



Mechanism for International Criminal Tribunals

Case No: MICT-12-20

Date: 26 March 2015

Original: English

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

PROSECUTOR

v.

BERNARD MUNYAGISHARI

PUBLIC

MONITORING REPORT FOR FEBRUARY 2015

Monitors:

Ms. Stella Ndirangu

Ms. Xheni Shehu

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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 (“Court”) and the interactions of the monitors appointed by the Mechanism for International Criminal Tribunals (“Mechanism”) with various stakeholders during the month of February 2015 (“Reporting Period”).
2. During the reporting period, the appointed monitors - Ms. Xheni Shehu and Ms. Stella Ndirangu (individually “Monitor”, collectively “Monitors”) - undertook two missions to Rwanda. Ms. Shehu undertook an individual mission from 2 to 6 February and a collective mission with Ms. Ndirangu from 24 to 27 February 2015. In addition to the monitoring activities, the purpose of the latter mission was also to introduce Ms. Ndirangu as a newly appointed monitor.¹
3. Two pre-trial hearings were held during the Reporting Period: on 3 and 25 February 2015. The hearings were held before the full Chamber, in the presence of the Accused, Mr. Munyagishari, who was represented by Counsel Mr. Jean Baptiste Niyibizi and Mr. John Hakizimana (“Counsel”). The Prosecution was represented by Mr. Jean-Bosco Mutangana and Mr. Bonaventure Ruberwa (“Prosecution”). The Court appointed interpreter, Mr. Faustin Murangwa, provided consecutive interpretation for Mr. Munyagishari. The Monitors followed both hearings with the assistance of an interpreter.
4. At the 3 February 2015 hearing, the Chamber heard submissions on the Defence’s failure to file its response to the Indictment and Mr. Munyagishari’s detention conditions. During the hearing, Mr. Munyagishari requested the recusal of the Presiding Judge. A specially appointed three judge panel of the High Court considered Mr. Munyagishari’s request for recusal. The panel issued a decision on 10 February 2015, dismissing Mr. Munyagishari’s request. At the 25 February hearing, the Chamber heard oral submissions from the parties on the Defence’s oral request for necessary facilities and resources to prepare its defence, issued a series of oral rulings and determined a “roadmap” for the trial. The Court scheduled the next pre-trial hearing on 1 April 2015.
5. During the reporting period, the Monitors met with Mr. Munyagishari, Counsel for the Prosecution, the Permanent Secretary of the Ministry of Justice, the President and the Executive Secretary of the Rwanda Bar Association (“RBA”), and examined the case file.²
6. A detailed report on all activities during the Reporting Period is provided below.

¹ See *In the Matters of Jean Uwinkindi and Bernard Munyagishari*, Case Nos. MICT-12-25 and MICT-12-20, Order Appointing a Monitor, 18 February 2015.

² The Monitors met with Mr. Munyagishari and examined the case file with the assistance of an interpreter.

II. DETAILED REPORT

A. Monitoring Mission from 2 to 6 February 2015

Court Hearing of 3 February 2015

7. The Court opened the hearing by noting its ruling of 10 December 2014 directing the Defence to file its response to the Indictment one week before the hearing.³ Noting that the Defence had failed to comply with its ruling, the Court asked the Defence to provide an explanation.
8. Mr. Munyagishari responded that he did not have the necessary material to prepare his response to the Indictment, requested an adjournment of the hearing, and indicated that he had prepared a “declaration” to the Court but was unable to print it. Mr. Munyagishari noted that on 17 November 2014, he submitted a letter to the Prison Director, with a copy to the Prosecution, asking for material resources to prepare his response to the Indictment, but he had not received a reply.⁴ The Prosecution responded that it did not recall receiving a copy of the letter, noting that it had received similar letters from other accused to which it had responded.
9. Mr. Munyagishari replied that he had reminded the Prosecution of its request on 13 January 2015, when a team from the Office of the Prosecutor visited him at the Prison. He informed the Court that while he received a flash disk, he had not received other material, including paper. With permission from the Court, Mr. Munyagishari then provided a flash disk to the Court so as to take a copy of his declaration.
10. At the invitation of the Court, Mr. Munyagishari proceeded to orally present his declaration. Noting Article 26 of the Law relating to the Transfer of Cases to the Republic of Rwanda (“Transfer Law”),⁵ Mr. Munyagishari stated that he wished to inform the Court that the statements of the Prison Director, which were reported in the Second Monitoring Report of November 2014, in particular in paragraphs 7, 9, 10, 11-13 and 15, were contrary to the truth and misrepresented the conditions of detention at

³ See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Public Second Monitoring Report for December 2014 (“Second December 2014 Report”), 27 January 2015, para. 9.

⁴ A copy of the letter is attached as an annex to the Defence Preliminary Objections filed on 2 December 2014. See Second December 2014 Report, footnote 6.

⁵ Article 26 of the “Law N°47/2013 of 16 June 2013 relating [*sic*] Transfer of Cases to the Republic of Rwanda”, titled “Conditions of Detention” paragraph 1 provides: “Any person who is transferred to Rwanda by the ICTR, the Mechanism or any other State for trial shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998.”

the Kigali Central Prison.⁶ As an example, he claimed that contrary to the statements of the Prison Director, the detainees at the Special Enclosure⁷ prepare their own breakfast.

11. Further, Mr. Munyagishari claimed that he had been unable to prepare for the day's hearing and have breakfast because he received a haircut that morning. Mr. Munyagishari noted that according to the Internal Regulations of the Prison, detainees are required to receive a haircut every week. According to Mr. Munyagishari, he had asked the Prison Director to schedule his haircut a day before the hearing so that he could prepare for the hearing, but his request was denied.
12. The Court asked Mr. Munyagishari to succinctly explain the basis of his complaints in order to better understand his submissions. The Court further enquired whether Mr. Munyagishari was requesting a stay of the hearings because he did not have breakfast.
13. Mr. Munyagishari responded by reference to Principle 33 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁸ arguing that he has a right to complaint to the Court about his conditions of detention.
14. The Court stated that while it had a mandate to administer criminal trials, it was not competent to address detainee's complaints about their daily care at the Prison. The Court further indicated that unless Mr. Munyagishari was being tortured, he should follow proper procedures and submit claims related to his detention to the Prison authorities. The Court then recalled its request for an explanation of why the Defence had failed to file its response to the Indictment in accordance with its ruling.
15. Noting that the Court had declared itself incompetent to hear submissions about his conditions of detention, Mr. Munyagishari stressed that it is important for the Court to be informed of his conditions of detention. In support, Mr. Munyagishari referenced Article 26 of the Transfer Law.⁹ Further, Mr. Munyagishari stated that if the Court intended to accelerate the case, it could not do so by affecting his rights to a fair trial.
16. The Court intervened and reminded the Defence that it had ten minutes to explain why they had not submitted their response to the Indictment.

⁶ See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Public Second Monitoring Report for November 2014 ("Second November 2014 Report"), 17 December 2014, paras. 7, 9, 10, 11-13 and 15.

⁷ The Special Enclosure is separated from the general section of the Kigali Central Prison and houses detainees whose cases have been transferred from the ICTR, the Mechanism or national jurisdictions.

⁸ Principle 33 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998, in paragraph 1 provides: "A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers."

⁹ See Article 26 reproduced in footnote 5.

17. Mr. Munyagishari continued by stating that the Ministry of Justice and the Prosecution are the same entity. He argued that consequently there was a conflict of interest between the Ministry of Justice providing remuneration to his Counsel and his legal representation.
18. The Court indicated that the Ministry of Justice and the Prosecutor are two different institutions and asked Mr. Munyagishari to precisely explain the conflict of interest in the instant case. Mr. Munyagishari explained that the Ministry of Justice submitted a document to the International Criminal Tribunal for Rwanda (“ICTR”) in 2001 where it claimed to be the Prosecutor General of Rwanda. After receiving a copy of the document, and noting that the document was created in 2001, the Court reiterated its request for clarification on where the conflict of interest lies.
19. Mr. Munyagishari, exhibiting frustration with the Chamber’s questioning, submitted an oral request for the recusal of Presiding Judge Alice Ngendahayo on the ground that she manifested bias against his case. He stated that the Presiding Judge was hostile and did not listen or take into consideration his submissions.
20. At the invitation of the Court, the Prosecution responded that routine claims that Mr. Munyagishari may have with respect to his conditions of detention, including cutting hair or preparing breakfast, should not be an impediment to the continuation of the proceedings. With respect to the 2001 document, the Prosecution submitted that this was a document that was translated by the ICTR, and requested the Court to examine the original document. Regarding the request for recusal, the Prosecution argued that Mr. Munyagishari did not provide any grounds to justify his request. The Prosecution requested that the hearing should continue and if Mr. Munyagishari did not agree he could waive his right to appear in his trial.
21. In response to Mr. Munyagishari’s request to address the Chamber, the Chamber stated that once the accused makes a request for the recusal of a Judge, the accused may no longer address the Chamber. The Chamber adjourned and informed that the Court would consider the request and communicate its decision to the parties in due course.

Brief Meeting with Counsel for the Prosecution on 3 February 2015

22. Mr. Mutangana reiterated that Mr. Munyagishari did not provide a legal basis for his request to recuse the Presiding Judge. He anticipated that the recusal proceedings were likely to delay the proceedings. He further explained that in accordance with Rwandan law, a new panel of judges will be designated to consider the request. He indicated that it would be at the Court’s discretion whether to hold a hearing before issuing a decision. Notwithstanding, the decision of the Court would be communicated to the parties, together with the schedule of the next hearing, if applicable.

Meeting with the Permanent Secretary of the Ministry of Justice on 6 February 2015¹⁰

23. With respect to the new draft contract, the Permanent Secretary informed that the Ministry is carefully reviewing the draft contract with a view to clarifying any provisions that may appear to hamper the independence of counsel. In particular, the Permanent Secretary noted Article 6 of the draft contract on termination.¹¹ The Permanent Secretary explained that the Ministry is considering the type of behaviour or conduct that may fall under this provision.
24. The Permanent Secretary further informed that the Ministry is considering re-incorporating the RBA as a party to the contract, given its role in appointing counsel, monitoring their activities and facilitating their payment.
25. The Permanent Secretary reiterated that investigation of witnesses residing outside Rwanda would be negotiated and funded separately.¹²

Communication from the Registry of the High Court on 12 February 2015

26. On 12 February 2015, the Monitor received an email correspondence from the Registry of the Court transmitting the Decision on Mr. Munyagishari's request for the recusal of Judge Alice Ngendahayo, issued by a panel of specially appointed three judges on 10 February 2015.
27. The Decision dismissed Mr. Munyagishari's request, finding his allegations "inadmissible" on the ground that they did not demonstrate "animosity" by Judge Ngendahayo.

¹⁰ This meeting mainly discussed the *Uwinkindi* case. This report only contains those portions of the discussion that are relevant to the *Munyagishari* case.

¹¹ 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.

¹² See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Public Monitoring Report for January 2015 ("January 2015 Report"), 26 February 2015, para. 6.

28. The Registry of the Court also informed the Monitor that the next court hearing was scheduled on 25 February 2015.

B. Monitoring Mission from 24 to 27 February 2015

Court Hearing of 25 February 2015

29. Upon commencement of the hearing, the Court noted that the hearing was delayed due to Mr. Munyagishari's late arrival. The Court ordered the organ in charge of Mr. Munyagishari's detention to ensure that he arrives at Court no later than 8:20 on the mornings of scheduled hearings.
30. Observing that the Defence was granted over three months to complete its response to the Indictment and had failed to do so by the set deadline, the Court considered that the Defence would proceed to trial without submitting a response to the Indictment. The Court then announced that it would hear submissions on how the parties intend to present their cases in order to set out a "roadmap" for the trial proceedings. The Court further ruled that after the next hearing it would not accept any further submissions pertaining to "prejudicial issues" or "impediments" to the progress of the proceedings. The Court then invited the Prosecution to indicate how it would present its case.
31. With permission from the Court, Mr. Munyagishari stated that the Prosecution had failed to provide him with the necessary means to prepare and complete his response to the Indictment, including paper. The Prosecution responded that if Mr. Munyagishari had prepared his response, they are willing to assist him with printing the document. In the alternative, the Prosecution requested the Court to accept an electronic version of the submission.
32. Mr. Munyagishari replied that the Prosecution had misrepresented his point. He explained that he did not have any of the materials he requested on 17 November 2014 to prepare his case.¹³ He also indicated that he had written a reminder to the Prosecution but had not received a response.
33. The Court stated that Mr. Munyagishari had been appearing in Court for a year and had received a complete copy of the case file, including the French translation of the Indictment and its supporting material. The Court asked Mr. Munyagishari to explain what was impeding the Defence from preparing its response to the Indictment.
34. Mr. Munyagishari argued that the principle of equality of arms had not been respected in his case. He claimed that while the Prosecution engaged 42 investigators to prepare the case file and has two full-time paid national Prosecution Counsel to prepare the

¹³ See para. 8 *supra*.

trial, the Defence has never had the means or the necessary facilities to prepare his case. Noting that it is the Court's duty to protect the rights of the Accused, Mr. Munyagishari pleaded the Court to consider his right to necessary facilities and means to prepare his Defence case. Mr. Munyagishari further opined that the Prosecution and the Ministry of Justice were responsible for delaying the trial.

35. With its permission, Counsel addressed the Court. Counsel stated that the Prosecution should not presume that the Defence had completed its response to the Indictment, without the necessary means to do so. Counsel stated that, despite lacking any means, the Defence had submitted its Preliminary Objections to the Court on 2 December 2014.¹⁴ Counsel noted that the Prosecution had not filed a response and the Court had not held oral arguments on the submission.
36. Relying on Articles 18 and 19 of the Constitution of Rwanda¹⁵ and Article 14 of the Transfer Law,¹⁶ Counsel requested the Court to issue an order to the institutions in charge to provide the Defence with the necessary facilities and funding in order to prepare its case and conduct investigations.
37. The Court reiterated its request to the Defence to explain in detail what it needed to prepare the case. Mr. Munyagishari responded that the Defence does not have the material and human resources necessary to prepare his case. He requested the assignment of two investigators, funding for Counsel and investigations, copies of relevant laws and codes and other material resources, as specified in his letter of November 2014. Mr. Munyagishari stressed that he could not be accused of delaying the trial if none of the sufficient means are made available to him and his Counsel.
38. The Prosecution responded that Mr. Munyagishari is represented by Counsel who know how and where to request the means for the preparation of the Defence. The Prosecution stated that its mandate is to prosecute cases not to provide means to the Defence. Further, the Prosecution opined that the Court is not the appropriate venue for discussing funding for the Defence. The Prosecution argued that the Court should not intervene as the Defence had not demonstrated whether and how they had sought out the means to prepare the case.

¹⁴ See Second December 2014 Report, para. 15 and footnote 6; *see also*, January 2015 Report, para. 29.

¹⁵ Article 18 of the Constitution of the Republic of Rwanda in paragraph 3 provides: "The right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and other decision making organs." Article 19 of the Constitution in paragraph 1 provides: "Every person accused of a crime shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair trial in which all the necessary guarantees for defence have been made available."

¹⁶ Article 14 of the Transfer Law, titled "Rights of an accused person," paragraph 6 provides, *inter alia*, that the accused person shall be entitled "to counsel of his/her choice in any a [sic] examination. In case he/she has no means to pay, he/she shall be entitled to legal representation."

39. Turning to Mr. Munyagishari's request for investigators, the Prosecution argued that Rwandan law does not permit the assignment of private investigators. Noting that Mr. Munyagishari is no longer at the ICTR and that he was transferred to Rwanda to be prosecuted in accordance with Rwandan laws, the Prosecution argued that Mr. Munyagishari should not insist on the provision of resources that are not provided for by the laws of Rwanda.
40. The Prosecution further stated that Mr. Munyagishari has Counsel who are appointed to assist him and they should provide him with the requested laws and codes. The Prosecution questioned the role of Defence Counsel if they could not provide to the Accused basic information about the applicable laws in the Country. The Prosecution concluded that the Defence has had the means and the time to prepare its response to the Indictment and that the case should proceed to trial.
41. Without waiting for the interpretation of the Prosecutions' submissions into French, Mr. Munyagishari requested to respond.¹⁷ Noting that Mr. Munyagishari understood the Prosecution's submissions, which were made in Kinyarwanda, the Court granted his request. Mr. Munyagishari explained that he was able to follow the Prosecution's submissions through his Counsel.
42. Mr. Munyagishari then proceeded to reiterate that pursuant to Article 17 of the Transfer Law,¹⁸ an accused is entitled to all the necessary means to prepare his Defence. Counsel then stated that contrary to the Prosecution's submissions, Mr. Munyagishari did not think he was at the ICTR. Counsel argued that international laws equally apply to Rwanda and they provide that an accused shall have the necessary means and facilities to prepare his defence case in order to protect his right to a fair trial. By general reference to the ICTR Referral Decision,¹⁹ Counsel asserted that the Court should ensure that Mr. Munyagishari is assisted by professional lawyers who are remunerated.
43. Following the parties' submissions, the Court issued a series of oral rulings. First, recalling that Mr. Munyagishari had requested to be supplied with printer cartridge, paper, and a flash disk, the Court ruled that Mr. Munyagishari should submit his response to the Indictment through a flash disk. Second, with respect to the request for relevant laws and codes, the Court ordered Counsel to provide them to Mr.

¹⁷ On 19 March 2014, the Court found that Mr. Munyagishari does not possess sufficient knowledge of Kinyarwanda to defend himself in that language, and therefore held that a French language interpreter would be assigned to Mr. Munyagishari throughout the proceedings. For additional details, see *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Public Monitoring Report for the *Munyagishari* Case (March 2014) Report"), 27 March 2014.

¹⁸ Article 17 of the Transfer Law, titled "Defence counsel," provides: "Without prejudice to the provisions of other laws of Rwanda, Defence Counsels and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties. They shall not be subject to search, seizure, arrest or detention in the performance of their legal duties. The Defence Counsel and his/her support staff shall be provided with appropriate security and personnel protection, at their request."

¹⁹ See *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89, Public Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012.

Munyagishari, if he did not already have them. Third, the Court stated that it had already ruled that Rwandan law does not permit engagement of private investigators and that investigations could be undertaken by Counsel. Fourth, the Court ruled that it was beyond its mandate to consider issues pertaining to remuneration, and requested Counsel to continue their negotiations with the Ministry of Justice.

44. Turning to the roadmap for the trial, the Court then asked the Prosecution to indicate how much time they would need to present the Indictment. The Prosecution stated that it would prefer to start with its opening statement before presenting the Indictment. Noting that the Indictment has also been translated into French, the Prosecution stated its preference to make submissions in Kinyarwanda, even if that might require additional time due to interpretation. The Prosecution requested one day for the presentation of its opening statement and ten days for the Indictment.
45. The Court then turned to the Defence to enquire how much time they needed to present their response. Mr. Munyagishari announced his intent to lodge an appeal against the ruling of the Court that he was not entitled to investigators. In addition, Mr. Munyagishari maintained that he did not have the necessary means to prepare for trial and was unable to indicate the time required for his response.
46. The Court stated that it had already addressed those issues. Noting that Mr. Munyagishari did not indicate the time required by the Defence to present its submissions, the Court allotted ten days to the Defence to present its opening statement and the response to the Indictment.
47. Counsel reminded the Court that the Defence submitted its Preliminary Objections on 2 December 2014, requesting the Court to consider it and decide before proceeding to trial.
48. The Court conferred and delivered an oral ruling. The Court scheduled the next hearing for 1 April 2015 and requested that both parties submit any final preliminary objections they may have two weeks before the hearing. The Court stressed that the roadmap should be respected and that after the 1 April hearing it would not entertain any further objections related to prejudicial or procedural matters or impediments to the preparation of the Defence. The Court adjourned.

Meeting with Lead Counsel for the Prosecution on 25 February 2015

49. After the introduction of the newly appointed Monitor, Mr. Mutangana welcomed the newly appointed Monitor, extended his cooperation and provided a brief overview of the role of the Prosecution and the proceedings in the *Uwinkindi* and *Munyagishari* cases.

50. On a general note, Mr. Mutangana indicated that the Prosecution is dedicated to ensuring expeditious and fair trials in both cases. Noting that issues related to legal representation continue to be raised in Court, he shared the Prosecution's hope that such issues will be resolved expeditiously and that the Accused will be represented by competent and professional Counsel.
51. Turning to the proceedings in the *Munyagishari* case, Mr. Mutangana recalled that the Defence had submitted its Preliminary Objections on 2 December 2014 and the Court had ordered the parties to submit any final preliminary objections two weeks before the hearing of 1 April 2015. The Prosecution indicated that the Court made it very clear that any objections should be dealt with before the commencement of the substantive trial. Noting the Court's ruling that it would not accept any further procedural objections subsequent to the 1 April hearing, the Prosecution anticipated the trial would begin shortly thereafter. He reported that the Prosecution is ready to proceed.
52. The Prosecution further reiterated its position that it should not have the obligation or take the burden of providing material facilities to the accused. The Prosecution noted that while it had assisted the accused at its discretion, it is the Counsel's duty to provide the accused with basic material resources and information about the case.

Examination of the Case File on 25 February 2015

53. The Monitor examined the Case File in the office of the Registrar. The following documents were added to the case file since the previous examination:²⁰
- i. Letter from Counsel to the Registrar of the Court dated 26 January 2015, requesting translation into French of the minutes of the hearings;²¹
 - ii. Letter from the Registrar of the Court to Counsel, rejecting the request for translation of the minutes of the hearing, on the grounds that the request was outside the scope of the Court's ruling of 4 June 2014.²² The letter was not dated.
 - iii. Mr. Munyagishari's "Declaration" to the Court dated 3 February 2015;²³
 - iv. Letter from the Registrar of the Court to Mr. Munyagishari dated 5 February 2015, requesting written Defence submissions on its request for recusal of the Presiding Judge. In his acknowledgment receipt, Mr. Munyagishari had indicated that he would be unable to respond without a French translation;
 - v. Decision of the Court on Mr. Munyagishari's request to recuse the Presiding Judge, dated 10 February 2015;²⁴

²⁰ See Second Monitoring Report for December, para. 11.

²¹ See para 69 *infra*.

²² For additional details on this ruling see *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Public Redacted Version of the Monitoring Report for June 2014, 16 July 2014, paras. 6-25.

²³ See para. 10 *supra*.

²⁴ See paras. 26-27 *supra*.

- vi. Letter from Mr. Munyagishari to the Registrar of the Court dated 10 February 2015, requesting copies of two documents provided to the Court at the hearing of 3 February 2015;
- vii. Summons of the Registrar of the Court dated 11 February 2012, scheduling a hearing in the Munyagishari case for 25 February 2015; and
- viii. Letter from the Registrar of the Court to Mr. Munyagishari dated 19 February 2015, informing Mr. Munyagishari that the documents he had requested in his 10 February letter were not in the records of the Registry.

Meeting with the Executive Secretary of the Rwanda Bar Association on 26 February 2015²⁵

54. After the introduction of the newly appointed Monitor, Mr. Mugabe welcomed the newly appointed Monitor, extended his cooperation and provided a brief overview of the role of the RBA. Mr. Mugabe then continued to clarify certain aspects of the role of the RBA in determining lawyers' fees.
55. Mr. Mugabe explained that in Rwanda there are in effect three legal representation regimes. The first regime involves non-indigent accused, in which case counsel fees are negotiated between counsel and client within the scale of fees prescribed by the RBA. The second regime involves indigent accused who are represented by *pro bono* Counsel, who receive payment for minor expenses. The third regime involves indigent accused whose representation is funded by the Government, as is the case with the transferred cases. In the latter case, Mr. Mugabe reiterated that the role of the RBA is limited to appointing competent counsel and supporting the Government in facilitating legal aid payments.²⁶ Mr. Mugabe also indicated that the RBA also ensures that counsel receive adequate support and assistance in fulfilling their professional obligations.
56. With respect to provision of the list of counsel to the accused, Mr. Mugabe indicated that there is no rule that requires the RBA to provide a list of counsel to indigent accused. Mr. Mugabe explained that in most cases the RBA designates lawyers for indigent accused. He indicated that the list of lawyers is posted on the RBA website and can be shared upon request with partner institutions, such as the Court, Prosecution, and national or international organisations. In the *Uwinkindi* case, Mr. Mugabe indicated that a list of two counsel was provided at the time of Mr. Uwinkindi's transfer at the request of the Prosecution as provided by the Criminal Procedure Code. In the *Munyagishari* case, Mr. Mugabe noted that the accused refused duty counsel assigned by the RBA.²⁷ Noting that an accused has a right to refuse counsel assigned by the RBA, Mr. Mugabe stated that Mr. Munyagishari chose lawyers who were on the list of RBA lawyers and the RBA accepted his choice. By comparison, Mr. Mugabe indicated

²⁵ This meeting also discussed the *Uwinkindi* case. This report only contains those portions of the discussion that are relevant to the *Munyagishari* case.

²⁶ See January 2015 Report, para. 60; see also, *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Monitoring Report for the Uwinkindi Case (January and February 2014), 7 March 2014, para. 54.

²⁷ See *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Monitoring Report for the Munyagishari Case (July-August 2013), 16 September 2013, paras. 49-50 and 95.

that in the *Mbarushimana* case, a list of all RBA lawyers was provided at the request of the Court.

Meeting with the President and the Executive Secretary of the Rwanda Bar Association on 26 February 2015²⁸

57. The Monitors met with Mr. Athanase Rutabingwa, the President of the Rwanda Bar Association. Mr. Mugabe was also in attendance.
58. After the introduction of the Monitors, Mr. Rutabingwa provided an overview of the role of the RBA. He explained that the RBA appoints or designates lawyers to indigent accused upon request from the accused, the Court or the Prosecution. Such counsel normally engage in *pro bono* representation. After the appointment, the RBA is available to assist counsel if they encounter difficulties in the course of their professional duties, including in accessing the accused at the Prison and having sufficient time to present their case in Court.
59. Mr. Rutabingwa indicated that given the magnitude and complexity of the transferred cases, the Government has agreed to provide legal aid funding. In accordance with the Legal Aid Policy and the budget, the Government has committed to remunerate counsel for transferred accused 15 million Rwandan Francs for the completion of the entire case, with the exception of investigation of witnesses outside Rwanda, which is negotiated separately with the Government.
60. Mr. Rutabingwa further explained that based on the practice in Rwanda, the scale of fees for a criminal case is between 1 and 15 million Rwandan Francs. Mr. Rutabingwa, informed that as the President of the RBA, he has authority to recommend an increase in remuneration on the basis of the nature of the case, but this option is only available if the funder, be it the client or the Government, accepts the recommendation. Mr. Rutabingwa indicated that based on the nature of the transferred cases, the RBA recommended to the Ministry an increase in remuneration beyond 15 million. Within its allocated budget, however, the Ministry decided to remunerate the maximum amount for a criminal case. Mr. Rutabingwa stressed that the Ministry consulted the RBA in order to ensure that the overall budget was reasonable and the RBA did not negotiate with the Ministry on behalf of any specific counsel.
61. Mr. Mugabe stressed that while the scale of fees is the basis for determining payment of lawyers, it does not apply to cases falling under the legal aid regime.
62. With respect to the provision of a list, Mr. Rutabingwa stressed that the right to choose counsel applies only to non-indigent accused. In accordance with the Law establishing

²⁸ This meeting also discussed the *Uwinkindi* case. This report only contains those portions of the discussion that are relevant to the *Munyagishari* case.

the RBA, the institution ensures that all indigent accused are assigned competent, professional and independent lawyers, subject to a conflict of interest or objection on personal conviction of counsel. He noted that all the lawyers accredited by the RBA have the competence to practice and represent accused.

Meeting with Mr. Munyagishari on 26 February 2015

63. The Monitors met with Mr. Munyagishari at the Kigali Central Prison, where he is detained. After the introduction of the newly appointed Monitor, Mr. Munyagishari provided a brief overview of his case and encouraged the Monitors to review the Affidavit of the International Association of Defence Lawyers²⁹ which, according to Mr. Munyagishari, reflects the dire status of the proceedings in his case.
64. Mr. Munyagishari asked if he could receive a copy of the Memorandum of Understanding referred to in the appointment order of the new Monitor. The Monitor responded that inquiries related to the monitoring arrangements should be addressed to the Mechanism.
65. Mr. Munyagishari then turned to the classification of the monitoring reports and noted that he had received a letter from the Registry of the Mechanism indicating that the classification of the report is at the discretion of the monitor. Mr. Munyagishari inquired whether the monitor had received his letter of 16 February 2015 seeking clarification on the matter. The Monitor confirmed that she had received the letter on the same day. By reference to his letter, Mr. Munyagishari enquired why the monitors had classified the reports as confidential and *ex parte* given that the President of the Mechanism had ordered that he should be provided with confidential monitoring reports.³⁰ The Monitor explained that while she could not comment on the classification decisions of other monitors, she noted in general that the monitors are guided by their Terms of Reference. The Monitor further explained that under the Terms, the monitors indicate to the Mechanism whether, in the course of their monitoring activities, any information has been provided on a confidential basis or should remain confidential. A confidential and *ex parte* classification ensures adequate protection of information provided by different interlocutors in confidence. Further, the Monitor observed that the decision of the President does not foreclose the possibility that certain reports may be filed on a confidential and *ex parte* basis, including the accused.
66. Turning to the issue of Counsel, Mr. Munyagishari recalled his letter of 17 February 2015 addressed to the monitors,³¹ regarding allegedly contradictory and false statements made by the Ministry of Justice and the RBA in the Second December 2014

²⁹ See *Prosecutor v. Munyagishari*, Case No. ICTR-2005-89, Requête de la Défense de Bernard Munyagishari aux fins d'accepter la lettre ouverte et la résolution de l'Association Internationale des Juristes Démocrates relative au renvoi de l'affaire *Munyagishari* au Rwanda, 15 February 2012.

³⁰ See *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.

³¹ The Monitor received a copy of the letter on 25 February 2015.

Report. According to Mr. Munyagishari, the Ministry of Justice and the RBA appear not to agree on the role of the RBA on legal aid, as the former indicated that the RBA determines lawyers' fees,³² while the latter stated that it is not involved in matters of remuneration.³³ Further, Mr. Munyagishari claimed that it was not correct for the Ministry to compare the *Bandora* case with the *Munyagishari* or *Uwinkindi* case. According to Mr. Munyagishari, Mr. Bandora was able to cover the costs of his own counsel. He claimed that Mr. Bandora's counsel signed the contract three months before the completion of trial in order to cover any anticipated court fees in the event of a conviction, as stipulated in Ministerial Order No. 001/08.11 of 11 February 2014, concerning Court Fees for Criminal Matters.³⁴

67. At the conclusion of the meeting, Mr. Munyagishari requested to meet with the Monitors the next day in the presence of his Counsel in order to discuss a number of fair trial rights issues.

Meeting with Mr. Munyagishari on 27 February 2015³⁵

68. Noting the absence of his Counsel, Mr. Munyagishari indicated that since the submission of the first revocation application by the *Uwinkindi* Defence, he fears Counsel may be intimidated to fully participate in monitoring activities.
69. Turning to his proceedings, Mr. Munyagishari noted that on 26 January 2015, his Counsel had made another request to the Registrar of the Court for the translation of the minutes of the hearings into French.³⁶ He stated that he had not received the Registrar's response denying the request. He asserted that if the Court rejects his request for the translation of the minutes of the hearings, especially once the trial commences, it would be impossible for him to prepare his defence.
70. Mr. Munyagishari expressed grave concern about the hearing of 25 February 2015. He opined that the Court is so intent on starting the trial that it ignored the Defence Preliminary Objections of 2 December 2014. Mr. Munyagishari stated that it is not the parties' responsibility to manage the case, but the situation was so critical that his Counsel had to remind the Court of the submission on two occasions.
71. Of further concern to Mr. Munyagishari is the Court's decision to hear all submissions related to prejudicial or procedural objections by 1 April and not to accept submissions of similar nature thereafter. He claimed that the decision infringes on his right to a fair trial. By reference to Article 14 and 18 of the Transfer Law,³⁷ Articles 18 and 19 of the

³² See Second December 2014 Report, para. 21.

³³ *id.*, para. 34.

³⁴ For additional information on the Ministerial Order, see *Prosecutor v. Bernard Munyagishari*, Case No. MICT-12-20, Public Monitoring Report for May 2014, 4 July 2014, para. 26.

³⁵ Ms. Ndirangu departed Kigali on 26 February and was not present at this meeting. Lead Counsel for Mr. Munyagishari was unable to attend the meeting.

³⁶ See para. 53 *supra*.

³⁷ See Article 14 reproduced in footnote 16; Article 18 of the Transfer Law, titled "Appeal", provides: "Both the prosecution and the accused have the right to appeal against any decision taken by the High Court upon one or

Constitution,³⁸ and Article 150 of the Law No. 30/2013 of 24 May 2013 Relating to the Code of Criminal Procedure (“Criminal Procedure Code”),³⁹ he indicated that he has a right to raise objections that impinge on his defence rights at any stage of the proceedings. He indicated that limiting the Defence’s possibility to raise objections concerning fair trial rights only at the pre-trial stage effectively denies his right to object to fair trial right impediments that may arise at later stages of the proceedings. By comparison, Mr. Munyagishari stated that at the ICTR, the Chamber considered all requests related to fair trial violations at any stage of the proceeding. He claimed that contrary to international standards, the Chamber assigned to his case has repeatedly declined to consider issues that affect his fair trial rights. Instead, he claimed, the Court “belittles” his requests. Mr. Munyagishari informed that he will appeal the Court’s decision.

72. Further, Mr. Munyagishari claimed that the Government’s recent decisions in relation to legal aid funding have had an adverse influence on the Court. As the Government has indicated that it does not have sufficient legal aid funding, the Court has now decided to accelerate the schedule of proceedings so that lawyers are deemed to have received sufficient funding. Mr. Munyagishari concluded that this amounts to direct interference by the executive branch on judicial independence, in contravention of the Constitution of Rwanda.
73. With respect to investigations, Mr. Munyagishari challenged the Prosecutor’s interpretation of the law on investigators. He stated that the Transfer Law is a Rwandan law and Article 17 thereof⁴⁰ provides for investigators and support staff for the accused.
74. Turning briefly to his conditions of detention, Mr. Munyagishari informed that on 10 February 2015, the Prison Director held a meeting with all the transferred accused. According to Mr. Munyagishari, the Prison Director had indicated that he will strengthen disciplinary measures at the Special Enclosure. Mr. Munyagishari stated that the Prison Director had displayed anger at the meeting and had made certain statements that were intended to intimidate the detainees. As an example, Mr. Munyagishari claimed that the Prison Director had stated that he was not afraid of the Court if the detainees accused him in Court.
75. Mr. Munyagishari also revisited the statements of the Prison Director in the Second November 2014 Report.⁴¹ Mr. Munyagishari noted that the Prison Director had stated that assistance with cleaning chores is not an entitlement. In his view, such statements

all of the following grounds: 1) an error on a question of law invalidating the decision; 2) an error of fact which has occasioned a miscarriage of justice. The Supreme Court may uphold or invalidate some or all of the decisions of the High Court. Where necessary, it may order the High Court to review the case.”

³⁸ See Article 18 and 19 reproduced in footnote 15.

³⁹ Article 150 of the Criminal Procedure Code, titled “Substantial principles of criminal cases,” provides: “Criminal cases must adhere to the following substantial principles: 1° being held in public; 2° being fair and impartial; 3° respect for the right to defence and to legal counsel; 4° adversarial proceedings and equality of parties before the law; 5° basing on evidence lawfully produced, being rendered within the time limits prescribed by law with the judgment and being rendered in the language used in the pleading.”

⁴⁰ See Article 17 reproduced in footnote 17.

⁴¹ See Second November 2014 Report, paras. 6-15.

flout the Government's commitments to the ICTR that the detention rules applied to the convicted persons of the Special Court for Sierra Leone would also apply to the transferred accused, including those related to hygiene and sanitation.⁴²

76. Regarding family visits, Mr. Munyagishari noted the Prison Director's statement in paragraph 13 of the Second November 2014 Report that none of his visitors were denied entry. Mr. Munyagishari claimed that this statement was erroneous as he has been denied visitors on several occasions. He explained that most recently his brother-in-law, who is a genocide survivor, was also denied entry and was intimidated at the gate. According to Mr. Munyagishari, the guards at the gate told his brother-in-law that he will lose his survivor benefits if he visited Mr. Munyagishari. Mr. Munyagishari indicated that if the Prison Director is not aware of such incidents, he should have consulted with him. Mr. Munyagishari stated that he had informed the Director of the visitation issue, and that while he had indicated that he would address it, he had not yet responded.

III. CONCLUSION

77. The Monitors remain available to provide any additional information, at the President's direction.

Dated this 26th day of March 2015

Respectfully submitted,



Stella Ndirangu
Monitoring for the *Munyagishari* case
Nairobi, Kenya



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

⁴² See *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-05-89, Public Brief of the Republic of Rwanda as *Amicus Curiae*, dated 13 January 2013, para. 23 and Annex H, Memorandum of Understanding between the Special Court for Sierra Leone and the Government of the Republic of Rwanda, 2 October 2009.



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