140]

53. The Chamber, in all events, appreciated that the alleged witness fears were not restricted to prosecution and arrest as Uwinkindi complains.[141] It acknowledged the full range of witness fears raised by the defence,[142] and proceeded to address those fears and explain why it did not consider them to be obstacles to referral.[143]

54. Because the "majority of the potential witnesses fear[ed] that they may be prosecuted under the genocide ideology laws," the Chamber reasonably focused on this point.[144] In this regard, it observed that there was "little indication" that any of

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[133] Brief, para. 44.
[134] Brief, paras. 32, 41.
[135] Brief, para. 51.
[136] Brief, para. 29.
[137] Brief, para. 37.
[138] Brief, para. 38.
[139] RP 3677-74, paras. 81-88; 4661-60, paras. 87-91.
[140] *Rwamakuba*, para. 6.
[141] Brief, para. 49.
[142] Decision, para. 89.
[143] Decision, paras. 91-114.
[144] Decision, para. 89.

the potential witnesses identified by Uwinkindi had been advised of the Transfer Law's immunity provisions.[145]

55. This omission was significant because Articles 13 and 14 of the Transfer Law confer broad immunity on witnesses.[146] Article 13 states that "[w]ithout prejudice to the relevant laws of contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial."[147] Article 14 provides an additional guarantee of immunity for witnesses who travel from abroad. It provides that "[a]ll witnesses who travel from abroad to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials."[148]

56. Uwinkindi contends that these immunity provisions are not "worth the paper they are written on."[149] The only support he provides for this inflammatory statement is the unfortunate comment made four years ago by Rwanda's minister of justice.[150] The Chamber rightly expressed its concern about this comment but reasonably determined that it did not detract from the law's plain terms.[151] Indeed, approximately two years *after* the minister's comment, Rwanda amended the Transfer Law to enhance the protections afforded to witnesses.[152] The Chamber reasonably viewed this "amendment as a positive development."[153] It also is tangible proof of Rwanda's continued commitment to the Transfer Law's immunity provisions.

57. Because no cases have yet been referred to Rwanda, the immunity provisions have not been tested in practice. The Chamber, however, reasonably accepted

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[145] Decision, para. 89.
[146] Decision, paras. 91-93.
[147] Transfer Law, Article 2.
[148] Transfer Law, Article 14.
[149] Brief, para. 31.
[150] Brief, para. 31.
[151] Decision, paras. 87-88, 91-93.
[152] Decision, para. 93.
[153] Decision, para. 93.

Rwanda's representations that, consistent with usual presumption of good faith on the part of government officials, the immunity provisions would be honored.[154]

58. The Chamber's confidence in Rwanda's commitment to honoring the immunity provisions was reinforced by Rwanda's study of proposed revisions to the Genocide Ideology Law.[155] Rwanda's subsequent report demonstrates that substantial progress has been made in addressing past concerns.[156] It also provides a timeline for adoption of these latest reforms.[157]

59. Regardless of the status of these proposed reforms, the Chamber correctly noted that the Transfer Law, "as amended, provides immunity to defence witnesses and defence counsel for anything said or done in the course of trial."[158] This immunity extends to any statements made in the course of trial amounting to genocide denial under either the current or revised ideology law. Thus, contrary to Uwinkindi's contention,[159] there was no ambiguity in the Chamber's analysis of the pending reforms to the ideology law – the Transfer Law's broad immunity provisions adequately addressed any witness fears related to arrest and prosecution under the ideology law.[160]

60. The Chamber also addressed a potential loophole in the Transfer Law's exclusion of prosecutions for "contempt of court and perjury."[161] It observed that "[i]n the course of trials before this Tribunal some accused and witnesses have made statements amounting to denial of [the Rwandan] genocide."[162] Anticipating that the accused, defence counsel, or witnesses may make similar statements in the course of trial in Rwanda, the Chamber emphasized that they "shall not" be subject to prosecution for contempt or perjury on this basis.[163]

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[154] Decision, paras. 88, 225; RP 2687, para. 54.
[155] Decision, para. 95.
[156] RP 5191-84, p. 2-9.
[157] RP 5191-84, p. 2-9.
[158] Decision, para. 95.
[159] Brief, para. 44.
[160] Decision, para. 95.
[161] Decision, para. 96.
[162] Decision, para. 96.
[163] Decision, para. 96.

61. Somewhat ironically, Uwinkindi faults the Chamber for overstepping its bounds by allegedly interfering with a sovereign state's enforcement of its laws.[164] The Chamber did no such thing. In an abundance of caution, the Chamber merely identified a potential gap in the Transfer Law's immunity provisions and closed it.

62. The Chamber's interpretation of the Transfer Law's contempt and perjury exception also is consistent with the law's overarching goal of providing immunity for anything said or done at trial, including statements potentially amounting to genocide denial. The contempt and perjury exception was not intended to swallow this broader purpose. Instead, it is properly interpreted as a limited reservation for the types of intentionally false testimony or contemptuous conduct within the inherent authority of any court to punish. This interpretation is confirmed by the fact that, although accused and witnesses in trials before the Tribunal have made statements amounting to genocide denial,[165] there is not a single instance where they were subsequently prosecuted for contempt or perjury in Rwanda.[166]

63. In all events, it was within the Chamber's discretion to impose – as a condition on referral – the scope of immunity it expected to be observed during the trial in Rwanda. Uwinkindi fails to demonstrate any abuse of discretion in this regard, particularly given that the Chamber's interpretation worked to his benefit.

64. Uwinkindi also fails to demonstrate any discernable error in the Chamber's treatment of alleged witness fears for the safety of family members in Rwanda. Contrary to his argument, the Chamber did not ignore these fears;[167] it acknowledged them and implicitly addressed them in two ways.[168] First, the Chamber noted that, pursuant to Rule 11 *bis* (D)(ii), it could order that protective measures for witnesses and victims, which often include family members, remain in

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[164] Brief, para. 46.
[165] Decision, para. 96.
[166] Rwanda's prosecution of Nshogoza, a former ICTR defence investigator, for allegedly bribing witnesses to provide false testimony is no exception. RP 4142, para. 79. In all events, because Nshogoza's case was not referred, the Transfer Law's immunity provisions are inapplicable.
[167] Brief, paras. 49, 57.
[168] Decision, para. 89; RP 4140-39, para. 83.

place.[169] Second, the Chamber considered the improvements to Rwanda's witness protection services, including the creation of WPU under the auspices of the judiciary.[170] As noted below, the Chamber reasonably determined that WPU's creation was a positive step toward allaying any lingering fears about having witness protection services administered by a unit within the prosecutor's office.[171]

65. Given these considerations, there is nothing to preclude Uwinkindi from applying to the Tribunal before referral for appropriate witness protection measures, including measures extending to family members.[172] And, following referral, he may apply to the High Court for similar measures.[173] Indeed, pursuant to Article 14 of the Transfer Law, the High Court "shall provide appropriate protection for witnesses and shall have the power to order appropriate protective measures similar to those set forth in Articles 53, 69 and 75 of the ICTR Rules of Procedure and Evidence."

66. Uwinkindi next contends that the Chamber minimized the chilling effect that could result from the involvement of the Prosecutor General's Fugitive Tracking Unit (FTU) in facilitating travel for witnesses from abroad, as well as the potential negative impact that travel could have on a witness' refugee status. The Chamber acknowledge that some witnesses might be concerned about the FTU's involvement in facilitating witness travel, but found that those concerns were "premature" given the immunity afforded under the Transfer Law.[174]

67. Furthermore, contrary to Uwinkindi's suggestion, there is nothing nefarious in FTU's involvement in facilitating witness travel. FTU's involvement is a function of Article 14(2) of the Transfer Law, which directs the Prosecutor General to "facilitate the witnesses in giving testimony including those living abroad, by the provision of appropriate immigration documents, personal security as well as providing them medical and psychological assistance."

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[169] Decision, para. 132.
[170] Decision, para. 131.
[171] Decision, para. 131.
[172] RP 4140-39, para. 83.
[173] RP 4349, para. 59.
[174] Decision, para. 88.

68. Because of its extensive contacts with foreign governments, FTU is the logical unit within the Prosecutor General's office to coordinate this effort. As the acting head of FTU explained in an affidavit submitted to the Chamber:

> Over the years, Rwanda has accommodated numerous requests from other countries to facilitate the travel of witnesses . . . to and from Rwanda. Many of these requests were based on informal agreements of mutual assistance and cooperation, including requests submitted by Belgium, Canada, Denmark, Finland, France, Germany, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States.[175]

69. In each case, FTU coordinated with other Rwandan officials, including immigration and foreign affairs, and foreign embassies to arrange the necessary entry or exit visas.[176] Having assisted these other countries with their requests for mutual assistance, the Chamber reasonably concluded that Rwanda would receive similar assistance in facilitating witness travel in any case referred for trial.[177] And, in the unlikely event that the requested assistance was not forthcoming, Rwanda had the right under UN Security Council Resolution 1503 to insist that assistance be given.[178]

70. There also is no reason to believe, based on Rwanda's past experiences in facilitating witness travel to and from Rwanda, that a witness' refugee status will be adversely affected.[179] Indeed, no such fears were evident, let alone realized, in connection with the Eighth National Dialogue that Rwanda hosted in December 2010. Over 120 representatives of the Rwandan Diaspora traveled from 25 foreign countries – ranging from Afghanistan to Zambia – to attend the Dialogue and stayed in Rwanda for three or more weeks.[180] Even without the Transfer Law's protections and Rule 11 *bis*' monitoring, all attendees were able to re-enter their 25 countries of residence without any adverse consequence to their refugee status.[181]

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[175] RP 2628-27, paras. 2-4.
[176] RP 2628-27, paras. 2-4.
[177] Decision, para. 108.
[178] *Hategekimana*, para. 25.
[179] Decision, paras. 107-08.
[180] RP 2627, paras. 5-6.
[181] RP 2627, para. 7.

b. High Court genocide cases.

71. Uwinkindi also claims that the Chamber "erred in law" by allegedly finding that the High Court presided over 36 genocide *trials* in first instance.[182] This is presumably a reference to paragraph 100 of the Chamber's decision, where it mistakenly referred to the "36 genocide cases tried in the High Court." In fact, as the Chamber acknowledged at other points, the 36 genocide cases before the High Court were not trials in first instance.[183] Rwanda made clear in its submissions that the 36 genocide cases over which the High Court presided involved "judicial review of jurisdictional issues, appeals from Intermediate Court judgements and sentences, and applications for post-conviction review," not trials in first instance.[184]

72. The Chamber's isolated misstatement regarding the court where the trials occurred does not, however, impugn the substance of its findings. The Chamber referenced the "information provided by Rwanda on the 36 genocide trials in Rwanda,"[185] to show that the defence was able to "secure the attendance of witnesses even without the safeguards available to cases transferred from the Tribunal."[186] This finding is amply supported by Rwanda's submissions, which reveals that a significant number of defence witnesses were called during trial of these and other cases.[187] It remains unchanged regardless of whether those cases were tried in first instance before Rwanda's Intermediate Court or High Court. No doubt this is why the Chamber omitted reference to the particular court in paragraph 97 of its findings.

73. Moreover, Rwanda initially cited the 36 genocide cases as proof of the High Court's familiarity with genocide law (not the number of defence witnesses called at trial).[188] By presiding over appeals and other matters relating to these 36 genocide cases, Rwanda confirmed the High Court's expertise.[189] Indeed, even Uwinkindi

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[182] Brief, para. 29.
[183] Decision, paras. 64 n. 86, 97.
[184] RP 4695, para. 3.
[185] Decision, para. 97.
[186] Decision, para. 100.
[187] RP 4695-83, paras. 5-43; 5166.
[188] RP 2659, para. 123.
[189] RP 4695, para. 4.

has conceded that "Rwandan judges are almost certainly more experienced in trying genocide cases that would be the judges of almost any other jurisdiction in the world."[190]

c. Compulsory process.

74. Uwinkindi's challenge to the Chamber's citation to Article 50 of the Rwandan Criminal Code likewise demonstrates no discernable error.[191] To be sure, the Chamber cited the incorrect provision of the Code. Article 50, as Uwinkindi notes, relates to the use of pre-trial summonses.[192] But, the substance of the Trial Chamber's findings regarding the obligation of witnesses to appear and give evidence, as well as the availability of compulsory process to compel attendance, is supported by other provisions of the Code.[193]

75. As detailed by the Kigali Bar Association, these rights are provided by Articles 54 and 55 of the Code.[194] Additionally, pursuant to Article 57, a "witness who fails to appear and testify without advancing a justifiable excuse after being summonsed" is subject to criminal prosecution. Thus, there was no discernable error in the Chamber's substantive finding regarding the availability of compulsory process, notwithstanding its mistaken citation to Article 50.

2. Uwinkindi fails to demonstrate any discernable error in the Chamber's findings regarding Rwanda's witness protection services and use of alternative means of testifying.

76. Uwinkindi next challenges the Chamber's findings relating to the adequacy of Rwanda's witness protection services[195] and effectiveness of the various alternatives Rwandan law provides for obtaining testimony or evidence from witnesses unable or unwilling to travel to Rwanda.[196] On both points, Uwinkindi relies on isolated excerpts from the Chamber's findings that do not accurately reflect the Chamber's more comprehensive reasoning.

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[190] RP 3648, para. 201; Decision, para. 178.
[191] Brief, para. 37.
[192] Brief, para. 37.
[193] Decision, para. 104.
[194] RP 4350-49, paras. 54-56.
[195] Brief, paras. 59-60.
[196] Brief, paras. 52-56, 58.

a. Witness protection programmes.

77. This selective reading is most evident in his challenge to the Chamber's findings regarding Rwanda's witness protection services. The Chamber's ultimate determination regarding the adequacy of Rwanda's witness protection programmes was based on its evaluation of the services provided by both WVSU and WPU.[197] Uwinkindi, however, focuses solely on WPU, as though it were the only provider of witness protection services in Rwanda.[198] The Chamber's findings (and Rwanda's submissions) establish that this is not the case.[199]

78. For cases referred by the Tribunal or transferred from other countries, WPU is charged with informing "witnesses about their rights and the ways to exercise them[;]" it also "ensures that all protective measures issued by the courts are implemented."[200] Because no cases have been transferred, WPU's services have not yet been utilized.[201]

79. Nevertheless, two registrars in both the High Court and Supreme Court have been designated to plan for and work on any witness protection matters that may arise.[202] Additionally, to assist WPU in becoming fully operational, the Prosecutor General has made one of WVSU's safe houses available to WPU.[203] And, in October 2010, the ICTR's witness support section provided specialized training to WPU.[204] Thus, although not yet fully operational, the Chamber reasonably determined that Rwanda's creation of WPU was a positive step in closing the perceived gap identified in earlier Rule 11 *bis* proceedings.[205]

80. Uwinkindi further faults the Chamber for allegedly failing to follow prior Appeals Chamber decisions.[206] According to him, while the Appeals Chamber held

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[197] Decision, paras. 101, 129-31.
[198] Brief, para. 59.
[199] RP 2668-62, paras. 2-19; RP 2590-89, paras. 2-4.
[200] Decision, para. 131.
[201] Decision, para. 131.
[202] RP 2590, para. 2.
[203] RP 2590, para. 3.
[204] RP 2589, para. 4.
[205] Decision, para. 131.
[206] Decision, para. 131.

that WVSU was not rendered inadequate simply because it was administered within the Prosecutor's Office, it went on to hold that prior trial chambers did not abuse their discretion in finding that some witnesses may nevertheless be reluctant to avail themselves of the services for this reason.[207]

81. But, this argument is premised on a misunderstanding of the record. Uwinkindi erroneously contends that witnesses seeking services from WPU will be required to file an application with the Prosecutor General.[208] This is not correct. Witnesses seeking services from WPU will be able to apply directly to the court or administrators within the judiciary. This is consistent with Article 14 of the Transfer Law, which grants the High Court "the power to order appropriate protective measures" in referred cases.

82. The Chamber regrettably repeated Uwinkindi's error in its findings.[209] Its confusion can be traced to Uwinkindi's response, which conflated the two separate witness protection services into one service.[210] Without distinguishing between the two services, Uwinkindi discussed an internal directive issued by the Prosecutor General relating to witness protection services provided by WVSU, a unit within the prosecutor's office.[211] That internal directive, however, has no bearing on WPU because it is a unit within the judiciary, as the Chamber correctly found.[212]

83. In all events, regardless of the Chamber's confusion on this point, "[i]nherent in the notion of discretion is that different Trial Chambers are permitted to reach different decisions within that sphere of discretion, even if they are each presented with the same question."[213] What matters to this appeal is not whether other chambers, in the exercise of their discretion, reached a different conclusion several years ago but that there was no "discernable error" in the Chamber's determination that those earlier concerns had been addressed to its satisfaction.

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[207] Brief, para. 61.
[208] Brief, para. 60.
[209] Decision, para. 131.
[210] RP 3661, para. 147; Decision, para. 123.
[211] RP 3660, paras. 149-51.
[212] Decision, para. 131.
[213] *Gacumbitsi*, para. 32, n. 90.

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84. In this regard, Chamber noted that, over the intervening years, "Rwanda has shown the willingness and capacity to change by amending its relevant laws. . . ." These changes were "complemented," in the Chamber's estimation, by the "improvements" made to WVSU and the "creation" of WPU "under the Judiciary."[214]

85. The *Mugiraneza* case, cited by Uwinkindi, demonstrates the reasonableness of the Chamber's findings regarding the effectiveness of Rwanda's witness protection services.[215] After testifying for the defence, some genocide survivors were summoned to attend a meeting with their local IBUKA representative for Remera Sector, Ngoma District.[216] They were accused by other members of the survivors group of having accepted bribes to provide false testimony aimed at exculpating the accused.[217] Acting on this accusation, the local IBUKA representative dismissed them from the survivors' group, resulting in the loss of survivor benefits.[218] The witnesses complained to WVSU, which investigated the matter and asked the national IBUKA Chairman to intervene.[219] The national IBUKA Chairman thereafter rescinded the local representative's decision and reinstated all benefits, retroactively.[220]

86. Certainly, it would have been best if the local IBUKA representative had acted with more care and deliberation. But, the incident nevertheless shows that the Chamber committed no discernable error in finding that Rwanda's witness protection services were able to effectively address the full range of witness availability concerns Uwinkindi identified.

87. Indeed, perhaps the most concrete evidence showing the reasonableness of the Chamber's findings relating to the effectiveness of Rwanda's witness protection services is that the Tribunal itself relies on those services to lend assistance in ICTR cases. Over the years, the ICTR Registry has relied on WVSU to help

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[214] Decision, paras. 131, 100.
[215] Brief, para. 34.
[216] RP 3814-13, para. 2
[217] RP 3814-13, para. 2.
[218] RP 3814-13, para. 2.
[219] RP 3813, para. 3.
[220] RP 3813, para. 3.

investigate 73 separate incidents of threats against ICTR witnesses.[221] Given that Rwanda has been instrumental in assisting the ICTR in responding to these incidents, Uwinkindi fails to show any abuse of discretion in the Chamber's determination that it will be able to provide similar services for witnesses in referred cases.

b. Alternative means for securing witness testimony.

88. The Chamber reasonably acknowledged that, notwithstanding the immunity and other protections available to them, some witnesses from abroad may still be unable or unwilling to testify in Rwanda.[222] It noted, however, that Rwanda had taken "specific and concrete" steps to amend its laws "to secure the attendance or evidence of witnesses from abroad."[223]

89. Article 14 *bis* of the Transfer Law, as inserted in 2009, provides that a witness may testify (a) by deposition in Rwanda or in a foreign jurisdiction before a presiding officer, magistrate or other judicial officer appointed by the Judge for that purpose; (b) by video-link hearing taken by a judge at trial; or (c) by a judge sitting in a foreign jurisdiction for the purpose of recording such *viva voce* testimony.[224] Testimony given in any of these ways must be transcribed so it can be made part of the trial record and shall carry the same weight as testimony given in court.[225] These procedures are consonant with the ICTR Rules of Procedure and Evidence, and its jurisprudence.[226]

90. Furthermore, although there is a preference for live witness testimony over recorded testimony, the Chamber reasonably found the "Defence argument that [Uwinkindi] would be absent for the majority of his Defence case untenable."[227] Each of the alternatives provided by Rwandan law could, with appropriate logistical support, allow Uwinkindi to both face the witnesses and hear their testimony *viva*

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[221] RP 2613, para. 19.
[222] Decision, para. 128.
[223] Decision, para. 108.
[224] Decision, para. 109.
[225] Transfer Law, Article 14 *bis*.
[226] Rules 70, 90 (A) of the Rules; *Akayesu*, paras. 134, 286.
[227] Decision, para. 113.

voce. Uwinkindi, for instance, could be present at the same location where the witness testifies via video-link or deposition. And, if one or more of the judges hearing the case wished to be physically present when a witness testifies, they could likewise travel to the witness's location. In fact, this is precisely what is envisioned under Rwanda's third alternative, whereby all of the principals (the judge, prosecution, defence, and witness) would be present to hear the witness testify in a foreign courtroom. The Chamber, therefore, did not abuse its discretion in finding that these alternatives adequately addressed any remaining concerns about Uwinkindi's ability to secure live witness testimony from witnesses who may be unwilling or unable to travel to Rwanda.

91. Uwinkindi nevertheless complains that it is unclear how these alternatives will function in practice.[228] Yet, Rwanda's existing video-link facilities already have been used to hear witnesses in cases pending before other national courts.[229] In the trial of *François Bazaramba*, the accused and his defence team remained in Finland to conduct cross-examination of witnesses in Rwanda *via* video-link.[230] Similarly, in the trial of *Desiré Munyaneza*, which took place in Canada, 14 prosecution witnesses and 7 defence witnesses testified from Rwanda *via* video-link.[231]

92. For the first time on appeal, Uwinkindi suggest that some of the African countries where his witnesses reside may lack video-link capabilities.[232] But, this is pure speculation. The Tribunal's own capability and experience in arranging video-link testimony show that this would not be an insurmountable hurdle in any event.

93. Similarly, with regard to the two other alternatives, no sophisticated technology or expertise is required. Depositions and the recording of testimony are commonplace and easily implemented should either alternative prove necessary in a referred case. In fact, Rwanda recently assisted a Dutch judge in arranging the

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[228] Brief, paras. 52-56.
[229] RP 2613, para. 17.
[230] RP 2613, para. 17.
[231] RP 2613, para. 17.
[232] Brief, para. 54.

examination of 48 prosecution witnesses.[233] All of the witnesses testified in a Rwandan courtroom in proceedings presided over by the Dutch judge in the presence of both prosecution and defence counsel.[234] According to the Dutch government, Rwanda's cooperation with this and other investigations was "exemplary."[235]

94. Rwanda also has proposed new legislation to allow foreign or international judges to sit on the panel of any case referred for trial.[236] This prospect would adequately address any subjective fears that defence witnesses might have about appearing before only a Rwandan judge and, thus, further "enhance the Accused's fair trial rights."[237]

95. Although Uwinkindi complains that this legislation has not yet been enacted,[238] Rwanda's Parliament has tabled it for vote this term.[239] Its passage will fulfill the Chamber's expectation that it be in place for referral.[240]

G. The Chamber reasonably determined that Rwanda will secure Uwinkindi's right to an effective defence.[241]

96. The Chamber reasonably determined that Rwanda had sufficient funds allocated to its legal aid programmes and that Uwinkindi "will have counsel made available to him in Rwanda."[242] After considering the applicable law and parties' submissions on Uwinkindi's ability to present a line of defence amounting to genocide denial, the Chamber reasonably determined that he was free to present a full and vigorous defence.[243] Uwinkindi fails to demonstrate any discernable error.

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[233] RP 2613, para. 18.
[234] RP 2613, para. 18.
[235] RP 3818, para. 7.
[236] Decision, para. 114.
[237] Decision, para. 114.
[238] Brief, para. 58.
[239] RP 5184, p. 9.
[240] Decision, para. 114.
[241] Response to Grounds 11 and 12.
[242] Decision, paras. 140, 146.
[243] Decision, paras. 167-69.

1. Uwinkindi will have counsel available to him.[244]

97. Uwinkindi's assertions about the alleged lack of funds for an effective defence are based on several layers of sweeping and flawed assertions. Contrary to his assertions, the evidence before the Chamber showed that there are sufficient "funds for a trial in Rwanda."[245]

98. Rwanda's submissions included affidavits from its Minister of Justice and the Acting President of the Kigali Bar Association, which administers the legal aid programme. The Minister's affidavit established that Rwanda's current budget includes 92 million RWF for legal aid.[246] An additional 30 million RWF have been designated for ICTR-related issues, including, but not limited to, the provision of legal assistance to indigent accused in transferred cases.[247] Between these two separate line items, a total of 122 million RWF (approximately $205,000 U.S. dollars) is currently available for providing legal aid in transferred cases, including this case.[248] In addition, pursuant to contracts between the bar association and government, the Ministry of Justice has committed to paying 90 million RWF to support the provision of domestic legal aid services in 2011 alone.[249] The Chamber reasonably determined that these funds were sufficient to provide Uwinkindi with legal aid.[250]

99. The Chamber reasonably declined Uwinkindi's request to "verify availability of funds for legal aid."[251] Established Rule 11 *bis* jurisprudence holds that "'there is no obligation to establish in detail the sufficiency of the funds available as a precondition for referral.'"[252] The Chamber reasonably accepted Rwanda's

[244] Response to Ground 11.
[245] Brief, para. 65.
[246] RP 2641, para. 2.
[247] RP 2641, para. 3.
[248] RP 2641, para. 4.
[249] RP 2649, para. 11; 2647-43.
[250] Decision, para. 144.
[251] Decision, para. 144.
[252] Decision, para. 144 (quoting *Stanković*, para. 21).

representations regarding the sufficiency of its funding and properly declined to "scrutinize" those internal budgetary matters further.[253]

100. Furthermore, although "the level of funding for the Defence may be lower than at this Tribunal," the Chamber correctly noted that Rule 11 *bis* does not require an objective level of funding."[254] Instead, what matters is that the Chamber is satisfied that sufficient funds have been budgeted for legal aid to ensure equality of arms in the defence of any referred case.[255] Based on the parties' and *amici*'s submissions, the Chamber was "satisfied that this requirement ha[d] been met."[256]

101. Uwinkindi's further contention that budgeted funds may not be sufficient because his trial "would inevitably involve huge expenses" is speculative.[257] With regard to defence travel and preparatory work, for instance, Uwinkindi says that his witnesses reside in at least 10 countries. However, these are only *potential* witnesses, some of whom he may decide against calling at trial. Moreover, the affidavits that Uwinkindi submitted to the Chamber show that members of his defence team already have met with and interviewed these witnesses. Thus, the actual costs for defence travel and preparatory work likely will not be as "huge" as Uwinkindi imagines.

102. Similarly, with regard to his projections for the travel costs for judges, prosecutors, and registry clerks, Uwinkindi likewise fails to establish that any such travel actually will be required, let alone that it would be charged against Rwanda's legal aid budget as opposed to other line items. His reliance on these anticipated costs, therefore, is unfounded and fails to demonstrate any discernable error in the Chamber's assessment that Rwanda's budget for legal aid was sufficient.

103. Comparison with the prevailing rates and costs for cases tried before this Tribunal and other national jurisdictions also is not reflective of the situation in

[253] Decision, para. 144.
[254] Decision, para. 139.
[255] Decision, para. 139.
[256] Decision, para. 139.
[257] Brief, para. 64.

Rwanda, the jurisdiction where the case will be tried. As the Kigali Bar Association noted, the funds budgeted for legal aid are sufficient in light of the prevailing rates charged in Rwanda.[258] Indeed, the bar association confirmed that its members would "comply with their duty to provide all the legal assistance that would be required, should UWINKINDI Jean or any other case be transferred to Rwanda from the ICTR, including through the legal aid scheme."[259]

104. Notably, hundreds genocide-related cases have already been tried in Rwanda.[260] The factual basis of Uwinkindi's case is not so complex in comparison to these other cases that it will require the "huge" expenses Uwinkindi suggests.

105. In fact, the cost of investigations likely will be less given that both the prosecution and defence already have investigated his case and any additional investigations may be conducted locally in Rwanda.[261] Pursuant to the referral order, the ICTR Prosecutor will hand over to Rwanda's Prosecutor General all of the material supporting the Indictment and all other evidentiary material, including disclosures, in his possession.[262] And, as noted above, Uwinkindi's defence team already has located and interviewed numerous potential defence witnesses.

106. There also is nothing precluding Uwinkindi's current defence team from continuing to represent him following referral of his case to Rwanda.[263] Indeed, some defence team members are already accredited to practice in Rwanda.[264]

107. In all events, because Rwanda's legal aid budget is reviewed every six months,[265] additional funds could be made available if necessary to secure Uwinkindi's right to effective legal representation. The Tribunal's revocation mechanism provides further assurance that, if referral is allowed, Rwanda will

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[258] RP 4357, para. 29.
[259] RP 4359-58, para. 26.
[260] RP 4362, para. 17.
[261] RP 4357, para. 33.
[262] Decision, p. 57.
[263] RP 4361, para. 19.
[264] RP 4361, para. 19.
[265] RP 4358, para. 27.

respect Uwinkindi's right to equality of arms in the preparation and conduct his defence.[266]

2. Uwinkindi will be able to pursue his line of defence.[267]

108. Uwinkindi likewise shows no discernable error in the Chamber's finding regarding his ability to run the line of defence he wishes to run in Rwanda. Contrary to his suggestion, the Chamber did not confine itself only to consideration of the presumption of independence and impartiality.[268] But, even if it had, this would not establish any discernable error. The Chamber was entitled to take the presumption into account along with any other relevant aspect of Rwandan law.

109. The Chamber, in any event, duly noted Uwinkindi's submissions regarding his alleged inability to run his line of defence but found that the examples he provided were "inapposite."[269] All of the examples he provided "took place within a different legal framework and [were] of little assistance in assessing the likelihood that the Accused will be able to pursue his particular line of defence."[270]

110. Under the legal framework applicable to referred cases, the Chamber was satisfied that Uwinkindi's fears were misplaced. It correctly noted that, pursuant to Article 13 of the Transfer Law, "no person shall be criminally liable for anything said or done in the course of a trial." This immunity extends to both witnesses and defence team members, and its application to Uwinkindi's case was further ensured by the Chamber's detailed monitoring provisions.[271]

111. The reasonableness of the Chamber's determination is supported not only by the Transfer Law's immunity provision and Rule 11 *bis*' monitoring provision, but also by the practical experience of members of the Kigali Bar Association, who attested:

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[266] Decision, para. 139.
[267] Response to Ground 12.
[268] Brief, para. 69.
[269] Decision, paras. 162, 164.
[270] Decision, para. 167.
[271] Decision, paras. 93, 96.

> In genocide cases, members of the [bar] have been able to present the fullest defence possible, by adducing evidence refuting the allegations and charges against them, without adverse consequences or interferences from the executive against the lawyers or defence witnesses. In this regard, Article 44 of the Code of Criminal Procedure stipulates that "if evidence proving the offence has been adduced, the accused or his or her counsel should submit all the grounds of his or her defence, indicating why the claims should be dismissed, proving that the allegations against him or her do not constitute a criminal offence or that he or she is innocent and all other grounds to counter attack prosecution's case." Thus, nothing prevents a defendant to mount a defence that, *i.e.* the crime he was charged with was committed by others, including Tutsi, RPF soldiers or else.[272]

112. Uwinkindi's assertion that potential defence counsel might be reluctant to advance a line of defence that could be interpreted as genocide denial is refuted by the fact that one of his own counsel is presently enrolled in the defence of Victoire Ingabire.[273] According to Uwinkindi, Ingabire was arrested and charged with genocide denial after she claimed that large numbers of Hutu also were killed during the 1994 genocide.[274] Former Bâtonnier, Me Gatera Gashabana, a Rwandan lawyer enrolled on the ICTR list of potential defence counsel, also is part of Ingabire's defence team.[275] The participation of these attorneys in Ingabire's defence shows that, even without the immunities of the Transfer Law, defence lawyers are not afraid or unwilling to defend cases where the potential line of defence includes statements denying or minimizing the genocide.

H. The Chamber reasonably found that unsubstantiated allegations of executive interference in Rwanda's judiciary were insufficient to rebut the presumption of independence and impartiality.[276]

113. The Chamber was "satisfied that the judges of the Supreme Court and the High Court of Rwanda are qualified and experienced and that they have the necessary skills to handle the case at issue if transferred."[277] Additionally, the

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[272] RP 4353, para. 41.
[273] http://rwandinfo.com/eng/rwanda-high-court-orders-trial-of-victoire-ingabire-to-proceed/ (accessed 26 September 2011).
[274] Decision, para. 164.
[275] RP 4362-61, para. 18.
[276] Response to Ground 13.
[277] Decision, paras. 178.

Chamber determined that allegations of widespread corruption within the judiciary were unsubstantiated and noted the "significant steps" Rwanda has taken to address corruption in all sectors of government.[278] The Chamber further considered several individual cases that Uwinkindi and his *amici* cited as examples of alleged executive interference with the judiciary. "Having reviewed these cases, the Chamber [found] that most are of a political nature and do not necessarily reflect the conditions of the trial or the charges that [Uwinkindi] faces."[279] As such, the cases were insufficient to rebut the ordinary presumption of judicial independence and impartiality.[280]

114. Moreover, as the Chamber noted, "any transferred case will be closely monitored by the ACHPR, which will give periodic reports to the President of the Tribunal."[281] If the monitor detects any violation of Uwinkindi's fair trial rights, including executive interference with his case, referral could be revoked.[282]

115. Uwinkindi claims the Chamber failed to "take into account properly or at all the substantial evidence" he and his *amici* allegedly adduced to show that Rwanda's judiciary is subject to political interference, and that executive interference is a real feature of the Rwandan legal system.[283] He also challenges the distinction the Chamber drew between his case and the "political" cases he cited. Lastly, he claims that the Chamber erred in relying on Rule 11 *bis*' monitoring and revocation mechanisms to redress any allegations of executive interference that might occur after referral because, he claims, such interference will be difficult to detect. Each contention is addressed in turn.

1. The Chamber reasonably considered all evidence before it.

116. Uwinkindi does not substantiate his claim that the Chamber failed to take into account the evidence he and his *amici* submitted on the independence of the judiciary. A cursory review of the Chamber's Decision shows that it considered all

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[278] Decision, paras. 184-85.
[279] Decision, para. 196.
[280] Decision, para. 166.
[281] Decision, para. 196.
[282] Decision, para. 196.
[283] Brief, paras. 75-79.

of the arguments placed before it relating to the competence, independence, and impartiality of Rwanda's judiciary.[284] At each stage of its exacting inquiry, the Chamber made specific references to the parties' submissions.[285]

117. Even assuming the Chamber did not expressly reference some of the submissions, there was no error. A Chamber is not bound to refer to every piece of evidence before it, and its failure to do so does not mean the evidence was ignored.[286] The burden lies on the appellant to show that the Chamber's failure to refer to some piece of evidence or material shows that it disregarded it.[287] Here, Uwinkindi has not pointed to any particular material or evidence that the Chamber did not reference or consider. Accordingly, he fails to discharge his burden on appeal.

118. Uwinkindi's alternative claim that the Chamber's assessment was "awfully inadequate," is equally unsubstantiated. Once again, Uwinkindi does not elaborate on why he thinks the Chamber's assessment was inadequate, nor does he identify any specific instance where the Chamber's assessment was lacking. Without further development, the Appeals Chamber (and Prosecutor) can only guess what error he alleges occurred. This is not sufficient.[288]

2. The Chamber did not abuse its discretion in distinguishing Uwinkindi's case from the "political" cases he relied upon.

119. In impugning the independence and impartiality of the entire Rwandan judiciary, Uwinkindi and his *amici* based their arguments on a handful of 'high profile political' or 'politically sensitive' cases in which they suspected executive interference.[289] The Chamber reasonably found that, because these cases were of a political nature, they did not necessarily reflect the conditions of trial or charges he

[284] Decision, paras. 170-96.
[285] Decision, paras 170, 177, 179-83, 186-96.
[286] *Krajišnik*, para. 19.
[287] *Musema*, para. 277.
[288] *Kamuhanda*, para. 187.
[289] RP 3644-38, paras. 218-43. With respect to cases of suspected genocidaires, Uwinkindi makes a general reference to Human Rights Watch Report but provides no details or elaboration. He also appears to premise his case of alleged interference in cases of suspected genocidaires only on 'high political figures,' and he admits that he does not fall into this category. RP 3638, paras. 244-245; RP 2496-94, paras. 71-72; 75.

would face if his case was referred to trial.[290] There are at least four reasons why this distinction was reasonable and not a discernable error.

120. First, the Chamber was entitled to examine Uwinkindi's own argument *in casu*, as defined by the nature of the Rwandan cases he (and his *amici*) invoked to demonstrate executive interference in the Rwandan judiciary. His argument was that there was executive interference in 'political' or 'politically sensitive" cases – what he also defined as "cases of government opponents" or suspected genocidaries falling in the category of "high political figures."[291] Uwinkindi re-confirms on appeal that the cases he and his *amici* invoked were "largely political."[292] The Chamber committed no discernable error in examining these cases according to the argument Uwinkindi himself proposed.

121. Second, Uwinkindi's position on appeal, that his case is "political" or "politically sensitive," contradicts the position he pursued before the Chamber. In his response, Uwinkindi stated that his case did not fall within the class of "high political figures" facing genocide charges.[293] His "about-turn" on appeal alone justifies dismissal of this aspect of his appeal.

122. Third, Uwinkindi's attempt on appeal to link his case to the 'political' or 'politically sensitive' cases he invoked before the Chamber is tenuous, at best. The features of his case that he highlights on appeal – including that he is charged as a high-profile genocidaire; his alleged leadership in the perpetration of the massacres in his commune; and his being the first ICTR indictee to be transferred to Rwanda[294] – do not render his case 'political' in the same sense as most of the cases he invoked before the Chamber. Unlike Uwinkindi's cases, the cases he invoked before the Chamber involved alleged political opposition leaders. Uwinkindi is not a political opposition leader in any way comparable to the cases he cited below. Thus, the Chamber reasonably distinguished his case from these other cases.

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[290] Decision, para. 196.
[291] RP 3644, Title (j), p. 57.
[292] Brief, para. 75.
[293] RP 3638, paras. 244-45.
[294] Brief, para. 75.

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123. The Chamber's distinction is not rendered unreasonable simply because the Prosecutor General, in Rwanda's report to the President (submitted *after* the Chamber's Decision), said that "the people and the government of Rwanda applaud the Referral Chamber's 28 June 2011 decision allowing the referral of the captioned cases to Rwanda for trial."[295] This statement shows nothing more than what Rwanda has said all along: it regards the trial of those accused of genocide in Rwanda to be a critical step on its path toward national reconciliation and healing.[296]

124. Fourth and in all events, none of the so-called "political" cases invoked by Uwinkindi were sufficient to rebut the presumption of independence and impartiality applicable to Rwandan judges.[297] The Appeals Chamber has held that it is insufficient to allege that the independence of a judge was undermined merely because external pressure was exerted; it must also be proven that the judge was in fact influenced by such pressure.[298] Similarly, with regard to the presumption of impartiality, "it is for the appellant doubting the impartiality of a Judge to adduce reliable and sufficient evidence to the Appeals Chamber to rebut this presumption of impartiality."[299]

125. As shown in Section C above, the Chamber reasonably determined that the chain of events surrounding the Gacaca Appeals Courts' decisions vacating Uwinkindi's *in absentia* convictions was insufficient to rebut the usual presumption of independence and impartiality.

126. Uwinkindi's remaining submission to the Chamber likewise failed to rebut the usual presumption of independence and impartiality. Uwinkindi, for instance, adduced no evidence to support his allegations of political interference with judicial decisions. He referred to a handful of cases where certain political, military and media figures were arrested and prosecuted. But, he presented no evidence of

[295] RP 5192, p. 1.
[296] RP 2704, para. 3; 2655, para. 136.
[297] Decision, para. 166.
[298] *Nahimana*, paras. 30-46.
[299] *Nahimana*, para. 48.

alleged political interference. Instead, in a nutshell, his arguments were grounded on a false assumption that because the individuals in question might have been critical of the Rwandan government, their arrest and prosecution must have been politically motivated.

127. Trials in several of the cases that Uwinkindi invoked were completed. An examination of the verdicts returned reveal that the charges were well grounded, ranging from incitement of the people to rebel against the existing government; incitement intended to cause social unrest and threatening national security.[300] Furthermore, in a clear manifestation of independence and impartiality, the Rwandan Judges dismissed those charges that had not been proven.[301]

128. Other submissions that Uwinkindi made to the Chamber were similarly insufficient and, in some cases, entirely unsupported. The statement that Uwinkindi attributed to the President of the High Court – namely, that he told at least two persons that judges of his court had been subjected to interference – was expressly discredited by the judge.[302] Similarly, his allegation of political interference in the *Bizimungu* case – a case tried more than five years ago – was shown to be based on the equivocal opinion a single person based on triple-layer hearsay.[303]

129. Uwinkindi also twisted a statement by the President of the Supreme Court in relation to corruption in the Rwandan judiciary. Her statement was not an acknowledgment that corruption in the judiciary is widespread.[304] Instead, it was meant to articulate the judiciary's zero tolerance policy for corruption. [305]

130. In the same manner, Uwinkindi twisted the Ombudsman's report on the *perception* of corruption to reflect what he claimed were actual instances of

[300] RP 4158-55, paras. 38-41.
[301] RP 4159, para. 35.
[302] RP 4157, para. 41.
[303] RP 4152-51, paras. 51-56.
[304] RP 4161, para. 28.
[305] RP 4161, para. 28.

corruption.[306] As the Chamber reasonably observed, Rwanda has taken "significant steps" to stamp out actual corruption.[307] Indeed, an independent report by Transparency International ranked Rwanda as the least corrupt country in East Africa.[308]

131. Having considered all of these submissions, the Chamber reasonably determined that Uwinkindi's sweeping and unsubstantiated allegations were insufficient to rebut the presumption of impartiality and independence. Uwinkindi fails to demonstrate any abuse of discretion in this regard. He merely attempts to impermissibly substitute his own assessment for the Chamber's reasonable assessment of the same evidence.[309]

3. The Chamber committed no discernable error by considering the safeguards of monitoring and revocation.

132. Uwinkindi next claims that the Chamber erred in considering the monitoring and revocation mechanisms as safeguards against executive interference in the judiciary because, according to him, such interference is done secretly. The only way, he claims, such interference could be detected is if the parties disclosed it themselves. But, Uwinkindi provides no substantiation at all for this sweeping assumption. Indeed, his own submissions to the Chamber demonstrate that allegations of political interference can and have been monitored by persons other than the alleged perpetrators.[310] Well-versed as it is in matters relating to the fairness of trial, the Chamber committed no discernable error in relying on the ACHPR to report any suspected political interference in Uwinkindi's trial and, thereby, trigger potential revocation.[311]

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[306] RP 4098-97, paras. 2-4.
[307] Decision, para. 184.
[308] RP 4162, para. 25.
[309] *Kamuhanda*, paras. 252, 337.
[310] RP 3644-43, paras. 219-20; 3642-38, paras. 227-45 (citing reports of HRW and others of suspected political interference).
[311] Decision, paras. 196, 211.

I. Uwinkindi's undeveloped argument relating to the alleged "political climate" in Rwanda should be summarily dismissed.[312]

133. Uwinkindi next baldly alleges that the Chamber erred in "failing to consider any of the evidence relating to the deteriorating political climate in Rwanda."[313] But, he fails to identify what particular evidence he means, let alone show how the Chamber's further consideration of that evidence would establish any discernable error. Submissions "entirely devoid of any reference to the record or to features that might help identify what evidence is being challenged" are insufficient on appeal.[314]

134. The Chamber, in any event, considered Uwinkindi's and his *amici*'s submissions regarding several high-profile political cases.[315] "Having reviewed these cases," the Chamber reasonably determined that they did not "necessarily reflect the conditions of the trial or the charges that the Accused faces."[316] For the same reasons noted in the preceding section, Uwinkindi fails to show any abuse of discretion.

J. The Chamber committed no discernable error by fashioning "robust" monitoring and revocation provisions.[317]

135. In compliance with Rule 11 *bis* and settled jurisprudence, the Chamber incorporated meaningful monitoring and revocation provisions to safeguard Uwinkindi's fair trial rights.[318] However, it did so *only* after having satisfied itself that Uwinkindi's trial in Rwanda will be fair.[319] Although the Chamber identified a few discrete concerns, it was confident overall that Uwinkindi's trial will be consistent with internationally recognized fair trial standards.[320] To ensure that

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[312] Response to Ground 14.
[313] Brief, para. 80.
[314] *Niyitegeka*, paras. 172, 254, 259, 261.
[315] Decision, para. 196.
[316] Decision, para. 196.
[317] Response to Grounds 15 and 16.
[318] Decision, p. 57-59.
[319] Decision, paras. 35, 60, 132, 146, 167-169, 183, 211, 223.
[320] Decision, paras 35, 39-40, 88, 95, 110, 114, 131, 160-161, 183, 223-224.

this happens, the Chamber put in place a comprehensive system for monitoring in accordance with the recently-amended Rule.[321]

1. The Chamber properly considered monitoring as a safeguard for ensuring that Uwinkindi's trial will be fair.

136. Uwinkindi claims that the Chamber erred by placing "an undue and unreasonable emphasis on the monitoring system throughout the Decision."[322] However, the Chamber's treatment of monitoring was in line with Appeals Chamber jurisprudence, holding that it is an appropriate factor to consider in allowing referral.[323]

137. Contrary to Uwinkindi's argument, the Chamber did not treat monitoring and revocation as "the determinative, if not the only factors" to support referral.[324] In each of the examples Uwinkindi cites, the Chamber first satisfied itself that the substantive fair trial right at issue was secure.[325] Only then, did the Chamber impose the additional safeguard of monitoring (and, if necessary, revocation) to ensure that the right was honored in practice. This approach was both logical and legally correct.[326]

138. It also was within the Chamber's authority and broad discretion to fashion specific guidelines for the monitors it appointed.[327] The guidelines the Chamber fashioned were tailored to address particular concerns Uwinkindi raised and intended to make certain that those concerns never materialized.[328] As Uwinkindi acknowledges, the monitors will report any concerns relating to those matters to the President and, by extension, the Chamber and parties.[329]

139. The Chamber was under no misconception with respect to the monitors' role and responsibilities.[330] By using the word "ensure" in its findings, the Chamber

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[321] Rule 11 *bis* (D)(iv) and (F); Decision, paras. 205-208.
[322] Brief, paras. 91-102.
[323] *Stanković*, para. 52.
[324] Brief, para. 94.
[325] Brief, para. 95.
[326] *Rašević*, para. 82.
[327] Decision, para. 220 (quoting *Stanković*, para. 51).
[328] Decision, para. 211, p. 57-58; Brief, paras. 96-97.
[329] Brief, para. 89; Decision, para. 211, p. 57-58; *Munyakazi*, para. 30.
[330] Brief, paras. 86, 89.

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merely expressed its intention that the monitors will police Uwinkindi's fair trial rights and report any suspected violation to the Tribunal. Ensuring timely and accurate reporting from the monitors to the Tribunal was not *ultra vires*.

140. Equally misguided is Uwinkindi's claim that certain fair trial issues, especially those related to availability and protection of witnesses, cannot be ensured by monitoring. The jurisprudence he cites does not support this assertion.[331] To the contrary, the Appeals Chamber has previously held that monitoring and revocation procedures could provide an adequate remedy to address fair trial issues, including concerns relating to the availability to and protection of witnesses.[332] Indeed, it found that prior Trial Chambers erred in failing to consider the existence of a monitoring system and the remedy of revocation in their fair trial assessment.[333]

141. When the Appeals Chamber decided that monitoring and revocation would not be an adequate remedy, it did so in the context of findings relating to past concerns about the availability and protection of witnesses.[334] The Chamber took note of these prior concerns, but found them unavailing because of the substantial progress Rwanda had made in the intervening years.[335]

2. Uwinkindi fails to demonstrate any abuse of discretion in the Chamber's subsidiary findings regarding monitoring.

142. Uwinkindi next faults the Chamber for concluding that a "robust monitoring system is in place."[336] In support, he raises several alleged sub-errors relating to the Chamber's findings, all of which are unmeritorious.[337]

143. First, Uwinkindi's claim that the Chamber erred in finding that appropriate financial arrangements existed for monitoring.[338] The Chamber correctly cited the

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[331] Brief, paras, 98-101.
[332] *Munyakazi*, paras. 30; *Hategekimana*, para. 29.
[333] *Munyakazi*, paras. 30, 44; *Hategekimana*, para. 29.
[334] *Hategekimana*, para. 38; *Munyakazi*, paras. 44-45.
[335] Decision, paras. 101-104, 108, 110, 112, 132.
[336] Brief, para. 102, 82
[337] The alleged sub-error with respect to monitoring conditions of detention, Brief, paras. 87-88, is addressed in Section E above.
[338] Brief, paras. 83-85.

2011 acceptance letter from the ACHPR, which set forth its understanding relating to the financial arrangements required for monitoring.[339] At the same time, the Chamber's instructed the Registrar to secure a formal arrangement that would clearly stipulate the logistical, financial, and other modalities by which the monitoring shall be carried out. This direction was reasonably related to the Chamber's mandate under amended Rule 11 *bis* (D)(iv), which confers substantial discretion on the Chamber to determine how monitoring will be conducted, including the necessary financial modalities.[340] The Chamber, in all events, was not required to work out all the modalities of its monitoring plan before allowing referral.[341]

144. Second, the Chamber did not act *ultra vires* in requiring ACHPR to appoint more than one monitor.[342] The Chamber issued the order under its new mandate to send monitors, and thus acted within its authority.[343] This order is within the core of the Chamber's inherent discretionary powers.

145. Lastly, Uwinkindi challenges the Chamber's conclusion that "the parties do not dispute the qualifications of the ACHPR to monitor a transferred case".[344] This finding was reasonable given Uwinkindi's submissions that he had "no doubt about the professionalism and integrity of the ACHPR's members,"[345] and did "not question the fact that the ACHPR has experience in adjudicating cases involving alleged violations of human rights."[346] His only reservation was that he questioned whether ACHPR had any experience in monitoring trials.[347] The Chamber, however, was satisfied based on ACHPR's qualifications, independence, and experience that it was well-suited to the task.[348]

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339 Decision, para. 210, n. 302; RP 4609.
340 *Stanković* , paras. 51, 54; Decision, paras. 209, 220.
341 *Stanković*, para. 57; *Janković*, para. 56; RP 4133, para. 104.
342 Brief, para. 86.
343 Decision, paras. 209, 213; *Stanković*, paras. 51, 54.
344 Brief, para. 90 (quoting Decision, para. 211)
345 RP 4656, para. 109.
346 RP 4656, para. 109.
347 RP 4656, paras. 107-08; 4655, paras. 110-11.
348 Decision, para. 211; RP 4619-4568.

3. Uwinkindi fails to demonstrate a discernable error in the Chamber's findings regarding revocation.

146. Uwinkindi also faults the Chamber for not properly examining the conditions for revocation.[349] The Chamber correctly observed that revocation should be "a remedy of last resort . . . not a panacea."[350] This statement reflects both the letter and spirit of Rule 11 *bis* (D)(iv) and (F), which provide that monitoring and reporting are the primary safeguards against suspected violations of fair trial rights. Resort to revocation should only be had if monitoring and reporting are unable to rectify the violation.

147. The Chamber was mindful of the delays associated with proceedings for the referral of cases to a national jurisdiction and the additional time required for revocation of a case following referral. Given these realities, the Chamber reasonably concluded that revocation should be a "last resort."[351] It did not, contrary to Uwinkindi's suggestion, exclude the possibility of revocation. It merely noted that a revocation procedure could be time-consuming

148. The Chamber also reasonably determined that the "monitor would be in a position, not only to provide accurate and up-to-date data on the conduct of the proceedings in Rwanda, but to support or investigate any application for the revocation of a transferred case."[352] Both work hand-in-hand. This finding does not go against the ACHPR being an independent organ charged with monitoring the proceedings.[353]

149. In addition, Uwinkindi takes issue with the Chamber's finding that he could trigger revocation by raising a complaint with the President and asking the Chamber to exercise its authority *proprio motu* to initiate the revocation process.[354] This alleged error was not raised in Uwinkindi's Notice of Appeal, and should,

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[349] Brief, para. 103.
[350] Decision, para. 217; Brief, paras. 104-06
[351] Decision, para. 217.
[352] Decision, para. 218.
[353] Brief, para. 107.
[354] Brief, paras. 107-10.

therefore, be disregarded.[355] In any event, the report relating to Rule 11 *bis*' amendment explicitly endorses the Chamber's finding. It provides:

> The basis for the Trial Chamber to consider revocation *proprio motu* may be the reports from the monitors and/or reports from human rights NGOs and/or complaints from the accused.[356]

150. Uwinkindi's further claim that he will not be in a position to alert the Chamber to a potential basis for revocation because he may not receive the monitor's reports is unconvincing.[357] Uwinkindi, together with his counsel, are best placed to identify potential concerns and raise them with the President, regardless of whether he is granted access to the monitor's reports. Moreover, his claim that counsel will be unwilling to represent him and, thus, assist in reporting potential violations is without basis for the reasons noted above.[358]

K. Because there was no individual error, Uwinkindi's reliance on any alleged "cumulative" error is misplaced.[359]

151. Lastly, for the first time on appeal, Uwinkindi faults the Chamber for allegedly "failing to consider the cumulative effect of all the ways in which [his] right to a fair trial are likely to be breached."[360] As demonstrated in the preceding sections, however, Uwinkindi has failed to establish any discernable error in the Chamber's treatment of his multiple grounds of appeal. Moreover, he fails to demonstrate any abuse of discretion in the Chamber's reliance on a robust monitoring mechanism to further safeguard Uwinkindi's fair trial rights. Because no individual error has been shown, there could be no cumulative error.

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[355] *Ntakirutimana*, para. 370.
[356] Report on Amendment to Rule 11 *bis*, 15 March 2011, para. 9.
[357] Brief, paras. 111-14.
[358] *See* Section G (2) above.
[359] Response to Ground 2.
[360] Brief, para. 6.

153/A

III. Conclusion

152. In sum, the Chamber's decision allowing the Prosecutor's application for referral of Uwinkindi's case to Rwanda for trial should be affirmed.

Word Count: 14,735

Dated and signed this 28th day of September 2011, Arusha, Tanzania.

James J. Arguin
Chief, Appeals & Legal Advisory Division

152/A

ANNEX – CITED MATERIALS AND DEFINED TERMS

A – Jurisprudence

1. ICTR

Akayesu

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (*Akayesu*)

Bagaragaza

The Prosecutor v. Michel Bagaragaza, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006 (*Bagaragaza*)

Gacumbitsi

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 (*Gacumbitsi*)

Hategekimana

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*)

Kamuhanda

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (*Kamuhanda*)

Kanyarukiga

Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 (*Kanyarukiga*)

Munyakazi

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*, 8 October 2008, (*Munyakazi*)

Musema

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (*Musema*)

Nahimana

Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (*Nahimana*)

Niyitegeka

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (*Niyitegeka*)

Nshogoza

Léonidas Nshogoza v. The Prosecutor, Case No. ICTR-2007-91-A, Judgement, 15 March 2010 (*Nshogoza*)

Ntakirutimana

The Prosecutor v. Elizaphan Ntakirutimana et al., Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 (*Ntakirutimana*)

Rutaganda

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (*Rutaganda*)

Rwamakuba

André Rwamakuba v. The Prosecutor, Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007 (*Rwamakuba*)

2. ICTY

Janković

Prosecutor v. Gojko Janković, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005 (*Janković*)

Krajišnik

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 (*Krajišnik*)

Kvočka

The Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, Judgement, 28 February 2005 (*Kvočka*)

Mejakić

Prosecutor v. Želko *Mejakić et al.*, Case No. IT-02-65-*AR11bis*.1, Decision on Joint Defence Appeal against Decisions on Referral under Rule 11*bis*, 7 April 2006 (*Mejakić*)

Rašević

Prosecutor v. Mitar Rašević et al., Case No. IT-97-25/1-AR11*bis*1 & IT-97-25/1-AR11*bis*2, Decision on Savo Todović's Appeals against Decision on Referral under Rule 11*bis*, 4 September 2006 (*Rašević*)

Stanković

The Prosecutor v. Radovan Stanković, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005 (*Stanković*)

B – Defined Terms and Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
Brief	*Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-2001-75-AR11bis, Defence Appeal Brief against the Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, 8 September 2011
Chamber	Referral Chamber designated under Rule 11 *bis*
Decision	*Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011
IADL	International Association of Democratic Lawyers
ICCPR	International Covenant on Civil and Political Rights
ICDAA	International Criminal Defence Attorneys Association

ICTY	International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
HRW	Human Rights Watch
n.	footnote
p.	page
para. (paras.)	paragraph (paragraphs)
Prosecutor	Office of the Prosecutor
RP	Registry Page
Rules	Rules of Procedure and Evidence of the ICTR
RWF	Rwandan Franc
Statute	Statute of the International Tribunal for Rwanda
Transfer Law	Organic Law No. 11/2007 of 16/03/2007, concerning transfer of cases to the Republic of Rwanda from the International Tribunal for Rwanda and from other States (O.G., 19 March 2007), as modified and complemented by Organic Law No. 03/2009/OL of 26/05/2009 (O.G., 26 May 2009)
Tribunal or ICTR	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
Uwinkindi	Jean Uwinkindi

United Nations
Nations Unies

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