

# **ADDITIONAL EXPERT REPORT**

**BY**

**MARTIN WITTEVEEN**

**ADVISOR INTERNATIONAL CRIMES TO  
THE NATIONAL PUBLIC PROSECUTION AUTHORITY, NPPA, IN RWANDA**

**Prepared for**

**Extradition Proceedings re: Government of Rwanda v Dr. Vincent Bajinya and others**

Kigali, Rwanda  
June 3<sup>rd</sup>, 2015

## Introduction and personal circumstances

1. This additional expert report builds on my expert report dated September 19<sup>th</sup>, 2014 [hereafter: “the expert report”]. Since I submitted the expert report, almost nine months have passed.

I am still an advisor international crimes to the National Public Prosecution Authorities, the NPPA, in Rwanda, advising on their transfer genocide cases. Generally, the circumstances of my position and work, as described in detail in the expert report, have not changed.

2. Regarding my responsibilities outside the scope of my official work, I have assumed a position in a Panel of Experts for a research project, conducted by two non-governmental organizations: International Corporate Accountability Roundtable, ICAR, and Amnesty International, AI. The topic of the research is to find an answer to the question why there are so few prosecutions of corporations for international crimes or any other serious human right abuse.

Secondly, I have conducted a two day seminar for students in the Master International Crimes at the *Vrije Universiteit* in Amsterdam on the topic “*Truth finding in international crimes*” in April 2015. For the seminar I drafted a course book.

3. During the eleven months of my tenure at the NPPA in Kigali, Rwanda, I have almost exclusively focused my attention on the work conducted in the Genocide Fugitive Tracking Unit, the GFTU, in the NPPA. From September 2014 onwards I have studied and analyzed the work processes in and in relation to the GFTU and produced an extensive analysis recorded in an assessment report, which I finalized in December 2014. I have presented these findings to the Prosecutor-General and the Minister of Justice in Rwanda. Based on this analysis and my recommendations in the assessment report, I have advised the GFTU/NPPA on a number of selected topics in 2015. Except from a few issues, analyzed in the assessment report, which I will reference hereunder, this report has, in my opinion, no relevance for the topics addressed in the expert report.
4. For the purpose of the study of the work processes of the GFTU and the drafting of the assessment report, I have interviewed around 40 staff members from various organizations, including all the members of the GFTU. I also reviewed a number of documents relevant for the study and examined various websites.
5. Moreover, I have attended a number of court proceedings in the transfer cases, notably the cases against Uwinkindi, Munyagishari, Mbarushimana, Bandora and Mugesera. I

have not logged each court session individually, but it is fair to say that I have attended at least a dozen trial sessions.

6. As I have been integrated in the NPPA from the beginning, I have attended a few conferences of the NPPA as well as the regular weekly meetings of the GFTU.
7. For my work, I also maintain regular contacts with some of the staff in the Ministry of Justice. To analyze the situation of the defence attorneys I have spoken to staff in the Rwanda Bar Association, RBA, individual defence attorneys and the Director of the Legal Aid Forum in Rwanda.

### **Purpose of this additional report**

8. The purpose of this additional report is to provide an update on my expert opinion on the critical topics addressed in the expert report. Additionally, I wish to provide expert opinion on the status and work of the defence attorneys in the genocide transfer cases, currently adjudicated before the High Court in Kigali, Rwanda. In this respect I wish to refer to what I have stated in the expert report, when I highlighted the need not to criticize Rwanda, but assist them in building the justice system<sup>1</sup>.

### **Update**

9. On the basis of my experiences and the information and knowledge I accrued during my tenure in Kigali, I maintain what I have stated in the expert report. I believe I made no factual mistakes in the expert report and in my opinion there is no need to correct any statement.
10. I specifically maintain my main expert opinion<sup>2</sup> that, in the genocide transfer cases that I have witnessed, Rwanda has a functioning justice system, capable of investigating, prosecuting and adjudicating cases of genocide, transferred from other jurisdictions, applying international standards and providing fair trial rights for defendants.
11. More specifically, I have witnessed professional prosecutors, litigating the cases before the High Court, who are knowledgeable, dedicated and conversant both with the substance of the case as well as the legal issues in the case. Based on how the prosecutors have litigated the case, I have no doubt that the prosecution intends to prosecute the transfer cases both expeditiously and with respect for the rights of the defendants as enshrined in the Rwandan laws and the international conventions.

---

<sup>1</sup> See the Expert Report dated September 19<sup>th</sup> 2015, par. 129 – 137.

<sup>2</sup> *Ibid.*, par. 120.

12. During the court proceedings I witnessed, and based on other information I gathered<sup>3</sup>, I assessed that the parties, but specifically the defendants as well as the defence attorneys, were given generous time and opportunity to comment on the proceedings, present views and bring forward motions. With a few exceptions, I have never seen the judges to be unfriendly or even rude to the defendants or the defence attorneys or to have cut them short. Throughout the proceedings the judges have maintained a professional, knowledgeable and composed attitude, free from bias. I profoundly believe that the judges in the High Court have a sincere intent to adjudicate these transfer cases according to international standards and that they are genuinely pursuing this in a role that is, to a degree, new to them.
13. I especially highlight the fact that, from witnessing the court proceedings, there is no indication whatsoever, that the defendants were considered as political opponents of the government, who had to fear for their safety. Nor did politics play any part in the proceedings. I have never heard or seen the defendants or attorneys invoke anything in court that was political of nature or suggest that their lives or that of their families were in danger. Obviously, they are unharmed and in good condition and none of the allegations made against the government of Rwanda on the issues of safety and security prior to the transfers, have become reality.

### **The position of the defence in transfer cases**

14. In spite of these positive findings, I have a deep concern on the status and quality of the defence attorneys acting for their clients in the genocide transfer cases. In the cases I witnessed, none of the defence attorneys performed at a level that meets any international standard. In summary: in some cases there is currently no defence, either officially or materially, in other cases the defence attorneys act or acted substandard and even irresponsible.
15. I realize that this opinion may be considered as sensitive or even inappropriate, but I find it inevitable. I equally realize that this opinion has not often been expressed, although some of the issues have also been raised during the referral trials in Uwinkindi and Munyagishari before the ICTR<sup>4</sup>. I have noted that both in Uwinkindi as well as in

---

<sup>3</sup> See paragraphs 16 – 18 hereafter for my explanation which sources of information I used.

<sup>4</sup> See for the case of Uwinkindi: *Decision on Prosecutor's Request for Referral to the Republic of Rwanda*, dated June 28<sup>th</sup> 2011, Chapter 9: "Right to an Effective Defence" at: <http://www.unict.org/sites/unict.org/files/case-documents/ictr-01-75/trial-decisions/en/110628.pdf> . And for the case of Munyagishari: *Decision on Prosecutor's Request for Referral to the Republic of Rwanda*, dated June 6<sup>th</sup> 2012, Chapter 10: "Right to an Effective Defence" at: <http://www.unict.org/sites/unict.org/files/case-documents/ictr-05-89/trial-decisions/en/120606.pdf>.

Munyagishari, the defence has lodged applications for the deferral of the cases and raised issues of fair trial<sup>5</sup>. In my opinion, what has been lacking in these applications is a reflection of the functioning of the individual defence attorneys in these cases as well as in other referral cases in Rwanda.

## The cases

16. My observations and opinions on the defence attorneys, expressed in this report, are based on my observations during trial in the cases of Uwinkindi, Munyagishari, Bandora, Mugesera and Mbarushimana<sup>6</sup>, my personal encounters and discussion with the defence attorneys<sup>7</sup> as well as discussions within the NPPA and with other actors.

17. As noted earlier, I have attended a limited number of trial sessions. However, a legal officer of the Embassy of the Kingdom of the Netherlands has attended almost all of the trial sessions during the period September to December 2014. She was accompanied by a local staff member of the embassy who translated for her and me and typed the

---

The Referral Chamber explicitly took into account the fact that the work of the defence in the case of Munyagishari would entail considerable work outside Rwanda. The Chamber then considered [par 148] that, given the unique challenges posed by this case, the Accused should be assigned a defence attorney with previous international experiences especially in eliciting evidence from witnesses abroad and made the referral conditional to a guarantee by the President of the Rwanda Bar Association that such a defence lawyer would be assigned. However, the Appeals Chamber overturned this decision. See: *Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeal against the Decision on Referral under Rule 11Bis*, dated May 3<sup>rd</sup> 2013, Chapter III, C., 1 "First Condition", par. 101 and further. Found at: <http://www.unict.org/sites/unict.org/files/case-documents/ictr-05-89/appeals-chamber-decisions/en/130503.pdf>.

The Referral Chamber found the assertion that the Accused's case is too complex for pro bono lawyers in Rwanda baseless speculation [par.155].

<sup>5</sup> See Uwinkindi's request for deferral, dated December 28<sup>th</sup> 2014: "Jean Uwinkindi's Request to Revoke Referral Order", found at: <http://www.unmict.org/sites/default/files/casedocuments/mict-12-25/defence-submissions/en/141228.pdf>.

By his decision, dated May 13<sup>th</sup> 2015, the President of the MICT decided to refer the deferral request to a full chamber of the MICT rather than dismissing the request himself. See: <http://www.unmict.org/sites/default/files/casedocuments/mict-12-25/president%E2%80%99s-decisions/en/150513.pdf>. Apparently, the March 2015 monitoring report was the ground for this decision.

See Munyagishari's request for deferral, dated March 3<sup>rd</sup> 2015: "Bernard Munyagishari's Request to Revoke Referral Order", found at: <http://www.unmict.org/sites/default/files/casedocuments/mict-12-20/defence-motions/en/150303.pdf>.

<sup>6</sup> I have not logged these observations and not always made notes, at least not when notes were taken by another person [see hereafter]. I made notes during trial sessions of Bandora [October 10 and 15, 2014], Mugesera [March 18 and 26, 2015 and April 15 2015] and Mbarushimana [March 25 2015 when I also briefly spoke to him during a break].

<sup>7</sup> I have spoken in length with the former defence attorney of Uwinkindi, Mr. Gashabana, the defence attorney of Bandora, Mr. Bakotwa and the new defence attorney of Uwinkindi, Mr. Ngabonziza. The defence attorneys of Munyagishari and Mugesera, Mr. Niyibizi and Mr. Rudakemwa made appointments with me but cancelled them and since have avoided me. Generally, the defence attorneys were not comfortable speaking to me except Mr. Ngabonziza.

translation on his computer. Most, but not all, of these notes have been preserved and I have received them and included them in my analyses for the purpose of this additional report.

18. Lastly, I have read all reports drafted and submitted by the monitors of the ICTR in the cases of Uwinkindi and Munyagishari. They are published on the website of the ICTR and the MICT. I have spoken occasionally to the monitors about their monitor work<sup>8</sup>. I have additionally spoken to the monitor<sup>9</sup> of the Office of the Prosecutor, OTP, of the ICTR, who has regularly attended court sessions in the cases against Uwinkindi and Munyagishari. The reports of this monitor have not been made public.

## Uwinkindi

19. The defendant Jean Uwinkindi was the first transfer case to Rwanda. The ICTR referred the case of Uwinkindi on June 28<sup>th</sup>, 2011<sup>10</sup>. He was transferred to Rwanda in April 2012 and his trial started in June of 2012. The decision to refer the case of Uwinkindi to Rwanda has a long history, dating back to 2007 and beyond<sup>11</sup>.
20. My aim is not to describe and analyze the court proceedings in the case against Uwinkindi before the Special Chamber of the High Court in Kigali, Rwanda. These proceedings, the views of the parties and others involved as well as the backgrounds have been reported by the ICTR court monitors in their continuing reporting<sup>12</sup>.
21. The notion I need to make and find relevant for my expert opinion is that, since January of 2015, and during the most critical phase of the trial, the hearing of witnesses, Uwinkindi is without any defence.
22. The origin of this situation is a conflict between Uwinkindi's two defence attorneys and the Minister of Justice about the fees to be paid to the attorneys and certain provisions in the contract. In summary, at the start of the case in Rwanda, the attorneys were paid 30.000 RwFr per hour. This was later changed into 1 million RwFr per attorney per month. As the case in court dragged on, the budget available for paid legal aid got depleted and in 2014 the Minister decided to fix the attorney's fees to 15 million per case, including the appeals phase and regardless the number of attorneys. In the case of

---

<sup>8</sup> I met the new ICTR monitoring team during a lunch on March 16<sup>th</sup> 2015 in Kigali.

<sup>9</sup> Vincent Lyimo, a retired Tanzanian judge.

<sup>10</sup> <http://www.unict.org/sites/unict.org/files/case-documents/ictr-01-75/trial-decisions/en/110628.pdf>

<sup>11</sup> See for an overview of that history and earlier attempts to refer cases: Jennifer Wren Morris, *The Trouble with Transfers: An Analysis of the Referral of Uwinkindi to the Republic of Rwanda for Trial*, 90 Wash. U. L. Rev. 505 (2012). Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol90/iss2/6](http://openscholarship.wustl.edu/law_lawreview/vol90/iss2/6)

<sup>12</sup> All reports can be found here: <http://www.unmict.org/en/cases/mict-12-25>

Uwinkindi, the Minister unilaterally<sup>13</sup> terminated the contract between him and the defence attorneys in November 2014 and presented them a new contract in which he offered to pay 15 million RwFr. By this time the Minister had paid the attorneys around 80 million RwFr in the case. The defence attorneys refused the new contract and also opposed a number of provisions in the contract<sup>14</sup>.

23. In trial, the attorneys requested to postpone the trial till a new contract was signed. When the court rejected the request and decided to move on with the trial, the attorneys appealed the decision and argued that during the appeal the trial should be stayed. When the court rejected also this request and continued the case, the attorneys ceased to appear in court leaving the defendant without defence<sup>15</sup>. The court then punished the attorneys for misconduct and delaying the trial, imposed a fine and ordered the Rwandan Bar Association to appoint new attorneys. When the RBA appointed these attorneys, Uwinkindi refused them and requested to re-appoint his old defence team. The court refused that and continued with the case. The new defence attorneys, although present in the court room, never represented Uwinkindi and are not in the possession of the case file<sup>16</sup>.

24. Unfortunately, after the court decided to continue with the trial and without any defence present, within a few days all the prosecution witnesses have been heard without being cross examined. A few defence witnesses<sup>17</sup>, which the defence team had already submitted to the court earlier, were also heard but not examined by the defence. Closing arguments have been postponed<sup>18</sup>.

---

<sup>13</sup> Invoking his right to do so under the then valid contract.

<sup>14</sup> See for the attorney's summary of the version of the conflict: monitor report March 2015, par. 31 – 40, monitor 2<sup>nd</sup> report December 2014, par 64 and monitor report January 2015, par 30. See for the Prosecution summary of the version of the conflict, monitor report February 2015, par. 10 – 25.

<sup>15</sup> Although the contract between the attorneys and the Minister stipulates that the defence attorneys are obliged to continue providing legal services to the defendant for three months after termination of the contract, which the attorneys ignored.

<sup>16</sup> For a full account of this episode see the monitor reports December of 2014 [2x], January, February and March of 2015. At the time of signing of this additional report the April report had not yet been published.

<sup>17</sup> The defence had submitted a list of defence witnesses to the court in 2014. Nine of these witnesses live in Rwanda, in fact most are incarcerated, and were heard during two mornings in March 2015. Most of the other witnesses reside abroad. The defence attorneys had requested the Minister a budget to travel to the countries where they reside and speak to these witnesses and obtain personal information. The Minister had rejected this budget as unrealistic and requested an amended, specified budget, which the attorneys never submitted. Thus, the court was not able to pursue these defence witnesses without further information to be provided by the defence attorneys. A request by the defence to hire an investigator was denied as inconsistent with Rwandan law. It has to be noted however, that during the referral trial before the ICTR, the defence presented 49 signed affidavits by potential defence witnesses.

<sup>18</sup> In the meantime proceedings at the Supreme Court have started to deal with the appeals by Uwinkindi against the decisions of the High Court, notably the decision to appoint new defence attorneys and the decision not postpone trial. The Supreme Court first did not want to hear the appeals as the defence attorneys had not paid the

25. When the trial of Uwinkindi reopened on June 2<sup>nd</sup>, 2015, Uwinkindi requested the court to postpone the trial till the MICT has taken a decision on his request to defer the case<sup>19</sup>. The prosecution is now taking the position that Uwinkindi cannot be without defence and requested the court to have the newly appointed lawyers to stay in the case and represent Uwinkindi. The High Court will take a decision on Uwinkindi's request for postponement on June 5<sup>th</sup> 2015.

## **Munyagishari**

26. On June 6<sup>th</sup>, 2012 the ICTR Referral Chamber decided to transfer the case against Bernard Munyagishari to Rwanda. He was ultimately transferred to Rwanda on July 24<sup>th</sup> 2013.

27. Since his arrival in Rwanda, the case against Munyagishari has not made much progress<sup>20</sup>. There have been endless debates on interpretation after Munyagishari refused to speak in Kinyarwanda and his right to have translation of documents in French and have translation during trial with which he was afforded. Furthermore, there have similar debates about Munyagishari's fair trial rights and his refusal to engage in the proceedings. Currently, the case has reached a stage where Munyagishari has been given the opportunity to respond to the indictment and to present his plan for his defence including the submission of a witness list. Munyagishari positions himself at trial as a defendant who cannot defend himself, does not have the support of defence attorneys as they are not paid and is not able to give any submissions as he does not have the means to do so.

28. The stall in the trial is largely due to the position that Munyagishari's two defence attorneys take in this case. The lead counsel for Munyagishari is the co-counsel in the case against Uwinkindi. Subsequently, the counsel for Munyagishari has refused to accept a contract offered by the Minister of Justice to take the case for the 15 million RwFr fee and there are no negotiations ongoing. As a result, the defence attorneys appear in court trials as pro bono attorneys<sup>21</sup>. In trial Munyagishari is largely defending

---

finer yet, that were imposed by the High Court after they did not appear in court. On April 24<sup>th</sup> 2015 the Supreme Court has rejected the defence appeal, ruling that Uwinkindi does not have a free choice of a defence attorney when he is indigent and that the High Court was right to request the Rwanda Bar Association to appoint new attorneys. See: <http://www.newtimes.co.rw/section/article/2015-04-27/188219/>.

<sup>19</sup> See footnote 5.

<sup>20</sup> All proceedings as well as backgrounds of the [lack of] developments in the cases can be found in the ICTR monitoring reports at: <http://www.unmict.org/en/cases/mict-12-20>.

<sup>21</sup> In the last two court sessions, the last one on June 3<sup>rd</sup> 2015, the defence attorneys were not present with Munyagishari unable to explain where his defence attorneys are. The court will take a decision how to proceed.



himself, his counsel is most of the time quiet in court and his contributions are limited to a few procedural issues and his complaint about the refusal of the Minister to present another contract<sup>22</sup>.

29. In summary: Munyagishari at this stage is in fact not represented by a professional legal counsel and refuses to get engaged in any proceedings. Munyagishari's defence attorney seems to take the position that he is not capable of defending Munyagishari at this point. In the February 25<sup>th</sup> 2015 court session, the counsel for Munyagishari is quoted as having stated that the court should ensure that Munyagishari is assisted by a professional lawyer that is enumerated, implying he is not one<sup>23</sup>.

### **Mugesera**

30. Leon Mugesera was deported from Canada to Rwanda on January 23<sup>rd</sup> 2012, after a long legal battle in various Canadian courts. Canada stipulated that Mugesera be tried under the Rwandan Transfer Law and his case is, indeed, adjudicated in the Special Chamber of the High Court in Kigali.

31. It has taken very long for the case against Mugesera to develop. At this stage 23 prosecution witnesses have been heard. Mugesera is provided the opportunity by the court to comment on these witnesses. So far Mugesera has not provided the court with a list of defence witnesses.

32. Mugesera is represented in court by one defence attorney. Initially, Mugesera paid his own defence attorney but later claimed indigence. As he has refused to fill in the necessary forms he has not benefitted from paid legal aid thus far.

33. What is remarkable about the defence attorney is the fact that he maintains complete silence during the court sessions and he seems to have been maintaining this posture all along the trial. It is only Mugesera that addresses the court. In conclusion, also Mugesera is not defended in court by a professional defence attorney.

### **Bandora**

34. Charles Bandora was extradited from Norway to Rwanda on March 9<sup>th</sup>, 2013 after the District Court in Oslo, Norway, authorized the extradition on July 11, 2011. His first appearance in the High Court was on November 4<sup>th</sup>, 2013.

---

<sup>22</sup> A summary of his view can be found in the monitoring report of January 2015, par. 24 – 28.

<sup>23</sup> See Monitor report Munyagishari, February 2015, par. 42. Found at: <http://www.unmict.org/sites/default/files/casedocuments/mict-12-20/submissions-non-parties/en/150326.pdf>

35. Bandora's case has also been tried before a gacaca court at the time the gacaca courts were active. In first instance Bandora was acquitted, but the victims and their representatives appealed the verdict<sup>24</sup> and in appeal Bandora was convicted in absentia<sup>25</sup>. That verdict was later nullified because of the rule that Category I defendants cannot be tried by a gacaca court.

36. Although Bandora is one of the last of the five current defendants in the five transfer cases to have been transferred from abroad, he is the first whose case has been concluded by the High Court<sup>26</sup>. Bandora has been represented by two defence attorneys, who he has selected himself independently from the Rwanda Bar Association. First he paid his lawyers from his own pocket. When he said he was no longer able to do so, he applied for paid legal aid. On September 14<sup>th</sup> 2014 a contract was signed between the defence attorneys and the Minister of Justice, in which the defence attorneys accepted the 15 million RwFr fee.

37. In June of 2014 both defence attorneys were fined by the High Court for contempt of court and delaying the trial after they had not shown up for the court session. The attorneys had sent a letter to the court requesting to adjourn the case, after their client had allegedly run out of financial resources to pay his lawyers personally, which led the attorneys to apply for paid legal aid at the Ministry of Justice<sup>27</sup>.

38. During trial, on various dates between September and December 2014, witnesses were heard in court. The prosecution presented twelve witnesses, the defence fourteen. Some of the fourteen defence witnesses exonerated Bandora for the crimes he is charged with. Many of these witnesses were themselves convicted of participating in these crimes and were incarcerated. The prosecution witnesses were very different in nature. Some incriminated Bandora, some witnesses retracted their earlier, incriminating statements, two witnesses were ten and fourteen years old at the time of

---

<sup>24</sup> One of the witnesses in the trial against Charles Bandora testified that he was a judge in the gacacas court and composed a file against Bandora. He was in charge of cases of theft and was not a member of the gacacas court who acquitted Bandora in the criminal case of genocide. He testified that victims and *Ibuka*, the umbrella organization that represents victims of the genocide, came to him and requested him to appeal the acquittal which he did.

<sup>25</sup> Information provided by the legal counsel of the Dutch embassy indicates it is not certain whether Bandora was convicted for genocide crime or theft.

<sup>26</sup> On May 15<sup>th</sup> 2015 Bandora was convicted by the High Court in Kigali to a 30-years imprisonment sentence for his role in the genocide. The 40-page verdict is being translated into English. The court ruled that they found a mitigating circumstance in the fact that Bandora was cooperative with the court throughout the trial.

<sup>27</sup> See: <http://www.newtimes.co.rw/section/article/2014-06-26/76393/>.

the alleged crimes. Another important incident happened during testimony which will be explained hereunder.

39. These hearings have been the first opportunity to watch and analyze how witnesses were examined. In general, the parties made a serious attempt to solicit from the witnesses what they had witnessed and other information. The judge was very active in the hearing of the witnesses. He asked the witness many questions and often interrupted the questioning by the parties. All parties showed basic knowledge about witness' testimony such as the difference between an eye witness and a hearsay witness.
40. However, evaluating the overall conduct of especially the defence, their performance was in many ways problematic.

- a. In the first place, the hearing of the witnesses by the defence, either in cross examination of the prosecution witnesses or in examining the defence witnesses, went chaotic. The defendant personally led much of the questioning without any guidance or direction from his attorneys, who were silently sitting next to him. The two defence attorneys did not seem to have any agreement on a structure, strategy or line of questioning, constantly taking over the questioning from each other and interrupted by Bandora.
  - b. The questions by the defence were very brief and superficial<sup>28</sup>. Most of the times, when the witness made a point, it wasn't followed up and the attorneys constantly switched topics with the witness.
  - c. Many questions by the defence were irrelevant, or seemed to be, and repetitious. The presiding judge interrupted the defence attorneys occasionally on this.
  - d. The defence attorneys as well as Bandora repeatedly mentioned the name of a protected witness, whose name was supposed to be not used in public court. At one point, the presiding judge threatened the defence by sanctioning them for this.
41. More problematic, in my opinion, is the fact that the defence left many opportunities unused, especially in reaction to prosecution witnesses. This in particular happened when two detained prosecution witnesses, who had earlier incriminated Bandora during gacaca, retracted their statements in court, claiming they were visited by the

---

<sup>28</sup> Usually, the defence took not more than 15 to 20 minutes to examine their witnesses and on one occasion the defence asked a defence witness only roughly ten questions.

prosecutors in the case in prison, prior to their testimony in court, who promised they would be released when they testified against Bandora. Asked why they had testified against Bandora during the appeals phase in gacaca, they said they were forced by businessmen to testify against Bandora, after his acquittal, as these businessmen wanted to take Bandora's possessions.

42. Although it is a well-known phenomenon that witness tampering has taken place in gacaca trials and, at a minimum, allegations of this nature have often been made<sup>29</sup> without knowing the veracity, it is incomprehensible that the defence attorneys did nothing with this information: no additional investigation was requested, nor did the defence submit an additional list of witnesses to clarify these allegations, that, if proven true, could have an impact on the outcome of the case. One of the businessmen, who had allegedly influenced the witness, was himself a witness in the trial before the High Court but was not questioned by the defence about this issue.

43. Equally worrisome is the fact that such a limited number of witnesses were heard, while, during the testimony of the witnesses who were heard in trial, many other names surfaced who allegedly were present during the charged crimes and attacks, while the defence made no attempt to hear those witnesses, at least not noticeably. Lastly, the defence attorneys have made no attempt to locate witnesses living abroad<sup>30</sup> and never requested the Minister a budget to investigate the case for the defence.

44. In sum: I believe the defence's performance in trial, especially in hearing the witnesses<sup>31</sup>, although there are no signs of bad intent or intentional negligence, is indicative of the lack of knowledge and experience in cases of genocide crime as well as the immaturity of the state of the defence in serious criminal cases. They simply were not capable of building a credible defence case that could have impacted on the outcome of the case.

## **Mbarushimana**

45. Emanuel Mbarushimana was extradited to Rwanda from Denmark on July 3<sup>rd</sup>, 2014 after the Supreme Court in Denmark rejected his appeal against extradition in November 2013. He has since been detained, but his case has not been tried as yet.

---

<sup>29</sup> In fact another witness testified that the same had happened to him but this time by the defence attorneys.

<sup>30</sup> When I asked the lead counsel later why he had not made any attempt as described above, he said it was not necessary, leaving me with the impression that the case had already burdened him enough in time and resources.

<sup>31</sup> Unfortunately, I was not in a position to hear their closing arguments or read them.

46. Up to the date of this additional report, Mbarushimana has not yet chosen his defence counsel. Upon arrival in Rwanda, he was led before a local court of Kanombe, Kigali as the local court where he was arrested, the airport. The local court ordered to supply to him a list of all defence attorneys in Rwanda after Mbarushimana claimed he had not received a full list of the attorneys to choose from. Since these initial appearances, Mbarushimana has not chosen a defence attorney, while this issue has been the subject of many court sessions by various judges.
47. Mbarushimana appeared before the High Court on March 25<sup>th</sup>, 2015<sup>32</sup>. Again, the discussion was about the list of attorneys, supplied to him. Mbarushimana claims he was provided a list of 500+ attorneys by the Rwandan Bar Association, but he pointed out that that the Government of Rwanda, when they litigated the extradition case in Denmark, claimed that there were more than 800 attorneys in Rwanda, that could defend him. He asked the court for that list. In the end the court ordered to supply him a full list<sup>33</sup>.
48. At the date of the closure of this report, I understand Mbarushimana still has not chosen a defence attorney. However, there are two defence attorneys, who negotiated with the Rwanda Bar Association to assign to him a defence team of six persons, including a monitor, an investigator and two foreign defence attorneys<sup>34</sup>.

## Conclusions

49. Firstly, I would like to note that the assessment of the performance by the defences in the five transfer cases, is not to determine responsibility for the current situation with the defence in transfer cases, nor do I wish to point fingers. I simply want to opine that in the transfer cases there is either no defence, formally or materially, or largely insufficient and/or unqualified defence.
50. However, I do believe it is an inevitable conclusion that nor the defendants, nor the [majority of the] defence attorneys have any trust in the government institutions. It either leads to complacency or animosity and confrontational attitudes and some of the defence attorneys and defendants seem to be determined to fight every possible fight and will use any tactics to frustrate the trials, including obstruction of the proceedings.

---

<sup>32</sup> Where I was present and I understood this was his first appearance in High Court.

<sup>33</sup> This decision is remarkable as the Supreme Court decided in the case against Uwinkindi that he does not have the right to choose an attorney from a list, if he is provided the status of indigence.

<sup>34</sup> Information supplied by Victor Mugabe, Executive Director of the Rwandan Bar Association on May 14<sup>th</sup> 2015.

51. Based on my observations and the information I collected, it is fair to say that the defence is by far the weakest link in the justice sector in Rwanda. The main reason probably is that it began developing only very recently. Rwanda has no history or extensive experiences with defence in criminal cases and no well-developed system of government financed legal aid. Additionally, unlike the NPPA and the judiciary, that both received extensive assistance in capacity building from donors, the Rwanda Bar Association hardly received any assistance<sup>35</sup>. This has resulted in an organizational immaturity and incapability dealing with genocide cases at this level, which are considered as the most serious and complex criminal cases the world has ever seen. This is certainly true when international standards are required.
52. I have in particular serious doubts whether defence attorneys in Rwanda are capable of conducting a robust and credible defence investigation aimed at establishing exonerating evidence. Given the reality of the Rwandan genocide cases, such will involve extensive investigations abroad as many of the potential defence witnesses are living outside Rwanda, sometimes in places as far as Northern America and Australia. These are time consuming, resource intense and expensive investigations, that require the support of the government of Rwanda in brokering international bilateral or multilateral judicial cooperation. At this stage and without any support, I cannot envision that defence attorneys in Rwanda are capable or even in a position to perform such investigations<sup>36</sup>.
53. To conclude, when the transfer cases were decided, Rwanda was still in the process of developing a legal aid system. Amendments have been made along the way, conflicts have arisen, improvements are still being implemented and not all disputes are settled. These are all healthy signs that the justice system is in action, that the intent is to guarantee that defence attorneys will be up to the task and I have no doubt that a balance will be found in the future, that is accepted by all parties<sup>37</sup>.

## **Relevance of defence in genocide cases**

---

<sup>35</sup> The Dutch embassy initiated a project for the training of defence attorneys in Rwanda that deals with genocide cases through the RBA and made funds available, but the Dutch Bar Association declined to assist, probably not to undermine their defence in trials and extradition cases in the Netherlands.

<sup>36</sup> See also footnote 4 where I made reference to ICTR's referral decision in Munyagishari, specifically the court's decision to make the referral conditional to a guarantee by the President of the Rwandan Bar Association that the Accused will be assigned a defence attorney with proven experience in international investigations.

<sup>37</sup> It is worth noting that the Minister of Justice promulgated his legal aid policy in September 2014 and started to supply a budget for legal aid in Rwanda, including some funds for paid legal services in transfer genocide cases. At: [http://www.minijust.gov.rw/fileadmin/Documents/MoJ\\_Document/Legal\\_Aid\\_Policy\\_-\\_IMCC\\_Feedback.pdf](http://www.minijust.gov.rw/fileadmin/Documents/MoJ_Document/Legal_Aid_Policy_-_IMCC_Feedback.pdf) ;

54. The role and importance of qualified, well performing defence attorneys in these genocide transfer cases cannot be underestimated or undervalued. It is my opinion that the right to be represented by a defence attorney is not merely a procedural right, but in fact what it should represent is the need, as in any criminal case for that matter, to bring fairness and balance to the investigation and trial. The defence's role is to test the evidence presented by the prosecution and build the strongest possible defence case for the defendant, with the aim to present the court alternatives for the case that is presented by the prosecution. If the defence is capable of doing that, then the judges can make a real determination on the truth in the case, based on alternative scenarios. If the defence is not capable of presenting [strong] evidence pointing in another direction than the prosecutor's case, at least the judges can safely assume the prosecution case is a better case for the truth. In that sense a defence investigation is always useful, when conducted professionally, even in case it does not yield much result.
55. In this respect, it has to be borne in mind the nature of the criminal proceedings under Rwandan law. While Rwandan's legal system is based on the legal system brought to the country by its colonizer and therefore is more inquisitorial in character, after the promulgation of the Transfer Law and the transfers of the cases from the ICTR, Rwanda has definitely chosen that the trials in the transfer cases are accusatorial in nature.
56. In an inquisitorial legal system the judges assume responsibility for assessing the facts in the case. The court will adjudicate the case based on the investigation by an investigation magistrate<sup>38</sup>, who will compile a dossier with all the results of the investigation. This comes on top of what the criminal investigation conducted under the authority of the prosecutor has yielded. During the investigation by the magistrate, the defence attorney is a full party and can request any type of investigation to be carried out by that magistrate. However, during an accusatorial proceedings, as it is the case in transfer cases in Rwanda, there is no neutral magistrate to conduct serious trial or pre-trial fact-finding for both parties<sup>39</sup> and the burden to prove and present a probable case and alternative scenario than the prosecution presents, is solely in the hands of the defence attorney<sup>40</sup>.

---

<sup>38</sup> Under Rwandan law, there is no investigation magistrate to conduct pre-trial judicial investigations.

<sup>39</sup> Equally, the trial judges in the transfer cases in Rwanda adopt a similar attitude as judges in international tribunals where they leave the hearing of the witnesses during trial to the parties, including the cross examination and may ask additional questions at the end of the hearing of a witness.

<sup>40</sup> The principle of fairness in regard of the need for defence investigations was eloquently described by ICC judge Christine van den Wijngaert in her dissenting opinion in the case of the *Prosecutor v. Katanga*, par. 92. The subsequent paragraphs are equally worth reading where she describes the unreasonableness of the decision of the Majority not to grant the defence time to conduct additional investigations after the Chamber had decided to re-



57. Given the accusatorial nature of the proceedings in the transfer cases, there is a clear need for a strong and qualified defence.
58. An additional circumstance that needs to be adduced here, is the fact that the case file presented by the prosecution is rather basic. This file consist almost completely on the criminal investigation carried out by a unit of the NPPA by investigators on loan from the Rwanda National Police. This investigation, as I have assessed in my study of the working processes of the GFTU, is normally carried out over the period of two weeks on the average, during which a limited number of witnesses are briefly interviewed<sup>41</sup>.
59. As I have pointed out earlier, genocide cases are the most complex and time consuming criminal cases, I know. Certainly when the investigation is carried out many years after the events have taken place, as is the case now in Rwandan genocide cases, and the case is exclusively built on witness testimony<sup>42</sup>, the investigators and other fact finders, in their quest to ascertain the truth, face many obstacles: failing and fading memories, source amnesia and source blending, trauma and stress that has impeded on the quality of what witnesses remember, the inability of witnesses to provide basic information about the crime and the perpetrators, such as time, place and geography as well as any numerical information such as distances, numbers, heights, etc. These inabilityes are often credited to illiteracy and the lack of education of many witnesses as well as cultural backgrounds. By now there is an impressive and important body of academic research that analyzes and describes these problems in detail<sup>43</sup>.

---

characterize the charge against Katanga. Found at: <http://www.icc-cpi.int/iccdocs/doc/doc1744372.pdf>

<sup>41</sup> In most cases I assessed found approximately 10 – 15 witnesses and the average time spent with one witness is around 1 – 2 hours including drafting the account and the read back of the statement to the witness. Additional investigations may be carried out after the arrest and transfer of the defendant but I have seen no substantial investigations at this stage. Obviously, the transferred cases from the ICTR are an exception as these cases were fully investigated by the ICTR.

<sup>42</sup> Unlike the Holocaust during World War II, during which the Nazis meticulously recorded everything they did, the Rwandan genocide is known for its stunning lack of documentation, largely the result of the oral cultures in Rwanda.

<sup>43</sup> I present here just a few examples of this literature: Nancy Combs: *Fact Finding Without Facts, The Uncertain Evidentiary Foundations of International Crimes Convictions*, Cambridge University Press, 2010. Alexander Zahar, *Witness memory and the manufacture of evidence at the international criminal tribunals. Future Perspectives on International Criminal Justice*, Carsten Stahn & Larissa van den Herik, eds., pp. 600 - 610, T.M.C. Asser/Cambridge University Press. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323079](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323079) ; Alexander Zahar, *The problem of false testimony at the International Criminal Tribunal for Rwanda. Annotated Leading Cases of International Criminal Tribunals*, Vol. 25: International Criminal Tribunal for Rwanda, 2006-2007, André Klip And Göran Sluiter, Eds., Pp. 509-522, Intersentia, 2010. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1443124](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443124). Timothy Longman & Théoneste Rutagengwa, *Memory, Identity & Community in Rwanda*, in *My Neighbor, My Enemy: Justice And Community In The Aftermath Of Mass Atrocity* (Eric Stover & Harvey M. Weinstein eds., 2004).



60. Another factor that has been highlighted in literature is the prevalence of perjuring witnesses. It is sure that in every jurisdiction, witnesses occasionally perjure themselves and every investigator, prosecutor, judge and defence attorney can attest to that. Indeed, Rwandan genocide cases have had their share of perjuring witnesses and in general the prevalence and nature of perjuring witnesses before tribunals have been described<sup>44</sup>. An additional example of perjuring witnesses in a Rwanda genocide case can be found in the national jurisdiction of Canada where the Superior Court in Ontario in the case against Jacques Mungwarere acquitted the defendant in July 2013 after a number of witnesses confessed to have lied to the court<sup>45</sup>.

## Final conclusions

61. I make all these notions and put them together in this context, not to assert that establishing the truth in Rwanda genocide cases is not possible. In fact, based on my years of experience in criminal cases of mass atrocities in Africa and elsewhere, including Rwanda genocide cases, I am certain and convinced that the facts can be established but only under the condition of high quality and professional investigations, applying internationally accepted standards. Part of this professionalism and these standards is the necessity to have defence attorneys who possess the knowledge, experience and the resources to conduct investigations for the defence, including the capabilities to conduct investigations abroad.

62. Based on my observations in the last year in Rwanda, I have profound doubts whether the Rwandan defence attorneys, currently assigned to the transfer cases, can do that. It is a fact that, so far, only one defence attorney has presented some local witnesses to the court. None of the defence attorneys has conducted any investigation abroad and it is highly doubtful if any of them has both the knowledge, experience or is in the position to conduct such an investigation. What the consequences for the outcomes of the cases are, is still to be assessed. Until today only in the case against Bandora the High Court has given its verdict<sup>46</sup>.

63. It is for all these reasons that I recommend the jurisdictions that extradite or transfer defendants to Rwanda for trial, to provide the defendant with a defence attorney who

---

<sup>44</sup> See Combs: *Fact finding without Facts*, Chapter 5. In Chapter 5C, Combs describes a fairly large number of examples of perjuring witnesses before the ICTR. It leads her to state: "The importance of adequate investigations cannot be overestimated" [page 148].

<sup>45</sup> I have not been able to locate the verdict. I know there is no English translation of the French version. See for a summary of the case: <http://www.internationalcrimesdatabase.org/Case/1026/Mungwarere/>. The prosecutors in the case of Mungwarere did not appeal the verdict.

<sup>46</sup> See footnote 24.

has proven to be capable of what I have described here. When this defence attorney is then coupled to a Rwandan defence attorney, funded by the Minister of Justice in Rwanda and provided funds for conducting investigations, which is on offer by that same Minister, it seems to me that it ensures the necessary and adequate defence capabilities for the defendant that meet the required standard and guarantees not only a procedural fair trial but also a fairness to the trial.

---

Martin Witteveen

Kigali, June 3rd 2015.

[End of text]