



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

436/H

QV

ICTR-05-89-AR11bis
25th February 2013
{436/H-418/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Arlette Ramaroson
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Mr. Bongani Majola

Decision of: 25 February 2013

ICTR Appeals Chamber
Date: 25 FEB 2013
Action: *Quana R.*
Copied To: *Chambers Defence, OTP-KLAD-SPU-CRIS*

QV

BERNARD MUNYAGISHARI

v.

THE PROSECUTOR

Case No. ICTR-05-89-AR11bis

**DECISION ON BERNARD MUNYAGISHARI'S FIRST AND SECOND MOTIONS
FOR ADMISSION OF ADDITIONAL EVIDENCE**

Counsel for Bernard Munyagishari:

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *ROSETTE MUZIGO-MORRISON*
SIGNATURE: *[Signature]* DATE: *25/02/13*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of two motions for the admission of additional evidence filed by Mr. Bernard Munyagishari on 7 November and 14 December 2012.¹ The Office of the Prosecutor (“Prosecution”) responded on 19 November and 21 December 2012.² Mr. Munyagishari filed replies on 26 November and 27 December 2012.³

A. Background

2. Mr. Munyagishari is charged before the Tribunal with conspiracy to commit genocide, genocide, complicity in genocide, and murder and rape as crimes against humanity.⁴ On 6 June 2012, the Referral Chamber Designated under Rule 11 *bis* (“Referral Chamber”) ordered Mr. Munyagishari’s case to be referred to the authorities of the Republic of Rwanda (“Rwanda”) for trial before the High Court of Rwanda, subject to certain conditions.⁵

3. Mr. Munyagishari and the Prosecution lodged appeals against the Referral Decision.⁶

4. In these Motions for Additional Evidence,⁷ Mr. Munyagishari requests that, pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), the Appeals Chamber

¹ Bernard Munyagishari’s Defence Motion for Admission of Evidence Under Rule 115 of the Rules of Procedure and Evidence, confidential, originally filed in French on 7 November 2012, English translation filed on 3 December 2012 (“First Motion”) and Bernard Munyagishari’s Second Defence Motion for Admission of Evidence Under Rule 115 of the Rules of Procedure and Evidence, originally filed in French on 14 December 2012, English translation filed on 17 January 2013 (“Second Motion”) (collectively, “Motions for Additional Evidence”).

² Prosecutor’s Response to “*Requête de la Défense de Bernard Munyagishari aux fins d’admission des moyens de preuve en application de l’article 115 du Règlement de procédure et de preuve*”, confidential, 19 November 2012 (“Response to First Motion”); Prosecutor’s Response to “*Seconde Requête de la Défense de Bernard Munyagishari aux fins d’admission des moyens de preuve en application de l’article 115 du Règlement de procédure et de preuve*”, 21 December 2012 (“Response to Second Motion”).

³ Bernard Munyagishari’s Reply to the Prosecutor’s Response to the Defence Motion for Admission of Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, confidential, originally filed in French on 26 November 2012, English translation filed on 14 December 2012 (“Reply Relating to First Motion”); Bernard Munyagishari’s Defence Reply to the Prosecutor’s Response to its Second Motion Filed Under Rule 115 of the Rules of Procedure and Evidence, originally filed in French on 27 December 2012, English translation filed on 11 January 2013 (“Reply Relating to Second Motion”).

⁴ *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Indictment, 8 September 2005.

⁵ *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-R11bis, Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, 6 June 2012 (“Referral Decision”), Disposition.

⁶ Notice of Appeal Filed by Bernard Munyagishari’s Defence, originally filed in French on 19 June 2012, English translation filed on 5 September 2012; Prosecutor’s Notice of Appeal Pursuant to Rule 11 *bis* (H), 20 June 2012; Prosecutor’s Appellant’s Brief, 29 June 2012; Appellant’s Brief Filed by Bernard Munyagishari’s Defence, originally filed in French on 5 November 2012, English translation filed on 3 December 2012.

⁷ The Appeals Chamber notes that Mr. Munyagishari has filed a third motion for admission of evidence on 11 February 2013, to which the Prosecution has not yet responded. See Bernard Munyagishari’s Third Defence Motion for Admission of Evidence Under Rule 115 of the Rules of Procedure and Evidence, originally filed in French on 11 February 2013, English translation filed on 19 February 2013.

admit as additional evidence documents related to the proceedings in the transferred case of Mr. Jean Uwinkindi, which is ongoing in Rwanda, and to the trial in Rwanda of Ms. Victoire Ingabire.⁸ He also requests the Appeals Chamber to call Mr. Uwinkindi's Counsel in Rwanda, Mr. Vincent Gatera Gashabana, to testify.⁹ Finally, he requests the Appeals Chamber to conduct a hearing in this case.¹⁰ The Prosecution responds that Mr. Munyagishari's Motions for Additional Evidence should be dismissed in their entirety.¹¹

B. Applicable Law

5. Rule 115 of the Rules provides for the admission of additional evidence on appeal where a party is in possession of material that was not before the trial chamber and which represents additional evidence of a fact or issue litigated at trial.¹² The Appeals Chamber considers that Rule 115 of the Rules is equally applicable to appeals from referral decisions under Rule 11 *bis* of the Rules.¹³ According to Rule 115(A) of the Rules, a motion for admission of additional evidence shall clearly identify with precision the specific finding of fact made by the trial chamber to which the additional evidence is directed. Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial in any form, or discoverable through the exercise of due diligence. The applicant must also show that the additional evidence is relevant and credible.¹⁴ Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it *could* have been a decisive factor in reaching the referral decision.¹⁵

⁸ First Motion, paras. 5, 11, 12, 14, 59, Annexes 1-7; Second Motion, paras. 8, 13, 43, Annex 1.

⁹ First Motion, paras. 15, 59.

¹⁰ Second Motion, paras. 42, 43.

¹¹ Response to First Motion, paras. 5, 46; Response to Second Motion, paras. 2, 4, 18, 19. The Prosecution also responds that, in the alternative, it and, if necessary, Rwanda will seek leave to submit evidence in rebuttal. See Response to First Motion, para. 47. The Prosecution also requests that the Appeals Chamber ask for "an expedited report" from the Tribunal's monitors in charge of monitoring the case of Mr. Uwinkindi in Rwanda "detailing the observations made during the most recently concluded missions." See *idem*. The Appeals Chamber does not find such a report necessary in the circumstances of this case and accordingly dismisses this request.

¹² See, e.g., *Augustin Ndingiyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Decision on Augustin Bizimungu's Rule 92Bis Motion and on His Rule 115 Motion for Admission of Additional Evidence, 11 June 2012 ("Ndingiyimana et al. Decision"), para. 8; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motions for the Admission of Additional Evidence, 21 March 2011 ("*Bagosora et al.* Decision of 21 March 2011"), para. 5; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Request to Admit Additional Evidence, signed on 2 October 2008, filed on 3 October 2008 ("*Hategekimana* Decision"), para. 5.

¹³ See *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005, para. 6, in which it was held that additional evidence may be admitted pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia in the course of Rule 11 *bis* appeal proceedings. See also *Hategekimana* Decision.

¹⁴ See Rule 115(B) of the Rules.

¹⁵ See, e.g., *Ndingiyimana et al.* Decision, para. 9; *Bagosora et al.* Decision, para. 6; *Hategekimana* Decision, para. 5.

6. Furthermore, where the evidence is relevant and credible, but was available during the referral proceedings under Rule 11 *bis* of the Rules or could have been discovered through the exercise of due diligence, the Appeals Chamber may allow it to be admitted on appeal provided the moving party can establish that its exclusion *would* amount to a miscarriage of justice.¹⁶ That is, it must be demonstrated that, had the additional evidence been adduced during the proceedings at first instance, it *would* have had an impact on the referral decision.¹⁷

C. Preliminary Matter: Request for Hearing

7. Mr. Munyagishari requests the Appeals Chamber to hold a hearing in this case.¹⁸ He submits that oral arguments would be useful in view of the ongoing developments in the *Uwinkindi* case, which are crucial to the instant case, and considering the volume of new evidence that has emerged since the Referral Decision was issued.¹⁹ The Prosecution has not specifically responded to this request.

8. The Appeals Chamber notes that Rule 115(C) of the Rules provides that it may decide a motion for additional evidence “with or without an appeal hearing”, whereas Rule 117(A) of the Rules provides that an appeal of a decision taken under Rule 11 *bis* of the Rules “may be determined entirely on the basis of written briefs.” The Appeals Chamber is satisfied that the written submissions filed in the present case and the original record before the Referral Chamber form an adequate basis for the consideration of the Motions for Additional Evidence and the appeals against the Referral Decision and are sufficient to enable the Appeals Chamber to reach informed decisions.

9. For the foregoing reasons, Mr. Munyagishari’s request for a hearing is denied.

¹⁶ See, e.g., *Ndindiliyimana et al.* Decision, para. 10; *Bagosora et al.* Decision, para. 7; *Hategkimana* Decision, para. 6.

¹⁷ See, e.g., *Ndindiliyimana et al.* Decision, para. 10; *Bagosora et al.* Decision, para. 7; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-01-70-A, Decision on Rukundo’s Motion for the Admission of Additional Evidence on Appeal, 4 June 2010, para. 7; *Hategkimana* Decision, para. 6.

¹⁸ Second Motion, paras. 42, 43.

¹⁹ Second Motion, para. 42.

D. Discussion

10. Mr. Munyagishari requests the Appeals Chamber to admit as additional evidence the following documents which, in his view, demonstrate that Rwanda's judicial system does not comply with international fair trial standards and, which, he submits, are relevant to determining Rwanda's ability to ensure that his trial would be fair:

- (i) the reports of the Tribunal court monitors observing the proceedings in the transferred case of Mr. Jean Uwinkindi in the courts of Rwanda ("Tribunal Monitors") dated 30 April 2012,²⁰ 18 June 2012,²¹ 4 July 2012,²² 1 August 2012,²³ 4 October 2012,²⁴ and 30 November 2012²⁵ (collectively, "*Uwinkindi* Monitoring Reports");
- (ii) a press release from Amnesty International related to the trial of Ms. Victoire Ingabire in Rwanda dated 30 October 2012 ("Amnesty International Press Release"); and
- (iii) an article from the International Federation for Human Rights ("FIDH") concerning Ms. Ingabire's trial dated 2 November 2012 ("FIDH Article").²⁶

Mr. Munyagishari also requests that Mr. Uwinkindi's counsel in Rwanda, Mr. Gashabana, be called to testify in the appeal proceedings in the present case.²⁷

11. The Appeals Chamber will address these requests in turn.

²⁰ First Motion, Annex 1, First Report of Interim Monitoring Mechanism – Uwinkindi, dated 30 April 2012, confidential ("*Uwinkindi* Monitoring Report of 30 April 2012"). The confidential *Uwinkindi* Monitoring Report of 30 April 2012 was disclosed to Mr. Munyagishari's Lead Counsel by the President of the Tribunal on 26 July 2012. See President Joensen's Letter to Mr. Munyagishari's Lead Counsel, Philippe Moriceau, dated 26 July 2012, ICTR/PRES/017/12.

²¹ First Motion, Annex 2, Report of the Court Monitor for the Uwinkindi Case (May 2012), dated 18 June 2012, confidential ("*Uwinkindi* Monitoring Report of 18 June 2012"). The confidential *Uwinkindi* Monitoring Report of 18 June 2012 was disclosed to Mr. Munyagishari's Lead Counsel by the President of the Tribunal on 26 July 2012. See President Joensen's Letter to Mr. Munyagishari's Lead Counsel, Philippe Moriceau, dated 26 July 2012, ICTR/PRES/017/12.

²² First Motion, Annex 3, Public Report of the Court Monitor for the Uwinkindi Case – June 2012, dated 4 July 2012 ("*Uwinkindi* Monitoring Report of 4 July 2012").

²³ First Motion, Annex 4, Report of the Court Monitor for the Uwinkindi Case – July 2012, dated 1 August 2012 ("*Uwinkindi* Monitoring Report of 1 August 2012").

²⁴ First Motion, Annex 5, Report of the Court Monitor for the Uwinkindi Case (September 2012), dated 4 October 2012 ("*Uwinkindi* Monitoring Report of 4 October 2012").

²⁵ Second Motion, Annex 1, Report of the Court Monitor for the Uwinkindi Case (October-November 2012), dated 30 November 2012 ("*Uwinkindi* Monitoring Report of 30 November 2012").

²⁶ First Motion, paras. 5, 11, 12, 14, 59, Annexes 1-7; Second Motion, paras. 8, 13, 43, Annex 1.

²⁷ First Motion, paras. 15, 59.

1. Admission of the *Uwinkindi* Monitoring Reports

(a) Submissions

12. Mr. Munyagishari submits that the *Uwinkindi* Monitoring Reports contain relevant information related to the conduct of proceedings in Rwanda, which casts serious doubt on Rwanda's ability to ensure that he will receive a fair trial and therefore supports his appeal against the Referral Decision.²⁸ He contends that these reports are all the more relevant as they "constitute the only source of information on the functioning of Rwanda's judicial system in referral cases",²⁹ that they were not available in the proceedings before the Referral Chamber, and that, given their source, they are credible.³⁰

13. Mr. Munyagishari submits that the *Uwinkindi* Monitoring Reports could have been a decisive factor in reaching the original decision in the proceedings before the Referral Chamber.³¹ He claims that they demonstrate that, in practice, the rights of the accused are not safeguarded in Rwanda and that several obstacles hinder defence counsel from working independently and negatively impact the right of the accused to an effective defence.³² In particular, Mr. Munyagishari contends that the *Uwinkindi* Monitoring Reports: (i) show that Mr. Uwinkindi's choice of counsel was restricted to a list of counsel provided by the Kigali Bar Association ("KBA"), and that, contrary to the KBA's assertions, he could not choose a foreign counsel;³³ (ii) reveal the flagrant violation of Mr. Uwinkindi's right to be assisted by counsel during his initial interviews with the police and the Rwandan Public Prosecutor, and that the exercise of the right of the accused to remain silent raises problems in Rwanda;³⁴ (iii) show the lack of funding for Mr. Uwinkindi's defence counsel who seems to have worked *pro bono* for a considerable period of time and is still

²⁸ First Motion, paras. 19, 20, 53, referring to Munyagishari's fourth, seventh, eighth and ninth grounds of appeal; Second Motion, paras. 14-17, 25-27, 30, 38, 39, referring to Munyagishari's seventh and eighth grounds of appeal. See also First Motion, paras. 11, 13, 17.

²⁹ First Motion, para. 13; Second Motion, para. 14. See also First Motion, para. 32.

³⁰ First Motion, paras. 21, 22, 27, 28, 30, 57; Second Motion, paras. 18-23, 40. Mr. Munyagishari submits that the *Uwinkindi* Monitoring Report of 30 April 2012 was confidential and that he was unaware of its existence at the time the Referral Decision was issued. See First Motion, para. 21.

³¹ First Motion, paras. 27, 52, 57, and heading (c) at p. 9; Second Motion, paras. 21, 38, 40, and heading (c) at p. 7.

³² First Motion, para. 36; Second Motion, para. 30.

³³ First Motion, para. 38, referring to *Uwinkindi* Monitoring Report of 18 June 2012, paras. 14, 25; Reply Relating to First Motion, para. 10, referring to *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, *Amicus Curiae* Brief of the Kigali Bar Association in the Matter of the Prosecutor's Request for the Referral of the Case of Munyagishari Bernard, 23 January 2012 ("KBA Brief"). While Mr. Munyagishari acknowledges that the fact that Mr. Uwinkindi was not offered the possibility to choose a foreign counsel does not by itself constitute a violation of Mr. Uwinkindi's rights, he argues that "it reveals that the reality of a trial in Rwanda differs considerably from the description given by the Rwandan authorities, the Kigali Bar Association and the Prosecutor when this matter came before the Trial Chamber." See Reply Relating to First Motion, para. 10.

³⁴ First Motion, paras. 38, 50, referring to *Uwinkindi* Monitoring Report of 18 June 2012, paras. 24, 25, and *Uwinkindi* Monitoring Report of 4 July 2012, para. 17. In reply, Mr. Munyagishari adds that the fact that Mr. Uwinkindi's decision to remain silent was considered "obstructive" demonstrates that the right to remain silent is not effective in Rwanda. See Reply Relating to First Motion, para. 12.

not provided with the necessary and appropriate means for ensuring an effective defence;³⁵ and (iv) call into question the Tribunal Monitors' ability to properly monitor the proceedings in transferred cases and ensure the respect of the rights of the accused in Rwanda.³⁶

14. Mr. Munyagishari further submits that the *Uwinkindi* Monitoring Reports demonstrate that "even though Rwanda's laws applicable to referral cases appear to guarantee the right of the Accused to obtain the appearance of Defence witnesses under the same conditions as Prosecution witnesses, their practical implementation is fraught with many problems which, in fact, render the right inexistent."³⁷ In this regard, he argues that the *Uwinkindi* Monitoring Reports: (i) show how a defence witness was harassed in a Rwandan case and how Rwandan judges declined to consider the incident, which, he argues, could have a negative impact on the willingness of witnesses to testify in transferred cases;³⁸ (ii) indicate that the Witness Protection Unit ("WPU") set up under the Rwandan judiciary is not yet operational;³⁹ and (iii) show that Rwandan counsel refrain from contacting defence witnesses for fear of being suspected of attempted subornation.⁴⁰

15. Mr. Munyagishari adds that the *Uwinkindi* Monitoring Reports reveal that the Rwandan system puts the defence in an unfavourable situation compared to the prosecution with respect to the ability to conduct investigations.⁴¹ He submits that, in practice, investigations in Rwanda are conducted either by the prosecution or the judicial police, which is under the authority of the public prosecution authority, and the defence can only conduct its own investigations if authorized by the court.⁴² He points out that, as a result, there is no funding available for the defence to conduct investigations.⁴³

³⁵ First Motion, paras. 38-41, 48, 49, referring to *Uwinkindi* Monitoring Report of 18 June 2012, paras. 25, 26, 28, *Uwinkindi* Monitoring Report of 4 July 2012, paras. 2-6, *Uwinkindi* Monitoring Report of 1 August 2012, para. 4, and *Uwinkindi* Monitoring Report of 4 October 2012, para. 14; Second Motion, paras. 35-37, referring to *Uwinkindi* Monitoring Report of 30 November 2012, paras. 5, 22, 26.

³⁶ First Motion, paras. 39, 51, referring to *Uwinkindi* Monitoring Report of 4 July 2012, para. 18. Mr. Munyagishari points out that the Tribunal Monitors were not allowed to attend Mr. Uwinkindi's appearance before the prosecutor. See *ibid.*, para. 51. See also Reply Relating to First Motion, paras. 20-24.

³⁷ First Motion, para. 36. See also Second Motion, para. 30.

³⁸ First Motion, paras. 37, 44-47, referring to *Uwinkindi* Monitoring Report of 30 April 2012, paras. 12, 19.

³⁹ First Motion, paras. 40, 47, referring to *Uwinkindi* Monitoring Report of 1 August 2012, paras. 6-8, 13. See also Reply Relating to First Motion, para. 17.

⁴⁰ First Motion, paras. 37, 39, 46, referring to *Uwinkindi* Monitoring Report of 30 April 2012, para. 14, and *Uwinkindi* Monitoring Report of 4 July 2012, para. 12.

⁴¹ Second Motion, para. 33. See also First Motion, paras. 39, 41, 46; Second Motion, paras. 32, 34.

⁴² First Motion, paras. 39, 41, 46, referring to *Uwinkindi* Monitoring Report of 30 April 2012, para. 20, *Uwinkindi* Monitoring Report of 4 July 2012, paras. 12, 13, and *Uwinkindi* Monitoring Report of 4 October 2012, para. 13; Second Motion, paras. 32-34, referring to *Uwinkindi* Monitoring Report of 30 November 2012, paras. 22, 24. Mr. Munyagishari argues that the fact that the defence needs to request and obtain authorization from the court significantly delays its investigations. See Second Motion, para. 34. See also Reply Relating to First Motion, paras. 14, 22; Reply Relating to Second Motion, paras. 11-15.

⁴³ First Motion, para. 41, referring to *Uwinkindi* Monitoring Report of 4 October 2012, para. 14; Second Motion, para. 32, referring to *Uwinkindi* Monitoring Report of 30 November 2012, para. 20. See also Reply Relating to Second Motion, paras. 11-14.

16. Mr. Munyagishari submits that, had the information contained in the *Uwinkindi* Monitoring Reports been available before the Referral Chamber, it would not have held that:

- (i) the immunities contained in the Transfer Law constitute an adequate legal framework;
- (ii) Rwanda has the capacity to ensure and respect his right to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him;
- (iii) an adequately funded legal system will afford him the legal assistance of qualified, competent, and experienced lawyers; and
- (iv) his right to an effective defence will be secured in Rwanda.⁴⁴

Mr. Munyagishari argues that, in light of the *Uwinkindi* Monitoring Reports, the Referral Chamber would not have decided to refer the case to Rwanda.⁴⁵

17. The Prosecution responds that Mr. Munyagishari fails to demonstrate how any of the allegations and observations reflected in the *Uwinkindi* Monitoring Reports constitute additional evidence that could or would have had any impact on the decision to refer his case to Rwanda.⁴⁶ The Prosecution argues that Mr. Munyagishari does not identify any specific evidence that was not available in any form before the Referral Chamber,⁴⁷ and fails to point out any conclusions or facts indicating a violation of Mr. Uwinkindi's fair trial rights or supporting Mr. Munyagishari's contention that Rwanda is unable to ensure the right to a fair trial of any other transferred accused.⁴⁸

18. In reply, *inter alia*, Mr. Munyagishari submits that the argument that the proposed evidence was available in another form is "totally unfounded" as no case had been referred to Rwanda by the Tribunal at the time the present case was considered by the Referral Chamber.⁴⁹

⁴⁴ First Motion, para. 52, referring to Referral Decision, paras. 102, 139, 170, 171 (referring to Organic Law N° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States [Rwanda], as amended by Organic Law N° 03/2009/OL. of 26/05/2009 Modifying and Complementing the Organic Law N° 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and Other States [Rwanda] ("Transfer Law")); Second Motion, para. 38.

⁴⁵ First Motion, para. 52; Second Motion, para. 38.

⁴⁶ Response to First Motion, paras. 5, 46; Response to Second Motion, paras. 2, 18, 19.

⁴⁷ Response to First Motion, para. 5; Response to Second Motion, paras. 2-5, 18. The Prosecution submits that the fact that the *Uwinkindi* Monitoring Reports were submitted after the issuance of the Referral Decision "does not render any evidence or information allegedly contained therein unavailable for the purposes of Rule 115 of the Rules." See Response to Second Motion, para. 8.

⁴⁸ Response to First Motion, paras. 5, 46; Response to Second Motion, para. 5. The Prosecution contends that Mr. Munyagishari relies on "a truncated presentation of unsubstantiated allegations of difficulties raised by Uwinkindi or his Counsel Gashabana, which are reported by ICTR Interim Monitors often without verification or confirmation", as well as on contentions or speculative concerns similar to those already rejected by the Referral Chamber. See Response to First Motion, paras. 5, 6, 8, 28, 32; Response to Second Motion, para. 2.

⁴⁹ Reply Relating to First Motion, para. 6. See also Reply Relating to Second Motion, paras. 6-9. Mr. Munyagishari also complains that the Prosecution relies on documents attached to its Response to First Motion which were never disclosed

(b) Analysis

19. The Appeals Chamber considers that the *Uwinkindi* Monitoring Reports were not available in the proceedings before the Referral Chamber in this case. The Appeals Chamber observes that the *Uwinkindi* Monitoring Reports contain a number of references to public submissions made before the *Uwinkindi* Referral Chamber prior to the issuance of the Referral Decision, as well as information relating to the Rwandan judicial system which was before the Referral Chamber in the present case.⁵⁰ However, the Appeals Chamber considers that the observations of the Tribunal Monitors on the conduct of Mr. Uwinkindi's transferred case in Rwanda were not available before the Referral Chamber in this case in any form.⁵¹

20. The Appeals Chamber is also satisfied that the *Uwinkindi* Monitoring Reports are relevant to the extent that they provide information on the implementation of the Transfer Law and the conduct of proceedings in a transferred case in Rwanda. The Appeals Chamber also considers that the *Uwinkindi* Monitoring Reports bear sufficient indicia of credibility to be considered admissible as additional evidence on appeal.

21. Having so found, the Appeals Chamber will accordingly turn to determine whether the information in the *Uwinkindi* Monitoring Reports could have been a decisive factor in reaching the Referral Decision.

22. The Appeals Chamber considers that, contrary to Mr. Munyagishari's claim,⁵² the *Uwinkindi* Monitoring Reports do not show that the accused's rights to legal representation and to remain silent are not safeguarded in Rwanda. The *Uwinkindi* Monitoring Reports demonstrate that, in accordance with Rwandan laws, Mr. Uwinkindi, as an indigent accused, was assigned an experienced defence counsel, whom he chose from the list of *pro bono* counsel presented by the KBA.⁵³ The Appeals Chamber recalls that an indigent accused does not have the right to a counsel

to the Defence and which, in his view, should have been filed pursuant to Rule 115 of the Rules if the Prosecution intended to tender the documents into evidence. *See* Reply Relating to First Motion, paras. 7, 8. In submitting the documents, the Prosecution clarified that they were "presented at this stage as an offer of proof only to illustrate the insufficiency of Munyagishari's submissions." *See* Response to First Motion, fn. 16. As they are not part of the original record of the Referral Chamber and have not been admitted as additional evidence pursuant to Rule 115 of the Rules, the Appeals Chamber will not consider the documents attached to the Prosecution's Response to First Motion in deliberating on the Motions for Additional Evidence.

⁵⁰ *See, e.g.*, *Uwinkindi* Monitoring Report of 30 April 2012, paras. 5, 10, 20; *Uwinkindi* Monitoring Report of 18 June 2012, para. 19; *Uwinkindi* Monitoring Report of 4 July 2012, paras. 4, 5, 6, 10, 11, 12. *See also infra*, para. 27.

⁵¹ The Appeals Chamber notes that the *Uwinkindi* Monitoring Report of 30 April 2012 was issued confidentially and was only disclosed to Mr. Munyagishari's defence team on 26 July 2012. *See supra*, fn. 20. The subsequent reports were issued after the issuance of the Referral Decision.

⁵² *See* First Motion, paras. 36, 38-41, 48-50, 52; Second Motion, paras. 30, 35-38.

⁵³ *Uwinkindi* Monitoring Report of 30 April 2012, para. 3; *Uwinkindi* Monitoring Report of 18 June 2012, para. 14. *See also* *Uwinkindi* Monitoring Report of 1 August 2012, para. 4. The Tribunal Monitors noted that Mr. Uwinkindi's assigned counsel, Mr. Gashabana, is a former President of the KBA and has previously worked on genocide cases. *See Uwinkindi* Monitoring Report of 30 April 2012, para. 3.

of his own choosing⁵⁴ and notes that the transfer of Mr. Uwinkindi's case to Rwanda was not made subject to the condition that a foreign counsel be assigned to represent him.⁵⁵

23. The Appeals Chamber further notes that the issue of Mr. Uwinkindi's appearance before a police officer for the preparation of a "statement of arrest" upon his arrival in Rwanda without the assistance of counsel⁵⁶ was litigated before the Nyarugenge Intermediate Court and, on appeal, before the High Court of Rwanda.⁵⁷ The Tribunal Monitor reported that Mr. Uwinkindi's appeal against the decision denying his submissions on this issue was dismissed in "a public, detailed and reasoned document."⁵⁸ In these circumstances, the Appeals Chamber is not convinced that the information contained in the *Uwinkindi* Monitoring Reports in this respect could have affected the Referral Chamber's confidence that Mr. Munyagishari will be afforded legal assistance and that his right to an effective defence will be secured in Rwanda.⁵⁹ As for the allegation regarding the un-assisted appearance of Mr. Munyagishari before the Rwandan Prosecutor referred to in the *Uwinkindi* Monitoring Report of 18 June 2012,⁶⁰ the Appeals Chamber observes that, according to his counsel, Mr. Uwinkindi exercised his right to remain silent during this appearance, and that neither Mr. Uwinkindi's counsel nor the Tribunal Monitors raised this un-assisted appearance as a matter of concern.⁶¹

24. The *Uwinkindi* Monitoring Reports also show that Mr. Uwinkindi was able to exercise his right to remain silent.⁶² The mere expression of the concern of Mr. Uwinkindi's defence counsel reported in some of the *Uwinkindi* Monitoring Reports that the exercise of Mr. Uwinkindi's right not to provide a statement to the Rwandan prosecution on the allegations against him may be considered "obstructive" or "uncooperative" by the Rwandan authorities⁶³ falls short of

⁵⁴ See, e.g., *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, originally filed in French on 28 November 2007, English translation filed on 16 May 2008, para. 128; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007, para. 17. See also Referral Decision, para. 146, fn. 281, and references contained therein.

⁵⁵ The Appeals Chamber considers that Mr. Munyagishari's submission that the fact that Mr. Uwinkindi was not offered the possibility to choose a foreign counsel "reveals that the reality of a trial in Rwanda differs considerably from the description given by the Rwandan authorities, the Kigali Bar Association and the Prosecutor when this matter came before the Trial Chamber" is without merit insofar as the Referral Chamber did not rely on the submissions regarding the possible assignment of a foreign counsel to reach its decision to refer Mr. Munyagishari's case to Rwanda. See Reply Relating to First Motion, para. 10.

⁵⁶ See First Motion, paras. 38, 50.

⁵⁷ See *Uwinkindi* Monitoring Report of 4 October 2012, paras. 2-6.

⁵⁸ *Uwinkindi* Monitoring Report of 4 October 2012, para. 10.

⁵⁹ Referral Decision, paras. 170, 171.

⁶⁰ See First Motion, paras. 38, 50.

⁶¹ See *Uwinkindi* Monitoring Report of 18 June 2012, para. 25.

⁶² The Appeals Chamber notes that the Tribunal Monitors reported that: (i) Mr. Uwinkindi's request not to enter a plea was granted by the Nyarugenge Intermediate Court; and (ii) Mr. Uwinkindi did in fact not make the statement addressing the allegations against him requested by the Rwandan prosecutorial authorities. See *Uwinkindi* Monitoring Report of 30 April 2012, para. 4; *Uwinkindi* Monitoring Report of 18 June 2012, para. 25; *Uwinkindi* Monitoring Report of 4 July 2012, para. 17; *Uwinkindi* Monitoring Report of 1 August 2012, para. 16.

⁶³ *Uwinkindi* Monitoring Report of 4 July 2012, para. 17; *Uwinkindi* Monitoring Report of 1 August 2012, para. 5.

demonstrating Mr. Munyagishari's assertion that the right to remain silent is not given full effect in Rwanda.⁶⁴

25. With respect to the issue of the funding of Mr. Uwinkindi's defence counsel,⁶⁵ the Appeals Chamber observes that the *Uwinkindi* Monitoring Reports reveal that Mr. Uwinkindi's defence counsel were not paid for their services for a considerable period of time.⁶⁶ These reports, however, also reflect, *inter alia*, that the issue of the financing of legal aid was the subject of on-going negotiations between the defence counsel, the KBA, and the Rwandan Ministry of Justice ("MoJ").⁶⁷ The Appeals Chamber notes, in particular, that an agreement concerning the financing by the MoJ of legal aid for the services of defence counsel representing transferred accused was reached between the KBA and the MoJ on 3 August 2012, and that an agreement on the remuneration of defence counsel between Mr. Uwinkindi's counsel and the President of the KBA was concluded on 31 October 2012.⁶⁸ It also bears noting that neither Mr. Uwinkindi's counsel nor the Tribunal Monitors suggested that the remuneration issues jeopardized Mr. Uwinkindi's right to a fair trial. Against this background, the Appeals Chamber considers that Mr. Munyagishari's contention concerning the lack of funding for Mr. Uwinkindi's defence counsel is without merit. The Appeals Chamber emphasizes in this regard that, in accordance with its jurisprudence, the Referral Chamber held that it was not obligated to itemise the provisions of Rwanda's budget once it had learned that there was financial support for the accused's representation.⁶⁹ The Appeals Chamber concludes that the information pertaining to the funding and remuneration of Mr. Uwinkindi's defence counsel disclosed in the *Uwinkindi* Monitoring Reports

⁶⁴ See First Motion, paras. 38, 50. See also *ibid.*, para. 39.

⁶⁵ See First Motion, paras. 38-41, 48, 49, 52; Second Motion, paras. 34-38.

⁶⁶ *Uwinkindi* Monitoring Report of 18 June 2012, paras. 26, 28; *Uwinkindi* Monitoring Report of 4 July 2012, paras. 2-6; *Uwinkindi* Monitoring Report of 1 August 2012, paras. 2, 4.

⁶⁷ *Uwinkindi* Monitoring Report of 4 July 2012, para. 2; *Uwinkindi* Monitoring Report of 1 August 2012, para. 2; *Uwinkindi* Monitoring Report of 30 November 2012, para. 25, fn. 4.

⁶⁸ *Uwinkindi* Monitoring Report of 30 November 2012, paras. 17, 19. Against this background, the Appeals Chamber considers that Mr. Munyagishari's fear "that the same situation may reoccur in the instant case" is groundless, in particular in light of the information provided in the *Uwinkindi* Monitoring Report of 30 November 2012 that the "established package" should apply to the next transfer cases. See First Motion, para. 48; *Uwinkindi* Monitoring Report of 30 November 2012, para. 16. In reply, Mr. Munyagishari further argues that there is no proof that the issue of the remuneration of defence counsel is now resolved and that the "agreement signed by Defence Counsel and the [KBA] shows that the funds provided for the Defence are ridiculous." See Reply Relating to First Motion, para. 13. The Appeals Chamber observes in this regard that while the *Uwinkindi* Monitoring Report of 30 November 2012 suggests that Mr. Uwinkindi's lead counsel will seek a revision of the agreed rate of legal aid and of the number of hours that may be billed, the issue of payment for counsel's services was not raised as a matter of concern in recent monitoring reports. See *Uwinkindi* Monitoring Report of 4 October 2012; *Uwinkindi* Monitoring Report of 30 November 2012.

⁶⁹ Referral Decision, para. 153, referring to *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions, 16 December 2011, para. 71.

could not have had any impact on the conclusion of the Referral Chamber concerning the provision of appropriate and sufficient funding for legal aid for transferred cases in Rwanda.⁷⁰

26. As for the issue of the funding of the defence investigations,⁷¹ the *Uwinkindi* Monitoring Report of 30 November 2012 indicates that the Permanent Secretary of the MoJ informed the Tribunal Monitors that the MoJ had the budgetary allocation to provide for an investigation by the defence provided that the investigation was allowed by the High Court.⁷² In light of this, the Appeals Chamber does not find that the information pertaining to the funding for Mr. Uwinkindi's investigations could have had any impact on the Referral Chamber's conclusions that it was confident that an adequately funded legal aid system will afford Mr. Munyagishari legal assistance and that his right to an effective defence will be secured in Rwanda.⁷³

27. The Appeals Chamber further observes that the Referral Chamber was aware of the legal framework within which criminal investigations in Rwanda are conducted and of the gathering of evidence *à charge et à décharge* by the judicial police in Rwanda.⁷⁴ The Appeals Chamber also notes that Mr. Munyagishari did not argue before the Referral Chamber that this procedure would deny his right to a fair trial in Rwanda.⁷⁵ The Appeals Chamber also observes that the *Uwinkindi* Monitoring Reports do not refer to any difficulties in the cooperation of the judicial police with the defence or in the conduct of the judicial police's investigations. In these circumstances, the Appeals Chamber does not consider that, as suggested by Mr. Munyagishari,⁷⁶ the information provided by the *Uwinkindi* Monitoring Reports regarding the conduct of criminal investigations in Rwanda could have been a decisive factor in reaching the Referral Decision.

⁷⁰ See Referral Decision, paras. 153, 170.

⁷¹ See First Motion, paras. 41, 49; Second Motion, paras. 30-32, 34.

⁷² *Uwinkindi* Monitoring Report of 30 November 2012, para. 20. The report also notes the assurance by the MoJ's representative that the MoJ shall disburse the funds when an invoice made pursuant to the applicable law will be raised. The representative further informed the Tribunal Monitors that, while no provisions had initially been made for funding defence investigators given the functioning of the Rwandan justice system, the MoJ, "if the High Court so permits, [...] will comply and provide such funding." See *idem*. Mr. Uwinkindi's counsel appears to have acknowledged that, in accordance with Rwandan law, it is now for the High Court to decide whether it authorizes the defence to conduct its own investigations. See *ibid.*, para. 24.

⁷³ Referral Decision, paras. 170, 171.

⁷⁴ See Referral Decision, para. 120; *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11Bis of the Tribunal's Rules of Procedure and Evidence, 9 November 2011 ("Prosecution Request for Referral"), paras. 51, 52; Prosecution Request for Referral, Annex J (*Amicus Curiae* Brief for the Republic of Rwanda in Support of the Prosecutor's Application for Referral Pursuant to Rule 11 BIS [in the Case of Jean Uwinkindi]), paras. 27-32; Prosecution Request for Referral, Annex L (Affidavit of Emmanuel Rukangira, KBA Acting President, dated February 2011), para. 13; Prosecution Request for Referral, Annex M (*Amicus Curiae* Brief of the Kigali Bar Association in the Matter of the Prosecutor's Request for the Referral of the Case of Uwinkindi Jean), paras. 44-47; *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, Prosecutor's Consolidated Brief in Reply, 29 February 2012, para. 149. See also Rwandan Criminal Code, Arts. 18, 19, 22.

⁷⁵ See *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, *Réponse de la Défense de Bernard Munyagishari à la Requête du Procureur aux fins de renvoi de l'affaire Munyagishari au Rwanda en application de*

28. Turning to Mr. Munyagishari's remaining arguments regarding the right to obtain the appearance of defence witnesses under the same conditions as prosecution witnesses, the Appeals Chamber finds that Mr. Munyagishari fails to show how the information contained in the *Uwinkindi* Monitoring Reports to the effect that it is common practice for defence counsel in Rwanda not to meet witnesses before they testify in order to avoid any suspicion of subornation⁷⁷ could have had any impact on the Referral Decision.⁷⁸

29. Similarly, the Appeals Chamber does not consider that the discussion of an alleged incident of harassment of a defence witness in the *Ingabire* case in the *Uwinkindi* Monitoring Report of 30 April 2012 could have had any bearing on the Referral Decision.⁷⁹ The Appeals Chamber notes that the Tribunal Monitor suggested that this incident "*could potentially* have a chilling effect on the willingness of defence witnesses to testify in the *Uwinkindi* case" without reaching any conclusion in this regard.⁸⁰ This matter was not raised in any of the subsequent reports. In any event, the Referral Decision reflects that the Referral Chamber took account of the fact that, unlike the *Ingabire* trial, Mr. Munyagishari's case in Rwanda would be subject to independent monitoring under the authority of the Tribunal and to additional protections and guarantees under Rwandan laws applicable to cases transferred from the Tribunal.⁸¹ The Referral Decision also reflects that the Referral Chamber considered that, should the right of Mr. Munyagishari to obtain the attendance and examination of his witnesses under the same conditions as those testifying for the prosecution not be respected, the referral of his case may be revoked.⁸²

30. With respect to Mr. Munyagishari's arguments concerning the WPU,⁸³ the Appeals Chamber notes that the establishment of this program under the auspices of the judiciary was one of the factors the Referral Chamber relied on to conclude that it was satisfied that Rwanda had the capacity to ensure and respect Mr. Munyagishari's right to obtain the attendance and examination of witnesses under the same conditions as witnesses against him.⁸⁴ The Appeals Chamber considers that it transpires from the information reported in the *Uwinkindi* Monitoring Reports of

l'article 11bis du Règlement de procédure et de preuve, 1 February 2012; *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89-I, T. 12 April 2012.

⁷⁶ See First Motion, paras. 39, 41, 46, 47; Second Motion, paras. 30-34.

⁷⁷ *Uwinkindi* Monitoring Report of 30 April 2012, para. 14; *Uwinkindi* Monitoring Report of 4 July 2012, para. 12.

⁷⁸ See First Motion, paras. 37, 39, 46, 52, referring to *Uwinkindi* Monitoring Report of 30 April 2012, para. 14, *Uwinkindi* Monitoring Report of 4 July 2012, para. 12.

⁷⁹ See First Motion, paras. 37, 44, 45.

⁸⁰ *Uwinkindi* Monitoring Report of 30 April 2012, para. 19 (emphasis added). See also *ibid.*, paras. 10-18.

⁸¹ See Referral Decision, paras. 55, 91, 92, 97, 102, 107, 111, 117, 118, 128, 137, 138, 162, 197, 208.

⁸² See Referral Decision, paras. 102, 111, 118, 128, 134, 138, 153, and Disposition.

⁸³ See First Motion, paras. 40, 47.

⁸⁴ See Referral Decision, paras. 107, 108, 137, 139.

18 June 2012 and 1 August 2012 that the WPU was not yet operational in July 2012.⁸⁵ However, the *Uwinkindi* Monitoring Report of 30 November 2012 notes that steps have been taken by the Rwandan authorities to make the WPU functional.⁸⁶ In light of these positive developments and information concerning the status of defence investigations,⁸⁷ the Appeals Chamber is not persuaded that the information provided by the Tribunal Monitor in the earlier *Uwinkindi* Monitoring Reports concerning the WPU could have had any impact on the conclusions reached in the Referral Decision.

31. Finally, the Appeals Chamber observes that the *Uwinkindi* Monitoring Reports contain no suggestion that the Tribunal Monitors were not able to carry out their mandate. The Appeals Chamber accordingly considers that, contrary to Mr. Munyagishari's claim,⁸⁸ the *Uwinkindi* Monitoring Reports demonstrate that the Tribunal Monitors are able to fully fulfil their monitoring mission as defined in the *Uwinkindi* Referral Decision, the decision of the President of the Tribunal on the monitoring arrangements for the trial of Mr. Uwinkindi in Rwanda, and the Registrar's Guidelines on Monitoring.⁸⁹ The Appeals Chamber notes, in particular, that none of these decisions and guidelines provides that the Tribunal Monitors are responsible for attending appearances of the transferred accused before the national prosecutor.

(c) Conclusion

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

⁸⁵ See *Uwinkindi* Monitoring Report of 18 June 2012, paras. 19, 20; *Uwinkindi* Monitoring Report of 1 August 2012, paras. 7, 8, 13.

⁸⁶ See *Uwinkindi* Monitoring Report of 30 November 2012, paras. 11, 12.

⁸⁷ See *Uwinkindi* Monitoring Report of 30 November 2012, para. 5.

⁸⁸ See First Motion, paras. 39, 51.

⁸⁹ *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 ("*Uwinkindi* Referral Decision"), paras. 208, 212, 214, and Disposition; *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012, paras. 19, 24, 25, 30, 31, 33; Guidelines on Monitoring Trials Referred to National Jurisdictions Under Rule 11 Bis by ICTR Staff Monitors, 29 June 2012 ("*Guidelines on Monitoring*"). See also Transfer Law, Art. 19.

2. Admission of the Amnesty International Press Release and the FIDH Article

(a) Submissions

33. Mr. Munyagishari submits that the Amnesty International Press Release and the FIDH Article were not available in the proceedings before the Referral Chamber and, given their source, are credible.⁹⁰ He contends that these two documents contain relevant information as they “highlight the shortcomings of the Rwandan judicial system”⁹¹ and reveal the failure of Rwanda to respect the presumption of innocence, the right to an effective defence, and the right of an accused to call witnesses under the same conditions as prosecution witnesses.⁹² Mr. Munyagishari argues that, while these documents relate to a case not covered by the Transfer Law, there is no guarantee that the incidents which occurred in the *Ingabire* case will not occur in a transferred case.⁹³ In his view, the Amnesty International Press Release and the FIDH Article also show that the presence of observers monitoring the conduct of a criminal trial in Rwanda is not a sufficient guarantee for a fair trial.⁹⁴ Mr. Munyagishari concludes that, had the information contained in the Amnesty International Press Release and the FIDH Article been available in the proceedings before the Referral Chamber, the Referral Chamber would not have held that it was not concerned about the protection of the presumption of innocence, and would not have decided to refer the case to Rwanda.⁹⁵

34. The Prosecution responds that Mr. Munyagishari fails to demonstrate how the opinions expressed by Amnesty International and the FIDH regarding the *Ingabire* case constitute additional evidence that could or would have had any impact on the decision to refer his case to Rwanda.⁹⁶ The Prosecution argues that the Referral Chamber already addressed and rejected the claims that Mr. Munyagishari’s presumption of innocence will not be respected in Rwanda based on the same sort of evidence.⁹⁷ It adds that Mr. Munyagishari’s case has to be distinguished from other cases in Rwanda, and that mere opinions expressed by non-governmental organizations on the conduct and outcome of the *Ingabire* case are not relevant to the present case.⁹⁸

⁹⁰ First Motion, paras. 21, 24, 27, 29, 30.

⁹¹ First Motion, para. 42.

⁹² First Motion, paras. 33, 34, 42. *See also ibid.*, paras. 11, 17.

⁹³ First Motion, paras. 33, 43.

⁹⁴ First Motion, paras. 33, 51. *See also ibid.*, para. 17; Reply Relating to First Motion, paras. 23, 24.

⁹⁵ First Motion, paras. 52, 57.

⁹⁶ Response to First Motion, paras. 5, 46. *See also ibid.*, paras. 32, 37, 40.

⁹⁷ Response to First Motion, paras. 37-39.

⁹⁸ Response to First Motion, para. 5, 36, *referring to Uwinkindi Appeal Decision of 19 April 2012*, pp. 2, 3.

35. In reply, Mr. Munyagishari submits that the Tribunal Monitors considered that the events which transpired in the *Ingabire* case were sufficiently relevant to be included in their reports.⁹⁹

(b) Analysis

36. The Appeals Chamber notes that the trial of Ms. Victoire Ingabire was conducted in part when Mr. Munyagishari's case was pending before the Referral Chamber and that issues pertaining to her trial in Rwanda were raised before the Referral Chamber.¹⁰⁰ The Appeals Chamber considers, however, that the views expressed in the Amnesty International Press Release and the FIDH Article published on 30 October and 2 November 2012, respectively, were not available at trial for the purposes of Rule 115 of the Rules. The Appeals Chamber is also satisfied that the Amnesty International Press Release and the FIDH Article are relevant to the extent that they provide information on the conduct of judicial proceedings in Rwanda, and that they bear sufficient indicia of credibility to be considered admissible as additional evidence on appeal.

37. However, the Appeals Chamber finds that neither the Amnesty International Press Release nor the FIDH Article could have been a decisive factor in reaching the Referral Decision. The Appeals Chamber recalls that, unlike the *Ingabire* case, Mr. Munyagishari's case in Rwanda would be subject to independent monitoring under the authority of the Tribunal and to additional protections and guarantees under Rwandan laws applicable to cases transferred from the Tribunal.¹⁰¹ Moreover, a further distinguishing factor is the fact that any referral of Mr. Munyagishari's case for trial in Rwanda would be subject to revocation.¹⁰² The Appeals Chamber therefore considers that the differences between the case of Ms. Ingabire in Rwanda and the cases transferred from the Tribunal for trial in Rwanda are such that the information regarding the conduct of the *Ingabire* case provided in the Amnesty International Press Release and the FIDH Article could not have had any impact on the Referral Decision.¹⁰³

(c) Conclusion

38. Based on the foregoing, the Appeals Chamber dismisses Mr. Munyagishari's request to have the Amnesty International Press Release and the FIDH Article admitted as additional evidence in the present case.

⁹⁹ Reply Relating to First Motion, para. 18, referring to *Uwinkindi* Monitoring Report of 30 April 2012, para. 12.

¹⁰⁰ See Referral Decision, para. 183.

¹⁰¹ See *supra*, para. 29.

¹⁰² See Referral Decision, Disposition, p. 56.

¹⁰³ Cf. *Uwinkindi* Appeal Decision of 19 April 2012, pp. 2, 3.

3. Appearance of Vincent Gatera Gashabana

(a) Submissions

39. Mr. Munyagishari requests that Mr. Uwinkindi's counsel in Rwanda, Mr. Gashabana, be called to testify in the present case.¹⁰⁴ In support of his request, Mr. Munyagishari submits that Mr. Gashabana would provide significant and useful insight into the *Uwinkindi* proceedings in Rwanda and into Rwanda's ability to ensure a fair trial, guarantee an effective defence, and safeguard the rights of the accused.¹⁰⁵ He contends that Mr. Gashabana could, in particular, provide specific information related to the funding of the legal aid system in Rwanda and to the ability of defence counsel in Rwanda to secure the appearance of witnesses on behalf of the accused under the same conditions as prosecution witnesses.¹⁰⁶ He argues that this information was not in Mr. Gashabana's possession before the issuance of the Referral Decision.¹⁰⁷ Mr. Munyagishari also explains that his defence team has been unable to question Mr. Gashabana as the Registry has not yet responded to the defence team's request for authorization to travel to Rwanda.¹⁰⁸ He submits that his defence team is willing to record a statement from Mr. Gashabana and seeks its admission as additional evidence provided that the defence team is authorized to travel to Rwanda to interview Mr. Gashabana.¹⁰⁹

40. The Prosecution responds that the request to call Mr. Gashabana should be summarily dismissed because Mr. Munyagishari proffers no statement from Mr. Gashabana or any documentation that may be admissible as additional evidence.¹¹⁰ In any event, the Prosecution submits, Mr. Munyagishari fails to demonstrate "what, if anything, Gashabana would say that is different from what the ICTR Interim Monito[rs] already have reported."¹¹¹

41. Mr. Munyagishari replies that he cannot provide the Appeals Chamber with evidence that is not in his possession.¹¹²

(b) Analysis

42. The Appeals Chamber recalls that "it has the authority to summon a witness, in appropriate circumstances, to testify before the Chamber so as to facilitate the effective conduct of appeal

¹⁰⁴ First Motion, paras. 15, 59.

¹⁰⁵ First Motion, paras. 15, 18. *See also ibid.*, paras. 27, 54.

¹⁰⁶ First Motion, paras. 55, 56. *See also* Reply Relating to First Motion, para. 26.

¹⁰⁷ First Motion, para. 23.

¹⁰⁸ First Motion, para. 16.

¹⁰⁹ First Motion, para. 16.

¹¹⁰ Response to First Motion, paras. 42, 43.

¹¹¹ Response to First Motion, para. 44.

¹¹² Reply Relating to First Motion, para. 25.

proceedings, and especially Rule 115's power to admit additional evidence".¹¹³ However, the purpose of Rule 115 of the Rules is to deal "with the situation where a party *is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial."¹¹⁴ The Appeals Chamber considers that Rule 115 of the Rules does not permit a party to merely request a particular person to be summoned as a witness to give evidence at the appellate stage.¹¹⁵ As repeatedly held, a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.¹¹⁶ Where a party seeks to call a witness, it needs to provide a statement or other documentation of the potential witness's proposed evidence, which the Appeals Chamber may admit as additional evidence pursuant to Rule 115 of the Rules and on the basis of which it may determine whether calling the witness to testify on appeal is necessary.¹¹⁷

43. In the present case, Mr. Munyagishari has not provided the Appeals Chamber with any statement from Mr. Gashabana or any documentation that may be admissible as additional evidence and the contents of which would prompt the Appeals Chamber to call the witness to testify in person. The Appeals Chamber considers that Mr. Munyagishari's explanation as to why he could not procure any statement or supportive documentation from Mr. Gashabana does not demonstrate that Mr. Munyagishari's defence team was effectively unable to obtain any material from Mr. Gashabana that may have been submitted in support of the request to hear the latter on appeal. Given the absence of any material from Mr. Gashabana that Mr. Munyagishari can seek to have admitted as "additional evidence", the Appeals Chamber considers that Mr. Munyagishari's request that Mr. Gashabana appear as a witness in these appeal proceedings pursuant to Rule 115 of the Rules cannot be granted.

(c) Conclusion

44. Accordingly, the Appeals Chamber denies Mr. Munyagishari's request that Mr. Uwinkindi's counsel in Rwanda, Mr. Gashabana, be called to testify on appeal in this case.

¹¹³ *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motions for the Admission of Additional Evidence, 21 March 2011 ("*Bagosora et al. Decision of 21 March 2011*"), para. 31, and references contained therein.

¹¹⁴ *Bagosora et al. Decision of 21 March 2011*, para. 31, and references contained therein.

¹¹⁵ *Bagosora et al. Decision of 21 March 2011*, para. 31, and references contained therein.

¹¹⁶ *Bagosora et al. Decision of 21 March 2011*, para. 31, and references contained therein. See also Practice Direction on Formal Requirements for Appeals from Judgement, dated 4 July 2005, para. 7(e), which provides that a motion under Rule 115 of the Rules should contain an appendix with copies of the evidence the party is applying to present.


¹¹⁷ *Bagosora et al. Decision of 21 March 2011*, para. 31, and references contained therein.

E. Disposition

45. For the foregoing reasons, the Appeals Chamber **DENIES** the Motions for Additional Evidence in their entirety.

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

Done this 25th day of February 2013,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

[Seal of the Tribunal]

