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Mechanism for International Criminal Tribunals

Case No: MICT-12-20

Date: 25 May 2016

Original: English

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

PROSECUTOR

v.

BERNARD MUNYAGISHARI

PUBLIC

MONITORING REPORT FOR APRIL 2016

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Monitor:
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"), I respectfully submit this Report to the President of the MICT through the Registrar.
2. This Monitoring report pertains to the activities of interactions of Ms. Stella Ndirangu, a Monitor appointed by the Mechanism ("Monitor"), with Mr. Munyangishari and the Director of the Kigali Central Prison during the month of March 2016 ("the Reporting Period").
3. During the Reporting Period, the Monitor undertook one mission to Rwanda on 10 April 2016 to 15 April 2016 to monitor the Bernard Munyagishari case.
4. During the month of April 2016, the High Court held two hearings and the Supreme Court held one hearing. The Accused person did not appear for the High Court hearings. The Supreme Court hearing delivered judgment in the absence of the Accused and other parties.
5. A detailed report on all activities during the Reporting Period is provided below.

II. DETAILED REPORT

A. *Monitoring Mission from 10 April to 15 April 2016*

High Court Hearing of 11 April 2016

6. The hearing was held before the full Chamber, comprising of the Presiding Judge Alice Ngendakuriyo, Judge Fidele Nsanzimana and Judge Timothee Kanyegeri, in the absence of the Accused, Mr. Bernard Munyagishari. Mr. Jean Bosco Mutangana and Mr. Bonaventure Ruberwa appeared for the Prosecution, while Defence Counsel Bruce Bikotwa and Jeanne d'Arc Umutesi were present for the Defence.
7. The Court begun by noting that the Prosecution had finalized submitting on the indictment in the last hearing, the Defence was going to reply to the indictment. Noting that the Defence had filed with the Court a defence brief of 18 pages. The Court confirmed that the Prosecution had a copy of the brief, before giving the floor to Defence Counsel Bruce Bikotwa to submit on the brief.

8. Counsel submitted that the defence brief should be treated as provisional, as it had been drafted based only on the indictment. Counsel explained that the Defence expected to collect evidence and file an additional defence brief at a later time.
9. According to the Defence after reading the indictment and listening to the Prosecutor in Court they had identified defects in the indictment. They submitted they needed time to develop the responses based on each charge set out on the indictment against Mr. Munyagishari.
10. Recalling that the charges are divided into genocide, complicity to commit genocide, conspiracy to commit genocide, murder and rape classified as crimes against humanity, Counsel analyzed in detail the defects and lack of linkage evidence in the indictment, witness statements and submissions on the indictment by the Prosecution.
11. Counsel Bruce Bikotwa submitted that it is expected that when a Court finds that an indictment has defects, it ought to acquit the Accused. He asserted that in the current trial, the indictment had many defects and the Prosecution had not submitted any evidence to support its allegations.
12. Once Counsel had closed their submissions in response to the indictment, the Court took a 40-minute break.
13. When the Court resumed Defence Counsel continued submitting on the final part of the defence brief responding to the indictment.
14. After Counsel closed their submissions, the Court noted that after hearing from the Defence, the Prosecution should prepare a reply, but this would be done after the appearance of all the witnesses.
15. The Court noted that it had planned to hear witnesses at the next hearing however, the Defence had requested the Court in writing, to allow them discuss the oral request they had made before the Court previously, relating to the request for time to investigate and prepare a proper defence for the Accused.
16. At the invitation of the Court, Defence Counsel Jeanne submitted that the Defence needed 30 days to carry out investigations, before filing a final defence brief. During these 30 days of investigations, they would visit different areas where the Accused is alleged to have committed the crimes. Counsel would need financial resources to cater for accommodation, meals and transport amounting to 12 Million RWF.
17. The Court requested for an explanation, as to why the Defence needed all that money to carry out the investigations, while the Accused had refused to cooperate with them.

18. In response to the Court's inquiry, Counsel submitted that even though the Accused had refused to cooperate with them, it was in the interest of justice that they carry out investigations so as to present a proper defence for the Accused person.
19. The Court indicated it was not satisfied with the explanation offered by Counsel and it wanted to know if Counsel had a list of the witnesses they planned to meet, that could have informed their planning for investigations.
20. Recalling the Prosecution had referred only to 3 sites where the Accused had committed crimes, the Court inquired why the Defence was planning to visit 10 sites yet the Prosecution had relied on 3 sites. The Court reiterated that Counsel needed to justify why they should visit additional sites. In addition, the Court wanted to know if Counsel had received any information from the Accused, relating to the areas they could find witnesses who could be of assistance to the Defence.
21. In response, Counsel submitted that taking into account the time that had lapsed since the crimes were committed, they were assuming that witnesses would not be found only in the 3 sites identified by the Prosecution, as many people had relocated to other areas over the years.
22. The Court probed Counsel on why they assumed witnesses would be found in the additional 7 sites, requesting to be informed specifically if Mr. Munyagishari had informed Counsel that witnesses could be found in all additional proposed sites.
23. Reiterating that the Prosecution had identified only 3 sites where crimes were committed, the Court told Counsel that they could even request to go to Australia to conduct investigations, but they had to justify why they needed to go to that particular area.
24. The Court asked Counsel to give precise information on any witnesses they believed had moved from the 3 sites identified by the Prosecution, so as to justify the request to visit the additional 7 sites proposed.
25. Defence Counsel indicated that their proposal was to visit Gisenyi City in its entirety, to avoid having to come back to the Court with additional requests to visit other sites that might become relevant in the course of their investigations.
26. The Court asked Counsel to provide tangible evidence on the rates they had used to calculate the costs of the investigations, because the funds that would be allocated, would be drawn from taxpayers' money that had to be applied reasonably.

27. In response, Counsel submitted that they had consulted with persons with expertise in the different categories of the costs enumerated in their request, but if the Court was inclined to receiving invoices, Counsel could obtain them and present them before the Court at a later time.
28. At the invitation of the Court, the Prosecution observed that the request for 30 days to conduct investigations was unreasonable. On the amount of money to be availed for the investigations they submitted that it should be calculated using the official tariffs used by civil servants on official mission. On the total amount requested of 12 million RWF, the Prosecution submitted that the amount does not tally with the budget lines detailed, indicating their own tallying had totaled to 7 million RWF, they questioned if the Defence had erroneously miscalculated the total amount of the budget.
29. When the Prosecution finished submitting, the Court requested them to submit on the number of sites proposed for the defence investigations.
30. The Prosecution submitted that they did not understand why the Defence should want to conduct investigations, in sites other than the ones identified in the indictment, unless they had already visited the 3 sites and found reason to go to other areas, to meet witnesses. The Prosecution submitted that the Defence should not be allowed to go on a fishing expedition and the request for investigations had to be more precise.
31. The Court closed the hearing, indicating that it would deliver its decision on the request by the Defence for time and resources for their investigations on Wednesday, 13 April 2015 at 11.00 am.

Meeting with Mr. Munyagishari in Kigali Central Prison on 12 April 2015

32. The Monitor met with Mr. Munyagishari at the Kigali Central Prison. The meeting was held with the assistance of an interpreter.
33. Mr. Munyagishari informed the Monitor that he had received an update from colleagues, who had listened to voice of America on the trial proceedings at the High Court, the previous day. He indicated that he had been surprised, upon the realizing that the defence brief had not raised the issue of his nationality, which he wants settled before he can be put to trial. Mr. Munyagishari indicated that he wanted the Court to acknowledge that he was Congolese, even if they decided to put him through the trial.
34. Mr. Munyagishari complained that the Court and the Prosecution were determined to prosecute and convict him as a Rwandan, yet the rightful process

would be for him to be tried as a Congolese. He explained that the nationality issue could influence the decision to be taken in his case.

35. Mr. Munyagishari explained further that he was neither Hutu nor Tutsi, therefore he did not want to be drawn into the differences between Hutu and Tutsi's in Rwanda, he was only looking for a fair trial.
36. Mr. Munyagishari informed the Monitor that he was unhappy with Defence Counsel, explaining that on 8 January 2016,¹ Counsel had informed the Court that they were prepared and ready to proceed with the trial, then later during the proceedings they had indicated they were not prepared including at the last hearing held on 11 April 2016. This conduct according to Mr. Munyagishari was indicative of the lack of seriousness on the part of Defence Counsel.
37. On the issue of witnesses, Mr. Munyagishari informed the Monitor that there were genocide survivors who were prepared to appear in Court as defence witnesses, but they had been denied access to him whenever they had come to see him in prison. He alleged that 'Ibuka' the organization that assists genocide survivors had been threatening to withdraw its assistance to witnesses, who assisted with Mr. Munyagishari's defence.
38. Referring to the MICT transfer decision,² Mr. Munyagishari noted that the Chamber had taken into account, that the Defence had filed 16 statements for potential defence witnesses living outside Rwanda. The Chamber had also noted that the witnesses did not want to go testify in Rwanda and was convinced that preparations for Accused's defence might require a lot of work outside Rwanda.
39. The Chamber had also taken into consideration of the possibility of the Accused being given a lawyer with international experience to work particularly on the recording of witness statements from witnesses who residing outside Rwanda and this was to be done through the legal aid programme if the Accused was an indigent or using the Accused's resources if he was not indigent. The Chamber had also taken into account that such a lawyer could belong to the RBA and the Chamber had set a condition of the transfer of the Accused, that he was to be assigned a lawyer with considerable international experience. The Chamber had requested that the President of the Kigali Bar Association gives a guarantee for that the condition would be met.
40. Mr. Munyagishari indicated that he was surprised that Defence Counsel had not acknowledged, that it was imperative for them to conduct investigations beyond

¹ See *The Prosecutor v. B. Munyagishari*, Case No. MICT-12-20, Public Monitoring Report for March 2016 ("March 2016 Monitoring Report) para. 130.

² *Prosecutor vs. Munyagishari*, Case no. ICTR-2005-89-R11bis, Decision on the Prosecutor's request for Referral of the Case to the Republic of Rwanda, ("Transfer Decision") paras. 148 and 149.

Rwanda, in order to prepare good defence, yet even MICT in the transfer decision acknowledges this fact.

41. Mr. Munyagishari expressed concern over the decision by the High Court, to entertain submissions relating to resources needed for preparations and investigations related to his defence. He pointed out that previously, the Court was categorical that it was not interested in having discussions with his former Counsel, regarding the resources they needed to conduct defence investigations, in order to prepare a good defence.
42. Mr. Munyagishari explained that the previous day's discussions before the High Court relating to the resources needed to conduct investigations for the preparation of his defence, touched on his appeal that was before the Supreme Court, as his former Counsel were stopped from representing him, because they were requesting to be facilitated to carry out investigations.
43. Mr. Munyagishari handed over to the Monitor a letter he had written to Counsel Natacha Ivanovic, requesting that the Monitor assists in transmitting the letter to Counsel Natacha. The Monitor informed him that she could not act on the request, as it was beyond her terms of engagement. Mr. Munyagishari then indicated that he would send the letter to the MICT Registrar, expressing frustration because of the decision to block him from communicating with Counsel Natacha by the prison authorities, he felt that he had to use any possible means to reach out to Counsel Natacha.³
44. Turning to the detention conditions, Mr. Munyagishari complained about the catering services offered to the transfer Accused persons. He informed the Monitor that he was receiving small portions, of and badly cooked food. To demonstrate how bad the food was, Mr. Munyagishari had carried with him a piece of sweet potato that was burnt/charred, which he showed the Monitor. Mr. Munyagishari asked that the Prison Director be requested to reinstate the former caterer, expressing that with the previous caterer their only concern was the size of the portions (quantity) she provided and not the quality. He decried that currently the quantity was not enough and the quality was also very bad.

Meeting with Mr. Mukono, Prison Director of Kigali Central Prison on 12 April 2016

45. The Monitor met with the Prison director to understand if he had received the complaints related to the catering service provider from the transferred Accused persons.

³ See *The Prosecutor v. B. Munyagishari*, Case No. MICT-12-20, March 2016 Monitoring Report para. 178.

46. The Director informed the Monitor that he was aware of the complaints against the new caterer, his office had communicated the concerns to the new caterer and was monitoring to see if she would improve her services. If she did not, his office would have to look for an alternative service provider.

High Court hearing of 13 April 2016

47. The hearing was held before the full Chamber. Mr. Jean Bosco Mutangana and Mr. Bonaventure Ruberwa appeared for the Prosecution. The Accused Mr. Munyagishari and Defence Counsel Bruce Bikotwa and Jeanne d'Arc Umutesi were absent.
48. The Court delivered the decision on the request by Defence Counsel, for an adjournment of the proceedings and allocation of resources to enable them conduct defence investigations.
49. The Court began by summarizing the submissions by both the Defence and the Prosecution on the request by the Defence, made before the Court on 10 April 2016.
50. The Court noted that it was normal for the Defence, to request for time and resources to carry out investigations, in preparing the defence of their client.
51. The Court decided to limit the sites to be visited to the 3 sites, identified in the indictment, Kanama, Nyundo and Gisenyi town. Time given was limited to 6 days, for the investigation exercise. The Court indicated that if in due course, the Defence found good reasons to visit other sites, they could come to Court at a later time to request for additional time and resources.
52. The Court ordered that the Supreme Court Practice Directions, on support for requests for defence investigations,⁴ be used to guide the allocation of resources to Defence Counsel.
53. The Court informed Counsel that after they had finalized the investigations, they would be expected to file a list of witnesses met, who would be potential Defence witnesses, with specific information on those that need protective measures.
54. On the issue of resources, the Court directed the Ministry of Justice to allocate to Defence Counsel, the equivalent of the amount allocated to Director General's in the civil service, when they are on mission, citing Article 3 of the Supreme Court Practice Directions⁵ on the facilitation of investigations.

⁴ On 6 August 2015, the Supreme Court issued new practice directions for Defence Investigations to guide requests related to defence investigations and the rates to be used in allocating funding for such investigations.

⁵ Article 3 of the *Practice Direction by the Chief Justice on Allocation of Means for Further Defense Investigations for Indigent Accused Transferred to Rwanda, 2015*, lists the costs that are recoverable for travel and interpretation.

55. The Court indicated that the next hearing would be on 3 May 2016, when Defence Counsel would be expected to report to the Court, on the outcome of the investigations carried out.
56. The Prosecution was requested to prepare Prosecution witnesses who would take the stand on 4 May 2016. And if they had identified any other witnesses that needed protective measures, they were to ensure the protective measures hearing, was scheduled for before the hearing of 3 May 2016.
57. The Court adjourned the hearing to 3 May 2016, indicating they would start at 8.00am.

Supreme Court hearing of 15 April 2016

58. The Court had scheduled the next hearing for 11.00 am, but delivered the decision at 9.00 am. The Monitor arrived in Court at 11.00 am, to find the decision had been delivered earlier that morning.
59. The three Judges of the bench composed of Judge Fidelite Kanyange, Judge Alphonse Hitiyarenye and Judge Agnes Nyirandabaruta signed the decision. The decision was specific that it had been issued in the absence of Judge Agnes who she had appended her signature.
60. The decision was also specific that it had been issued in the absence of the parties.
61. The Monitor obtained a copy of the last page of decision, which contained the order, from the Registrar of the Supreme Court. The Registrar informed the Monitor that the complete judgment was still undergoing minor editing and would be available the following week.
62. The Supreme Court decided that the decision issued by the High Court in the Bernard Munyagishari case on 9 June 2015, did not require translation of Court transcripts and decisions in the trial. The Supreme Court upheld the decision of the High Court indicating only the indictment would be translated and an interpreter availed for Mr. Munyagishari during proceedings.
63. The Court directed that it would address the issue costs, in the final decision of the substantive appeal.
64. The hearing was adjourned to 13 June 2016.

III. CONCLUSION

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

Dated this 25th day of May 2016

Respectfully submitted



Stella Ndirangu
Monitor for the B. Munyagishari case
Nairobi, Kenya



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