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UNITED
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Mechanism for International Criminal Tribunals

Case No: MICT-12-20

Date: 27 January 2015

Original: English

Before:

Judge Theodor Meron, President

Registrar:

Mr. John Hocking

PROSECUTOR

v.

BERNARD MUNYAGISHARI

PUBLIC

SECOND MONITORING REPORT FOR DECEMBER 2014

Monitors:

Ms. Jelena Gudurić

Prof. Zbigniew Lasocik

Ms. Xheni Shehu

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CONTENTS

I.	INTRODUCTION	3
II.	DETAILED REPORT	3
	<i>A. Monitoring Mission from 8 to 12 December 2014</i>	3
	<i>Court Hearing of 10 December 2014</i>	3
	<i>Examination of the Case File on 10 December 2014</i>	3
	<i>Meeting with Mr. Munyagishari on 10 December 2014</i>	4
	<i>Meeting with representatives of the Ministry of Justice on 10 December 2014</i>	6
	<i>Meeting with the Minister of Justice on 11 December 2014</i>	7
	<i>Meeting with a representative of the Rwanda Bar Association on 12 December 2014</i>	7
	<i>B. Monitoring Mission from 29 to 31 December 2014</i>	8
	<i>Meeting with Mr. Munyagishari on 31 December 2014</i>	8
	<i>Information from other sources</i>	9
III.	CONCLUSION	9

I. INTRODUCTION

1. This monitoring report pertains to the activities in the *Munyagishari* case before the Rwandan judiciary and the interactions of Jelena Gudurić, monitor appointed by the Mechanism for International Criminal Tribunals (“Monitor” and “MICT”, respectively) with various stakeholders during her two missions to Rwanda, from 8 to 12 December 2014 and from 29 to 31 December 2014 (“Reporting Period”).¹
2. One court hearing was held in the Reporting Period, on 10 December 2014. No substantive matters were discussed at the hearing as the Chamber adjourned the hearing due to the unavailability of Defence Counsel.
3. The next hearing is scheduled on 3 February 2015.
4. In addition to observing the hearing, the Monitor met with Mr. Munyagishari, representatives of the Ministry of Justice, the Minister of Justice, the Executive Secretary of the Kigali Bar, and examined the Case File.²
5. A detailed report on all activities during the Reporting Period is provided below.

II. DETAILED REPORT

A. Monitoring Mission from 8 to 12 December 2014

Court Hearing of 10 December 2014

6. The hearing was held before the full Chamber, in the presence of the Accused, Mr. Munyagishari, and Mr. Mutangana, who appeared for the Prosecution. Defence Counsel were not in attendance.
7. The Chamber invited Mr. Munyagishari’s comments in relation to the absence of his Defence Counsel. Mr. Munyagishari submitted that he is unable to plead without their assistance.
8. Noting that Defence Counsel had informed the Court that they would be absent from the hearing to attend a funeral ceremony at the same time, the Prosecution indicated they did not object to an adjournment.
9. The Chamber adjourned the hearing until 3 February 2015, noting Mr. Munyagishari’s right to elect not to proceed without his Counsel. The Chamber also instructed Mr. Munyagishari to inform his Counsel to prepare for the next hearing and file all due submissions at least one week in advance of the hearing.

Examination of the Case File on 10 December 2014

10. The Monitor examined the Case File in the office of the Registrar. Two documents were entered on the case file since the previous examination:³ (i) Defence Counsel’s

¹ Prof. Zbigniew Lasocik filed a separate report on his mission. See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Monitoring Report December 2014, public, dated 13 January 2015.

² The Monitor met with Mr. Munyagishari and examined the Case File with the assistance of the interpreter.

³ See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Monitoring Report November 2014, public, dated 19 November 2014, paras. 19-20.

submission to the Registrar dated 19 November 2014 requesting a copy of all court minutes for the Accused, and (ii) Defence Counsel's submission dated 9 December 2014 requesting adjournment of the 10 December 2014 hearing in order to attend a colleague's funeral.

Meeting with Mr. Munyagishari on 10 December 2014

11. Mr. Munyagishari expressed significant concerns with Rwanda's inability to ensure a fair trial in his case due to a lack of legal aid funds.
12. He provided an overview of the issue of his counsel's contract. He noted that immediately upon Mr. Uwinkindi's transfer to Rwanda, the latter's Counsel were offered a contract providing for payments of 30,000 Rwandan francs ("RWF") per hour per Counsel. Subsequently, the Ministry agreed to a new contract providing for monthly payments of 1 million RWF per lawyer. Mr. Munyagishari's Counsel wanted the same terms of contract as those offered to Mr. Uwinkindi's Counsel but the Ministry instead offered them a lump-sum of 15 million RWF. Mr. Munyagishari observed that the Ministry has recently similarly proposed a new contract to Mr. Uwinkindi's Counsel providing for the lump-sum payment. The proposed lump-sum, in Mr. Munyagishari's view, diminishes Counsel's conditions of contract.
13. The situation in his case is particularly grave, according to Mr. Munyagishari, as no contract has been signed and Counsel have not received payment since the commencement of proceedings. In this regard, Mr. Munyagishari noted paragraph 153 of the referral decision of the International Criminal Tribunal for Rwanda ("ICTR") of 6 June 2012 ("Referral Decision") which relies upon assurances that the Government will provide appropriate funds for legal aid.⁴ He concluded that the present situation, where no funds have been provided, is in itself a ground for the revocation of the case.
14. Of further concern to Mr. Munyagishari is that the contract for his Counsel's remuneration is to be negotiated and signed with the Ministry of Justice, not the Bar Association. He submitted that this is contrary to paragraph 143 of the Referral Decision, which relies on the Bar Association's submission that it administers the legal aid scheme.⁵

⁴ *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11 *bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, public, dated 6 June 2012, para. 153: "The Chamber recalls that it is not obligated to itemise the provisions of Rwanda's budget once it has learned that there is financial support for that representation. The factual assertions of the Defence fail to rebut the affidavits of the Minister of Justice and the Secretary-General of the Supreme Court. The Chamber considers these assurances that appropriate funding will be provided in good faith. It is encouraged by the provision of an additional 118 million Rwandan francs designated specifically for transfer cases for the period between January and June 2012 in reaction to the referral of the *Uwinkindi* case. This conclusion is mindful of the unique challenges presented in this case, and, in particular, the existence of prospective witnesses outside of Rwanda. Should Rwanda fail to provide sufficient funding so as to infringe on the fair trial rights of the Accused, the case is subject to revocation in accordance with Rule 11 *bis* (F)." (footnotes omitted).

⁵ *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11 *bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, public, dated 6 June 2012, para. 143: "The Prosecution and the KBA submit that the right to legal aid for indigent accused is guaranteed by the legal framework contained within the Rwandan Constitution, Transfer Law, Code of Criminal Procedure and the Law Establishing the Bar in Rwanda. The KBA is the primary administrator of the legal aid system and attests that the legal aid system functions in practice." (footnotes omitted).

15. Mr. Munyagishari referred to a court submission made by his Counsel on 2 December 2014,⁶ and concluded that as long as his Counsel do not receive funds, the Court should not expect further submissions.
16. Turning to his conditions of detention, Mr. Munyagishari reiterated his dissatisfaction with the recent decision of the Prison Administration to terminate the assistance for prisoners with daily chores,⁷ as it effectively prevents him from having breakfast before court. Among other tasks, the assistant used to make breakfast (for example, warm the milk, if bread and milk are provided for breakfast), wash the dishes and clean the dining room. Mr. Munyagishari prepared for that morning's hearing from 4 a.m. to 7 a.m. and, as a result, did not have time to make his breakfast and carry out the other chores. With reference to paragraph 81 of the Referral Decision,⁸ Mr. Munyagishari concluded that if conditions of detention are not adequate, his case should be referred back to the ICTR.
17. Mr. Munyagishari took the opportunity to clarify and correct several paragraphs of previous monitoring reports: (i) Reference to "Kinyarwanda" in paragraph 12 of the September 2014 report should read "French";⁹ (ii) Reference to "09/2013/OL" in paragraph 13 of the September 2014 report should read "47/2013";¹⁰ (iii) Sentence "Mr. Munyagishari indicated that since 2011 another detainee has been designated to provide assistance with cleaning of the dining room, cells and the remainder of the Special Enclosure, as well as washing clothes and dishes." from paragraph 9 of the October 2014 report should be clarified in that the assistant was cleaning all areas of the Special Enclosure except the detainees' cells;¹¹ (iv) Reference to "son" in paragraph 13 of the October 2014 report should read "daughter";¹² (v) With reference to paragraph 15 of the October 2014 report Mr. Munyagishari specified that he is not allowed at all to speak

⁶ A copy of the court submission is kept in the case correspondence binder. In the submission, Defence Counsel, *inter alia*, sought 21 months "to prepare an efficient defence [...], counting from the day on which the required facilities will be available" (six months to examine the Prosecution file of 3,339 pages; three months to conduct research of domestic and international jurisprudence on the crimes against humanity and genocide; six months to conduct a defence investigation of the crime site and search for witnesses currently located abroad, and six months for Counsel to draft its findings and submit them to the Court). Referring to Counsel's contract negotiations with the Ministry of Justice and the Bar Association as well as Mr. Munyagishari's request to the Prison Director for printer cartridges, paper, binders, a copy of the Constitution of the Republic of Rwanda and two laws, and noting that the issue of adequate means to prepare the defence comes under the authority of the Ministry of Justice and the Bar Association, Counsel submitted that failure to resolve those issues has a direct effect on the legal proceedings before the High Court which is responsible for ensuring a fair trial.

⁷ See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Monitoring Report for October 2014, public, dated 18 November 2014, para. 9, and *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Second Monitoring Report for November 2014, public, dated 17 December 2014, paras. 9 and 27.

⁸ *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11 *bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, public, dated 6 June 2012, para. 81: "The Chamber considers the Defence argument that the international human rights law will not be implemented in practice to be purely speculative. However, with regard to this concern, the Chamber notes that both Rule 11 *bis* (D)(iv) and Article 23(2) of the Transfer Law provides for monitors and observers. This monitoring extends to conditions of detention. The Chamber therefore envisages that the detention conditions of the Accused will be monitored at the pre-trial, trial and, if necessary, post-trial phases by either ICTR appointed monitors or the ICRC. Moreover, if adequate conditions are not provided the case is subject to revocation in accordance with Rule 11 *bis* (F)." (footnote omitted).

⁹ See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Monitoring Report September 2014, public, dated 2 October 2014.

¹⁰ *Ibid.*

¹¹ See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Monitoring Report for October 2014, public, dated 18 November 2014.

¹² *Ibid.*

with other detainees when going to religious services, and (vi) Reference to “2013” in footnote 7 of the October 2014 report should read “2012”.

Meeting with representatives of the Ministry of Justice on 10 December 2014

18. To adduce information on Defence Counsel’s contract, the Monitor met Ms. Odette Yankulije, Head of Access to Justice Department and Principal State Attorney, Mr. Théophile Mbonera, Head of Legal Service Department, and Ms. Olivia Kaguliro Mulerwa, International Justice and Judicial Cooperation Manager.
19. By way of introduction, the representatives of the Ministry explained that the International Justice Division is a newly created division of the Ministry of Justice whose mandate is to follow the cases transferred by the International Criminal Tribunal for Rwanda (“ICTR”) and by national jurisdictions.
20. Turning to the issue of remuneration of counsel, the representatives informed the Monitor that remuneration regulations of the Ministry of Justice changed in January 2014 and that a new legal aid policy and a Ministry directive are now in place. The two documents were developed taking into account best practices as well as the challenges previously faced by the Ministry.
21. The Ministry also developed a new model agreement between the Ministry and counsel who represent accused in transferred cases. The agreement was prepared after seeking the views of the Rwanda Bar Association. It provides for a lump sum of 15 million Rwandan Francs (“RWF”) for the entire duration of the trial and any appeal. The Ministry arrived at the amount of 15 million RWF after discussing it with the Rwanda Bar Association whose mandate is to determine lawyers’ fees. The Ministry representatives noted that the sum of 15 million RWF is the highest fee prescribed by the Bar Association and added that in order for counsel to charge more they need to seek approval from the Bar Association. In addition to the lump sum, the contract allows for extra payments such as for searching for witnesses.
22. According to the Ministry, as the new contract is based on a lump sum system, it acts as an incentive to progress the case expeditiously. This was confirmed by the Rwanda Bar Association as well as in practice since the new model agreement was signed with counsel in the *Bandora* case in September 2014. Notwithstanding specificities of each case, a comparison of the *Uwinkindi* case (which is remunerated through monthly payments irrespective of whether Counsel attend hearings) and the *Bandora* case (which operates under the lump sum system) reveals that the two are at the same stage though the former started two years before the latter.
23. The representatives also stressed the importance of having harmonised contracts in all cases, and added that a model contract similar to the one developed for transferred cases exists for cases where accused are minors.
24. The Ministry proposed the new contract to Mr. Uwinkinidi’s Counsel because the current contract provides that it can be revised after six months. The Ministry representatives noted that the current contract in the *Uwinkindi* case remains in force until a new one is signed. They added that the Ministry continues to make payments under the current contract, upon submission of invoices, and that any delays in payment are solely of administrative nature.

25. For the *Munyagishari* case, the Ministry similarly offered the new contract to Defence Counsel but, at present, no contract is in place.

Meeting with the Minister of Justice on 11 December 2014

26. The Monitor met His Excellency Mr. Johnston Busingye, Minister of Justice and Attorney General, at his invitation.
27. The Minister noted that the role of the Ministry of Justice in criminal cases is to administer legal aid and support evidence collection. He observed that, prior to the transfer of the two ICTR cases, Rwanda had no experience with such cases. In terms of legal aid, domestic cases never receive more than \$1,000 in legal aid funds. With ICTR accused on the other hand, Rwanda was required to provide \$60,000 in legal aid funds per case, which raised concerns as to the sustainability of such funding.
28. Further, a precondition for all legally aided cases in Rwanda is that the accused's indigence is verified. This is necessary as legal aid policies apply only if the accused is unable to fund his defence. The Minister believed that the ICTR did not verify the means of the transferred accused and accordingly the Ministry is required to provide funds without knowledge about the accused's indigency status.
29. The current contract in the *Uwinkindi* case (providing for monthly payments of 1 million RWF) was an alternative to the Ministry's initial proposal that the Defence be paid 15 million RWF for the entire duration of the case. The Ministry agreed to the current contract as it believed that the case would be completed by now and that Defence Counsel would not exceed the amount of 15 million RWF. However, the case is not progressing as expected.
30. The Minister observed that Rwanda has a number of transferred cases and concluded that, in order to ensure equal treatment of all accused, two legal aid regimes cannot exist. For this reason, the Ministry decided to harmonise counsel fees across all referred cases.
31. The Minister noted that Mr. Uwinkindi requested 100 million RWF for his investigation without providing any information on witnesses. He merely listed countries to which Counsel wishes to travel to search for witnesses. In the Minister's view, it would be unreasonable to allow funding for such a fishing expedition. The Minister opined that the Defence should provide a more detailed plan for their witness search before seeking funds for travel. In addition, with the help of the ICTR, new technology to hear evidence by alternative means has been installed. These means accommodate the testimony of witnesses who are fearful to come to Rwanda but can also be used for other witnesses.
32. The Minister concluded that his Ministry will continue to comply with its obligations. He highlighted that the ICTR did not specify the level of remuneration, and the Government made only broad-stroke assurances to provide legal aid, without committing to specific amounts.

Meeting with a representative of the Rwanda Bar Association on 12 December 2014

33. In the absence of the President of the Rwanda Bar Association, the Monitor met Mr. Victor Mugabe, Executive Secretary of the Rwanda Bar Association.

34. Mr. Mugabe explained that the role of the Bar Association is to provide qualified lawyers to the accused, in line with the accused's choice. The accused have the right to choose from a list of counsel maintained by the Bar Association. The Bar Association monitors qualified legal representation but is not involved in matters concerning remuneration of counsel. Any negotiation of payments in transferred cases is between the lawyer and the Ministry of Justice.
35. Mr. Mugabe noted that five cases have been transferred to Rwanda. In *Uwinkindi*, two Defence Counsel have been assigned who subsequently signed a contract with the Ministry of Justice for the remuneration of their work. In *Munyagishari*, the two designated Counsel have refused to sign a contract under the terms offered by the Ministry, which are different to those offered in the *Uwinkindi* case.
36. Mr. Mugabe informed that the Government has spent approximately 80 million RWF thus far on the *Uwinkindi* case. He opined that a lump-sum remuneration system would contribute to a speedy trial in accordance with the accused's right to an expeditious trial. He added that, under the current contract, Counsel for Mr. Uwinkindi provide reports containing general information on their work to the Permanent Secretary of the Ministry of Justice and reserve a copy thereof for the Bar Association. Under the previous contract in the *Uwinkindi* case, on the other hand, Counsel were paid by hour, and were required to produce detailed reports with times for hearings and other activities.
37. As a precondition for legal aid in domestic cases, according to Mr. Mugabe, the accused has to complete the form prepared by the Ministry of Justice in which they either claim full indigence or indicate the percentage to which they can contribute to the cost of their defence. He added that the indigence assessment is necessary to determine the extent to which the Ministry of Justice will support the applicant but that such an assessment has not been done in the transferred cases thus far.
38. Comparing the transferred cases with other genocide cases in Rwanda, Mr. Mugabe stated that the latter are tried before ordinary courts where lawyers act *pro bono*. For non-genocide criminal cases before courts, where an accused is indigent, only transportation and similar costs to counsel are covered but not their fees. Mr. Mugabe also explained that in all cases involving non-indigent accused, counsel fees are a matter of negotiation between the client and counsel within the fee scale prescribed by the Bar Association.

B. Monitoring Mission from 29 to 31 December 2014

Meeting with Mr. Munyagishari on 31 December 2014

39. Mr. Munyagishari pleaded for a fair trial, and called upon the MICT to reassess Rwanda's undertaking that it will respect its commitments concerning legal aid.
40. Defence Counsel continue to face difficulties negotiating a contract for the remuneration of their work, an issue that is common to both his and Mr. Uwinkindi's case. Mr. Munyagishari was uncertain as to whether the issue will be resolved, but expressed his fear that the Ministry of Justice will not reconsider its decision to

terminate the Defence Counsel contract in the *Uwinkindi* case.¹³ He concluded that unless sufficient legal aid funds can be provided, he will not receive a fair trial.

41. With reference to paragraphs 141 to 143 of the Referral Decision, Mr. Munyagishari reiterated his concerns with the Ministry of Justice assuming the role of the Bar Association with regard to the administration of the legal aid funds.
42. As to the conditions of his detention, he complained that the lights in the toilet have not been working since July 2014.

Information from other sources

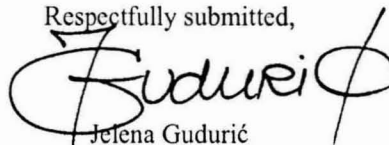
43. The Monitor notes that the National Legal Aid Policy dated September 2014 is available on the website of the Ministry of Justice.¹⁴ The Policy, *inter alia*, provides for a budget of 100 million RWF for “Hiring [Rwanda Bar Association] lawyers for indigent persons in other courts including for international genocide cases” for year 2014/15.¹⁵
44. The Monitor also notes that according to an article available on the website of the Ministry of Justice dated 25 December 2014, the Minister of Justice (together with other individuals) became a member of the Rwanda Bar Association.¹⁶

III. CONCLUSION

45. The Monitor remains available to provide any additional information, at the President’s direction.

Dated this 27th day of January 2015

Respectfully submitted,



Jelena Gudurić
Monitor for the *Munyagishari* case
The Hague, the Netherlands

¹³ For more information concerning the termination of contract in the *Uwinkindi* case, see *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Second Monitoring Report for December 2014, public, dated 27 January 2015, paras. 48-56.

¹⁴ See http://www.minijust.gov.rw/fileadmin/Documents/Mol_Document/Legal_Aid_Policy_-_IMCC_Feedback.pdf (last accessed on 22 January 2015).

¹⁵ *Id.*, page 36, item 11.

¹⁶ See http://www.minijust.gov.rw/mcfa-center/news/news-details/?x_news%5D%3D%32&cHash=b4638b00901bdc1c7ae1027623eb64b (last accessed on 8 January 2015).