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Mechanism for International Criminal Tribunals

Case No: MICT-12-25

Date: [18<sup>th</sup> June 2015]

Original: English

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**Before:** Judge Theodor Meron, President

**Registrar:** Mr. John Hocking

**PROSECUTOR**

v.

**JEAN UWINKINDI**

**PUBLIC**

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**MONITORING REPORT FOR APRIL 2015**

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**Monitors:**  
Judge Imani Aboud

Case No. MICT-12-25

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## I. INTRODUCTION

1. Pursuant to the Terms of Reference for the Monitors, particularly part “C” of Annex II to the MOU between the Mechanism for International Criminal Tribunals (“MICT” or “Mechanism”) and the Kenya Section of the International Commission of Jurists (“ICJ Kenya”), I respectfully submit this Report to the President of the MICT through the Registrar.
2. This Monitoring Report pertains to the activities in the case of Jean Uwinkindi before the Supreme Court of Rwanda (“Court”) of the Monitor appointed by the Mechanism, during the month of April (“Reporting Period”).
3. During the reporting period, the appointed Monitor Judge Imani About (“Monitor”) undertook two missions to Rwanda to monitor the proceedings in the Jean Uwinkindi case. The missions were from 6 to 7 April, 2015 and from 23 to 25 April, 2015.
4. One Court hearing was held during the Reporting Period. The Supreme Court heard the appeal filed by Uwinkindi on 6 April 2015. The hearing was held before the full Chamber in the presence of the accused person, Mr. Uwinkindi the appellant and was represented by his Counsel, Mr. Gatera Gashabana and Mr. Jean-Baptiste Niyibizi (“Defence Counsel”). On the prosecution side, the respondent was represented by Mr. Jean Bosco Mutangana and Mr. Bonaventure Ruberwa (“Prosecution”). The monitor followed the hearing without proper assistance of a professional interpreter, but was assisted by Ms. Colette Murebwayire from the MICT office in Kigali.<sup>1</sup>
5. During the hearing of the appeal on 6 April 2015, the Court asked the Defence Counsel to confirm whether they had paid the fine ordered by the High Court of Rwanda<sup>2</sup> before the Court could proceed to hear the appeal. They responded in the affirmative and it was agreed by the full bench that Counsel had satisfied this requirement, which was reflected in the Court record.
6. The Supreme Court asked Mr. Uwinkindi if his Defence Counsel were representing him on *pro bono* basis or if he was to pay them.<sup>3</sup> Mr. Uwinkindi informed the Court that his Counsel agreed to represent him because he needed them in order to seek justice. Defence Counsel also confirmed that they were representing him on *pro bono* basis.

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<sup>1</sup> An official interpreter assigned to assist in interpreting court hearing proceedings did not appear in court, thus the office of MICT- Kigali made an arrangement for an unofficial interpreter at very short notice. The monitor however later received the transcripts from the proceedings that assisted her to prepare this report.

<sup>2</sup> See January, 2015 Monitoring Report, Para. 28, and March 2015, Monitoring Report, Para. 10.

<sup>3</sup> See January, 2015 Monitoring Report, Para. 74.

7. The Supreme Court heard a preliminary objection raised by the Prosecution on the appeal of Mr. Uwinkindi, indicating that the High Court decision in question was non-appealable.<sup>4</sup> The Supreme Court overruled the objection and the appeal hearing proceeded as scheduled.
8. On 24 April 2015 the Supreme Court delivered its decision on the appeal of Mr. Uwinkindi heard on 6 April 2015. The appeal was dismissed.
9. In addition to observing the hearing the Monitor held meetings with Mr. Uwinkindi, Defence Counsel Mr. Gashabana, Counsel for the Prosecution, two officials from the Ministry of Justice, the Prison Director and the Executive Secretary of the Rwanda Bar Association (“RBA”).
10. A detailed report on all activities during the Reporting Period is provided below.

## II. DETAILED REPORT

### *A. Monitoring Mission from 6 to 8 April, 2015*

#### Supreme Court hearing of 6 April 2015

11. The hearing was held before the Supreme Court full chamber comprising of Hon. President Judge Mutashya Jean Baptiste, Judge Gakwaya Justin and Judge Hitiyaremye in the presence of Mr. Uwinkindi, the Appellant, who was represented by his Defence Counsel Mr. Gashabana and Mr. Niyibizi. The Prosecution was also represented by Mr. Mutangana and Mr. Ruberwa.
12. The Court recalled that a fine of 500,000 Rwanda francs was imposed by the High Court to each of Mr. Uwinkindi’s Defence Counsel<sup>5</sup> and requested Defence Counsel to confirm if they had paid the fine. Both Counsel confirmed they had paid the fine.
13. The Court reminded Mr. Uwinkindi that when the case was last adjourned<sup>6</sup> he indicated he would appear in Court with lawyers of his choice and he would pay for his defence team himself. The Court asked Mr. Uwinkindi to confirm if he had paid his Counsel appearing in

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<sup>4</sup> The Prosecution raised a preliminary objection that Mr. Uwinkindi’s appeal before the Supreme Court was not admissible in law because it was an appeal against an interlocutory decision of the High Court which is not appealable under Article 162 of the Civil, Commercial, Labour and Administrative Procedure Code of Rwanda.

<sup>5</sup> See March 2015 Monitoring Report, Para. 10.

<sup>6</sup> On 9 March 2015 Mr. Uwinkindi appeared before Supreme Court but the hearing was adjourned because Defence Counsel had not complied with the order of the High Court to pay the fines imposed on them.

Court on his behalf. Mr. Uwinkindi reported that his Counsel were representing him on a *pro bono* basis.

14. At the invitation of the Court the Prosecution submitted on Mr. Uwinkindi's revelation that his Defence Counsel have agreed to represent him on *pro bono* basis. The Prosecution told the Court that they had no comment to make until Defence Counsel personally confirmed in Court that they were representing Mr. Uwinkindi *pro bono*. The Court asked Defence Counsel to confirm if they were representing Mr. Uwinkindi *pro bono*. Mr. Gashabana and Mr. Niyibizi confirmed that they agreed to assist Mr. Uwinkindi *pro bono* during the hearing of the interlocutory appeal before the Court.<sup>7</sup>
15. Responding to the confirmation by Defence Counsel on their representing Mr. Uwinkindi on *pro bono* basis, Prosecution stated that Defence Counsel had done the right thing by agreeing to assist Uwinkindi *pro bono* even if the Bar Association had not assigned them as his Counsel. However, Prosecution raised their concern that it was not proper for Defence Counsel to represent Mr. Uwinkindi, because the President of the Bar Association had written a letter to them dismissing them from handling the case and ordering them to be replaced by newly appointed counsel. Prosecution was of the view that, by appearing at the Supreme Court, Defence Counsel had acted contrary to the decision of the President of the Bar Association.<sup>8</sup> The Prosecution submitted that Defence Counsel's appearance before Supreme Court was unprofessional, however they indicated they were simply sharing this information with the Court and were not requesting the Supreme Court to make a ruling on the points raised.
16. Supreme Court called on the Defence Counsel to respond to the issue raised by the Prosecution. Mr. Gashabana indicated that they decided to represent Uwinkindi in the interests of justice and to allow enjoyment of his right provided for under Article 18(3) of the Constitution of Rwanda, which gives equal rights to everybody before the Court<sup>9</sup>. He also referred to Article 14(6) and 14(3) of the Transfer Law which gives rights to the accused person to be assisted / represented by a Counsel of his choice. Mr. Gashabana urged Prosecution not to interfere with the business of the Bar Association and its members, instead urging them to support their stance as lawyers who have decided to protect rights of the accused, and to ensure there is fair trial in Mr. Uwinkindi's case.

<sup>7</sup> See January, 2015 Monitoring Report, Para. 74.

<sup>8</sup> On 29 January 2015 President of Rwanda Bar Association decided to appoint new Counsel Mr. Joseph Ngabonziza and Mr. Isacaar Hishamunda to represent Mr. Uwinkindi in the High Court proceedings.

<sup>9</sup> Article 18(3) of the Constitution of The Republic of Rwanda provides that; "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".

17. Mr. Niyibizi repeated the sentiments stating that they had acted in the interest of justice. Further, he submitted that, Mr. Gashabana being former President of the Bar, was very well versed in the rules, and they did not violate any rule of the Bar Association.
18. The Court noted that Defence Counsel had paid the fine of five hundred thousand (500,000) Rwanda Francs each<sup>10</sup> that was ordered when the case was last adjourned. The Court file contained cash deposit slips to prove the payment. The Court also noted that, given that Defence Counsel were representing Mr. Uwinkindi on *pro bono* basis, they would not claim any fee from him or anyone else.
19. Mr. Gashabana requested that the Court permit them to visit their client in prison, because they had been barred by the Prison Director from accessing Mr. Uwinkindi and the reason given was that the Prison Director was implementing instructions given by the High Court.
20. The Court indicated that it had no such authority to give Defence Counsel permission to visit their client in prison. The Court also noted that the RBA removed Defence Counsel from representing Mr. Uwinkindi and ordered them to be replaced by other lawyers; it was for this reason that Defence Counsel were barred from accessing their client by the Prison Director. The Court noted it was agreeing to Defence Counsel only representing Mr. Uwinkindi on appeal before the Court.
21. Prosecution raised a preliminary objection against Mr. Uwinkindi's interlocutory appeal. Mr. Ruberwa for the Prosecution stated that the preliminary objection was based on Article 162 of the Civil, Commercial, Administrative and Social Procedure Code of Rwanda<sup>11</sup>. Mr. Ruberwa further stated that their objection was also based on Article 36, Section 10 of the Special Organic Law of 2008 governing the Supreme Court. Prosecution contended that Article 27 and 28 of the Transfer law that Mr. Uwinkindi relied upon in his appeal did not address the issue before the Court. Mr. Ruberwa therefore requested the Court to determine the appeal was not properly filed before it.
22. Arguing against the Preliminary objection, Mr. Uwinkindi stated before the Court that Article 27 and 28 of the Transfer Law, on which he based his appeal, was the relevant law applicable in the circumstance, and that the law provides very clearly a special regime of law designed to deal with transferred cases. Such cases cannot be considered like any other cases where only Rwandan laws are applicable. Mr. Uwinkindi told the Court that Article 27 of the Transfer Law was clear that where there was conflict in law in such cases, the Transfer Law

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<sup>10</sup> The High Court ordered on 15 January 2015 that the two Counsel to pay each fine of Rwandan Francs 500,000 to the Court. Also see March 2015 Public Monitoring Report, Para. 10.

<sup>11</sup> Article 162 of the Civil, Commercial, Administrative and Social Procedure Code does not allow interlocutory appeals when there is hearing of the main case in the first instance court.

prevails. He also added that Article 180 of the Criminal Procedure Code (CPC)<sup>12</sup> provides that where there is an interlocutory appeal, the main trial should be adjourned until the Court determines such appeal.<sup>13</sup> Mr. Uwinkindi urged the Court that he appealed against the decision of the High Court because he had the right to be represented by lawyers of his choice, and he could not proceed with the case without lawyers, as promised by the Rwandan government in Arusha before he was transferred.<sup>14</sup>

23. Mr. Niyibizi, responded to the preliminary objection by indicating that the preliminary objection to the interlocutory appeal had no merit and should be overruled. He stated that Mr. Uwinkindi's appeal had its basis under Article 18 of the Transfer Law; it was therefore not proper to refer to Article 162 of the Law of Civil Procedure<sup>15</sup> because this was not applicable to criminal cases. Given that the case before the Court was not like any other ordinary case but was a transfer case from the ICTR that is governed by special laws, it was not proper to refer the Court to Article 162 cited above, which is only applicable where the other laws are silent. Therefore he asked the Court to hear and determine the appeal before it because the Transfer Law<sup>16</sup> allows such an appeal, and the appeal is on the issue that goes to a fundamental right of the accused.
24. The Court questioned Mr. Niyibizi on whether he had anything to say about Article 34 of the law governing the Supreme Court. Mr. Niyibizi responded to the Court that Article 34<sup>17</sup> is concerned with the powers of the Registrar of the Supreme Court to determine admissibility of an appeal before the Court. He further stated the interlocutory appeal was filed and given a registration number as indicated in the Court file, which shows that the Supreme Court agreed to entertain the relevant appeal.
25. At the Court's invitation Mr. Gashabana stated that the appellant had the right to appeal against the High Court decision. The Court intercepted him, recalling that a similar statement had already been made by Mr. Niyibizi. Mr. Gashabana submitted that the decision of the High Court was a conclusive decision regarding the right of an accused to be represented. He presented Article 18 of the Constitution and Article 14 of the Transfer laws, which provide for the accused's right to have a lawyer of his choice, which is a basic right. He also referred

<sup>12</sup> Article 180 of Law No.30/2013 of 2013, provides that "the execution of a judgement shall be stayed until the expiration of the time limits for appeal and if the appeal is filed, until the decision on appeal is rendered...."

<sup>13</sup> Also see January, 2015 Monitoring Report Para.21.

<sup>14</sup> The same argument was made by Mr. Gashabana, Counsel for Uwinkindi in Para.135 of the March 2015 Monitoring Report.

<sup>15</sup> Article 162 of the Law No 21/2012 of 14 June 2012, relating to the Civil, Commercial, Labour and Administrative Procedures.

<sup>16</sup> Article 27 of the Transfer Law provide that; " In the event of any inconsistency between this law and other ordinary law, the provisions of this Law shall prevail"

<sup>17</sup> Article 34 of the Organic Law No. 03/2012/OL, determines the organization, functions and jurisdiction of the Supreme Court including powers of the Chief Registrar to admit any appeal placed before the relevant court.

- the Court to Article 14 of the International Convention on Civil and Political Rights (ICCPR),<sup>18</sup> which Rwanda had ratified in 1995.
26. The Court asked Mr. Gashabana not to go beyond the submission on the issue before the Court. Mr. Gashabana stated that the submissions of his colleague Mr. Niyibizi on Article 34 of the law relating to the organizational function and competence of the Supreme Court was correct, and the article giving the right to the Registrar to receive or reject the appeal did not conform with the transfer law. Nonetheless he submitted that since the Registrar of the Supreme Court decided to receive the appeal, the appeal was correct according to the law.
  27. Mr. Gashabana argued that the Prosecution erred in its submission that Uwinkindi must wait to file the relevant appeal once the case before the High Court is concluded. Mr. Gashabana further submitted that the Transfer Law allows an appeal to be instituted during ongoing proceedings, as Uwinkindi had done in that instance. He concluded by asking the Court to consider that Uwinkindi has the legal right to have lawyers of his choice.
  28. The Court adjourned the case to allow for consultation on the ruling of the Preliminary Objection raised by the Prosecution.
  29. The hearing resumed at 11:35 am. The Court's decision on the preliminary objection was that the accused rightly appealed to the Court as provided by Article 18 of the Transfer Law.<sup>19</sup> The Court also found that the interlocutory appeal did not fall under Article 162<sup>20</sup> therefore the Prosecution's arguments were not relevant to the appeal in question. The Court found that the preliminary objection had no merit and the interlocutory appeal was allowed to be heard accordingly. Thereafter the Court called upon Mr. Uwinkindi to submit his grounds of appeal.
  30. Arguing his appeal, Mr. Uwinkindi submitted that the basis of his appeal was as a direct result of the deprivation of his right to be legally represented in the High Court. He asked the Supreme Court to decide if it was correct for the High Court to remove lawyers of his choice given the advanced stage his case had reached, where witnesses were being summoned to testify before the Court. He contended that it was not right for the High Court to continue with the hearing of witnesses without him being represented by his lawyers. Mr. Uwinkindi stated that his lawyers represented him up to the stage that he was to call witnesses, but there

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<sup>18</sup> Article 14(3) (b) of the CCPR provides that in determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defence and to communicate with Counsel of his own choice.

<sup>19</sup> Article 18 of the Transfer Law provide that; "both the prosecution and the accused have the right to appeal against any decision taken by the High Court upon one or all of the following grounds, 1. An error on a question of law invalidating the decision, 2. An error of fact which has occasioned miscarriage of justice".

<sup>20</sup> See Article 162 produced in footnote.



were some outstanding issues that gave rise to his lawyers' request for an adjournment, a request that was ignored by the High Court. He

31. Mr. Uwinkindi argued that the High Court spontaneously fired his lawyers as the Prosecution was preparing to call their witnesses to testify. He was then given new lawyers who were not conversant with his case, and the High Court forced him to appear in court for a hearing with those newly appointed lawyers. He voiced his dissatisfaction that the High Court instructed the Rwanda Bar Association (RBA) to remove his former lawyers and appoint new ones to assist him in court, an order which was adhered to by the RBA. Mr. Uwinkindi stated that he had inquired from the High Court why his lawyers were removed without his agreement as he did not have problem with them, he indicated he had not written to the High Court informing it that he had an issue with his counsel. Further, neither of his lawyers wrote to the Court to explain that they had problem with him. He said that the action of the High Court was conducted unilaterally as the RBA did not write any letter to the Court to that effect. Mr. Uwinkindi told the Supreme Court that the RBA only respected the High Court order that removed his lawyers with the result of depriving him a proper defence in court.
32. Mr. Uwinkindi submitted to the Court that he expected to receive a fair trial as was promised by the Rwandan government during his transfer proceedings before the ICTR in Arusha. He asserted that such a promise was made in writing by the then Minister of Justice Mr. Karugarama to the Tribunal assuring that the case would not face any problems, because there are available funds for the handling of the case.
33. The Supreme Court asked Uwinkindi to point out which error had been committed by the High Court when it ordered that he did not have right to get lawyers of his choice because he had no means to pay them. Mr. Uwinkindi responded by pointing out three errors: that the prosecution had cited a case which was submitted to the High Court after the hearing and he was not availed of a chance to respond or comment on the use of the case; that prosecution cited an authority of Akayesu case where the defendant fired his lawyer which was not analogous with the current case as lawyers of his choice were fired by the High Court; and that the High Court did not comply with Article 16 of the Rwandan Constitution,<sup>21</sup> which prohibits discrimination and provides that everyone is equal before the law. He contended that the High Court discriminated against him because he wished to be given a list of lawyers to choose from without being forced to accept lawyers appointed for him. He further stated that he had the right to choose lawyers as others did, a right which he had enjoyed at the beginning of the case at the High Court. Mr. Uwinkindi mentioned to the Court that other defendants such as Mr. Munyagishari and Mr. Mbarushimana were given such right of choice

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<sup>21</sup> Article 16 of the Rwandan Constitution provides that all human beings are equal before the law. They shall enjoy without any discrimination, equal protection of the law.

of lawyers to represent them<sup>22</sup>. He highlighted that in Mr. Mbarushimana's case he refused the lawyer whom he believed could not defend his interest and the Nyarugunga District Court ordered the President of the RBA to give him a list of lawyers to choose from. Mr. Uwinkindi asked the Court why other prisoners were given such rights and not him.

34. In response the Court informed Mr. Uwinkindi that the problem with his case was that the RBA<sup>23</sup> had given him new lawyers and he did not want them. The Court then asked Mr. Uwinkindi if he had anything against the new lawyers assigned to him by the RBA. In response, Mr. Uwinkindi stated that of the new lawyers assigned to him, Mr. Isaacar Hishamunda, was declared incompetent in a similar case before the Nyarugunga District Court, and the other lawyer Mr. Joseph Ngabonziza was enrolled to the Bar in 2010, and therefore was still new to the profession and was not experienced enough to handle a case like his. Mr. Uwinkindi further stated that the list of lawyers he was given while in Arusha to choose his lawyers from had only seven (7) qualified counsel and Mr. Gashabana and Mr. Niyibizi were in that list. He chose them to as his counsel and<sup>24</sup> he had no problem with them to date.
35. The Court asked Mr. Uwinkindi to clarify what would happen if the lawyers of his choice were to no longer represent him. The Court wished to know whether he would accept counsel from if a list was presented to him, or if he insisted on continuing with current Counsel because they are conversant with his case.
36. In response, Mr. Uwinkindi stated that he wanted his former lawyers, Mr. Gashabana and Mr. Niyibizi, to continue representing him as they had been in his case from the beginning. He told the Court his lawyers did not make any mistake, and if the Court proves that they did so then he would wish to be availed with a list of lawyers to choose from. Mr. Uwinkindi requested that if the only option available was to appoint new lawyers of his choice, that the Court allow his case to start afresh, although this will bring problems as they will need time to study the case file because his case involved serious crimes.
37. Mr. Uwinkindi wondered why his lawyers were barred from representing him in the High Court just as they started to look for witnesses.<sup>25</sup> He told the Court that immediately after his lawyers were removed, the Prosecution called their witnesses to testify and even defence witnesses were called without him being given time to consult his lawyers and choose the defence witnesses to be summoned to defend him before the Court.<sup>26</sup> Mr. Uwinkindi stated

<sup>22</sup> Mr. Munyagishari is an accused transferred from ICTR- Arusha, See *The Prosecutor v. B. Munyagishari*, Case No. MICT-12-20 and Mr. Mbarushimana is an accused transferred from a national jurisdiction. The two accused are detained in Kigali Central Prison.

<sup>23</sup> The new Counsel, Mr. Joseph Ngabonziza and Mr. Isaacar Hishamunda.

<sup>24</sup> See March 2015, Monitoring Report Para. 57.

<sup>25</sup> See March 2015 Monitoring report, Para. 51.

<sup>26</sup> See March 2015 Monitoring report, Para. 52, 53 and 54.

that this series of events before the High Court amounted to a manipulation of Court process by the Prosecution because it is clear they did not have a good case against him, and they called witnesses knowing that he had no capacity to cross examine them. He concluded that the Prosecution had contributed to the way the High Court conducted his case unfairly.

38. At the invitation of the Court Mr. Niyibizi, reiterated that Mr. Uwinkindi had been deprived of his right to be represented in court by lawyers of his choice. He wondered why in other similar cases, accused persons were given such an opportunity and referred the Court to the case of Mr. Munyagishari, where Counsel was chosen by the accused and subsequently, received a letter from the RBA assigning him to represent Mr. Munyagishari. Mr. Niyibizi reiterated arguments raised by Mr. Uwinkindi that the case referred to by the Prosecution, Akayesu, is distinguishable from the case of Mr. Uwinkindi because in the Akayesu case, the accused wanted to change lawyers and choose others, while in this case the accused wants to retain his lawyers. Mr. Niyibizi further explained to the Supreme Court that under International Customary Law an accused has the right to have a lawyer of his choice. He referred the Court to the practice that was used in the ICTR at Arusha where suspects were availed with a list of lawyers to choose from. He added that even the Registrar appointed lawyers chosen by accused persons.
39. Mr. Niyibizi also submitted to the Court that the High Court considered the case that was referred to by the Prosecution in its decision without giving an opportunity to Mr. Uwinkindi to respond, which violated Article 18 of the Constitution of the Republic of Rwanda. Mr. Niyibizi contended that changes of lawyers in the Akayesu case were prompted by reasons that were for the better administration of justice. In contrast, in the current case before the Court Mr. Gashabana and himself had conducted the case and did a lot of preparation, including preparing briefs and searching for witnesses. He called upon the Court to order a retrial if they are replaced by new lawyers. Mr. Niyibizi further submitted that in the interests of good administration of justice Mr. Uwinkindi should be permitted by the Supreme Court to continue with his former lawyers.
40. The Supreme Court intercepted Mr. Niyibizi's submission asking him if he had anything against the new lawyers assigned to Uwinkindi by the RBA. In response to the question. Mr. Niyibizi said it was for Mr. Uwinkindi to decide as he explained that it was not proper to change lawyers at the stage the case had reached. The Supreme Court asked Mr. Niyibizi again if he meant that the new Counsel appointed for Uwinkindi were not competent. Mr. Niyibizi replied that, according to International standards they do not qualify to handle cases of this nature because the minimum experience required is ten (10) years. He added that the Defence Counsel had tried to handle the case file to the new Counsel but the prison administration did not allow them to do so, while the accused also asked them not to handover the case file to anyone else. Mr. Niyibizi stated that they did not have reason to

insist remaining with the accused's case but it was Mr. Uwinkindi decision that was important.

41. At the Courts invitation, Mr. Gashabana referred the Court to Article 14(6)<sup>27</sup> and stated that it gives the accused right to have lawyers of his choice. He stated that the relevant Article does not prevent an indigent from having independent lawyers, and the right to have a lawyer of his choice is a right which cannot be interfered with, whether the accused has money or not. Mr. Gashabana told the Court that the High Court made an error in its decision that an indigent has no right to have a lawyer of his choice. Further he stated that the basis of his submission was Article 14 of the International Convention on Civil and Political Rights and the African Charter, both of which Rwanda is a signatory to. Mr. Gashabana expressed that there is confusion in the interpretation of the Transfer Law.
42. The Court asked Mr. Gashabana to clarify whether he was arguing that Mr. Uwinkindi was deprived of the right to have lawyers of his choice or that he and Niyibizi were wrongly removed to represent Uwinkindi and should remain his lawyers. The President of the Supreme Court summarized that Mr. Uwinkindi asked for two things before them: that his lawyers be retained to continue with his case, and if not, then the RBA was to give him a list of lawyers to choose from and for the case be ordered to start afresh. In response to the Supreme Court, Mr. Gashabana confirmed that the foregoing was a correct representation of his submissions which were based on the above referred law,<sup>28</sup> demonstrating that the High court wrongly interpreted the relevant law and it was an error that the Supreme Court should correct in the appeal before it.
43. Mr. Gashabana submitted that the principles of the Bar Association state clearly that every accused has a right to have a lawyer of his choice. Therefore the administration of the Rwanda Government has to do everything possible to ensure that the accused got the lawyers of his choice. He submitted that the High Court decision on the appealed issue was wrong and that was the reason for the prayer that the Supreme Court overrules such a decision. Mr. Gashabana stated that they were removed by the Ministry of Justice from Mr. Uwinkindi's case and that this decision showed the High Court's bias towards the defence. He said the executive perpetrated an injustice towards the accused and his lawyers because they violated the principle of the Independence of the Judiciary when they wrote to the High Court asking the Court to remove Mr. Uwinkindi's lawyers.<sup>29</sup> Mr. Gashabana concluded that they were seeking from the Supreme Court an order that the High court decision was erroneous, and that Mr. Uwinkindi be allowed to have the lawyers of his choice. He told the Court that if it

<sup>27</sup> Article 14(6) of Law No. 4772013 of 16/06/2013 Relating Transfer of Cases to the Republic of Rwanda

<sup>28</sup> Ibid

<sup>29</sup> Article 140 of the Rwandan Constitution which provide that: "The Judiciary is independent and separate from the Legislative and Executive branch of the Government"

was not possible for them to continue defending Uwinkindi, he be given a list of lawyers to choose other counsel to defend his case.

44. The Supreme Court invited the Prosecution to respond. Mr. Ruberwa informed that the High Court decision that Uwinkindi be assigned new lawyers was based on the previous lawyers' disagreement with the new conditions for the agreement that was prepared by the Ministry of Justice. He said there are procedures to be followed in assigning lawyers to represent indigents transferred to Rwanda from outside the country. The RBA appoints lawyers who enter into a contract with the Ministry of Justice. Mr. Ruberwa told the Supreme Court that the problem in Mr. Uwinkindi's case was that Mr. Gashabana and Mr. Niyibizi had refused to agree to the proposed terms on how much they were to be paid after the Ministry of Justice suspended their previous contract where the Ministry was paying them one Million Rwanda francs each month. In the new contract the Ministry of Justice offered them a lump sum payment of fifteen million Rwanda francs for each case. He therefore said the Ministry was right to ask the RBA to assign new lawyers to represent Uwinkindi within the new terms of agreement. He asserted that if the accused wanted to retain his former lawyers then he must pay them.
45. The Prosecution also responded to the issue of the competence of the newly assigned lawyers, asserting that they are competent enough, and that is why they are in the list of the Bar. Mr. Mutangana added that the right to be represented in court in cases like this is provided in laws but is not an absolute right.<sup>30</sup> He indicated that the right to choose counsel accrues to an accused who has the capacity to pay the lawyer of his choice, but not for those who are assigned to him and paid for by the Ministry of Justice like the current case.<sup>31</sup> Mr. Mutangana told the Court that Mr. Uwinkindi being an indigent can choose lawyers from the list presented to him by the Ministry of Justice and the Bar Association. The Ministry would only enter into contract with lawyers who are ready to be paid according to its budget, because there are many other accused persons who require legal assistance, other than Mr. Uwinkindi. He therefore submitted that Mr. Uwinkindi should accept to be represented by the new lawyers assigned to him by the RBA and should not request to be availed of a list of lawyers to choose from, because if they are not ready to accept the amount of money available it would create challenges. the Prosecution requested Mr. Uwinkindi to accept the new lawyers because they had the required experience. Mr. Mutangana submitted that it was also not true, as alleged by Counsel for Uwinkindi that Mr. Uwinkindi did not get an opportunity to argue on the case law referred to at the High Court. He said those cases were discussed and thereafter in two hours they were filed in Court and communicated to Mr. Uwinkindi.

<sup>30</sup> Prosecution referred the Court to the case decided by the International Tribunal for the former Yugoslavia in Paragraph 36 above.

<sup>31</sup> Prosecution referred the Court to the case of *The Prosecution v. Akayesu*, Case No. ICTR-96-04-A, and *Nahimana et al v. The Prosecution*, Case No. ICTR-99-52-A.

46. In conclusion the Prosecution asked the Court to give its decision on the issue of an accused refusing to be represented by lawyers assigned to him in the interest of justice.<sup>32</sup>
47. The Supreme Court asked Uwinkindi if he had any additional submissions. In response, Mr. Uwinkindi emphasized that the Court should allow his former counsel to continue representing him. He was of the view that money was not an issue because the Ministry of Justice as *amicus curiae* before the ICTR promised that the Rwandan Government has enough money for such purposes. He asserted that even the RBA confirmed that fact and assured the ICTR that the accused will be defended by lawyers of his choice as was their right, so he did not understand why he could not enjoy the same rights as other accused persons did.
48. Mr. Niyibizi argued that the Executive Secretary of the RBA had previously informed a monitor that accused persons transferred to Rwanda are given the list of lawyers to make their own choice on who is to represent them before the Court. Submissions by the Prosecution that the Ministry of Justice avails the list of lawyers are not true because RBA works independently. He reiterated that the President of the Bar Association, as *amicus curiae*, has explained procedures to be followed in cases transferred to Rwanda. He further told the Court that there is a list of experienced lawyers to handle cases like this and he wondered why the Prosecution is insisting the accused have new lawyers. He reiterated that Article 45<sup>33</sup> of the Rules of Procedure before the RBA provided for 10 years of experience in cases of this nature.
49. Mr. Niyibizi concluded his submission by informing the Supreme Court that Defence Counsel refused to sign the new agreement with the Ministry indicated they had two agreements that were still valid and requested for their implementation. Mr. Gashabana reiterated the arguments of Mr. Niyibizi. Mr. Gashabana stated that they could not sign new agreements while the two agreements were subsisting and the Ministry. He insisted that the Government was capable of meeting all the requirements of the case and had promised to respect right to a fair trial. Mr. Gashabana finally asked the Court to consider the agreement that was made by the Rwandan Government and the International Criminal Tribunal, in particular on the issue of funding to assist Uwinkindi in his case and his right to have a lawyer of his choice.
50. The Supreme Court adjourned the hearing to 24 April, 2015 at 11.30.am when the Judgment was to be delivered.

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<sup>32</sup> Prosecution said particularly when the accused refused his lawyer in case like this.

<sup>33</sup> Article 45 of the Rules and Procedure of the Rwanda Bar Association.

Meeting with Lead Counsel Gashabana on 7 April 2015<sup>34</sup>

51. The Monitor met with Mr. Gatera Gashabana, Counsel for Mr. Uwinkindi at the Supreme Court hearing.
52. Mr. Gashabana reiterated his position that Mr. Uwinkindi will not have a fair trial in Rwanda given the trajectory of the case in the High Court. He said he has been denied right of representation as provided in law.<sup>35</sup>
53. Mr. Gashabana stressed the need of the Government of Rwanda to comply with the agreement established when they requested for the transfer of Uwinkindi case to Rwanda. He said the government of Rwanda did not want to respect the arrangements for transfer of governed prisoners that are based on the agreement signed between it and the ICTR. He was of the view that each and all terms and conditions of the relevant agreement are self-explanatory and wondered whether developments in the current case show non-compliance of the agreement. He further stated that the RBA also made similar representations in an affidavit to ICTR<sup>36</sup> that the transferred prisoners will have the right to have lawyers of their own choice to defend them and the Rwandan government has financial capability to pay the lawyers and facilitate the hearing of the transferred cases.
54. Mr. Gashabana said the circumstances of the case compelled him and his colleague Mr. Niyibizi to agree with the request of Mr. Uwinkindi that they represent him in appeal at the Supreme Court on a *pro bono* arrangement.

***B. Monitoring Mission of 23 to 25 April 2015***

Meeting with Mr. Victor Mugabe, the Executive Secretary of the Rwanda Bar Association on 23 April 2015

55. The Monitor met Mr. Mugabe, the Executive Secretary of the RBA, and discussed the progress of Uwinkindi's case, and the issue of his right to be represented in all stages of the case. Mr. Mugabe indicated that there was no development regarding the issue of Uwinkindi's defense counsel of his choice. He explained that after they received the Court order to appoint new counsel for Uwinkindi, they chose lawyers, some of whom have more than 10 years of experience in practice and others are from the judiciary or prosecution. He said however that

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<sup>34</sup> During the mission, the monitor was unable to reach the new Counsel for a meeting.

<sup>35</sup> The Transfer Law regulating the trial of transferred cases.

<sup>36</sup> See March 2015 Monitoring Report, Para. 135.

Uwinkindi refused the lawyers, as he still wanted to be represented by the former Counsel who were his choice.

56. Mr. Mugabe insisted that the RBA is guided by rules and regulations that have to be followed for all cases concerning provision of legal aid. On this basis the RBA is not involved in availing funds to those who represent defendants in Court; the position is different in instances where there is donor money to facilitate the process. He informed the monitor that Mr. Gashabana and Niyibizi had requested the RBA to deal with their remuneration, as they believed that the issue was the concern of the RBA and lawyers. Mr. Mugabe informed the Monitor that was not a correct understanding on the role of the RBA, because its role is to ensure their work as Defence Counsel meets the set standards. He however stated the RBA was initially involved in negotiations leading to the development of the last contract and had informed the Ministry of Justice that they should facilitate Counsel by providing at least fifteen million Rwandan Francs. The Ministry agreed to pay them that amount.<sup>37</sup>
57. On the issue of availing a list of lawyers to Mr. Uwinkindi to choose from, Mr. Mugabe pointed out that the law does not allow or compel the RBA to give any accused a choice of lawyer. He referred to Article 14 of the law relating to the transfer cases to Rwanda which he said provides the right for any accused to have a lawyer of his choice but if he cannot afford to pay for the service, he may ask for one from the RBA on a *pro bono* basis.
58. Mr. Mugabe said the cooperation between the accused and the Court is lacking. He raised a concern that the RBA should be involved from the day the accused arrives in Rwanda by giving him/her assistance to minimize chances of misunderstandings as in the current case.

Meeting with Mr. Jean Bosco Mutangana, Lead Counsel for Prosecution on 23 April 2015

59. The Monitor met with Mr. Jean Bosco Mutangana, Lead Counsel for the Prosecution on 23 April 2015. He informed the monitor that Counsel for Mr. Uwinkindi, Mr. Gashabana and Mr. Niyibizi, had refused to proceed with the case because they were not satisfied with their contract. In his view the guaranteed fair trial had taken place in the case in line with the fundamental right of the accused person. He was concerned that the case was taking too long because of the arguments raised by the Defence. They were raising issues that delayed the process, such as the matter of Defence Counsel contract with the Ministry of Justice.<sup>38</sup> He further stated that in the process there are also many requests made by Mr. Uwinkindi that the Prosecution did not object to but sometimes they had to ask for the reasons behind such

<sup>37</sup> See February 2015 Monitoring Report, Para. 41.

<sup>38</sup> Mr. Gashabana and Mr. Niyibizi refused to sign a new contract as were the views that it was impossible to sign it while ensuring the rights and interest of the accused are fully protected. See February 2015 Monitoring Report, Para. 35.



requests. Mr. Mutangana strongly emphasized that they are trying to do their work in a way that does not jeopardize the defence case and the Prosecution was happy with how they had conducted the cases.

Meeting with Mr. Twahirwa Gervais, Director General of corporate service, Ministry of Justice on 24 April 2015

60. Mr. Twahirwa informed the Monitor that the complaint by Defence Counsel that they had not been paid since January 2014 was not true because the Ministry of Justice had paid them, as evidenced by the last invoices that were brought to the attention of the Ministry. The last payment was made in February 2015.
61. Mr. Twahirwa informed the Monitor that Defense Counsel for Mr. Uwinkindi, were assured that all the payments of invoices submitted to the Ministry would be paid. He asserted that in the case of Munyagishari's defence lawyers no single invoice had been brought to the Ministry for payment. He concluded that the Ministry has never defaulted on payments to Defence Counsel.

Supreme Court hearing of 24 April 2015

62. On 24 April 2015, the Supreme Court presided over by Hon. President Judge Mutashya Jean Baptiste, Judge Gakwaya Justin and Judge Hitiyaremye reconvened at 11.30 am to deliver the judgement. Mr. Uwinkindi was present and the Prosecution was represented by Mr. Jean-Bosco Mutangana and Mr. Bonaventure Ruberwa. However the Court delivered only one judgment in another case and adjourned all other cases to the afternoon indicating that they needed time to complete the judgement in Mr. Uwinkindi's case. There was no scheduled time that was announced in Court.
63. The Court resumed at 2.30 pm with the same Coram of the Judges, Mr. Uwinkindi was present and the Prosecution was represented by Mr. Mutangana. The Court delivered the judgment. In its decision the Court rejected Mr. Uwinkindi's appeal. It also rejected the preliminary objection raised by the Prosecution concerning inadmissibility of Mr. Uwinkindi's appeal. The Court decided to uphold the decision No. RP0002/12/HCCI taken by the International Crimes Chamber of the High Court on 6<sup>th</sup> February 2015. It was decided that Counsel Joseph Ngabonziza and Isacaar Hishamunda, appointed by RBA as Mr. Uwinkindi's Defence Counsel, were appointed in accordance with the law. Court fees were ordered to be borne by the Government treasury.

Meeting with Mr. James Mugisha, Prison Director, on 24<sup>th</sup> April 2015

64. On 24 April 2015, the Monitor met with Mr. James Mugisha, the Director of the Kigali Central Prison. Mr. Mugisha informed the Monitor that there was no complaint by the accused received in his office. He said accused persons go to Court whenever they are summoned, they receive proper food and are given other facilities, but they were not satisfied by the provisions of papers, ink, pens and others such requests. Mr. Mugisha said they had introduced a new system where any accused who requested for supplies was required to write in a book that keeps a record of what he has taken and for how long they use it. The purpose of such a recording system, he said, was to hold the accused person accountable for the supplies.
65. Regarding medical facilities, Mr. Mugisha said defendants are treated at the King Faisal Hospital where the prison pays the costs 100%.

Meeting with Mr. Uwinkindi on 24 April 2015

66. The Monitor met with Mr. Uwinkindi on 24<sup>th</sup> April 2015 at the Kigali Central Prison. The meeting was held with the assistance of an interpreter.
67. Mr. Uwinkindi raised his concerns over what happened at the Supreme Court on the morning of 24<sup>th</sup> April 2015 when he was waiting for his judgment on appeal to be delivered. He said the Court delivered only one decision and adjourned the other cases without announcing the time they were to deliver his decision. He further said the Prosecution had been informed about the adjournment informally, and that the judgment was to be delivered at 2:00 pm. Mr. Uwinkindi was concerned as to why the Prosecution received such information and he was not informed as a party to the proceedings. Mr. Uwinkindi asserted that in the afternoon when the Court resumed only one Prosecutor, Mr. Mutangana, appeared in Court without the other one (Mr. Bonaventure Ruberwa). Mr. Uwinkindi speculated whether Mr. Ruberwa was left behind purposefully to help the Judges to draft the judgment.
68. Mr. Uwinkindi expressed concern that the submission he made at the Supreme Court pertaining the concern that the newly assigned lawyers do not possess the required experience, particularly Mr. Ngabonziza who was enrolled in the Bar in 2010, was not considered in Supreme Court decision.
69. Mr. Uwinkindi informed the Monitor that he had several points to discuss on that day. The first point of discussion focused on the February Monitoring Report specifically concerning

the Chief Executive Secretary of the RBA, Mr. Mugabe. He said Mr. Mugabe told the Monitors that when Mr. Uwinkindi arrived in Rwanda the defendant was presented with a list of two lawyers,<sup>39</sup> which was not correct. Mr. Uwinkindi asserted that it was a lie fabricated by Mugabe in order to hamper his trial. He explained that the list that he was given was of 59 lawyers and he received the relevant list on 23 April 2012. Mr. Uwinkindi gave a copy of the said list to the Monitor. Mr. Uwinkindi further said the RBA, the Judiciary and the Ministry of Justice were not helping him in his case and expressed his worries about receiving a fair trial, particularly given the RBA, Judiciary and the Ministry of Justice seemed to be working against him. He informed the Monitor that when his case was transferred to Rwanda the RBA provided him with a list of lawyers who were experienced but now he was assigned Mr. Ngabonziza who joined the Bar in 2010.<sup>40</sup>

70. Mr. Uwinkindi reiterated his concern about the second lawyer Mr. Hishamunda: that he was declared by the District Court not capable of assisting the accused in the case of Mbarushimana Emmanuel.<sup>41</sup> He claimed that Mr. Munyagishari and Mr. Mbarushimana refused their lawyers and were granted permission by the High Court to have other lawyers of their choice. Thus he said he was discriminated against by the Court, which violated Article 16 of the Constitution.<sup>42</sup> Mr. Uwinkindi further said that his case is different from that of Akayesu, where the accused refused lawyers, but in his case he did not refuse Mr. Gashabana and Mr. Niyibizi, who were the lawyers of his choice. The High Court forced his lawyers to stop representing him although he wanted them to continue representing him and they were willing to continue as they did not terminate their contract with the RBA, but were removed by the High Court. Mr. Uwinkindi insisted that he still recognized his former lawyers, and their contract to assist him was still valid. Mr. Uwinkindi submitted that Mr. Gashabana and Mr. Niyibizi had not received letters of termination of their contract from the RBA, but the Permanent Secretary of the Ministry of Justice terminated their contract.
71. Mr. Uwinkindi registered his concern that he is always confused when he finds the Monitoring reports mix monitors interviews with him and those of other stakeholders, for instance the Director of Prison etc.
72. Mr. Uwinkindi requested that Monitors allocate more time for meetings with him. He felt that he needed more time to express his concerns. He proposed that Monitors visit him for at least five (5) hours in the future.

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<sup>39</sup> See February 2015, Monitoring Report, Para 56, March 26, 2015 Monitoring Report, page 13.

<sup>40</sup> According to Mr. Uwinkindi the enrolment list of the RBA reflected Mr. Ngabonziza was enrolled in a Bar in 2010.

<sup>41</sup> See foot note 24 above.

<sup>42</sup> See foot note 23 above.

Meeting with Mr. Theophile Mbonera, Head of Legal Service, Ministry of Justice on 25 April 2015

73. The Monitor met Theophile Mbonera, Head of Legal Service in the Ministry of Justice on 25 April 2015. Mr. Theophile was representing the Permanent Secretary who was out of the country at the time.
74. Regarding the contract with Mr. Uwinkindi's Defence Counsel, Mr. Theophile informed that the Ministry held negotiations with Counsel on the terms and conditions of contract but they could not reach an agreement. On the basis of such failure to reach an agreement, the Ministry decided to terminate the lawyers' contract by writing to them a letter dated 22 December 2014.<sup>43</sup> Letters to the two lawyers contained termination of contract with notice, which referred to the contract made between the parties on 1 November 2013 and signed by the representatives of both the Ministry and the lawyers. Mr. Theophile said the letter of termination of contract that was signed by the Permanent Secretary to the Ministry and copied to other relevant institutions<sup>44</sup> explained the reason for the change of terms of contract: that there was a necessity to fund an agreement in line with available funds from the legal aid policy, and such agreements are guided by the principle of equal treatment.
75. Mr. Theophile explained to the Monitor that the contract of Mr. Gashabana and Mr. Niyibizi were terminated with three months' notice as mentioned in Article 7 of the contract.<sup>45</sup> He further stated that the lawyers were required to continue to assist the accused until the notice period had lapsed and they were required to claim the fee attached to such representation.
76. Mr. Theophile indicated that following the decision of the Supreme Court of 24 April 2015 where it rejected the appeal of Uwinkindi, the Ministry expected the new lawyers to sign the contract to represent Uwinkindi. He said they were in the process of discussing with the RBA so that the contract of Defence Counsel should be signed between them and the RBA and not the Ministry as it used to be before. However he said the procedure he narrated would be in place after the Ministry has entered into a contract with the RBA. Mr. Theophile reiterated that all outstanding bills for payments of Gashabana and Niyibizi were paid. This was contrary to their claim before the High Court, where they stopped appearing for the Defence because they wanted to solve the problem of payment with the Ministry.

<sup>43</sup> Letter from the Ministry, Mr. Gatera Gashabana, and Niyibizi, Jean Baptist, Learned Counsel with Ref. No.2185/08.15 MOK/LSD U.

<sup>44</sup> Termination letter was copied to the President of the Supreme Court, Hon. Minister of Justice, General Prosecutor, High Court President and the President of Rwanda Bar Association.

<sup>45</sup> A Contract between the Ministry of Justice and Mr. Uwinkindi former defence Counsel signed on 1 November, 2013.

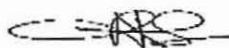
77. Mr. Theophile Mbonera also informed the Monitor that Mr. Gashabana and Mr. Niyibizi were paid the costs for investigations within the country, but not for investigation in a foreign country, because they presented a proposal that was not justified. The lawyers merely said they wanted to investigate certain people without mentioning their names and full identifications; it was therefore impossible to verify exactly where they were, or if they did exist.

### III. CONCLUSION.

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

Dated this 18<sup>th</sup> June 2015

Respectfully submitted,



Imani Aboud  
Monitor for the Uwinkindi case  
Dar-es-Salaam, Tanzania