



Mechanism for International Criminal Tribunals

Case No: MICT-12-20

Date: 05 November 2015

Original: English

**Before:** Judge Theodor Meron, President

**Registrar:** Mr. John Hocking

**PROSECUTOR**

v.

**BERNARD MUNYAGISHARI**

**PUBLIC**

**MONITORING REPORT FOR SEPTEMBER 2015**

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**Monitor:**  
Ms. Elsy Sainna  
Ms. Stella Ndirangu

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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"), we 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 Bernard Munyagishari before the High Court of Rwanda ("Court") and of interactions of Ms. Elsy Sainna and Ms. Stella Ndirangu, Monitor's appointed by the Mechanism ("Monitor"), with various stakeholders during the month of September ("the Reporting Period").
3. During the Reporting Period, the Monitor's undertook two missions to Rwanda on 10 September 2015 to 11 September 2015 and on 27 September 2015 to 30 September 2015, to monitor the Bernard Munyagishari case.
4. One Court session was held during the Reporting Period, the Supreme Court held a hearing on 28 September 2015. The Monitor followed the hearing with the assistance of an interpreter.
5. During the Reporting period the Monitor's also held meetings with Jean Bosco Mutangana, the lead Prosecutor and Mrs. Isabelle Kalihangabo, Permanent Secretary, Ministry of Justice. The Monitor's held two meetings with Mr. Munyagishari at the Kigali Central Prison with the assistance of an interpreter.
6. A detailed report on all activities during the Reporting Period is provided below.

## II. DETAILED REPORT

### *A. Monitoring Mission from 10 to 11 September 2015*

#### *Meeting with Lead Prosecutor, Jean Bosco Mutangana on 10 September 2015*

1. The Monitor met with Mr. Mutangana who reiterated that the Prosecution was keen to see the hearing proceed, and the Accused person assisted by Counsel.
2. He further stated that the Prosecution was willing to accept a request for additional time should the Defence require more time to prepare for hearing.

#### *Meeting with Mrs. Isabelle Kalihangabo, Permanent Secretary, Ministry of Justice on 10 September 2015*

3. The Monitor met with the Mrs. Kalihangabo at the Ministry of Justice offices.

4. Mrs. Kalihangabo confirmed that, in addition to the 15M RWF set aside to cater for the transfer cases, the Ministry had set a side separate funds for situations where witnesses were required and resided outside Rwanda. These additional funds would be administered within agreed contractual obligations with the Rwanda Bar Association.

Meeting with Bernard Munyagishari on 11 September 2015

5. The Monitor met with the Accused person at the Kigali Central Prison, in the presence of the Interpreter.
6. [REDACTED]
7. [REDACTED]
8. With respect to the question of legal representation, Mr. Munyagishari expressed the view that at the hearing of the transfer of cases, the Government of Rwanda gave assurances that adequate legal aid would be provided but it did not commit to a particular amount. Hence in that respect, he did not understand why the Ministry of Justice and the Rwanda Bar Association would proceed to appoint new Defense Counsel whom he do not accept or recognize.
9. Mr. Munyagishari reiterated that he did not want to be represented by newly assigned lawyers because they were assigned without his prior consent and were undermining his fair trial rights. Further he asserted that he was of the opinion that it was incumbent on the Monitor's and President of the Mechanism to assess the adequacy of this proposed legal aid regime.
10. Mr. Munyagishari expressed concern, that the Monitor had made contact with the newly assigned Defence Counsel, Bruce Bitokwa and Jean Umutesi, because he did not recognize them. The Monitor assured Mr. Munyagishari that it was the mandate of all Monitors to consult with all Parties concerned with his case and present discussions in a factual report to the President of the Mechanism.
11. Mr. Munyagishari was concerned that he was still unable to prepare for his appeal, as he was yet to receive translated court transcripts and documents. However, while the Monitor was still meeting with the Mr. Munyangishari, he received letter dated 9 September 2015, in response to his written request for translated court decisions and transcripts.
12. The Interpreter read the content of the letter to the Monitor in the presence of the Mr. Munyangishari, which indicated that his request for translated court documents would be confined only to the indictment and witness statements. The letter was from the President of

the International Crimes Division of the High Court, with a copy addressed to the President of the Mechanism.

13. Mr. Munyagishari expressed the view that the content of the letter contradicted the decision of the Court that had previously allowed him to plead in a language he spoke and understood.
14. With respect to detention conditions, Mr. Munyagishari was concerned and worried that during the past monitoring visit, they were not accorded privacy. In that regard, he made reference to a letter received from the head of Rwanda correction services regarding transmission of new rules that would govern how detainees and prisoners should be treated in prison, in particular, accused persons transferred from other jurisdictions. He made a request that those rules should be obtained and given to them so that they could familiarize themselves with its content.

***B. Monitoring Mission from 27 to 30 September 2015***

*Supreme Court Hearing on 28 September 2015*

15. The hearing was held before the full Chamber, consisting of Justice's Mukamulisa Marie Therese, Hitiyaremye Alphonse and Munyangeri Innocent. Mr. Bonaventure Ruberwa and Jean Bosco Mutangana, appeared for the Prosecution. The Accused, Mr. Bernard Munyagishari and his Defence Counsel Mr. John Hakizimana were also present.
16. The Court enquired whether an interpreter was present. It was confirmed there was no interpreter in the court room at the time.
17. The Prosecution was invited to submit on whether they knew why no interpreter was available. Mr. Ruberwa explained that at the High Court proceedings interpretation is provided by Mr. Faustin Murangwa, the Legal Adviser to the President of the High Court. Mr. Ruberwa indicated, he was not aware of the individual assigned the responsibility of interpreting at the Supreme Court, although he confirmed that he had seen Mr. Faustin in the Court room before the hearing commenced, but was not sure he was there to interpret the proceedings for the Accused.
18. Addressing the Accused, the Court enquired if he could speak Kinyarwanda and whether his understanding of Kinyarwanda had improved over time.
19. Defence Counsel responded, indicating that his client could not proceed with the hearing in Kinyarwanda, because he could not defend himself in Kinyarwanda, since he was not conversant in the language. Counsel requested for an adjournment.
20. The Court decided to adjourn the hearing and proposed the next hearing date as 7 or 14 December 2015, whichever was convenient for the Parties. Before the Parties could respond, Mr. Faustin, the interpreter arrived in Court and identified himself and took the oath.

21. The hearing proceeded with the Court laying out the issues for determination before it. Indicating that the Accused had approached the Court, because he had been concerned about the decision of the High Court issued on 9 June 2015, to remove his Defence Counsel from his case, issued on 9 June 2015. Mr. Munyagishari's Defence Counsel had, through a letter dated 20 and 25 March 2015, informed the High Court of challenges they were experiencing as a result of the protracted discussions with the Ministry of Justice on their pay. They indicated in the letter that the impasse on concluding the contracting was an impediment to their continued appearance in Court, Counsel requested to be allowed to resolve the issue before they could continue appearing for the Accused.
22. Further, the Court noted that Counsel had met officials from the Ministry of Justice over a period of 19 months, but were never able to reach an agreement. On 1 April 2015, when the Accused appeared in Court, he did not have lawyers to represent him. The Court adjourned the hearing to 3 May 2015, to allow Counsel time to address the pending issues related to their contracts. On 3 May 2015, when the hearing resumed, the Prosecution and the Accused were present in Court but Defence Counsel were absent. Defence Counsel had not informed the Court about their absence. Mr. Munyagishari informed the Court that he was not ready to proceed without Counsel assisting him. The Prosecution agreed that Mr. Munyagishari could not proceed without Counsel and asked the Court to appoint new Counsel to represent him since his Defence Counsel had abandoned him. On 9 June 2015, the High Court issued a decision indicating Mr. Munyagishari was no longer represented by his Counsel and directed the competent institution to assign new Counsel, to assist Mr. Munyagishari. Mr. Munyagishari did not agree with that decision, as a result, he filed the appeal before the Supreme Court.
23. The Court further enumerated the grounds of the appeal as follows:
  - (a) The High Court had made an error of law, when it refused to summon the Minister of Justice and the Bar Association, to explain why his Defence Counsel were facing challenges that made it difficult for them to appear in Court to represent him.
  - (b) The High Court made errors of law and fact, when it decided Mr. Munyagishari had to be assisted by other lawyers.
  - (c) The High Court made errors of law and fact, when it failed to decide that 15 Million RWF were not enough for his defence and the government was not respecting the commitments made at the ICTR during transfer proceedings.
24. Mr. Munyagishari's request to the Supreme Court was for the Court to decide that Mr. Jean Baptiste Niyibizi and Mr. John Hakizimana, remain as his Counsel and they be given sufficient means, to fulfill their obligation as Defence Counsel.
25. The Court further informed that after filing the brief on 21 September 2015, Mr. Munyagishari wrote letter that reached the Supreme Court on 25 September 2015. The Prosecution filed its response to the grounds filed by Mr. Munyagishari indicating that the three grounds in Mr. Munyagishari's brief were baseless and they would explain the reasons in Court. The Court ended its narration of the summary of the case before it and invited Mr. Munyagishari to address the Court.

26. Mr. Munyagishari requested for an adjournment, giving two reasons in support of the request. First, He explained that since June 2015, he could not communicate with his Counsel. He was allowed to meet Mr. Hakizimana on 25 September 2015, after the Registrar of the Supreme Court visited him in Prison and intervened. Second, he had received the Prosecution's reply to his appeal brief on 25 September 2015, therefore he needed time to prepare a response.
27. The Court requested Defence Counsel to inform it, whether he held the same view as his client on the issue of accessing his client to prepare for trial.
28. Mr. Munyagishari submitted that it was the registrar of the Supreme Court, who helped him to meet his Counsel so that he could help him to prepare the brief and this was because the law<sup>1</sup> requires an Accused person before the Court be represented by Counsel.
29. The Court reiterated that it wanted to hear from Counsel, on whether he had prepared sufficiently to assist his client at the hearing.
30. Counsel submitted that he shared the same opinion as his client, because he had only managed to access his Mr. Munyagishari on 25 September 2015, at 3.00 pm since the decision was issued by the High Court on 9 June 2015, that Mr. Munyagishari be allocated new Counsel to assist him. When they met on 25 September 2015, they did not have enough time to talk about the case and therefore he was not certain he could represent the Accused effectively at the hearing.
31. At the invitation of the Court the Prosecution submitted that it wanted some issues clarified regarding the defence of Mr. Munyagishari, noting that the RBA had decided to replace Mr. Munyagishari's Counsel with two other lawyers to assist him as an indigent. The Prosecution wanted to understand why Counsel John Hakizimana, who had been replaced by the Bar was in Court to assist Mr. Munyagishari. The Prosecution indicated that Counsel Hakizimana should inform the Court, if Mr. Munyagishari was paying him or he is just assisting without pay.
32. The Prosecution submitted further, that they were in possession of a letters<sup>2</sup> from Mr. Munyagishari's former Counsel indicating that they were unable to represent Accused, because they did not have the means to continue representing the Accused. They enquired if Counsel had found the means that were lacking earlier since they were in Court.
33. The Prosecution submitted that the reason the Accused was unable to meet his Counsel was because, Counsel had decided to walk out of the case, consequently, Prison authorities and the Bar Association did not recognize him as Counsel for the Accused.
34. On the assertion that the Accused had received the Prosecution's reply late, the Prosecution submitted that it was not at fault, Mr. Munyagishari did not communicate the grounds of

<sup>1</sup> Article 42 of Organic Law N°03/2012/OL of 13/06/2012 determining the Organisation, Functioning and Jurisdiction of the Supreme Court titled "Representation before the Supreme Court" provides: It shall be mandatory for an appellant before the Supreme Court to be represented by a counsel.

<sup>2</sup> In reference to the two letters by Counsel John Hakizimana and Jean Baptiste Niyibizi to the High Court dated 20 and 25 March 2015, indicating their unavailability to attend the proceedings until the contracting issues with the Ministry of Justice was settled.



appeal and when the Prosecution obtained them through other sources, they prepared and filed their reply within reasonable time.

35. The Prosecution asserted that the reply was just responding to the appeal and had not raised new issues therefore, Mr. Munyagishari was just required to appear before the Court to explain his brief and let the Prosecution, explain their reply. The Prosecution therefore, did not see the need for an adjournment.
36. At the invitation of the Court, Mr. Munyagishari objected to the submission by the Prosecution indicating that the Prosecution was culpable of many delays experienced in his case. He asserted that Counsel John Hakizimana had indicated he was in Court in the interest of justice.
37. The Court requested Mr. Munyagishari to submit on any new issues he may want, as the Court had already noted the reason why Counsel was in Court, and that it was the registrar of the Supreme Court who had helped him access his Counsel.
38. Mr. Munyagishari submitted that when he lodged the appeal, he had transmitted a copy to the Prosecution, which acknowledged receipt on 12 September 2015. This communication was within the required time frame, for the Prosecution to file their response in good time. The Prosecution delayed to file their response and should be faulted for yet another delay in the trial.
39. The Court invited Counsel to explain whether he was representing the Accused *pro bono*, or whether he would be paid to avoid challenges experienced in the case before.
40. Counsel indicated he was in Court in the interest of justice.
41. The Court further enquired on who was paying Counsel.
42. Counsel confirmed he was representing the Accused *pro bono*, he also indicated he did not know the other lawyers the Prosecution had referred to, explaining that the Accused was in a better position to respond to that issue.
43. At the invitation of the Court the Prosecution responded to the submissions, noting that Counsel's explanation on his presence in Court represented, an exceptional way of representing an Accused, considering the Bar Association had appointed new Counsel to represent the Accused in Court. The Prosecution reiterated, it did not understand why Mr. Hakizimana was in Court that day, yet he was not available in the High Court. The Prosecution affirmed it had a problem with the situation but if the Court decided to proceed they would continue with the case.
44. The Court indicated that the Parties were getting into the substance of appeal, yet the Court was considering the adjournment request. Noting, it could not decide whether Counsel was rightfully at the hearing. They would make a decision on this issue at the next hearing.
45. The Court decided to give the Accused time to consult with his Counsel and they would adjourn the hearing to 7 December 2015.



46. The Court also directed that all documents filed with the registrar, be communicated with the other party, whether the Prosecution or the Accused.

Meeting with Mr. Munyagishari on 29 September 2015

47. The Monitor met with Mr. Munyagishari at the Kigali Central Prison. The meeting was held with the assistance of an interpreter.
48. Mr. Munyagishari indicated that after asking the Presiding Judge in his case to recuse herself on 15 July 2015, the Court had issued a decision on 22 June 2015, affirming that the Judge would remain in his case. He sought leave to appeal the decision; the Court declined to give him leave to appeal. The decision declining leave to appeal was based on Article 175 of the law relating to the civil, commercial, labour and administrative procedures,<sup>3</sup> which requires appeals be allowed once the substance of the case is decided. Mr. Munyagishari wondered how an Accused can ask a Judge who has already decided his case to recuse herself, asserting that the Court's decision, was proposing that he undertakes a futile action after the case is decided.
49. Turning to the detention conditions, Mr. Munyagishari informed the Monitor that the special enclosure was very dirty, cleaning was rarely done in the enclosure.
50. Mr. Munyagishari informed the Monitor that the Rwanda Correctional Services through the Rwanda commissioner of correctional services, had issued instructions on the conditions of detention in a letter dated 25 March 2015, which was addressed to the Prosecutor General. The letter indicated that the Commissioner was sending the Prosecutor General instructions guiding the detention of detainees and prisoners sent to Rwanda by tribunals and foreign States.
51. Mr. Munyagishari requested the President of the Mechanism, to ascertain if the new instructions on conditions of detention contained the affidavit filed in Arusha, since it had instructions guiding the detention conditions of Sierra Leone prisoners and the same standards and conditions were to be used in the detention of Accused persons transferred from Arusha.
52. Noting that for four months the television in the special enclosure had not worked, Mr. Munyagishari asserted that life in the enclosure was like living in a box where they did not know what was happening in the outside world. No information even through newspapers was availed to them, yet this was one of the welfare conditions Rwanda committed to during the transfer proceedings. He reiterated that the President of the Mechanism should confirm if the commitments by Rwanda, contained in the Amicus by the government of Rwanda in the transfer proceedings was violated by the new instructions on conditions of detention.

<sup>3</sup> The article stipulates that, "Judgements declaring inadmissible or rejecting applications disqualifying a judge shall be appealed against jointly with judgements on merits."

53. Mr. Munyagishari stated that since the Government of Rwanda had violated all the commitments, it made before the ICTR, he would not be surprised if the agreement on conditions of detention was also violated by the new instructions.
54. Turning to the operating environment for Defence Counsel, Mr. Munyagishari informed the Monitor that on 5 September 2013, after a hearing from the Uwinkindi case, Prosecutor Bonnaventure Ruberwa had verbally insulted Counsel Jean Baptiste Niyibizi, asking him if he was the one who would represent 'that son of a bitch' in reference to Mr. Munyagishari. He further informed that he had complained about that incident to the President of the Mechanism.
55. Counsel Niyibizi had filed a document titled 'opinion and observations on the draft contract between the Ministry of Justice and defence counsel of Bernard Munyagishari'. It was after filing this that he was threatened on 6 October 2014. Mr. Munyagishari recalled that at the time he had asked Mr. Niyibizi and Mr. Hakizimana to communicate with his other Counsel, Natacha Ivanovic, they informed him they could not do so since they were under threat.
56. Mr. Munyagishari indicated that when Counsel Natacha filed a request for the revocation of his transfer,<sup>4</sup> the MICT Prosecution used an affidavit from the President of the Rwanda Bar Association in support of their filing opposing the request. Counsel Niyibizi signed an affidavit contradicting the information given by the President of the Bar Association on 24 March 2015. As a result, Counsel Niyibizi received more threats.
57. Observing that Mr. Niyibizi also Defence Counsel in the Mr. Uwinkindi case, refused to sign the 15 Million RWF contract proposed by the Ministry of Justice, consequently, he was removed from the case. He also refused to sign the same contract in the Munyagishari defence case and was removed from the case. According Mr. Munyagishari the immense threats that Counsel Niyibizi had faced were the reason he failed to appear in the Supreme Court the previous day. Adding that Counsel Niyibizi had expressed to Counsel Gashabana<sup>5</sup> that he was no longer able to work on transfer cases.
58. Mr. Munyagishari asserted that it was clear that Counsel Niyibizi was considered a leading voice in the refusal of the new contracts for transfer cases and it was government policy to frustrate him and other defence counsel who disagreed with the Ministry of Justice contracts.
59. Turning to the 28 September 2015, hearing at the Supreme Court, Mr. Munyagishari explained to the Monitor that the Prosecution had misrepresented the truth since he had given them a copy of his appeal in good time. In the prosecutions reply, the Prosecution had indicated that Mr. Munyagishari did not indicate the grounds of appeal in his brief which was inaccurate.
60. Mr. Munyagishari informed the Monitor that it was difficult for him to prepare a detailed brief, because the High Court had failed to make available to him, the French translation of the court transcript and its decision. He had written to the High Court on 24 June 2015, requesting for the translations of the court transcript and the decision of 9 June 2015.

<sup>4</sup> Bernard Munyagishari's Request to Revoke Referral Order, 3 March 2015.

<sup>5</sup> Counsel Gatera Gashabana and Counsel Jean Baptiste Niyibizi are the former Counsel's representing Mr. Jean Uwinkindi. Counsel Jean Baptiste was the lead Counsel in the Bernard Munyagishari case.

61. Further, Mr. Munyagishari informed that when he appealed the decision at the Supreme Court, he wrote to the High Court again on 6 August 2015, reminding the Court of his letter of 24 June 2015, informing the court that he needed the translated documents so that he can detail his grounds of appeal before the Supreme Court. The High Court responded through a letter dated 11 September 2015, informing Mr. Munyagishari that it could not provide him with the translations requested for.
62. Mr. Munyagishari then wrote to the Supreme Court on 21 September 2015, indicating that he could not detail his grounds of appeal because the High Court had failed to provide him with a translated decision and the court transcripts.
63. Mr. Munyagishari asserted that the delays in his trial were excessive, unfair and were preventing the speedy resolution of his trial. He further noted that he had been in detention for four years, yet his case was to begin examining the substance of the case. He faulted the Ministry of Justice and the prosecution for the delays.
64. Mr. Munyagishari contended that the refusal to allow him to meet his Counsel resulted in the case being adjourned during the 29 September 2015, hearing to December 2015.
65. Mr. Munyagishari stated that it was not possible for a lawful country to impose lawyers on an accused person. His observation was that in a country where the rights of an accused are respected, counsel can be designated to assist them. The problem that he and other transferred accused have was that Counsel had been compromised through their appointment. Observing that Rwanda did not have a credible Bar Association, Mr. Munyagishari further stated that it was the Ministry of Justice and the Prosecution that decides which lawyers qualify to represent accused persons.
66. Mr. Munyagishari informed the Monitor that he was uncomfortable with the requirement to sign the page circulated after the hearing. Referring to Article 72 of the Administration, Social, Commercial and Civil Procedure Code,<sup>6</sup> which provides that Parties and Witnesses are authorized to read or ask someone to read for them and to verify if the content of the court transcript is faithful to the debate. Parties and Witnesses should also check if the objections were part of the hearing, using the record of the proceedings before appending their signatures or fingerprints to the court records. This is to be done in court after the hearing.
67. Mr. Munyagishari asserted that the manner in which the proceedings are run in the High Court does not afford an Accused the right provided under Article 72 enumerated above, as he is only provided with the last page to sign and not the court transcripts as required, this practice that leaves room for misrepresentations on the proceedings.

### III. CONCLUSION

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

<sup>6</sup> Article 72 on Verification of Court Transcripts Content, of the law relating to civil, commercial, labour and administrative procedure N° 21/2012 of 14/06/2012.

Dated this 5 day of November 2015

Respectfully submitted



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