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Mechanism for International Criminal Tribunals

Case No: MICT-12-20

Date: 26 February 2015

Original: English

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

PROSECUTOR

v.

BERNARD MUNYAGISHARI

PUBLIC

MONITORING REPORT FOR JANUARY 2015

Monitors:

Ms. Jelena Gudurić

Ms. Xheni Shehu

Received by the Registry

Mechanism for International Criminal Tribunals

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A handwritten signature in black ink, appearing to read 'McCall Carter', written over a white background within a black rectangular box.

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I. INTRODUCTION

1. This monitoring report pertains to the activities in the case of Bernard Munyagishari before the High Court of Rwanda and the interactions of Xheni Shehu, monitor appointed by the Mechanism for International Criminal Tribunals (“Monitor” and “Mechanism”, respectively) with various stakeholders during her two missions to Rwanda, from 14 to 16 January 2015 and 20 to 23 January 2015 (“Reporting Period”).
2. No court hearings were held during the Reporting Period. The next hearing is scheduled for 5 February 2015.
3. During the reporting period, the Monitor met with Mr. Munyagishari, his Lead Counsel, Mr. Jean-Baptiste Niyibizi, the Permanent Secretary of the Ministry of Justice, the Executive Secretary of the Rwanda Bar Association, the Prison Director and examined the case file.
4. A detailed report on all activities during the Reporting Period is provided below.

II. DETAILED REPORT

A. *Monitoring Mission from 14 to 16 January 2015*

Meeting with the Permanent Secretary of the Ministry of Justice on 15 January 2015

5. The Monitor met Ms. Isabelle Kaliknogabo, the Permanent Secretary and Deputy Attorney General of the Ministry of Justice to adduce information on the status of Defence Counsel’s contract.¹
6. By reference to discussions held between representatives of the Ministry of Justice and a Monitor on 10 December 2014,² the Permanent Secretary reiterated that a new draft contract was developed to ensure compliance with the new legal aid policy adopted in January 2014 by the Government of Rwanda. The remuneration contracts have been harmonised in order to ensure equal treatment of all the transferred accused. The contract provides for a lump sum of 15 million Rwanda Francs to cover the entire case. However, the contract does not include fees for witness investigations outside the country, if it can be justified that additional funds are necessary. This amount was fixed in consultation with the Bar Association, which has a mandate to determine lawyer’s fees, and was agreed to be sufficient to handle a transferred case.

¹ In this meeting, the Permanent Secretary also discussed the *Uwinkindi* case. This report only contains those portions of the discussion that are relevant to the *Munyagishari* case.

² See *The Prosecution v. Bernard Munyagishari*, Case No. MICT-12-20, Public Second Monitoring Report for December 2014 (“Second Monitoring Report for December”), 27 January 2015, paras. 18-25.

7. The Permanent Secretary noted that the Government of Rwanda made guarantees to the International Criminal Tribunal for Rwanda (“ICTR”) to provide legal counsel to suspects, but not to pay lawyers unlimited funds. The funds requested must be reasonably justified and documented and must be governed by a standardised framework as provided in the legal aid policy.
8. The Permanent Secretary indicated that the proposed contract is result-oriented as it provides funds for the completion of the entire case, including appeal. It will ensure that remuneration of counsel complies with public finance management and auditing regulations. Specifically, she explained that the prior contract signed with Mr. Uwinkindi’s Counsel was not result-oriented as it was based on a monthly payment regime. According to the Permanent Secretary, under this contractual arrangement, it was very difficult for the Ministry to justify to the public auditors why the case was expending so much more public funds than other cases, such as the *Bandora* case. As the new contract provides a lump sum payment for the entire case, the result is clearly established and funds are *a priori* justified.
9. The Permanent Secretary noted that Mr. Munyagishari’s Counsel have been offered the same contract but they have not signed it. In her view, the disputes related to Mr. Uwinkindi’s Counsel have also hindered the progress of the *Munyagishari* case as Mr. Munyagishari’s Counsel have refused to sign a contract that provides less funding than that signed by Mr. Uwinkindi’s Counsel.

B. Monitoring Mission from 20 to 23 January 2015

*Meeting with the Executive Secretary of the Rwanda Bar Association on 21 January 2015*³

10. The Monitor met with Mr. Victor Mugabe, the Executive Secretary of the Rwanda Bar Association to adduce information about the role and position of the Bar concerning Counsel contracts.
11. Mr. Mugabe indicated that the role of the Bar Association is limited to appointing competent counsel for indigent accused and to ensure that counsel provide competent representation. According to Mr. Mugabe, the two parties to a contract, which provides legal aid facilitated by the Government, are the counsel and the Ministry of Justice. The latter provides funding in accordance with government policy on public finance management. The Bar can only intervene on remuneration disputes in the event the paying entity refuses to pay defence counsel the amount due. Other disputes between counsel and the Ministry of Justice in relation to remuneration contracts are primarily resolved between the Ministry and the counsel. The Executive Secretary opined that Counsel for Mr. Uwinkindi and Mr. Munyagishari are well informed of the role of the

³ In this meeting, the Executive Secretary also discussed the *Uwinkindi* case. This report only contains those portions of the discussion that are relevant to the *Munyagishari* case.

Bar Association and know that the Bar would only intervene if the profession is threatened.

12. In Mr. Mugabe's view, the new lump sum contract will act as a mechanism for the transferred cases to progress expeditiously. Mr. Mugabe indicated that the Bar Association was consulted in determining the new lump sum amount and that agreeing on the acceptable amount of 15 million Rwandan Francs took time to negotiate. By reference to the *Bandora* case, Mr. Mugabe indicated that the new proposed contract, which has been signed by Mr. Bandora's Counsel, shows that the remuneration provided in that contract cannot be said to be totally insufficient to defend a case of this nature if some of the counsel have accepted the contract.
13. With regard to the termination provisions of the new contract,⁴ Mr. Mugabe indicated that the Bar Association would intervene if the new contract compromises the independence of the legal profession and would not allow counsel to sign a contract that may impede professional independence.

Meeting with Prison Director on 22 January 2015

14. The Monitor held a brief meeting with Mr. James Mugisha, the Director of Kigali Central Prison ("Prison"), before meeting Mr. Munyagishari.
15. The Director stated that he meets with the detainees in the Special Enclosure⁵ on a regular basis and the prison administration strives to resolve any issues brought to his attention as soon as possible, subject to the applicable rules and regulations. For example, he was pleased to inform that the renovations in the Prison are near completion, light bulbs inside the Special Enclosure have been repaired and he has opened a tender for procuring a new table and chairs for the sitting room in the Special Enclosure.

⁴ See Article 6 of the proposed draft contract, titled "Cancellation of the Contract", provides:

For legitimate reasons, first and foremost in view of the complexity of the litigation involved, each Party reserves the right to unilateral cancellation of the contract, following three (3) months' notice.

The Ministry reserves the right to cancel the contract, following thirty (30) days' notice, in the following cases:

- a) In case of violation by Counsel of the Code of Ethics of the Bar Association;
- b) in case of fraud or corruption;
- c) in case of commission by Counsel of any act of such a nature as to entail their criminal liability;
- d) if Counsel conduct themselves in an inappropriate way at the Tribunal or resort to stalling tactics to draw out the proceedings or inhibit their normal course;
- e) if Counsel make any statements aimed at discrediting the Government or the Ministry in the course of their work, either to the press or during the trial.

Without prejudice to the first paragraph of the present Article, any failure by the Accused to follow the instructions of the Ministry of Justice found in the Annex to this Contract, shall be considered as grounds for its cancellation.

When the Contract is cancelled, Counsel are required to hand over all the exhibits in the case file to the colleagues who will replace them in the same case; the accounts shall be balanced, and one or the other Party shall effect a refund or payment of the outstanding amount, as appropriate. The remaining fees for the case shall be payable to the succeeding legal representative.

⁵ The Special Enclosure houses male detainees whose cases have been transferred by the ICTR and national jurisdictions. It is separated from the general section of the Prison.

16. The Director indicated that routine medical services and assistance at the prison are provided by nurses. If necessary or at their request, the detainees in the Special Enclosure are referred to King Faisal Hospital.⁶

Meeting with Mr. Munyagishari on 22 January 2015⁷

17. Mr. Munyagishari stated that there has been no progress in his case. According to Mr. Munyagishari, Rwanda has reneged on many of its promises – it has failed to provide sufficient legal aid, Counsel are being intimidated and are withdrawing from cases, there is no equality of arms, and the accused are being pressured to complete the cases ‘expeditiously’ without regard for fair trial rights. Mr. Munyagishari also claimed that the Government of Rwanda has not kept its commitment to treat the transferred accused under the same conditions as those provided to the prisoners from the Special Court for Sierra Leone.
18. Mr. Munyagishari indicated that his Defence does not have the necessary facilities for the preparation of his case. As an example, he stated that there are no adequate facilities at the Prison where counsel and client can undertake confidential consultations. He added that the Prison administration expects him to discuss his case with his Counsel for ten minutes with no privacy or materials for preparation.
19. Mr. Munyagishari stated that he is regularly denied visitation rights, especially when family and friends who are Tutsi come to visit him, and he was not allowed by the Prison officials to give gifts to his grandchildren for the holiday season. Mr. Munyagishari noted that while he does not have any complains about the food at this time, he complained about having to prepare his own breakfast and cleaning his own clothes. According to Mr. Munyagishari, these chores impede him from preparing for his morning hearings.
20. Mr. Munyagishari informed that on 13 January 2015, a team from the Office of the Prosecutor, including three national prosecutors and the two prosecution counsel, visited him and Jean Uwinkindi. Noting that the typical aim of these visits is to assess the conditions of detention, he claimed that the Prosecution had visited with the intent to intimidate them. According to Mr. Munyagishari, the visitors from the Office of the Prosecutor had stated that they were not afraid of the ICTR or the monitors of the Mechanism, and had instructed the Prison Director to strengthen discipline in the Special Enclosure.
21. Mr. Munyagishari noted that he is not receiving confidential monitoring reports filed in his case before the Mechanism and expressed concern. In particular, he mentioned the

⁶ For additional details see *The Prosecution v. Bernard Munyagishari*, Case. No. MICT-12-20, Public Second Monitoring Report for November 2014, 17 December 2014, para. 15.

⁷ The Monitor met with Mr. Munyagishari with the assistance of an interpreter.

Monitoring Report for the month of September 2014⁸. He explained that he and his Counsel must have access to such reports in order to fully exercise his right to file revocation applications before the Mechanism. Referring to paragraph 52 of the Decision of the President of the Mechanism Regarding the Monitoring Mechanisms in the *Uwinkindi* and *Munyagishari* Cases,⁹ Mr. Munyagishari stated that he should receive all confidential reports filed in his case, especially when the confidential information pertains to facts provided by him.

22. Mr. Munyagishari also requested to make two corrections in the Monitoring Report for the month of November. He stated that paragraph 26 of the Report should state “the investigation lasted for 18 years” and “the Prosecution hired (appointed) 42 investigators”.¹⁰
23. Mr. Munyagishari concluded by indicating that the Mechanism has not responded to their concerns. In his view, the transferred accused “are left to fend for themselves with no assistance”.

Meeting with Lead Counsel, Mr. Jean-Baptiste Niyibizi, on 22 January 2015

24. With regard to Mr. Munyagishari’s case, Mr. Niyibizi observed that the case has not progressed as he would have expected as the Defence does not have any resources to conduct investigations. Mr. Niyibizi noted that the Chamber has requested the Defence to submit a response to the indictment but this has not been possible without undertaking any investigations. He stressed that the case has been proceeding for 16 months, but no financial facilities have been provided to the Defence to conduct its work. Mr. Niyibizi noted that regardless of these impediments, the Defence has made several submissions, including concerning provisional detention and, in December 2014, submitted its preliminary objections.
25. Mr. Niyibizi expressed serious concern about the new contract proposed by the Ministry of Justice. He stated that the contract does not permit Counsel to plead his client’s case freely and compromises their independence. He further added that the funding provided in the proposed contract is insufficient and unreasonable for a case of this nature and magnitude, and that no lawyer of calibre would accept to take a transferred case with such meagre resources.
26. Mr. Niyibizi further asserted that the Government of Rwanda has unreasonable expectation about the length of the cases. He explained that the case of Agnes Ntamabyariro, which took over ten years to complete, clearly shows that such cases

⁸ See *The Prosecution v. Bernard Munyagishari*, Case No. MICT-12-20, Public Monitoring Report November 2014, 2 October 2014.

⁹ See *The Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Decision on Registrar’s Submission Regarding the Monitoring Mechanisms in the *Uwinkindi* and *Munyagishari* Cases, 15 November 2013, para. 52.

¹⁰ See *The Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Public Monitoring Report November 2014, 19 November 2014 (“First November Report”), para. 26.

take a long time even in Rwanda. He claimed that under the proposed contract, lawyers will be underpaid because a case with a proper defence will inherently take much longer to complete than anticipated by the Government. He observed that the length of a case does not depend only on the Defence but also on the Chamber and the rules of procedure.

27. Mr. Niyibizi indicated that although he would favour negotiations on the proposed contract, the Ministry of Justice has presented the contract as “take it or leave it”, with no option for negotiation. Furthermore, he asserted that Counsel have no negotiating power given the position of the Bar Association and its support for the contract.
28. Mr. Niyibizi also expressed deep dissatisfaction with the conduct of the Chamber. According to Mr. Niyibizi, at the hearing of 5 November 2014,¹¹ the Chamber stated that Counsel have been unable to do anything on the case other than claim for funding. In his view, it was inappropriate for the Chamber to make such a statement in a public hearing.

Examination of the Case File on 22 January 2015

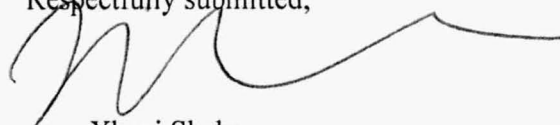
29. The Monitor examined the Case File in the office of the Registrar. The only new document that was added to the case file since the previous examination¹² was the Defence Preliminary Objections, which was filed on 2 December 2014.

III. CONCLUSION

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

Dated this 26th day of February 2015

Respectfully submitted,



Xheni Shehu
Monitor for the *Munyagishari* case
Arusha, Tanzania

¹¹ For additional details regarding this hearing, see First November Report, paras. 3-18.

¹² See Second Monitoring Report for December, para. 10.



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