



Mechanism for International Criminal Tribunals

Case No. MICT-12-25-R14.1

Date: 22 October 2015

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IN THE TRIAL CHAMBER

Before: Judge Vagn Joensen, Presiding
Judge William H. Sekule
Judge Florence R. Arrey

Registrar: Mr. John Hocking

Decision of: 22 October 2015

PROSECUTOR

v.

JEAN UWINKINDI

PUBLIC

DECISION ON UWINKINDI'S REQUEST FOR REVOCATION

The Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
François Nsanzuwera

Counsel for Jean Uwinkindi:

Gatera Gashabana

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Mechanism for International Criminal Tribunals
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VJ.

1. The Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively) is seised of Jean Uwinkindi’s request for the revocation of the referral of his case to the Republic of Rwanda.¹ The Prosecution and the Republic of Rwanda filed their respective responses on 4 September 2015.² Uwinkindi filed his reply on 14 October 2015.³

I. BACKGROUND

2. Uwinkindi, a former pastor of the Kayenzi Pentecostal Church in Nyamata Sector, Kanzenze Commune, Kigali-Rural Prefecture, was charged before the International Criminal Tribunal for Rwanda (“ICTR”) with genocide and extermination as a crime against humanity, related to alleged attacks at his church, area roadblocks, Rwankeri Cellule, Kayenzi hill, the Cyugaro swamps, and the Kanzenze communal offices.⁴ Uwinkindi was arrested in Uganda on 30 June 2010 and transferred to the ICTR on 2 July 2010.⁵ On 28 June 2011, a referral chamber, designated under Rule 11*bis* of the ICTR Rules of Procedure and Evidence (“Referral Chamber” and “ICTR Rules”, respectively), ordered that Uwinkindi’s case be referred to the authorities of the Republic of Rwanda for trial before the High Court of Rwanda.⁶ On 16 December 2011, the ICTR Appeals Chamber affirmed the order of the Referral Chamber and dismissed Uwinkindi’s appeal.⁷ Following the referral of his case to Rwanda, Uwinkindi was transferred to the custody of the Rwandan authorities on 19 April 2012.⁸

3. On 13 May 2015, the President of the Mechanism considered Uwinkindi’s comments as reported in the March 2015 Monitoring Report as a request for revocation of the order referring his case to Rwanda and assigned the matter to the Trial Chamber.⁹ On 22 May 2015, the Pre-Trial Judge

¹ *Mémoire à l’appui de la requête d’Uwinkindi Jean en annulation de l’ordonnance de renvoi*, 5 August 2015 (confidential) (“Brief in Support of the Revocation Request”), paras. 33, 44, 47, p. 27. See also Decision on Request for Revocation of an Order Referring a Case to the Republic of Rwanda and Assigning a Trial Chamber, 13 May 2015 (“Decision of 13 May 2015”), pp. 2, 3; Decision on Additional Request for Revocation of an Order Referring a Case to the Republic of Rwanda, 5 June 2015 (“Decision of 5 June 2015”), p. 3.

² Prosecution Brief Responding to Uwinkindi’s Revocation Request, 4 September 2015 (“Prosecution’s Response”); Republic of Rwanda’s Response to Jean Uwinkindi’s Request for Revocation of the Referral Order, 4 September 2015 (“GoR Response”).

³ *Réplique de la Défense aux conclusions en réponse du Procureur suivant Decision du 09 octobre 2015*, 14 October 2015 (“Reply”).

⁴ *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi’s Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 (“Appeal Decision of 16 December 2011”), para. 2. See also *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, Amended Indictment, 16 December 2011, paras. 4, 11-39.

⁵ *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, Rule 11*bis* of the Rules of Procedure and Evidence, 28 June 2011 (“Referral Decision”), para. 3.

⁶ Referral Decision, pp. 57-59.

⁷ Appeal Decision of 16 December 2011, para. 89.

⁸ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (May 2012), 1 September 2012 (confidential and *ex-parte*) (“Monitoring Report for May 2012”), para. 3.

⁹ Decision of 13 May 2015, pp. 2, 3. See also Decision of 5 June 2015, pp. 2, 3 (in which the President of the Mechanism referred a *pro se* written request for revocation to the Trial Chamber).

found that it would be in the interests of justice to only consider Uwinkindi's request for the revocation of his case after he had been assigned counsel and his counsel had been given an opportunity to prepare a brief in support of the revocation request.¹⁰ Accordingly, the Pre-Trial Judge set-forth the time-line for the briefing in this case and ordered Uwinkindi to file his brief in support of his request for revocation no later than 30 days following the assignment of counsel by the Registry.¹¹ On 22 June 2015, the Registrar assigned Mr. Gatera Gashabana as Uwinkindi's lead counsel.¹²

4. On 22 July 2015, the Pre-Trial Judge extended the time for Uwinkindi to file his Brief in Support of the Revocation Request and also extended the word limit for the brief to 9,000 words.¹³ On 5 August 2015, Uwinkindi filed his Brief in Support of the Revocation Request,¹⁴ followed by the filing of a Supplemental Brief on 12 August 2015.¹⁵ Uwinkindi filed the annexes to his Brief in Support of the Revocation Request on 9 September 2015,¹⁶ and on 28 September and 9 October 2015, he supplemented further his submissions in support of the revocation request.¹⁷ The Prosecution sought leave to supplement its submissions on 12 October 2015.¹⁸

¹⁰ Scheduling Order, 22 May 2015 ("Scheduling Order"), p. 1.

¹¹ Scheduling Order, p. 1.

¹² Decision, 22 June 2015, p. 2.

¹³ Decision on Jean Uwinkindi's Request for Extension of Time and for Extension of the Word Limit, 22 July 2015 ("Decision of 22 July 2015"), para. 8.

¹⁴ Brief in Support of the Revocation Request, p. 27. Uwinkindi originally filed his brief confidentially. On 1 October 2015, the Trial Chamber changed the classification to public. See Decision on Uwinkindi's Motion for a Stay of Proceedings before the High Court of Rwanda, an Oral Hearing, and Other Related Matters, 1 October 2015 ("Decision of 1 October 2015"), paras. 8, 9, 27.

¹⁵ *Mémoires complémentaires à l'appui de la requête d'Uwinkindi Jean en annulation de l'Ordonnance de renvoi*, 12 August 2015 (confidential) ("Uwinkindi's First Supplemental Brief"). The Prosecution objected to the filing of Uwinkindi's First Supplemental Brief. Trial Chamber, however, accepted the brief as validly filed. See Decision of 1 October 2015, paras. 10-14, 27.

¹⁶ *Transmission des éléments de preuve à l'appui de nos diverses écritures*, 9 September 2015 ("Annexes to Brief in Support of the Revocation Request").

¹⁷ *Communication à la Chambre des éléments de preuve et information supplémentaires, conformément à l'article 72D du Règlement de procédure de preuve*, 28 September 2015 ("Uwinkindi's Second Supplemental Brief"); *Communication à la Chambre et au Procureur de l'arrêt rendu par la Haute Cour en son audience publique du 29 septembre 2015, conformément à l'article 72D du Règlement de Procédure de Preuve*, 9 October 2015 ("Uwinkindi's Third Supplemental Brief"). The Trial Chamber notes that, in his supplemental filings, Uwinkindi refers to developments in his case before the High Court which occurred after the briefing was completed and which are pertinent to the matter before the Trial Chamber (see, e.g., Uwinkindi's Second Supplemental Brief, paras. 16-19, 23, 27, 28, 34; Uwinkindi's Third Supplemental Brief, paras. 28, 29, 38). The Trial Chamber is therefore satisfied that good cause exists, pursuant to Rule 154(A)(ii) of the Rules of Procedure and Evidence of the Mechanism ("Rules"), for recognizing Uwinkindi's Second and Third Supplemental Briefs as validly filed.

¹⁸ Prosecution's Motion for Supplemental Filing, 9 October 2015 ("Prosecution's Supplemental Brief"), para. 13. The Trial Chamber notes that in its filing, the Prosecution refers to developments in the Uwinkindi's case before the High Court which occurred after the Prosecution filed its response to Uwinkindi's request for revocation and which are pertinent to the matter before the Trial Chamber (see Prosecution's Supplemental Brief, paras. 2, 8, 9, Annexes A, C, D). The Trial Chamber is therefore satisfied that good cause exists, pursuant to Rule 154(A)(ii) of the Rules, for recognizing the Prosecution's Supplemental Brief as validly filed.

5. On 4 September 2015, the Prosecution and the Republic of Rwanda filed their respective responses, requesting that the Trial Chamber deny Uwinkindi's revocation request.¹⁹ Uwinkindi filed a reply on 18 September 2015, and shortly thereafter the Prosecution requested that the Trial Chamber strike the reply as filed out-of-time, exceeding the word limit, misreporting the word count, and circumventing the rules governing the admission of expert witness testimony.²⁰ On 9 October 2015, the Trial Chamber ordered Uwinkindi to re-file his reply in compliance with the applicable word limit.²¹ Uwinkindi re-filed his reply on 14 October 2015.²²

6. As part of his Brief in Support of the Revocation Request, Uwinkindi also sought a stay of the proceeding before the High Court of Rwanda, pending the resolution of his revocation request.²³ On 11 August 2015, the Pre-Trial Judge ordered the Prosecution and the Republic of Rwanda to file expedited responses, if any, to Uwinkindi's request for a stay of the proceedings before the High Court of Rwanda made in the Brief in Support of the Revocation Request.²⁴ In addition, on 24 August 2015, Uwinkindi requested that the Trial Chamber allow the parties to present oral arguments.²⁵ On 1 October 2015, the Trial Chamber dismissed Uwinkindi's request for stay of the proceedings before the High Court of Rwanda, pending the resolution of his revocation request, as well as his request for oral arguments.²⁶ On 22 October 2015, the Trial Chamber dismissed Uwinkindi's request for certification to appeal the Decision of 1 October 2015.²⁷

II. DISCUSSION

1. Jurisdiction and Applicable Law

7. Rule 11bis of the ICTR Rules, allows a designated trial chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. Pursuant to Article 6(5) of the Statute of the Mechanism

¹⁹ Prosecution's Response, para. 55; GoR Response, para. 7.

²⁰ Prosecutor's Motion to Strike Uwinkindi's Reply, 25 September 2015, paras. 1, 16.

²¹ Decision on Prosecutor's Motion to Strike Uwinkindi's Reply Brief, 9 October 2015, p. 3.

²² Reply, RP. 2337.

²³ Brief in Support of the Revocation Request, paras. 171-177, p. 27. The Trial Chamber notes that, in a letter to the President of the Mechanism dated 28 May 2015, Uwinkindi requested that the President order a stay of the proceedings before the High Court of Rwanda. On 22 July 2015, the President of the Mechanism forwarded Uwinkindi's letter to the Trial Chamber.

²⁴ Order for Expedited Responses and Reply to Jean Uwinkindi's Request for Stay of Proceedings, 11 August 2015, p. 1.

²⁵ *Requête tendant à solliciter une ordonnance invitant les parties à présenter les arguments oraux (Oral Hearing) devant la Chambre*, 24 August 2015, RP. 1043.

²⁶ Decision of 1 October 2015, paras. 22-24, 26, 27.

²⁷ Decision on Uwinkindi's Request for Certification to Appeal the Decision Denying his Request for Stay of Proceedings and for Oral Hearing, 22 October 2015, p. 3.

("Statute"), the Mechanism has a duty to monitor cases referred to national courts by the ICTR.

Article 6(6) of the Statute provides:

After an order referring a case has been issued by the [...] ICTR [...] and before the accused is found guilty or acquitted by a national court, where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice, the Trial Chamber may, at the request of the Prosecutor or *proprio motu* and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral.²⁸

8. It follows from Article 6(6) of the Statute that the Trial Chamber may, at the request of the Prosecution or *proprio motu*, revoke the referral of a case to a national jurisdiction.²⁹ In addition, the Referral Chamber expressly granted Uwinkindi standing to bring forward perceived violations of his rights by the Rwandan courts and to seek revocation.³⁰

9. In accordance with Article 6(6) of the Statute, an order for the referral of a case before a national jurisdiction issued by the ICTR may be revoked "where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice". In making this assessment, the Trial Chamber is mindful that the Mechanism's role is not to act as an independent level of appellate review for the national proceedings, but rather to determine primarily whether the conditions for a fair trial in the domestic jurisdiction no longer exist. Such a determination must necessarily take due consideration of the possibility and availability of remedies for any procedural irregularities at the trial and appeal stage of the national proceedings.³¹ The Trial Chamber is also of the view that a party should not wilfully obstruct national proceedings in a transferred case in an effort to have the case revoked by the Mechanism. In accordance with the Referral Decision, revocation pursuant to Article 6(6) of the Statute is a remedy of last resort.³²

²⁸ See also Rule 11bis(F) of the ICTR Rules.

²⁹ In addition, Rule 14(C) of the Rules provides that the President of the Mechanism may, *proprio motu* or at the request of the Prosecution, assign a Trial Chamber to decide, pursuant to Article 6(6) of the Statute, whether to revoke the referral order and make a formal request for deferral.

³⁰ Referral Decision, p. 59. See also Appeal Decision of 16 December 2011, para. 79. The Appeals Chamber has also explicitly determined that a trial chamber has inherent jurisdiction to consider a direct request for revocation from an accused whose case has been referred to a state for trial, to the extent that such a request concerns the fairness of proceedings. See *Prosecutor v. Radovan Stanković*, Case No. MICT-13-51, Decision on Stanković's Appeal against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, 21 May 2014 ("*Stanković* Appeal Decision"), para. 8. The Appeals Chamber also determined that there is a right to appeal a trial chamber's decision on revocation and set forth the appropriate procedure. See *Stanković* Appeal Decision, para. 9.

³¹ See *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on Gojko Janković's Motion of 12 April 2010, 21 June 2010, para. 10.

³² Referral Decision, para. 217. See also *The Prosecutor v. Bernard Munyugishari*, Case No. ICTR-2005-89- R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012, para. 216.

2. Arrest and Pre-Trial Detention

10. Uwinkindi submits that: (i) upon his arrival in Rwanda, he was arrested in violation of the domestic law;³³ (ii) did not have the assistance of counsel when questioned by the judicial police and the Rwandan Prosecution on 21 and 23 April 2012;³⁴ (iii) the order for his detention was issued in violation of Articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR");³⁵ and (iv) he was in pre-trial detention since his arrest in July 2010, thus exceeding the maximum period of one year pre-trial detention allowed under domestic law.³⁶

11. In response, the Prosecution submits that Rwanda observed all international and domestic legal requirements in relation to Uwinkindi's arrest and that Uwinkindi was not required to provide any statements in the absence of his counsel.³⁷ The Prosecution further submits that Uwinkindi's pre-trial detention in Rwanda lasted less than six months and that the period of his detention at the ICTR should not be considered in the context of Uwinkindi's revocation request.³⁸

12. The Trial Chamber notes that Uwinkindi was arrested by the Rwandan authorities on 19 April 2012 and, according to the police report which was signed by Uwinkindi, he was informed of the charges against him and of his rights in accordance with Rwandan law.³⁹ Uwinkindi fails to substantiate his submission that his arrest was in breach of domestic legal provisions or that the subsequent order for his detention violated international human rights standards. Similarly, Uwinkindi fails to provide any materials in support of his claim that he was improperly questioned by the judicial police and the Rwandan Prosecution on 21 and 23 April 2012 in the absence of counsel and, if so, that the questioning caused him any prejudice resulting in an unfair trial.⁴⁰

13. In relation to the length of Uwinkindi's pre-trial detention, the Trial Chamber notes that Uwinkindi was arrested in Uganda on 30 June 2010 and transferred to the ICTR on 2 July 2010.⁴¹ Following the referral of his case to Rwanda, Uwinkindi was transferred to the custody of the Rwandan authorities on 19 April 2012.⁴² Uwinkindi's request to be released on bail was denied on

³³ Brief in Support of the Revocation Request, para. 28.

³⁴ Brief in Support of the Revocation Request, para. 29; Reply, para. 58.

³⁵ Brief in Support of the Revocation Request, para. 30; Reply, para. 59.

³⁶ Brief in Support of the Revocation Request, para. 31; Reply, para. 60.

³⁷ Prosecution's Response, paras. 44, 45.

³⁸ Prosecution's Response, paras. 46-49.

³⁹ See Prosecution's Response, Annex 3.

⁴⁰ The Prosecution provided the Trial Chamber with a record of Uwinkindi's interview with the Rwandan Prosecution on 23 April 2012, which shows that Uwinkindi was informed of his right to have a legal counsel present. The interview was subsequently suspended until counsel was assigned. See Prosecution's Response, Annex. 4.

⁴¹ Referral Decision, para. 3.

⁴² Monitoring Report for May 2012, para. 3.

29 August 2012,⁴³ and his subsequent appeal was dismissed by the High Court on 24 September 2012.⁴⁴ On 28 September 2012, the Rwanda Prosecution submitted the case file to the High Court,⁴⁵ and the trial was originally scheduled to commence on 14 January 2013.⁴⁶ However, the start of the trial was repeatedly postponed following requests from Uwinkindi to have more time for trial preparation.⁴⁷ The trial commenced on 14 May 2014.⁴⁸

14. The Trial Chamber recalls that the length of pre-trial detention is necessarily linked to the right to be tried without undue delay which, in turn, is an inseparable and constituent element of the right to a fair trial.⁴⁹ A review of Uwinkindi's submissions does not reveal that he has challenged the length of his pre-trial detention before the High Court. Uwinkindi has also not shown that any possible violation, if established, could not be addressed or appropriately remedied by the High Court or in any subsequent appellate proceedings. Accordingly, the Trial Chamber is not satisfied that the conditions for referral of the case are no longer met in view of the length of Uwinkindi's pre-trial detention and that it is in the interests of justice to revoke the order of referral of Uwinkindi's case.

⁴³ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (August 2012), 12 October 2012, para. 11.

⁴⁴ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (September 2012), 12 October 2012, para. 10.

⁴⁵ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (October–November 2012), 6 December 2012, para. 3.

⁴⁶ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (20 December 2012 to 31 January 2013), 4 February 2013 (“Monitoring Report for December 2012 and January 2013”), para. 2.

⁴⁷ Monitoring Report for December 2012 and January 2013, paras. 6, 10; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case (1 to 31 March 2013), 12 April 2013 (“Monitoring Report for March 2013”), paras. 6-7; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitors for the Uwinkindi Case (1 May to 30 June 2013), 2 July 2013 (“Monitoring Report for May and June 2013”), para. 8; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for the Uwinkindi Case (July – August 2013), 12 September 2013 (“Monitoring Report for July and August 2013”), paras. 3, 18, 53; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for the Uwinkindi Case (September 2013), 31 October 2013 (“Monitoring Report for September 2013”), para. 17; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for the Uwinkindi Case (October and November 2013), 20 December 2013 (“Monitoring Report for October and November 2013”), para. 41; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for the Uwinkindi Case (January and February 2014), 11 March 2014 (“Monitoring Report for January and February 2014”), para. 60; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for the Uwinkindi Case (March 2014), 27 March 2014, para. 4.

⁴⁸ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for May 2014, 4 July 2014 (“Monitoring Report for May 2014”), para. 4.

⁴⁹ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 (“Šainović et al. Appeal Judgement”), para. 100. Before the *ad hoc* Tribunals, a number of considerations are relevant to this assessment, including: (i) the length of the delay; (ii) the complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence, the complexity of the facts and of the law); (iii) the conduct of the parties; (iv) the conduct of the authorities involved; and (v) the prejudice to the accused, if any. See *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Judgement, 4 February 2013, para. 30; *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 18; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, para. 238; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“Nahimana et al. Appeal Judgement”), para. 1074.

Moreover, the Trial Chamber observes that the revocation of Uwinkindi's referral and any subsequent trial before the Mechanism would only serve to prolong Uwinkindi's pre-trial detention.⁵⁰

3. Non bis in idem

15. Uwinkindi argues that the High Court violated the principle of *non bis in idem* by allowing his prosecution for the charge of complicity in genocide, although the ICTR refused to confirm the charge in the original indictment.⁵¹ In response, the Prosecution submits that there is no violation of the principle of *non bis in idem* as Uwinkindi has not been finally convicted or acquitted by the ICTR for complicity in genocide.⁵²

16. The Trial Chamber notes that on 24 August 2001, the Prosecution filed the initial indictment against Uwinkindi, charging him, *inter alia*, with genocide and, in the alternative, with complicity in genocide.⁵³ On 31 August 2001, ICTR Trial Chamber III confirmed the indictment, in part, and in relation to the count of complicity in genocide, directed the Prosecution to amend the indictment by clearly indicating the facts that could support Uwinkindi's involvement in the crime and the mode of liability.⁵⁴

17. The Trial Chamber recalls that the *non bis in idem* principle aims to protect a person who has been finally convicted or acquitted from being tried for the same offence again.⁵⁵ To the extent that Uwinkindi was not convicted for the crime of complicity in genocide by the ICTR, the principle of *non bis in idem* does not apply. Accordingly, his submission in this regard is dismissed.

4. Right to Counsel of Own Choosing

18. Following his transfer to Rwanda, Uwinkindi informed the Rwanda Bar Association that he was unable to fund his defence.⁵⁶ On 26 April 2012, Mr. Gatera Gashabana was assigned to represent Uwinkindi.⁵⁷ Mr. Gashabana was Uwinkindi's preferred choice as counsel.⁵⁸ Subsequently, Mr. Jean

⁵⁰ See Referral Decision, para. 217.

⁵¹ Brief in Support of the Revocation Request, paras. 34-39; Reply, para. 60.

⁵² Prosecution's Response, para. 54.

⁵³ *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-1, Confirmation of Indictment, 31 August 2001 ("Confirmation of Indictment"), paras. 1, 7.

⁵⁴ Confirmation of Indictment, paras. 7, 9.

⁵⁵ See *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11bis, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Decision on Referral under Rule 11 bis, 3 May 2013, para. 65 (citing references). See also Statute, Article 7; ICTR Statute, Article 9; ICTY Statute, Article 10.

⁵⁶ First Report of Interim Monitoring Mechanism – Uwinkindi, 30 April 2012 (confidential and *ex parte*) ("Monitoring Report for April 2012"), para. 3; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Second Monitoring Report for December 2014, 2 February 2015 ("Second Monitoring Report for December 2014"), para. 55.

⁵⁷ Monitoring Report for April 2012, para. 3.

⁵⁸ Monitoring Report for April 2012, para. 3; Second Monitoring Report for December 2014, para. 55.

Baptiste Niyibizi was assigned co-counsel for Uwinkindi.⁵⁹ On 18 November 2013, Mr. Gashabana informed the High Court that he had received a letter from the Ministry of Justice notifying him of a change in the payment scheme for the case and of the termination of his contract.⁶⁰ Subsequently, Mr. Gashabana signed a new contract with the Ministry of Justice with retroactive effect as of 1 November 2013.⁶¹ In May 2014, Mr. Gashabana informed the Monitor that he had asked the Rwanda Bar Association to explore the possibility of drafting a new contract which would establish monthly payments.⁶² Subsequently, a new payment proposal was considered and adopted.⁶³ In December 2014, the Ministry of Justice informed the Monitor that, as of January 2014, a new legal aid policy and a new model agreement between the Ministry of Justice and counsel who represent accused in transferred cases were in place. The new model agreement, which was prepared in consultation with the Rwanda Bar Association, provided for a lump sum of 15 million Rwandan Francs for the entire duration of the trial and any appeal in transferred cases.⁶⁴ In addition, Article 6 of the model agreement provided for a unilateral cancellation in the event that “Counsel make any statements aimed at discrediting the Government or the Ministry in the course of their work, either to the press or during the trial.”⁶⁵

19. Uwinkindi’s Defence did not accept the newly proposed agreement and the Ministry of Justice terminated their contract with a notice period of three months, during which time Counsel were required to continue assisting Uwinkindi.⁶⁶ On 30 December 2014, Counsel informed the High Court of the termination of their contract and stated that they could not continue to represent Uwinkindi for another three months if they were to be replaced.⁶⁷ The High Court adjourned the hearing, requesting Counsel to continue negotiating their contractual situation with the Ministry of Justice and to indicate at the next court hearing if they would continue to represent Uwinkindi.⁶⁸ On 14 January 2015, Uwinkindi requested a stay of proceedings until outstanding issues, including the uncertainty concerning his legal representation, were resolved.⁶⁹ Noting that the agreement between Counsel and

⁵⁹ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Report of the Court Monitor for the Uwinkindi Case July 2012, 5 November 2012, para. 4.

⁶⁰ Monitoring Report for October and November 2013, para. 25.

⁶¹ Monitoring Report for January and February 2014, para. 27.

⁶² Monitoring Report for May 2014, para. 66.

⁶³ Monitoring Report for May 2014, para. 66.

⁶⁴ Second Monitoring Report for December 2014, para. 15; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for January 2015, 3 March 2015 (“Monitoring Report for January 2015”), para. 33. See also Annexes to Brief in Support of the Revocation Request, RP. 1379-1373. The previous contract in the Uwinkindi case provided for monthly payments of 1 million Rwandan Francs. See Second Monitoring Report for December 2014, para. 34.

⁶⁵ Monitoring Report for January 2015, n. 15.

⁶⁶ Monitoring Report for January 2015, para. 36. See also Prosecution’s Response, Annexes 8, 9; Annexes to Brief in Support of the Revocation Request, RP. 1460-1459, 1369-1363.

⁶⁷ Second Monitoring Report for December 2014, paras. 50, 54.

⁶⁸ Second Monitoring Report for December 2014, para. 56.

⁶⁹ Monitoring Report for January 2015, para. 6.

the Ministry of Justice was under negotiation, on 15 January 2015 the High Court ruled that Uwinkindi could either accept the assistance of Counsel and continue the trial or request the appointment of a new counsel.⁷⁰ Uwinkindi responded that he would like to retain his Counsel and the High Court continued the proceedings, dismissing Uwinkindi's request for stay.⁷¹ However, following a brief adjournment, Counsel did not return to the court room, thus leaving Uwinkindi unrepresented.⁷² Having found that Counsel's decision to withdraw from the proceedings was made with the intention to delay the trial, the High Court imposed a fine on each Counsel in the amount of 500,000 Rwandan Francs.⁷³ On 21 January 2015, Counsel again failed to appear before the Court which led the High Court to conclude that Uwinkindi no longer had legal representation.⁷⁴ Accordingly, the High Court instructed that a new counsel be appointed, and, on 29 January 2015, Mr. Isacaar Hishamunda and Mr. Joseph Ngabonziza were appointed by the Rwanda Bar Association to represent Uwinkindi.⁷⁵

20. Uwinkindi objected to the appointment of the new counsel, claiming that he should have been provided with a list of counsels so that he could be represented by a counsel of his own choosing.⁷⁶ On 6 February 2015, the High Court found that, as an indigent accused, Uwinkindi was not entitled to counsel of his own choosing, confirmed the appointment of the new counsel, and ordered the continuation of the proceedings.⁷⁷ On 3 March 2015, Uwinkindi again objected to being represented by the newly appointed counsel.⁷⁸ In response to Uwinkindi's objection, the High Court considered that, if an accused does not want to have legal representation, it is his right not to be represented.⁷⁹ Having recognized that Uwinkindi was not assisted by counsel, throughout the month of March 2015, the High Court heard 14 Prosecution witnesses and nine Defence witnesses, none of whom were examined by Uwinkindi or by his newly appointed counsel who were present in the courtroom.⁸⁰ Uwinkindi also objected to his case file being handed over to his new counsel.⁸¹ On 24 April 2015,

⁷⁰ Monitoring Report for January 2015, para. 16.

⁷¹ Monitoring Report for January 2015, paras. 17, 19.

⁷² Monitoring Report for January 2015, para. 26; Prosecution's Response, Annex 15, paras. 5, 6.

⁷³ Monitoring Report for January 2015, para. 28; Prosecution's Response, Annex 15, para. 6.

⁷⁴ Monitoring Report for January 2015, para. 50; Prosecution's Response, Annex 15, paras. 7, 15.

⁷⁵ Monitoring Report for January 2015, para. 50; Prosecution's Response, Annex 15, para. 16; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for February 2015, 24 March 2015 ("Monitoring Report for February 2015"), para. 3, n. 2. See also Prosecution's Response, Annexes 12, 17.

⁷⁶ Monitoring Report for February 2015, paras. 9-12, 22, 23.

⁷⁷ Monitoring Report for February 2015, para. 43; See also Prosecution's Response, Annex 10, paras. 10-15.

⁷⁸ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for March 2015, 12 May 2015 ("Monitoring Report for March 2015"), paras. 16, 17.

⁷⁹ Monitoring Report for March 2015, para. 28.

⁸⁰ Monitoring Report for March 2015, paras. 7, 29, 38, 39, 46, 66-68, 100, 101, 104, 127, 132, 139, 140, 142.

⁸¹ *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for April 2015, 24 June 2015 ("Monitoring Report for April 2015"), para. 40; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Joint Monitoring Report for May and June 2015, 12 August 2015 ("Monitoring Report for May and June 2015"), para. 71. See also Uwinkindi's First Supplemental Brief, RP. 1027-1024.

the Supreme Court dismissed Uwinkindi's appeal and confirmed the appointment of the new counsel as lawful.⁸² On 9 June 2015, the High Court confirmed that the new counsel should continue to represent Uwinkindi, decided that the witnesses should be re-heard, and adjourned the trial until 10 September 2015 in order to allow newly appointed counsel to prepare for the trial.⁸³

21. On 23 September 2015, the newly appointed counsel informed the High Court that they have no communication with Uwinkindi and therefore are unable to make submissions on his behalf or to proceed with examining witnesses.⁸⁴ Consequently, the High Court allowed Uwinkindi to choose a new counsel from a list of 68 counsels.⁸⁵ On 24 September 2015, Uwinkindi informed the High Court of his objections to the manner in which counsel on the list were selected and to their competence, and declined to choose a counsel.⁸⁶ On 29 September 2015, the High Court issued a decision indicating that Counsel Hishamunda and Ngabonziza had received the case file and familiarized themselves with it, ruling that counsel should continue to represent Uwinkindi, and ordering that the proceedings resume on 15 October 2015.⁸⁷

22. Uwinkindi alleges that his right to be represented by counsel of his own choosing was violated when Counsel Gashabana was dismissed⁸⁸ and a new counsel, who did not have the required years of experience, was imposed on him.⁸⁹ Uwinkindi submits that despite his appeal against the decision assigning the new counsel, the proceedings continued and he had no legal representation during the hearings before the High Court in March 2015.⁹⁰ Uwinkindi further argues that, subsequently, he was forced to choose a counsel from a list of counsels compiled by the Ministry of Justice in violation of the principle of separation of powers.⁹¹ In addition, Uwinkindi argues that the High Court's decision

⁸² Monitoring Report for April 2015, para. 63. See also Prosecution's Response, Annex 11, paras. 47-64, 67. On 9 March 2015, the Supreme Court refused to hear the case until Counsel Gashabana and Niyibizi, who represented Uwinkindi *pro bono* before the Supreme Court, had paid the fine imposed by the High Court on 15 January 2015. See Monitoring Report for March 2015, paras. 90, 92, 95, 98; Monitoring Report for April 2015, paras. 12, 13, 18; Prosecution's Response, Annex 11, para. 8.

⁸³ Monitoring Report for May and June 2015, para. 70; Prosecution's Response, Annex 14, para. 15.

⁸⁴ Prosecution's Supplemental Brief, Annex A, pp. 2, 5, 6.

⁸⁵ Prosecution's Supplemental Brief, Annex A, pp. 8, 9.

⁸⁶ Prosecution's Supplemental Brief, Annex C, paras. 1-18.

⁸⁷ Uwinkindi's Third Supplemental Brief, RP. 1979-1977; Prosecution's Supplemental Brief, Annex D ("High Court Decision of 29 September 2015"). Both Uwinkindi and the Prosecution submitted the High Court's decision of 29 September 2015 in Kinyarwanda. The Trial Chamber reviewed the High Court's decision with the assistance of a Kinyarwanda interpreter provided by the Conference and Language Services Section.

⁸⁸ Brief in Support of the Revocation Request, paras. 45, 67, 74, 149-151, 155; Reply, paras. 5-10, 11-21.

⁸⁹ Brief in Support of the Revocation Request, paras. 72, 74, 151-155, 161, 162; Uwinkindi's First Supplemental Brief, paras. 8, 9, 25, 26, 29; Reply, paras. 22-28, 36, 37, 54, 63.

⁹⁰ Brief in Support of the Revocation Request, paras. 72, 73; Reply, paras. 55, 56.

⁹¹ Uwinkindi's Second Supplemental Brief, paras. 45-55. See also Reply, paras. 31-36, 39-43.

of 29 September 2015 ordering the continuation of the proceedings compounded the violation of his right to be assisted by counsel of his own choosing and to have effective legal representation.⁹²

23. In response, the Prosecution submits that, under Article 14 of the ICCPR, an indigent accused does not have the right to have a specific counsel assigned or to select from a list of several counsels.⁹³ It further argues that at the court hearings in March 2015, Uwinkindi refused to accept the services of his newly assigned counsels who were qualified and available, thus waiving his right to legal representation.⁹⁴ In addition, the Prosecution submits that Uwinkindi's most recent refusal to select a counsel from a list of 68 counsels is unjustified and aims to obstruct the trial proceedings.⁹⁵

24. The Trial Chamber recalls that, pursuant to Article 14(3)(d) of the ICCPR, an accused is entitled to defend himself in person or through legal assistance of his own choosing, and, if indigent, to have free legal assistance assigned to him when the interests of justice so require. However, the right of an accused to be represented by counsel of his own choosing is not absolute. Article 14(3)(d) of the ICCPR does not entitle an accused to choose counsel provided to him free of charge.⁹⁶ Similarly, the Appeals Chambers of the ICTR and the International Criminal Tribunal for the former Yugoslavia when interpreting identical guarantees in the Statutes of the *ad hoc* Tribunals have consistently recognized that individuals lacking the means to remunerate counsel do not have an absolute right to a counsel of their own choosing.⁹⁷ When deciding on the assignment of counsel,

⁹² Uwinkindi's Third Supplemental Brief, paras. 28-31, 37-42. Uwinkindi further argues that the High Court's decision of 29 September 2015 is *ultra vires*. See Uwinkindi's Third Supplemental Brief, paras. 32-36.

⁹³ Prosecution's Response, paras. 18-23.

⁹⁴ Prosecution's Response, paras. 24-29.

⁹⁵ Prosecution's Supplemental Brief, para. 11.

⁹⁶ *Tatyana Rastorgueva v. Poland*, Communication No. 1517/2006, 28 April 2011 ("*Rastorgueva v. Poland*"), para. 6.6; *Barno Saidova v. Tajikistan*, Communication No. 964/2001, 20 August 2004 ("*Saidova v. Tajikistan*"), para. 6.8; *Trevor Bennett v. Jamaica*, Communication No. 590/1994, 10 May 1999 ("*Bennett v. Jamaica*"), para. 6.6; *Dennie Chaplin v. Jamaica*, Communication No. 596/1994, 2 November 1995 ("*Chaplin v. Jamaica*"), para. 8.3; *Albert Berry v. Jamaica*, Communication No. 330/1988, 26 April 1994 ("*Berry v. Jamaica*"), para. 11.6; *Paul Kelly v. Jamaica*, Communication No. 253/1987, 10 April 1991 ("*Kelly v. Jamaica*"), para. 5.10; *Carlton Reid v. Jamaica*, Communication No. 250/1987, 21 August 1990 ("*Reid v. Jamaica*"), para. 11.4. See also Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In *Lagerblom v. Sweden*, the European Court of Human Rights ("ECtHR") held that, while Article 6(3) of the European Convention on Human Rights entitles an accused to be defended by counsel "of his own choosing" and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute and is necessarily subject to certain limitations where free legal aid is concerned: "[w]hen appointing defence counsel the courts must certainly have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice." (*Lagerblom v. Sweden*, no. 26891/95, 14 April 2003, para. 54; See also *Croissant v. Germany*, Series A no. 237-B, 25 September 1992, para. 29).

⁹⁷ *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010 ("*Nshogoza Appeal Judgement*"), para. 35; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-94-4-A, Judgement, 1 June 2001 ("*Akayesu Appeal Judgement*"), para. 61; *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda Appeal Judgement*"), para. 33; See also *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić Appeal Judgement*"), para. 17.

some weight is accorded to the accused's preference, but such preference may be overridden if it is in the interests of justice to do so.⁹⁸

25. The Trial Chamber notes that, upon his transfer to Rwanda, Uwinkindi was assigned counsel of his own choosing under Rwanda's legal aid program.⁹⁹ Following the change in the scale of remuneration of counsel representing accused in transferred cases, the Ministry of Justice extended a new offer to Uwinkindi's Counsel which the latter declined.¹⁰⁰ In light of the failure of Uwinkindi's Counsel to appear at two consecutive hearings, the High Court appointed new counsel to represent Uwinkindi over Uwinkindi's objections.¹⁰¹ Bearing in mind that Uwinkindi's initial Counsel had an obligation to continue representing Uwinkindi notwithstanding the termination of their contract,¹⁰² the Trial Chamber is not satisfied that Uwinkindi has shown that it was unreasonable for the High Court to appoint new counsel to represent him.¹⁰³ In addition, Uwinkindi fails to substantiate his submission that newly appointed counsel had insufficient years of experience.¹⁰⁴ Considering that, as an indigent accused, Uwinkindi had no entitlement to a counsel of his own choosing, the Trial Chamber is not satisfied that the replacement of Uwinkindi's initial Counsel prevents the possibility of a fair trial and necessitates the revocation of his case.

26. The Trial Chamber further notes that, although an indigent accused is not entitled to be represented by counsel of his own choosing, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice.¹⁰⁵ The Trial Chamber considers that Uwinkindi unjustifiably refused to cooperate with his newly appointed counsel. In particular,

⁹⁸ *Nshogozu* Appeal Judgement, para. 35; *Blagojević and Jokić* Appeal Judgement, para. 17; *Ferdinand Nahimana et al. v. The Prosecutor*, case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006, para. 10, and references cited therein; *Akayesu* Appeal Judgement, para. 62.

⁹⁹ See *supra* para. 18.

¹⁰⁰ See *supra* para. 19.

¹⁰¹ See *supra* para. 19.

¹⁰² See *supra* para. 19. The Trial Chamber notes that a similar obligation for assigned counsel to continue representing an accused even after the assignment has been withdrawn exists before the Mechanism. See Directive on the Assignment of Defence Counsel, MICT/5, 14 November 2012, Art. 22(A) ("Assigned counsel shall continue to act until: (i) a replacement counsel has been assigned by the Registrar; or (ii) a replacement counsel has been retained by the suspect or accused pursuant to Rule 42 of the Rules; or (iii) the suspect or accused as elected in writing to conduct his own defence pursuant to Rule 43(F) of the Rules and his election has been accepted by the Chamber.").

¹⁰³ The Trial Chamber notes that, before the Mechanism, counsel may also be removed if his conduct obstructs the proper conduct of the proceedings. See Rule 47 of the Rules.

¹⁰⁴ See Prosecution's Response, Annex 13, containing the *curricula vitae* of Counsels Hishamunda and Ngabonziza. Uwinkindi's submission that another accused in a transferred case refused to be represented by Counsel Hishamunda (see Brief in Support of the Revocation Request, para. 158) is insufficient to show that Uwinkindi's right to counsel of his own choosing was violated.

¹⁰⁵ *Rastorgueva v. Poland*, para. 6.6; *Saidova v. Tajikistan*, para. 6.6; *Chaplin v. Jamaica*, 8.3; *Kelly v. Jamaica*, para. 5.10. The ECtHR has held that the competent national authorities are required to intervene only if "a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way" (*Muyzh v. Russia*, no. 63378/00, 6 July 2005, para. 67. See also *Kamasinski v. Austria*, 19 December 1989, Series A no. 168, para. 65).

other than maintaining that he should be represented by counsel of his own choosing, Uwinkindi failed to advance any convincing explanation as to why newly appointed counsel should be withdrawn.¹⁰⁶ Notwithstanding the impasse, which is attributable to Uwinkindi's unilateral refusal to communicate with his new counsel, the Trial Chamber notes that, during the month of March 2015, the High Court continued with the examination of witnesses, acknowledging that Uwinkindi was not assisted by counsel.¹⁰⁷ The Trial Chamber recalls that where an accused unjustifiably resists legal representation from assigned counsel, counsel's professional obligations to continue to represent the accused remain.¹⁰⁸ Thus, the High Court should have taken necessary measures as the trial proceeded in March 2015 to ensure that Uwinkindi continued to benefit from effective legal assistance. As described below, the High Court ultimately took such measures in an effort to safeguard Uwinkindi's fair trial rights.

27. The Trial Chamber notes that, in view of the situation described above, the High Court subsequently decided to re-call the witnesses who were examined in March 2015 when Uwinkindi was not represented by counsel,¹⁰⁹ after having afforded additional time for trial preparation to newly appointed counsel.¹¹⁰ Moreover, on 23 September 2015, the High Court allowed Uwinkindi to choose a new counsel to represent him, and, on 29 September 2015, following Uwinkindi's refusal to select a counsel from a list of counsels, the High Court confirmed the appointment of Counsel Hishamunda and Ngabonziza.¹¹¹ The High Court explicitly considered that it is in the interests of justice that Uwinkindi be represented by counsel and that his refusal to communicate with Counsel Hishamunda and Ngabonziza did not prevent the latter from analyzing the charges, assessing the evidence, and making written submissions on behalf of the accused.¹¹² Accordingly, the High Court took measures to ensure that Uwinkindi is represented by counsel for the remainder of the proceedings.¹¹³ The Trial

¹⁰⁶ See Monitoring Report for February 2015, paras. 9-12, 20, 22, 23; Monitoring Report for March 2015, paras. 16, 17, 20; Monitoring Report for April 2015, paras. 30, 33, 36, 47.

¹⁰⁷ See *supra* para. 20. The Trial Chamber notes that the High Court did not consider Uwinkindi to be self-represented.

¹⁰⁸ See *Blagojević and Jokić Appeal Judgement*, para. 20, citing *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, *Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003 ("*Blagojević and Jokić Appeal Decision*"), para. 54.

¹⁰⁹ See *supra* para. 20.

¹¹⁰ See *supra* para. 20.

¹¹¹ High Court Decision of 29 September 2015, para.14.

¹¹² High Court Decision of 29 September 2015, para.14. The Trial Chamber is also not satisfied that Uwinkindi's claim that the High Court's decision of 29 September 2015 was *ultra vires*, even if established, would require a revocation of the referral order. In this regard, the Trial Chamber is mindful that the decision aimed to safeguard Uwinkindi's right to have effective legal representation as the trial progressed.

¹¹³ The Trial Chamber notes Uwinkindi's submission that, at the hearing on 15 October 2015, he was informed that Counsel Hishamunda had left the country without informing the High Court or the President of the Rwanda Bar Association and that the proceedings continued. See *Requête tendant à obtenir du Président de la Chambre l'autorisation de répliquer à la réponse du Procureur sur la demande de certification de l'appel*, 20 October 2015, paras. 22-27. The Trial Chamber is not satisfied that Uwinkindi has sufficiently explained the circumstances surrounding Counsel Hishamunda's departure or demonstrated that his remaining counsel is unable to conduct the defence. Even if that were the case, Uwinkindi has not shown that additional counsel could not be assigned from the list or that other appropriate

Chamber therefore considers that any potential violation of Uwinkindi's fair trial rights resulting from the lack of assistance of counsel in March 2015 could still be remedied at trial or on appeal. As to Uwinkindi's refusal to communicate with Counsel Hishamunda and Ngabonziza, the Trial Chamber recalls that an accused does not have the right to claim a breakdown in communication through unilateral actions, including refusals to meet with his counsel, in the hope that such actions will result in the withdrawal of his counsel, or, where transferred cases are concerned, in the revocation of the referral order.¹¹⁴

28. In relation to Uwinkindi's argument that the list of counsels he was offered to choose from was compiled by the Ministry of Justice in violation of the principle of the separation of powers, the Trial Chamber notes that Uwinkindi fails to substantiate his submission.¹¹⁵ The Trial Chamber further notes Rwanda's submission that over 60 qualified counsel, each with more than 10 years of experience, have indicated their willingness to represent accused under the new legal aid policy.¹¹⁶ As noted by the Referral Chamber, the most important factor is that the accused is entitled to counsel of his choice or, should he not have the means to pay for representation, to legal representation.¹¹⁷ Uwinkindi fails to demonstrate that counsel on the list are biased or lack sufficient competence to represent accused in transferred cases.¹¹⁸ As to the provision in the model agreement which allowed for a unilateral cancellation in the event that counsel makes statements discrediting the Government authorities,¹¹⁹ the Trial Chamber notes that the disputed provision was removed, following objections by the Rwanda Bar Association.¹²⁰

29. Accordingly, in relation to Uwinkindi's right to legal representation, the Trial Chamber is not satisfied that the conditions for referral of the case are no longer met and that it is in the interests of justice to revoke the referral order.

relief is unavailable before the High Court. In this respect, the Trial Chamber recalls the High Court's decision of 29 September 2015, in which the High Court stated that it is in the interests of justice that Uwinkindi be represented during the proceedings.

¹¹⁴ Cf. *Blagojević and Jokić* Appeal Decision, para. 51, quoting *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 100.

¹¹⁵ See Prosecution's Supplemental Brief, Annex B, containing a letter from the President of the Council of the Rwanda Bar Association addressed to the Minister of Justice, forwarding the list of 68 counsels who have expressed their readiness to represent accused in transferred cases.

¹¹⁶ GoR Response, para. 3.

¹¹⁷ Referral Decision, para. 139. See also Appeal Decision of 16 December 2011, para. 71.

¹¹⁸ See *Blagojević and Jokić* Appeal Decision, para. 18 (the ICTY Appeals Chamber held that a lawyer with "reasonable experience in criminal and/or international law" is able to work either as a defence counsel or as a prosecutor).

¹¹⁹ Monitoring Report for January 2015, para. 63.

¹²⁰ See Prosecution's Response, Annex 21.

5. Right to Have Adequate Facilities for Defence Preparation

30. Uwinkindi argues that he had no funds to conduct defence investigations or to recruit defence support staff, and that his trial was rendered unfair given the disparity in the resources available to him and to the Rwandan Prosecution.¹²¹ Uwinkindi submits that the Ministry of Justice “drastically reduced the financial means” available to counsel, thus making the conduct of an effective defence impossible.¹²² In particular, he claims that the Ministry of Justice did not provide the means necessary for the conduct of defence investigations,¹²³ reduced counsel fees,¹²⁴ and excluded the Rwanda Bar Association from the administration of the legal aid.¹²⁵

31. The Prosecution responds that Rwanda was justified in requiring Uwinkindi’s counsel to accept the new flat-fee structure which was devised to maximize economy.¹²⁶ The Prosecution points out that, as of November 2014, Uwinkindi’s defence team had received nearly 83 per cent of the entire budget available for all cases referred to Rwanda, and that despite this funding his trial preparations did not proceed expeditiously.¹²⁷ In relation to Uwinkindi’s ability to conduct defence investigations, the Prosecution submits that Uwinkindi chose not to ask the judicial police to collect exculpatory evidence, and failed to act diligently and reasonably in seeking the necessary funds to contact witnesses living abroad.¹²⁸

32. In response, Rwanda submits that Uwinkindi’s right to free legal assistance has been respected at all stages of the proceedings and that he has received funding to conduct defence investigations in Rwanda.¹²⁹ It further submits that, in order to address some of the difficulties experienced by Uwinkindi, Rwanda has adopted a new practice direction specifying how requests for additional funds for defence investigations, beyond those already conducted by the judicial police, should be provided.¹³⁰ In relation to its free legal aid system, Rwanda submits that there is a large roster of experienced counsel available for assignment under the new flat-rate counsel remuneration scheme.¹³¹ Finally, Rwanda submits that Uwinkindi fails to demonstrate any fundamental violation

¹²¹ Brief in Support of the Revocation Request, paras. 26, 27, 40-43, 83-86; Reply, paras. 44, 45, 50, 51.

¹²² Brief in Support of the Revocation Request, paras. 128, 138. *See also* Brief in Support of the Revocation Request, paras. 122-127, 129-137. Reply, paras. 29-35, 38, 63, 64.

¹²³ Brief in Support of the Revocation Request, paras. 93-102, 106, 107, 111, 112. *See also* Brief in Support of the Revocation Request, paras. 103-105; Reply, paras. 52, 53, 64.

¹²⁴ Brief in Support of the Revocation Request, para. 133.

¹²⁵ Brief in Support of the Revocation Request, paras. 139-148. *See also* Brief in Support of the Revocation Request, paras. 87-92.

¹²⁶ Prosecution’s Response, paras. 30, 33-36.

¹²⁷ Prosecution’s Response, paras. 31, 32.

¹²⁸ Prosecution’s Response, paras. 38-42.

¹²⁹ GoR Response, para. 6.

¹³⁰ GoR Response, paras. 4, 5.

¹³¹ GoR Response, paras. 2, 3.

of his right to a fair trial or any breach of the conditions of referral, and therefore any future challenges to the conduct of the proceedings should be raised by Uwinkindi before the Rwandan courts.¹³²

33. The Trial Chamber recalls that the principle of equality of arms goes to the heart of the fair trial guarantee and requires a judicial body to ensure that neither party is put at a disadvantage when presenting its case.¹³³ This principle does not require, however, material equality between the parties in terms of financial or human resources.¹³⁴ The Trial Chamber notes that at the time of Uwinkindi's transfer to Rwanda, Rwanda had created several legal aid programs and had made a budgetary provision of 100 million Rwandan Francs to fund legal aid for transferred cases.¹³⁵ In relation to the remuneration of counsel, in 2014 Rwanda introduced a flat-rate policy which replaced the hourly-rate policy previously in place.¹³⁶ According to the new policy, assigned counsel will receive 15 million Rwandan Francs for the entire case.¹³⁷ This remuneration does not include fees for additional defence investigations, which is separately funded in accordance with a newly adopted practice direction.¹³⁸ The record shows that the Rwanda Bar Association agreed to the new flat-rate policy for counsel remuneration.¹³⁹ In addition, the Rwandan Criminal Procedure Code provides that the judicial police shall be responsible for gathering evidence both for the prosecution and the defence.¹⁴⁰

34. The Trial Chamber considers that it is not within its purview to scrutinize the Rwandan legal aid budget, inquire into its sufficiency, or verify its administration and disbursement.¹⁴¹ Nor is the Trial Chamber in a position to decide on the fees that should be paid to counsel representing accused in transferred cases. As it was recognized by the Referral Chamber, the conditions of referral do not

¹³² GoR Response, paras. 7, 8.

¹³³ *Šainović et al.* Appeal Judgement, para. 123, referring to *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, para. 106.

¹³⁴ *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010, para. 34, referring to *Nahimana et al.* Appeal Judgement, paras. 173, 220; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 69. See also *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 149; *Prosecutor v. Dario Kordić and Marlo Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 176.

¹³⁵ Referral Decision, para. 14).

¹³⁶ Second Monitoring Report for December 2014, para. 15; Monitoring Report for January 2015, paras. 33-35. See also GoR Response, para. 2.

¹³⁷ Second Monitoring Report for December 2014, para. 15; Monitoring Report for January 2015, paras. 33-35.

¹³⁸ Second Monitoring Report for December 2014, para. 15; Monitoring Report for January 2015, para. 33. See also Prosecution's Response, Annex 18; GoR Response, paras. 4, 5.

¹³⁹ Monitoring Report for January 2015, para. 33, 61, 62.

¹⁴⁰ See Prosecution's Response, Annex 22. See also GoR Response, para. 4.

¹⁴¹ See *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-AR11bis.1 & IT-97-25/1-AR11bis.2, Decision on Savo Todović's Appeals against Decisions on Referral under Rule 11bis, 4 September 2006 ("Todović Appeal Decision"), para. 59; *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis, 7 April 2006, para. 70, and references cited therein. See also Referral Decision, para. 144, referring to *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008, para. 57; *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008, para. 48.

require an objective level of funding but that the accused be afforded equality of arms.¹⁴² The Trial Chamber accepts Rwanda's submission that over 60 qualified counsels have expressed their willingness to represent indigent accused in transferred cases under the new remuneration policy, thus ensuring Uwinkindi's right to free legal assistance.

35. In relation to the conduct of defence investigations, on 16 May 2013, the High Court denied Uwinkindi's request for the appointment of investigators and legal assistants, noting that the Transfer Law does not provide for such appointments, and reminding Uwinkindi that the judicial police is required to conduct investigations also on behalf of the Defence.¹⁴³ The High Court further invited Uwinkindi to request funding from the Ministry of Justice and the Rwanda Bar Association to facilitate the conduct of investigations by Counsel.¹⁴⁴ On 5 August 2013, Uwinkindi's proposed budget for contacting witnesses both within and outside Rwanda was submitted to the Ministry of Justice.¹⁴⁵ The Ministry of Justice indicated that the budgetary proposal lacked the necessary details and requested further clarifications.¹⁴⁶ On 11 October 2013, the High Court found that 876,000 Rwandan Francs had been given to Counsel for the conduct of defence investigations,¹⁴⁷ and on 18 November 2013, Counsel informed the High Court that he had started defence investigations within Rwanda.¹⁴⁸ The Trial Chamber recalls that the Referral Chamber was satisfied that legal aid would be provided to Uwinkindi and that he would be afforded equality of arms.¹⁴⁹ Uwinkindi fails to explain why the funding already provided to him by the Rwandan authorities is insufficient, what steps he took, if any, to use the services of the judicial police, and whether he submitted a more detailed budget proposal for the conduct of defence investigations, as requested.¹⁵⁰ Bearing in mind the funding that Uwinkindi has already received and the availability of the judicial police to conduct investigations for the Defence, Uwinkindi fails to substantiate his submission that the High Court's

¹⁴² Referral Decision, para. 139, where the Referral Chamber also recognized that the level of funding of the Defence in Rwanda may be lower than at the ICTR. *See also* *Todočić* Appeal Decision, n. 119.

¹⁴³ Monitoring Report for May and June 2013, para. 8; Prosecution's Response, Annex 5, paras. 15-24.

¹⁴⁴ *See* Prosecution's Response, Annex 5, para. 24. *See also* *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for the Uwinkindi Case (July – August 2013), 12 September 2013, para. 5; Monitoring Report for May and June 2013, para. 8; Monitoring Report for March 2013, para. 26.

¹⁴⁵ Prosecution's Response, Annex 6; Monitoring Report for July and August 2013, paras. 6, 7.

¹⁴⁶ Monitoring Report for September 2013, para. 19; Second Monitoring Report for December 2014, para. 36.

¹⁴⁷ Monitoring Report for September 2013, para. 17. On 15 January 2015, the Ministry of Justice informed the Monitor that Uwinkindi had thus far received 83 million Rwandan Francs for the conduct of his defence. *See* Monitoring Report for January 2015, para. 39.

¹⁴⁸ Monitoring Report for October and November 2013, para. 34; Monitoring Report for December 2013, para. 13.

¹⁴⁹ Referral Decision, paras. 139, 146. In addition, the President of the Mechanism dismissed an earlier request by Uwinkindi for the revocation of his case on the basis that the various issues relating to the funding of his defence, including the staffing of his defence team, were still the focus of ongoing negotiations and could be subject to further review within the Rwandan courts. *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Decision on Request for Revocation of an Order Referring a Case to the Republic of Rwanda, 12 March 2014, pp. 1, 3.

¹⁵⁰ The Trial Chamber notes that in September 2013, Counsel Gashabana informed the Monitor that, in his view, the original budget proposal submitted to the Ministry of Justice contained all the necessary details. *See* Monitoring Report for September 2013, para. 25.

decision denying his request for the appointment of investigators and legal assistants impaired the effective preparation of his defence.

36. The Trial Chamber further notes that, on 6 August 2015, the Chief Justice issued a practice direction setting out the conditions for funding additional defence investigations, and clarifying the type of funding available for such investigations.¹⁵¹ Considering that Uwinkindi's trial is still ongoing and that Uwinkindi's new legal counsel should be able to request funding for additional defence investigations, the Trial Chamber finds that Uwinkindi has failed to show that the conditions for referral of the case are no longer met and that it is in the interests of justice to revoke the referral order.

6. Right to be Tried before an Impartial Tribunal

37. Uwinkindi submits that the High Court exhibited partiality by imposing a fine on his counsel, violating his right to be heard, allowing the Rwandan Prosecution to make disparaging remarks, and showing bias towards the Rwandan Prosecution.¹⁵² In response, the Prosecution submits that Uwinkindi's submissions are without merit.¹⁵³

38. The Trial Chamber recalls that the right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial.¹⁵⁴ Uwinkindi claims a violation of his right to a fair trial on the basis that on 15 January 2015, the High Court imposed a fine on Counsel for their failure to appear in court and, subsequently, appointed a new counsel to represent Uwinkindi.¹⁵⁵ The High Court's decision on the appointment of new counsel was affirmed by the Supreme Court.¹⁵⁶ Considering the specific circumstances which triggered the sanction and subsequent replacement of counsel, the Trial Chamber is not satisfied that Uwinkindi has shown a violation of his right to be tried before an independent and impartial tribunal that would require the revocation of his case.

39. Concerning Uwinkindi's claim that the High Court violated his right to be heard, the Trial Chamber notes that on 15 January 2015, the High Court rejected Counsel Gashabana's request to

¹⁵¹ Prosecution's Response, Annex 18.

¹⁵² Brief in Support of the Revocation Request, paras. 48-64, 96-98; Uwinkindi's Second Supplemental Brief, paras. 32-44; Reply, para. 61.

¹⁵³ Prosecution's Response, paras. 50-53.

¹⁵⁴ *Šainović et al.* Appeal Judgement, para. 179, referring to *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, para. 39, and reference cited therein. See also Article 14(1) of the ICCPR; Article 10 of the Universal Declaration of Human Rights; Article 7(1)(d) of the African Charter on Human and Peoples' Rights; Article 6(1) of the ECHR; Article 8(1) of the American Convention on Human Rights.

¹⁵⁵ See Brief in Support of the Revocation Request, para. 52. See also Monitoring Report for January 2015, para. 28.

¹⁵⁶ Monitoring Report for April 2015, para. 63. See also Prosecution's Response, Annex 11.

complete his submission on the reasons why he intends to appeal the High Court's decision denying a stay of the proceedings.¹⁵⁷ The High Court reasoned that any appeal must be argued before the Supreme Court.¹⁵⁸ In relation to the hearing on 6 February 2015 when the High Court confirmed the appointment of a new counsel, Uwinkindi stated that he had received the submissions of the Rwandan Prosecution only the previous day and, therefore, claimed a violation of his right to be heard and respond to the submissions.¹⁵⁹ He further made an oral request for the disqualification of the Presiding Judge on several grounds, including alleged bias,¹⁶⁰ which was later rejected by a specialized chamber of the High Court.¹⁶¹

40. In relation to the hearings on 15 January and 6 February 2015, Uwinkindi fails to demonstrate that any possible violation of his right to be tried before an independent and impartial tribunal could not be addressed or appropriately remedied in any subsequent appellate proceedings.¹⁶² The same applies to Uwinkindi's reference to the High Court's alleged failure to sanction the Prosecution for any inappropriate remarks, or its alleged bias.¹⁶³ Accordingly, Uwinkindi fails to show that the conditions for referral of his case are no longer met in view of the alleged lack of judicial impartiality, and that it is in the interests of justice to revoke the order of referral of the case.

7. Conclusion

41. The Trial Chamber is not satisfied that any of Uwinkindi's complaints show that the conditions for referral of his case are no longer met and that it is in the interests of justice to revoke the referral order. In reaching this conclusion, the Trial Chamber is cognizant of the stage of the proceedings against Uwinkindi in Rwanda, the determination by the High Court that it is in the interests of justice that Uwinkindi be represented by counsel, the assignment of counsel to Uwinkindi, the decision of the High Court to re-call the witnesses who were examined in March 2015 when Uwinkindi was considered to lack the assistance of counsel, and the means available to Uwinkindi to seek an appropriate remedy in domestic appellate proceedings for any potential violations of his fair trial rights. Nevertheless, the Trial Chamber emphasizes the need for the monitoring to continue in

¹⁵⁷ Monitoring Report for January 2015, paras. 19-22.

¹⁵⁸ Monitoring Report for January 2015, para. 22.

¹⁵⁹ Monitoring Report for February 2015, paras. 42-44.

¹⁶⁰ Monitoring Report for February 2015, para. 45.

¹⁶¹ See Prosecution's Response, Annex. 24 ("Decision on Request for Disqualification").

¹⁶² Uwinkindi's cursory submissions that he was denied the right to an interlocutory appeal against the Decision on Request for Disqualification and that he will have to submit any challenges in this respect as part of a future appeal against the trial judgement (see Brief in Support of the Revocation Request, para. 63) are insufficient to show a violation of his fair trial rights.

¹⁶³ See Brief in Support of the Revocation Request, paras. 50, 51, 96-98; Uwinkindi's Second Supplemental Brief, paras. 38-44.

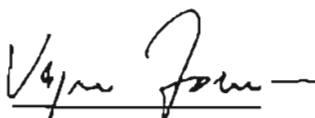
order to ensure that the Mechanism is appraised of any changes in the conditions of referral with the view of taking remedial action and revoking Uwinkindi's case if the interests of justice so require.

III. DISPOSITION

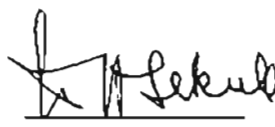
42. For the foregoing reasons, the Trial Chamber **DISMISSES** Uwinkindi's request for revocation.

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


Done this 22nd day of October 2015,
At Arusha,
Tanzania



Judge Vagn Joensen
Presiding Judge



William H. Sekule
Judge



Florence R. Arrey
Judge

[Seal of the Mechanism]

