UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No: MICT-12-23-AR14.2

Date: 23 January 2026

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IN THE APPEALS CHAMBER

Before: **Judge Graciela Gatti Santana, Presiding**
Judge Carmel Agius
Judge Florence Rita Arrey
Judge Liu Daqun
Judge Seon Ki Park

Registrar: **Mr. Abubacarr M. Tambadou**

THE PROSECUTOR

v.

FULGENCE KAYISHEMA

PUBLIC

DEFENCE APPEAL BRIEF AGAINST DECISIONS ON REQUEST FOR REVOCATION OF REFERRAL

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig

Counsel for Mr. Fulgence Kayishema:

Mr. Philippe Larochelle
Ms. Kate Gibson

I. INTRODUCTION

1. The Defence of Mr. Fulgence Kayishema ("Defence" and "Mr. Kayishema", respectively) hereby submits its brief in support of its consolidated appeal against Trial Chamber's "Decision on Fulgence Kayishema's Requests for Revocation of Referral and Assignment of Counsel" dated 29 October 2025 ("First Impugned Decision")[1] and "Further Decision on Fulgence Kayishema's Request for Revocation of Referral" dated 24 December 2026 ("Second Impugned Decision"; collectively, "Impugned Decisions").[2]

II. PROCEDURAL BACKGROUND

2. On 22 February 2012, a Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") referred the case against Mr. Kayishema to the Republic of Rwanda ("Rwanda").[3]

3. On 26 September 2019 a Trial Chamber of the International Residual Mechanism for Criminal Tribunals ("the Mechanism") dismissed without prejudice a request from the Office of the Prosecutor of the Mechanism ("Prosecution") to revoke the referral of Mr. Kayishema's case to Rwanda.[4]

4. On 24 May 2023, Mr. Kayishema was arrested in the Republic of South Africa ("South Africa") on the basis of a warrant of arrest issued by the Mechanism.[5]

5. On 14 August 2025, the Defence filed a request to revoke the Referral Decision ("Revocation Request").[6]

[1] Decision on Fulgence Kayishema's Requests for Revocation of Referral and Assignment of Counsel, 29 October 2025 (public) ("First Impugned Decision").
[2] Further Decision on Fulgence Kayishema's Request for Revocation of Referral, 24 December 2025 (public) ("Second Impugned Decision").
[3] *Prosecutor v. Kayishema*, Case No. ICTR-01-67-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 22 February 2012 ("Referral Decision").
[4] *Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Decision on Urgent Motion for Revocation of Referral and Amendment of Arrest Warrant, 26 September 2019 ("Decision of 26 September 2019").
[5] *Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Decision on a Motion to Lift the Confidentiality of an Arrest Warrant, 7 September 2023, p. 2. *See Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Warrant of Arrest and Order for Transfer Addressed to All States, 8 March 2019.
[6] Request for Revocation of Referral to the Republic of Rwanda, 14 August 2025 (confidential; public redacted version filed 26 August 2025) ("Revocation Request").

6. On 2 September 2025, the Defence filed a request before the Trial Chamber for the assignment of counsel in the interests of justice.[7]

7. On 29 October 2025, the Trial Chamber rendered the First Impugned Decision in which it (i) partially dismissed the Revocation Request in relation to Grounds 2 to 4 thereof; (ii) dismissed the Request for Assignment of Counsel in its entirety; and (iii) invited submissions from the Government of South Africa regarding Ground 1 of the Revocation Request.[8]

8. On 13 November 2025, the Defence filed a Notice of Appeal against the First Impugned Decision.[9]

9. On 19 November 2025, the Prosecution moved to strike the First Notice of Appeal.[10]

10. On 25 November 2025, the President declined to compose a bench of the Appeals Chamber in view of the First Notice of Appeal.[11]

11. On 28 November 2025, the Government of South Africa filed submissions responsive to the First Impugned Decision regarding Ground 1 of the Revocation Request.[12]

12. On 24 December 2025, the Trial Chamber rendered the Second Impugned Decision, dismissing Ground 1 and accordingly the remainder of the Revocation Request.[13]

13. On 8 January 2026, the Defence filed a consolidated notice of appeal against the Impugned Decisions.[14]

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[7] Defence Request for Assignment of Counsel, 2 September 2025 ("Request for Assignment of Counsel").
[8] First Impugned Decision, pp. 7-8, 9.
[9] *Prosecutor v. Kayishema*, Case No. MICT-12-23-AR14.1, Defence Notice of Appeal Against "Decision on Fulgence Kayishema's Requests for Revocation of Referral and Assignment of Counsel", 13 November 2025 ("First Notice of Appeal").
[10] *Prosecutor v. Kayishema*, Case No. MICT-12-23-AR14.1, Prosecution Motion to Strike Kayishema's Notice of Appeal, 19 November 2025 ("Motion to Strike").
[11] *Prosecutor v. Kayishema*, Case No. MICT-12-23-AR14.1, Decision in Relation to Defence Notice of Appeal Against "Decision on Fulgence Kayishema's Requests for Revocation of Referral and Assignment of Counsel", 25 November 2025 ("Decision of 25 November 2025"), p. 2.
[12] Submissions pursuant to "Decision on Fulgence Kayishema's Requests for Revocation of Referral and Assignment of Counsel", 28 November 2025 (public). *See also* Defence Response to the Submissions of the Government of the Republic of South Africa Responsive to the Decision of 29 October 2025, 10 December 2025 (public) ("Defence Response to South Africa's Submissions").
[13] Second Impugned Decision, p. 6.
[14] Defence Notice of Consolidated Appeal against Decisions on Request for Revocation of Referral, 8 January 2026.

III. JURISDICTION AND ADMISSIBILITY

A. Admissibility under Rule 14(E)

14. The Defence brings the present appeal pursuant to Rule 14(E) of the Rules of Procedure and Evidence ("Rules").[15] The Appeals Chamber has consistently affirmed that appeals of decisions on revocation requests should be governed by Rule 14(E) and thus lie as of right.[16] Moreover, paragraph 21 of the Practice Direction on Requirements and Procedures for Appeals codifies the ability of a party to appeal decisions taken under Rule 14 as of right.[17] Both Impugned Decisions were rendered pursuant Rule 14(C) and partially dispose of the Revocation Request.[18] Accordingly, the present consolidated appeal of the Impugned Decisions is admissible under Rule 14(E).

B. Admissibility of Appeal of the First Impugned Outside the Relevant Deadlines

15. The Defence notes that it filed its First Notice of Appeal within the prescribed deadline.[19] However, the President declined to compose a bench of the Appeals Chamber, finding "that the Trial Chamber remains seised of the Revocation Request and that composing a bench of the Appeals Chamber to address any issues raised in the [First] Notice of Appeal before the Trial Chamber's final decision on the matter is unnecessary to preserve any of Kayishema's rights, may result in a needless expenditure of judicial resources, and is not in the interests of justice."[20] Moreover, the President found that "Kayishema may seek appellate review of any findings of the Trial Chamber in relation to the Revocation Request once the Trial Chamber has definitively adjudicated the matter"[21] and, in this vein, instructed "Kayishema to file a notice of

[15] All references to "Rule" or "Rules" herein are to the Rules unless otherwise noted.
[16] *See Prosecutor v. 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* Decision"), para. 9; *Prosecutor v. Uwinkindi*, Case No. MICT-12-25-AR14.1, Decision on Motions to Strike Notice of Appeal and Appeal Brief, 4 February 2016 ("*Uwinkindi* Decision on 4 February 2016"), para. 6 and fn. 15.
[17] Practice Direction on Requirements and Procedures for Appeals, MICT/10/Rev.1, 20 February 2019 ("Practice Direction on Appeals"), para. 21.
[18] *See* First Impugned Decision, pp. 8, 9; Second Impugned Decision, p. 6.
[19] *See* Rule 14(E); Practice Direction on Appeals, para. 21.
[20] Decision of 25 November 2025, p. 2 (footnote omitted).
[21] Decision of 25 November 2025, p. 2, fn. 9.

appeal, if any, following the final adjudication by the Trial Chamber of his Revocation Request".[22]

16. The Defence notes its position that the President's refusal to compose a bench of the Appeals Chamber in view of its First Notice of Appeal was improper and exceeded the President's authority under Article 12(3) of the Statute of the Mechanism ("Statute")[23] and Rule 23(A). It is clearly provided that "[i]n the event of an of an appeal against a decision by a Trial Chamber, the Appeals Chamber *shall* be composed of five judges".[24] The assignment of a five-judge bench of the Appeals Chamber to hear an appeal against a decision of a Trial Chamber is thus mandatory and not a matter for the President's discretion.[25]

17. The Defence submits that, through the Decision of 25 November 2025, the President usurped the authority of the Appeals Chamber in effectively deciding upon the Motion to Strike herself. The procedural framework of the Statute and the Rules dictates that the Motion to Strike should have been decided upon by a bench of the Appeals Chamber assigned by the President further to the First Notice of Appeal.[26] Instead, the President effectively unilaterally decided upon the Motion to Strike, which asked for the First Notice of Appeal to be dismissed,[27] by declining to compose a bench of the Appeals Chamber, which has the same effect as the relief requested by the Prosecution in that it put an end to the appellate proceedings initiated by the First Notice of Appeal. This is distinguishable from other instances where the President has declined to compose a bench of the Appeals Chamber in view of a notice of appeal against a final appeal

[22] Decision of 25 November 2025, p. 2.
[23] All references to "Article" or "Articles" herein are to the Statute unless otherwise noted.
[24] Article 12(3) (emphasis added).
[25] In accordance with its ordinary meaning, the term "shall" denotes a "mandatory" requirement, meaning the decision maker does not enjoy discretion in a given matter. *See In the Case against Jojić and Radeta*, Case No. MICT-17-111-R90, Decision on *Amicus Curiae*'s Appeal against the Order Referring a Case to the Republic of Serbia, 12 December 2018 ("*Jojić and Radeta* Decision of 12 December 2018"), para. 11.
[26] In ongoing interlocutory appeal proceedings in *Robinson*, for example, following the *Amicus Curiae*'s filing of his notice of appeal under Rule 14(E) and the Accused's motion to strike the notice of appeal, the President assigned a bench of the Appeals Chamber to consider the appeal and the Accused's motion to strike; she did not opine or decide upon on the motion to strike, but rather left the motion to be considered by the assigned bench. *See In the Matter of Robinson*, Case No. MICT-25-135-AR14.1, Order Assigning Judges to a Bench of the Appeals Chamber, 4 December 2025. *See also In the Matter of Robinson*, Case No. MICT-25-135-AR14.1, Decision on Motion to Strike Notice of Appeal, 22 December 2025 ("*Robinson* Decision of 22 December 2025"), pp. 2-3 (where the Appeals Chamber decided upon the Accused's motion to strike).
[27] Motion to Strike, para. 4.

judgment as the Statute *a priori* provided no basis for such an appeal[28] and were not subject to a motion to strike meaning the President's decision did not constitute a *de facto* decision on a motion which should have been adjudicated by the Appeals Chamber.[29] There was no similar *a priori* lack of a basis in the Statute or the Rules for the assignment of a bench of the Appeals Chamber in view of the First Notice of Appeal.[30]

18. Moreover, the President reached this decision without affording the Defence the opportunity to respond to the Motion to Strike,[31] a well-established procedural right the Defence was entitled to exercise within the relevant timeframe prescribed by the Rules and the Practice Direction on Appeals.[32] While the Decision of 25 November 2025 is not stylized as a decision on the Motion to Strike, its *dispositif* effectively grants the relief requested by the latter.[33] The Appeals Chamber is not bound by decisions of the President concerning proceedings before it[34] and should have been free to reach its own decision on the Motion to Strike.

19. Therefore, in view of the Decision of 25 November 2025, the Appeals Chamber must consider the present appeal admissible insofar as it concerns the First Impugned Decision in the interests of justice[35] and in order to preserve the fairness of the

[28] *See* Article 23(2); *Prosecutor v. Šešelj*, Case No. MICT-16-99, Decision on Request to be Allowed to Exercise the Right to Appeal and to Have a Deadline Set for the Notice of Appeal, 27 November 2018, para. 8, and references cited therein.
[29] *Cf. Prosecutor v. Šešelj*, Case No. MICT-16-99, Decision on Vojislav Šešelj's Appeal Against the Decision Denying Request to Appeal the Appeal Judgement, 5 February 2019, p. 2; *Prosecutor v. Karadžić*, Case No. MICT-13-55, Decision on Radovan Karadžić's Notice of Sentencing Appeal and the Related Motion for Assignment of Counsel and Extension of Time, 2 April 2019, pp. 3-4.
[30] *See* First Notice of Appeal, para. 1 and fn. 2, *referring to* Rule 14(E); *Stanković* Decision, para. 9; *Uwinkindi* Decision on 4 February 2016, para. 6 and fn. 15.
[31] The Motion to Strike is dated 19 November 2025 but was notified to the Defence on 20 November 2025. The Defence had ten (10) days to respond. *See, e.g.*, *Prosecutor v. Kabuga*, Case No. MICT-13-38-AR80.4, Decision on Félicien Kabuga's Requests for Translation and Extension of Time, 30 December 2025, p. 2, *referring to* Rule 153(B); Practice Direction on Appeals, para. 15. The President rendered the Decision of 25 November 2025 ten (10) days after the notification of the Motion to Strike, five (5) days before the lapsing of the Defence's opportunity to respond to the latter.
[32] *See* Rule 153(B); Practice Direction on Appeals, para. 15; *Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Prosecution's Motion to Strike, 20 January 2005, para. 32.
[33] *See* Motion to Strike, para. 4. The President's decision to "DECLINE to compose a bench in view of the [First] Notice of Appeal" amounts to a dismissal of the First Notice of Appeal. Decision of 25 November 2025, p. 2.
[34] *See Prosecutor v. Karadžić*, Case No. MICT-13-55-A, Decision on Prosecution Motion to Strike Karadžić's Second Motion to Disqualify Judge Theodor Meron, Motion to Strike Judge William Sekule, and for Related Orders, 1 November 2018 ("*Karadžić* Decision of 1 November 2018"), para. 16.
[35] *Cf. Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on the Defence Motions for Certification to Appeal the Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 June 2012, para. 14.

proceedings,[36] notwithstanding the lapsing of more than fifteen (15) days since the issuance of the First Impugned Decision.

B. Admissibility of and Jurisdiction to Consider Issues Arising from the Request for Assignment of Counsel

20. Furthermore, the present appeal is admissible insofar as it concerns aspects of the First Impugned Decision that may be construed as deciding upon the Request for Assignment of Counsel. While the Defence recognizes that decisions concerning the assignment of counsel are, in principle, not appealable as of right,[37] it submits that, in the context of the First Impugned Decision, the Trial Chamber's decision concerning the Revocation Request is inextricably tied up with its decision on the Request for Assignment of Counsel in the sense that its findings on the two motions are not segregable from one another. Rather, aspects of the First Impugned Decision that could be considered deciding upon Request for Assignment of Counsel are indispensable to the Trial Chamber's overall determination of the Revocation Request.

21. Namely, the Revocation Request specifically requested the Defence be permitted to supplement its submissions on its preliminary grounds for revocation in the form of a final brief prepared by counsel remunerated under the Mechanism's legal aid system.[38] In deciding upon all four grounds of the Revocation Request, the Trial Chamber considered only the limited material in the Revocation Request while denying the Defence request to supplement these preliminary submissions after being granted legal aid.[39] The Trial Chamber's disposition of the Request for Assignment of Counsel was thus inseparable from its disposition of the request to file supplementary submissions within the Revocation Request and, more fundamentally, its eventual adjudication of

[36] *Cf. Prosecutor v. Nzuwonemeye*, Case No. MICT-13-43, Decision on the Appeal of the Single Judge's Decision of 22 October 2018, 17 April 2019 ("*Nzuwonemeye* Decision of 17 April 2019"), para. 7; *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018, 4 December 2018 ("*Mladić* Decision of 4 December 2018"), para. 12; *Karadžić* Decision of 1 November 2018, para. 10.
[37] *See Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006 ("*Šešelj* Decision of 20 October 2006"), para. 15.
[38] Revocation Request, paras. 3, 27, 28, 41.
[39] First Impugned Decision, p. 8.

all grounds of the Revocation Request based on the explicitly preliminary submissions contained in the latter.[40]

22. To deny the Defence the right to appeal aspects of the First Impugned Decision relating to the Request for Assignment of Counsel would be to artificially and impermissibly limit the scope of the right to appeal under Rule 14(E), which provides a right to appeal a "decision" on a revocation request. This is distinguishable from appeals concerning a specific "issue" under Rules 79(B)(ii) and 80(B). While the use of the term "issue" in such provisions has been interpreted as permitting first-instance chambers to limit the scope of interlocutory appeals to certain issues rather than an entire impugned decision,[41] no comparable language in Rule 14(E) can support such a segregation of a decision on a revocation request for the purpose of appeal. It falls to the appellant party to specify what aspects of an impugned decision it challenges.[42] The Trial Chamber's approach of deciding upon the Revocation Request and the Request for Assignment of Counsel in a single decision further underscores the non-segregability of the issues implicated in the two motions.[43]

23. The Trial Chamber was, moreover, under an obligation to render a decision in response to all motions before it in a manner which ensures that a party can exercise its right of appeal.[44] If the Defence were required to appeal the First Impugned Decision twice—once with respect to its partial disposition of the Revocation Request and once with respect to its disposition of the Request for Assignment of Counsel—the Trial Chamber's approach in deciding upon both motions in one decision with non-segregable reasoning would effectively frustrate the Defence's right to appeal. Furthermore, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has emphatically disapproved of the filing of multiple

[40] *See* First Impugned Decision, pp. 8, 9 (dismissing Grounds 2 to 4 solely on the basis of the preliminary arguments in the Revocation Request); Second Impugned Decision, pp. 5-6 (dismissing Ground 1 on the basis of the preliminary arguments in the Revocation Request and the Defence Response to South Africa's Submissions).
[41] *See, e.g.*, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 13.
[42] *See* Practice Direction on Appeals, para. 22(c). *See also* Rule 133.
[43] *Cf. Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Decision Dismissing Interlocutory Appeal against Trial Chamber II's Decisions of 21 and 23 June 2000, 16 October 2000, pp. 5-6 (where an Accused sought to appeal as of right decisions on a preliminary motion on jurisdiction and an ancillary motion related to the latter, with the Appeals Chamber finding that appeal of the second decision did not lie as of right as it did not form part of the decision on the preliminary motion).
[44] *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015, para. 1952.

appeals against a single decision.[45] Interpreting the Trial Chamber's approach as demanding the Defence lodge two separate appeals against the First Impugned Decision, one as of right and one requiring certification under Rule 80(B), would be contrary to principle of good administration of justice and judicial economy.

24. In the alternative, if the Appeals Chamber considers that issues within the First Impugned Decision concerning the Request for Assignment of Counsel are segregable and fall beyond the scope of Rule 14(E), it should nevertheless consider the Defence appeal as of right as the issues at hand concern the proper functioning of the Mechanism.[46] Insofar as it concerns the Request for Assignment of Counsel, the First Impugned Decision "implicates … clearly defined right[s]"[47] of Mr. Kayishema, namely (i) his right to have legal assistance assigned to him where the interests of justice so require and without payment where he does not have sufficient means to pay for it;[48] (ii) his right to have adequate time and facilities for the preparation of his defence;[49] and (iii) his right to equality of arms, a component of his right to a fair trial.[50] These rights are crucial to Mr. Kayishmea's enjoyment of his right to counsel, which itself is a central to the notion of a fair trial.[51]

25. Where an accused's fundamental rights are implicated as such, the issues in question have a bearing on the proper functioning of the Mechanism and are thus properly

[45] *See Prosecutor v. Karadžić*, Case Nos. IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, & IT-95-5/18-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 28 and fn. 82. *See also Co-Prosecutors v. Ieng Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Expedited Request for Extension of Page Limit to Appeal the Jurisdictional Issues Raised by the Closing Order, 1 October 2010, para. 10.
[46] *See In the Matter of Nzuwonemeye et al.*, Case No. MICT-22-124, Decision on Motions to Appeal Decision of 8 March 2022, for Reconsideration of Decision of 15 March 2022, and to Appear as *Amicus Curiae*, 27 May 2022, para. 14; *Nzuwonemeye* Decision of 17 April 2019, para. 7; *Mladić* Decision of 4 December 2018, para. 12; *Karadžić* Decision of 1 November 2018, para. 10, and references cited therein.
[47] *Nzuwonemeye* Decision of 17 April 2019, para. 7. *See also Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ("*Karadžić* Decision of 13 November 2013"), para. 11.
[48] Article 19(4)(d) of the Statute; Article 14(3)(d) of the International Covenant on Civil and Political Rights, 16 December 1966 ("ICCPR").
[49] Article 19(4)(b) of the Statute; Article 14(3)(b) of the ICCPR.
[50] Article 19(2) of the Statute; Article 14(1) of the ICCPR. *See Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement"), para. 67.
[51] *See Prosecutor v. Kabuga*, Case No. MICT-13-38-PT, Decision on Request for Certification to Appeal the Second Decision Related to Félicien Kabuga's Representation, 20 September 2022, p. 2. *See also Prosecutor v. Milošević*, Case No. IT-02-54-T, Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel, 10 September 2004, p. 4; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Application for Certification to Appeal the Trial Chamber's Decision on Motion to Vacate Appointment of Richard Harvey, 13 January 2010, para. 10. *Cf. Uwinkindi* Decision of 12 March 2014, p. 3.

subject to appellate review as of right.[52] While frequently applied in such contexts, appellate review as of right on this basis is not confined to decisions implicating the Mechanism's duty to ensure the welfare of released persons pending their relocation.[53]

26. Unlike other circumstances where decisions concerning the assignment of counsel where subject to certification rather than appeal as of right, the First Impugned Decision—insofar as it concerns the Request for Assignment of Counsel—is not one regarding who should represent an accused or whether a *pro se* accused should be assigned legal representation.[54] Instead, it is one as to whether an accused should be able to benefit from remunerated legal representation at all. It implicates the above rights in their most fundamental form as the effect of the Trial Chamber's denial of the Request for Assignment of Counsel is that Mr. Kayishema is precluded from the enjoyment of remunerated legal representation in litigation against the Prosecution, which enjoys a sizeable budget and a low caseload outside the present case.[55]

27. Accordingly, the present appeal is admissible insofar as it concerns the Request for Assignment of Counsel as the Trial Chamber's findings on the latter as part of the First Impugned Decision are not segregable from its findings on the Revocation Request and it is thus in the interests of legal certainty, judicial economy, and justice for the Appeals Chamber to consider the First Impugned Decision as a whole. In the alternative, the Appeals Chamber may exercise its jurisdiction and consider the present appeal insofar as it concerns issues arising from the Request for Assignment of Counsel which it considers falling outside the scope of Rule 14(E) as such issues concern the proper functioning of the Mechanism.

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[52] *See In the Matter of Nzuwonemeye et al.*, Case No. MICT-22-124, Decision on Motions to Appeal Decision Denying Assignment of Counsel, 27 May 2022, p. 3; *Nzuwonemeye* Decision of 17 April 2019, para. 7; *Mladić* Decision of 4 December 2018paras. 12, 15; *Karadžić* Decision of 1 November 2018, para. 10; *Karadžić* Decision of 13 November 2013, para. 11.

[53] *See, e.g.*, *Mladić* Decision of 4 December 2018, para. 15; *Karadžić* Decision of 1 November 2018, para. 10; *Karadžić* Decision of 13 November 2013, para. 11.

[54] *Cf. Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 8; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004, para. 3; *Šešelj* Decision of 20 October 2006, para. 15; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010, para. 8; *Prosecutor v. Kabuga*, Case No. MICT-13-38-AR80.2, Decision on an Appeal of a Decision on Félicien Kabuga's Representation, 4 November 2022, para. 14.

[55] *See* Request for Assignment of Counsel, paras. 24-26.

IV. STANDARD OF REVIEW

28. The issue before the Appeals Chamber is whether the Trial Chamber correctly exercised its discretion in reaching the Impugned Decisions.[56] A Trial Chamber exercised its discretion improperly if: (i) it misdirected itself either as to the legal principle to be applied, or as to the law which is relevant to the exercise of its discretion; (ii) it gave weight to irrelevant considerations or failed to give sufficient weight to relevant considerations; (iii) it made an error as to the facts upon which it has exercised its discretion; or (iv) its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[57]

V. GROUNDS OF APPEAL

A. Ground 1: The Trial Chamber Erred in Finding that the Statute Reflects a Preference for the Transfer of Mr. Kayishema's Case

i. Relevant Part of the Impugned Decisions

29. In outlining the law applicable to the Revocation Request in the First Impugned Decision, the Trial Chamber observed that "the Statute reflects a clear preference for a case of this nature to be tried in a national jurisdiction".[58]

ii. The Trial Chamber's Error

30. In reaching the above conclusion, the Trial Chamber misdirected itself as to the legal principle to be applied and as to the law which was relevant to the exercise of its discretion, thus committing an error of law.

31. Article 1(3) furnishes the Mechanism's jurisdiction over persons indicted by the ICTR or the ICTY "who are not among the most senior leaders" within the meaning of Article 2, provided it has "exhausted all reasonable efforts to refer the case as provided in Article 6 of the present Statute". Article 6(1) stipulates that the Mechanism "shall

[56] *Stanković* Decision, para. 12; *Prosecutor v. Uwinkindi*, Case No. MICT-12-25-AR14.1, Decision on an Appeal Concerning a Request for Revocation of a Referral, 4 October 2016 ("*Uwinkindi* Decision of 4 October 2016"), para. 7.
[57] *Stanković* Decision, para. 12; *Uwinkindi* Decision of 4 October 2016, para. 7.
[58] First Impugned Decision, p. 6, *referring to* Decision of 26 September 2019, para. 9; Articles 1(3) and 6(1).

undertake every effort, to refer cases involving persons covered by paragraph 3 of Article 1 of this Statute to the authorities of a State in accordance with paragraphs 2 and 3 of this Article."

32. It is well-established in the jurisprudence of the Mechanism that the Statute displays a strong preference for referral in the context of cases involving contempt offences under Article 1(4)(a) or (b) and Rule 90, if all relevant conditions are satisfied.[59] This "preference" is derived from the explicit wording of Article 1(4), providing, in relevant part, that "[b]efore proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute".[60]

33. However, a comparable preference does not apply with respect to cases involving core international crimes. The requirement under Article 1(3) that "all reasonable efforts to refer the case" be "exhausted" is distinct from that contained in Article 1(4). The text of provisions of the Statute must be afforded their ordinary meaning in their respective contexts and in light of the object and purpose of the Statute and the Rules,[61] an interpretative task that includes the presumption of meaningful variation: that where provisions of a statute use different language, particularly in close proximity, they are presumed to have distinct meanings.[62]

34. Article 1(3) adopts a textually distinct framework relative to Article 1(4). The language of Article 1(4) is expressly presumptive. In contempt cases, referral is framed as a

[59] *See Jojić and Radeta* Decision of 12 December 2018, para. 11; *Prosecutor v. Šešelj et al.*, Case No. MICT-23-129-I, Decision on Referral of the Case to the Republic of Serbia, 29 February 2024 ("*Šešelj et al.* Decision of 29 February 2024"), para. 9; *In the Matter of François Ngirabatware*, Case No. MICT-24-131-I, Decision on the Suitability of Referral of the Case, 17 September 2024 ("*Ngirabatware* Decision"), pp. 3-4; *In the Matter of Robinson,* Case No. MICT-25-135-I, Decision on the Suitability of Referral of the Case, 7 November 2025 ("*Robinson* Decision of 7 November 2025"), para. 10.
[60] *See Jojić and Radeta* Decision of 12 December 2018, para. 11; *Prosecutor v. Turinabo et al.*, Case No. MICT-18-116-PT, Decision on Suitability of Referral of the Case, 7 December 2018 ("*Turinabo et al.* Decision"), p. 3; *Šešelj et al.* Decision of 29 February 2024, para. 9; *Ngirabatware* Decision, p. 1; *Robinson* Decision of 7 November 2025, para. 10.
[61] *Prosecutor v. Kabuga*, Case No. MICT-13-38-AR80.3, Decision on Appeals of Further Decision on Félicien Kabuga's Fitness to Stand Trial, 7 August 2023, para. 60, and references cited therein.
[62] *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Re Application by Omagh District Council for Judicial Review* [2007] NIQB 61, para. 50; D. Bailey and L. Norbury (eds), *Bennion on Statutory Interpretation*, 7th ed. (2017), para. 21.3 ("There is a presumption that where different words are used in an Act they have different meanings").

threshold step before the Mechanism can proceed to trial.[63] The phrase "shall consider" reflects a particular normative orientation, namely that the appropriateness of referral is the default position of the Statute with respect to contempt cases which must be rebutted in order for such a case to be tried before the Mechanism, which may be rebutted with case-specific considerations.[64] The Mechanism's jurisdiction over contempt is, moreover, subsidiary and ancillary to its primary jurisdiction which is derived from the international community's mandates to ICTR and ICTY—the prosecution of serious violations of international humanitarian law and international human rights law in their respective contexts.[65] For example, recently the Single Judge in the *Robinson* case distinguished between the referral of contempt cases under Article 1(4) and the referral of core crimes cases under Article 1(3), with cases under the latter category "addressing allegations of serious violations of international humanitarian law – the core purpose for which the [ICTY and ICTR] were created, to support the effort to ending impunity".[66] The Mechanism's jurisdiction over contempt is not derived from this international mandate, but rather from its inherent judicial function.[67] The preference in favour of the referral of such cases under Article 1(4) must be understood as a feature of this institutional context underpinning the Mechanism's jurisdiction over contempt.

35. By contrast, Article 1(3) is not expressly presumptive. The "exhaustion" of the prospect of referral reflects a procedural precondition to the exercise of jurisdiction over core crimes, not a normative hierarchy of preference between international and domestic adjudication of the offences in question. In this sense, Article 1(3) reflects the principle

[63] *See Jojić and Radeta* Decision of 12 December 2018, para. 11 ("the Mechanism may only exercise jurisdiction [over a contempt case] after it has considered whether the case can be transferred to a national jurisdiction for trial").
[64] *See In the Case against Jojić and Radeta*, Case No. MICT-17-111-R90-AR14.1, Decision on Republic of Serbia's Appeal against the Decision Re-Examining the Referral of a Case, 24 February 2020 ("*Jojić and Radeta* Decision of 24 February 2020"), para. 14. *See, e.g.*, *Robinson* Decision of 7 November 2025, paras. 17-18 (considering whether factors raised by the *Amicus Curiae* overcome the presumption in favour of referral); *Turinabo et al.* Decision, pp. 4-5 (considering factors rebutting the presumption of referral in the circumstances).
[65] *See* Article 1 of the Statute of the International Criminal Tribunal for Rwanda; Article 1 of the International Criminal Tribunal for the former Yugoslavia; United Nations Security Council Resolution 827, 25 May 1993, para. 2; United Nations Security Council Resolution 955, 8 November 1994, para. 1.
[66] *Robinson* Decision of 7 November 2025, para. 14.
[67] *See Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, paras. 13-18, 26; *Prosecutor v. Marijačić and Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006, para. 23, and references cited therein; *In the Case against Šešelj*, Case No. IT-03-67-R77.2-A, Judgement, 19 May 2010, para. 17, and references cited therein.

one prominent scholars has described as "procedural subsidiarity".[68] This provision requires the exhaustion of certain procedural steps before the Mechanism can exercise its jurisdiction rather than establishing a statutory presumption in favour of referral of core crimes cases.

36. To treat Article 1(4) as creating a presumption in favour of referral in core crimes cases would collapse the purposeful architecture of the Statute with respect to referral. Article 1(3) defines the scope of the Mechanism's jurisdiction over core crimes cases while Article 1(4) embeds a unique pre-trial orientation towards the referral of contempt cases. Interpreting Article 1(3) as also extending a preference in favour of referral to core crimes cases obliviates the statutory distinction drawn between the referral of core crimes cases from that of contempt offence cases. The fundamental interpretive principle *ut res magis valeat quam pereat* demands that "one should not construe a provision or a part of [it] as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements."[69] Accordingly, "every single phrase or provision of a treaty has to be given effect as possessing its own independent meaning".[70] An interpreter is "not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[71]

37. But to construct both Article 1(3) and (4) as conveying a presumption in favour of referral would be to do just that. If a functionally identical preference applies to both core crimes and contempt cases, the deliberate statutory architecture by which referrals in the context of these two categories of cases are treated separately is rendered superfluous, with both paragraphs being deprived of independent meaning.[72] Rather,

[68] *See* S. Besson, "Subsidiarity in International Human Rights Law—What Is Subsidiary about Human Rights?", 61 *American Journal of Jurisprudence* (2016), p. 79 (while this principle is framed with reference to the requirement of exhaustion of domestic remedies before the European Court of Human Rights, it remains of relevance in the present context).
[69] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 284; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000, para. 27.
[70] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), p. 422.
[71] *United States—Standards for Reformulated and Conventional Gasoline*, Case No. WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996 ("*US—Gasoline* Appellate Body Report"), p. 23. *See also Corfu Channel (United Kingdom v. Albania)*, Judgment, ICJ Reports (1949), p. 24; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971), p. 35, para. 66.
[72] *Cf. US—Gasoline* Appellate Body Report, p. 23 (finding that to construct a *chapeau* and several subsections of a provision as referring to the same standard would "empty the *chapeau* of its contents and … deprive the exceptions in paragraphs (a) to (j) of meaning").

an interpretation of Article 1 which respects the *ut res* principle demands that paragraphs 3 and 4 convey differing legal postures towards referral in the context of core crimes cases and contempt cases, respectively.

38. The Defence submits that the proper interpretation of the two provisions provides that the examination of the prospect of referral serves as a procedural precondition in the context of core crimes cases under Article 1(3) which operates as a preference in favour of referral in the context of contempt cases under Article 1(4).

B. Ground 2: The Trial Chamber Erred in Dismissing the Revocation Request Without Affording the Defence the Opportunity to Make Supplemental Submissions in Support of the Revocation Request

i. Relevant Part of the Impugned Decisions

39. The Trial Chamber dismissed the Revocation Request in relation to Grounds 2 to 4 thereof on the basis of the Referral Chamber's "comprehensive assessment" of the prospects of a fair trial in Rwanda and receipt of certain guarantees from Rwanda, on the basis of which, in 2012, it was "persuaded to refer the case to Rwanda".[73] It characterized the Defence submissions of its preliminary grounds for revocation in the Revocation Request as "hypothetical, speculative, and incapable of showing that the conditions for a fair trial in Rwanda … no longer exist".[74]

40. On this basis, the Trial Chamber considered it "appropriate to dismiss Grounds 2 to 4 of the Revocation Request" and found "that it is not in the interests of justice to assign counsel under Rule 46 of the Rules in relation to these grounds".[75] Moreover, in inviting submissions from the Government of South Africa, the Trial Chamber also found it "unnecessary to grant Kayishema's request to submit a 'final brief' on Ground 1 of the Revocation Request and that it would not be in the interests of justice to grant assignment of counsel under Rule 46 of the Rules in relation to Ground 1 of the Revocation Request".[76]

[73] First Impugned Decision, p. 7, *referring to* Referral Decision, paras. 17-142, 148-56, 162, 163, p. 44.
[74] First Impugned Decision, p. 7.
[75] First Impugned Decision, p. 8.
[76] First Impugned Decision, p. 8.

ii. The Trial Chamber's Error

41. In reaching the above conclusion, the Trial Chamber failed to give sufficient weight to relevant considerations and made a decision which was so unreasonable and plainly unjust as to substantiate an inference that the Trial Chamber failed to exercise its discretion properly, thus committing an error of law.

42. It is well-established that the principle of equality of arms, a feature of the right to adequate time and facilities for the preparation of one's defence, "obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case" and that "the Prosecution and the Defence must be equal before the Trial Chamber".[77] While this principle does not require material equality in resources available to the parties,[78] "each party must have a reasonable opportunity to defend its interests under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent."[79]

43. The Trial Chamber's decision to deny the Request for Assignment of Counsel with respect to all grounds of the Revocation Request meant that the Defence was placed at a substantial disadvantage *vis-à-vis* the Prosecution in its capacity and ability both to investigate the factual matters at the heart of the proceedings—the conditions for Mr. Kayishema's enjoyment of a fair trial in Rwanda—and to make detailed, well-researched, and carefully prepared submissions in support of his position. While Mr. Kayishema enjoys *pro bono* representation, he is nevertheless at a substantial disadvantage *vis-à-vis* the Prosecution in light of the considerable resources at the latter's disposal.

44. The Prosecution operates as a permanent, institutionally resourced organ. It benefits from, *inter alia*: (i) dedicated and salaried legal staff; (ii) investigate teams with secure funding; and (iii) access to institutional infrastructure, research support, and administrative assistance. *Pro bono* counsel, however competent or committed, are subject to inherent limitations that do not apply to the Prosecution and place their client at a substantial disadvantage to the Prosecution in proceedings as complex as those

[77] *Tadić* Appeal Judgement, paras. 48, 52. *See also Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 9.
[78] *See Kayishema and Ruzindana* Appeal Judgement, para. 69.
[79] *Prosecutor v. Karadžić*, Case No. MICT-13-55-A, Judgement, 20 March 2019, para. 201; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.9, Decision on Slobodan Praljak's Appeal against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents, 4 September 2008, para. 29.

concerning the revocation of a referral. These limitations include: (i) other professional obligations to paying clients constraining the amount of time they can dedicate to the proceedings; (ii) absence of funding for legal research, investigations, expert witnesses, and support staff; and (iii) limited time and capacity to engage in extensive evidentiary review or prolonged investigations. The imbalance created by Mr. Kayishema's representation in the present proceedings by pro bono counsel places him at a substantial disadvantage *vis-à-vis* the Prosecution. Such disadvantage arises not from any lack of diligence on the part of Defence counsel, but from the systemic and structural disparities inherent in treating *pro bono* counsel as substitutes for counsel remunerated by legal aid and expecting the latter to take on a workload no other professional would expect not to be remunerated for. Mr. Kayishema's enjoyment of *pro bono* counsel cannot be symbolically and perversely used against him to maintain a system of such egregious material inequality between the capacity and resources of the Prosecution and Defence as to violate the equality of arms principle. Moreover, the Trial Chamber's approach also denied Mr. Kayishema the right to have adequate time and facilities for the preparation of his defence in preventing him from undertaking the necessary investigative work to further substantiate the Revocation Request.[80]

45. In light of this failure to represent the equality of arms guarantee and its related denial of the Defence's requests to supplement the Revocation Request with a supporting brief,[81] Mr. Kayishema was also denied an effective right to be heard. An accused enjoys the well-established right to be heard before a decision is made which can affect their rights.[82] It is uncontroversial that the Revocation Request "implicates fair trial issues in future judicial proceedings against Kayishema in Rwanda".[83]

46. In requesting the assignment of counsel and subsequent leave to file further submissions, the Defence merely sought to ensure the preliminary submissions in the Revocation Request were properly developed, clarified, and supported once the

[80] *See* Request for Assignment of Counsel, para. 19.
[81] *See* Revocation Request, paras. 3, 27, 28, 41.
[82] *See, e.g.*, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 27; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-A15*bis*, Decision in the Matter of Proceedings under Rule 15*bis*(D), 21 June 2004, para. 9; *Prosecutor v. Šešelj*, Case No. IT-03-67-AR15*bis*, Decision on Appeal against Decision on Continuation of Proceedings, 6 June 2014, para. 51.
[83] First Impugned Decision, p. 6. *See also Stanković* Decision, para. 9 ("decisions on revocation concern … fundamental questions related to whether the Mechanism should exercise jurisdiction over a case and the fairness of the proceedings of the referred case").

structural disadvantages inherent in solely *pro bono* representation were remedied. In denying the Defence this opportunity, Mr. Kayishema was prevented from fully and fairly articulating the arguments supporting the revocation of his referral and the Trial Chamber's consideration of the Revocation Request proceeded on an incomplete and underdeveloped record of pleadings.

47. The right to be heard must be understood as encompassing the right to present one's case in a manner that is meaningful, informed, and adequately supported by counsel acting under conditions consistent with the principle of equality of arms.[84] Accordingly, in refusing the accused's request to further substantiate submissions with the benefit of assigned legal aid counsel and adjudicating the Revocation Request on the basis of the explicitly preliminary submissions contained therein,[85] the Trial Chamber denied Mr. Kayishema a genuine opportunity to be heard and thus decided upon the Revocation Request in violation of the *audi alteram partem* principle.

48. When understood in collectively, the equality of arms principle and the right to be heard clearly required that Mr. Kayishema be permitted to supplement his Revocation Request with the benefit of counsel renumerated by the Mechanism's legal aid system and that the Trial Chamber only decide upon the Revocation Request once Mr. Kayishema has had a meaningful opportunity to be heard in a manner compatible with the guarantee of equality of arms.

C. The Trial Chamber Erred in Partially Dismissing the Revocation Request on the Basis of the Findings of the Referral Decision

i. Relevant Part of the Impugned Decisions

49. The Trial Chamber observed as follows regarding the original findings of the Referral Chamber on the suitability of the referral of Mr. Kayishema's case to Rwanda:

[84] *Cf. Ruiz-Mateos v. Spain*, App. No. 12952/87, Judgment, ECtHR (Plenary), 23 June 1993, para. 63 (examining the right to fair trial wholistically "because the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial").
[85] *Cf. Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009, para. 30 (rebuking a Trial Chamber for deciding upon a motion "solely in light of the available evidence" while "preventing the Appellant from further substantiating his allegations").

> [A]fter a comprehensive assessment of, *inter alia*, Rwanda's legal system, penalty structure, fair trial concerns, the independence and impartiality of the judiciary, the availability and protection of witnesses within and outside Rwanda, and the right to an effective defence – the Referral Chamber was confident that Kayishema's case, if referred, would be prosecuted "consistent with internationally recognised fair trial standards enshrined in the Statute of [the ICTR] and other human rights instruments", and was persuaded to refer the case to Rwanda after receiving assurances that a robust monitoring mechanism would be provided to ensure that any material violation of Kayishema's fair trial rights would be promptly brought to the attention of the Mechanism.[86]

50. On this basis, the Trial Chamber concluded that the Defence's "general submissions" under Grounds 2 to 4 of the Revocation Request "are, at present, hypothetical, speculative, and incapable of showing that the conditions for a fair trial in Rwanda, as thoroughly assessed in the Referral Decision, no longer exist".[87]

ii. The Trial Chamber's Error

51. In reaching the above conclusion, the Trial Chamber misdirected itself as to the legal principle to be applied and as to the law which is relevant to the exercise of its discretion and gave weight to irrelevant considerations, thus committing an error of law.

52. The Trial Chamber was required to assess whether "the conditions for referral of the case are no longer met",[88] with the conditions for referral demanding that the Trial Chamber "satisfied that the accused *will* receive a fair trial" in Rwanda.[89] It is therefore clear that the applicable legal standard demands an assessment which (i) is contemporary, in the sense that it represents an determination *in concreto* of whether

[86] First Impugned Decision, p. 7 (second alteration in original; footnotes omitted), *referring to* Referral Decision, paras. 148-156, 163.
[87] First Impugned Decision, p. 7, *referring to Uwinkindi* Decision of 12 March 2014, p. 3; *Prosecutor v. Munyagishari*, Case No. MICT-12-20, Decision on Second Request for Revocation on an Order Referring a Case to the Republic of Rwanda, 26 June 2014 ("*Munyagishari* Decision of 26 June 2014"), p. 3; *Prosecutor v. Munyagishari*, Case No. MICT-12-20, Decision on Third Request for Revocation on an Order Referring a Case to the Republic of Rwanda, 8 April 2015 ("*Munyagishari* Decision of 8 April 2015"), pp. 3, 4.
[88] Article 6(6).
[89] *Uwinkindi v. Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal against the Referral of His Case to Rwanda and Related Motions, 16 December 2011 ("*Uwinkindi* Decision of 16 December 2011"), para. 22; *Munyagishari v. Prosecutor*, Case No. ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional, Evidence and on the Appeals against the Decision on Referral under Rule 11 *bis*, 3 May 2013, para. 27; *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 30 October 2008, para. 4 (emphases added in all). *See also Jojić and Radeta* Decision of 24 February 2020, para. 14.

the conditions for referral exist in the referral State *today*;[90] and (ii) is prospective in the sense that represents an *ex ante* projection as to whether the case against the accused "will be" prosecuted *inter alia* in conformity with their fair trial rights,[91] which, by definition, requires the Trial Chamber to "speculate" as to the future of the case.[92]

53. The Referral Decision was issued more than thirteen (13) years ago. It would be absurd to suggest, without any contemporary analysis whatsoever, that the conditions in Rwanda are exactly identical to what they were over a decade ago. The Referral Decision, thus, does not reflect an accurate assessment of whether the conditions for the referral of Mr. Kayishema's case exist in the present day. The non-contemporaneous findings of the Referral Decision are not a proper basis on which the Trial Chamber may validly base the necessarily contemporary and *in concreto* assessment demanded of it by Article 6(6). Moreover, the Trial Chamber was not bound in law by the Referral Decision, as the decisions of different Trial Chambers are not binding on others.[93] In deferring entirely to the findings of the Referral Decision as an accurate reflection of whether the conditions for referral exist, the Trial Chamber directed itself as to the legal principle to be applied and considered irrelevant factors.

54. In addition, the Trial Chamber's dismissal of Defence submissions as "hypothetical" and "speculative" thus illustrates its misdirection as to the applicable legal principles and consideration of irrelevant factors as the assessment required of it under Article 6(6) is inherently forward looking. The remedy of revocation serves to prevent the violation of the rights of accused whose cases are transferred, not only remedy violations *ex post facto*.

55. Furthermore, in support of its finding on the basis of the Referral Decision, the Trial Chamber refers to three decisions in which the President had declined to assign revocation request to Trial Chambers because the issues complained of had either

[90] This is clear from the use of the phrase "no longer met" in Article 6(6).
[91] *Uwinkindi* Decision of 16 December 2011, para. 29.
[92] This is clear from the definition of "will" as a modal auxiliary verb. *See, e.g.*, *Oxford Advanced Learner's Dictionary* (accessed 23 January 2026), https://www.oxfordlearnersdictionaries.com/definition/english/will_3 ("used for talking about or predicting the future"); *Merriam-Webster Dictionary* (accessed 23 January 2026), https://www.merriam-webster.com/dictionary/will# ("used to express futurity");
[93] *See, e.g.*, *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 188; *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 32; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgement, 8 April 2015, para. 226; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Judgement, 29 November 2017, para. 337, and references cited therein.

become moot or were "still the focus of ongoing negotiations" in Rwanda and were thus "not ripe for consideration as a basis for revocation".[94] As Mr. Kayishema has not yet been transferred to Rwanda, none of the matters complained of in the Revocation Request are the focus of any ongoing negotiations with the Rwandan authorities. Considering that the issues raised in Grounds 2 to 4 of the Revocation Request are nevertheless not ripe for consideration because they *could*, should Mr. Kayishema be transferred, become the focus of negotiations in Rwanda represents a confused approach to the Mechanism's role in supervising referrals. It does not suffice that the accused may have the chance to raise concerns about their fair trial rights in that jurisdiction. As Mechanism must be satisfied the accused *will* receive a fair trial,[95] circumstances where the accused is yet to be transferred to the referral State, as is the case *sub judice*, are materially distinguishable from those where an accused has already been transferred and is actively attempting to resolve matters complained of in a revocation request through domestic avenues of remedy.

V. REQUEST FOR RELIEF

56. On the basis of the foregoing, the Defence respectfully requests that the Appeals Chamber:

REVERSE both Impugned Decisions;

INSTRUCT the Registrar to assign Mr. Kayishema counsel in the interests of justice for the purpose of the proceedings concerning the Revocation Request;

REMAND the Revocation Request back to the Trial Chamber for consideration in in accordance with the Appeals Chamber's instructions; and

INSTRUCT the Trial Chamber to authorize the Defence to file further submissions in the support of the Revocation Request with the benefit of remunerated counsel.

Word Count: 8,896 words

[94] *Uwinkindi* Decision of 12 March 2014, p. 3; *Munyagishari* Decision of 26 June 2014, p. 3; *Munyagishari* Decision of 8 April 2015, p. 3. *See* First Impugned Decision, p. 7, fn. 46.
[95] *See supra* note 89.

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Respectfully submitted this 23 January 2026,

At Montréal, Canada

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