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# Memo

**To:** Mr. James Arguin, Chief, Appeals and Legal Advisory Division MICT.

**From:** Martin Witteveen

**Date:** June 18, 2015

**Re:** Transfer Genocide Cases in Rwanda

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1. On June 23rd, 2015 I am ending my one year contract as advisor international crimes to the National Public Prosecution Authority in Rwanda. During this year I have primarily advised the NPPA on the work of the Genocide Fugitive Tracking Unit of the NPPA. I submitted a lengthy assessment report which contains dozens of recommendations how the work of the GFTU can be improved. Additionally, I have submitted many other memo's with advice.

2. When I started my tenure in the NPPA in Rwanda, the Head of the GFTU requested me to support the ongoing extradition procedures in London, United Kingdom, where five Rwandans are requested to be extradited. This procedure has not yet come to a close when I leave Rwanda this month. I have agreed to serve in support of the proceedings and submitted an initial expert report in September 2014. The Crown Prosecution Service in London indicated they intended to call me as an expert witness. I finally testified in Westminster's Magistrate Court in London between June 8 and June 10, 2015. As time had passed by since my initial report and I was requested to monitor court proceedings in the transfer cases in Rwanda, I decided to draft an additional expert report which I submitted on June 3rd, 2015.

3. In summary, I support extraditions to Rwanda and, based partly on my own experiences in Rwanda, dating back to 2008 as well as experiences of others, dismiss allegations that government authorities intervene in cases, unduly influence witnesses , genocide cases are political of nature and defendants run security risks after being transferred. It is my observation that Rwanda has a functioning justice system for genocide transfer cases. However, based on my observations during my year in Rwanda, in my additional expert report, I have criticized the quality and performance of the defense attorneys in the five cases I observed. It is my

assessment that in four of the five cases there is either no defense, formally or materially, and/or the defense is of substandard quality.

4. It was my deliberate choice in the additional expert report to focus on the quality of the defense in the transfer cases and not criticize government authorities. First because I see it as the first and foremost reason for an impediment to fair trial in these cases. Secondly, no one else will present this view because no one has an interest.

5. Remarkably, none of the defense attorneys in court in London questioned me about the role of government authorities in respect of the functioning of the defense attorneys in the transfer cases. Some came very close but at the end did not ask the right questions. Still there are observations, I made, which I believe are relevant. The purpose of this memo is to describe them. The main caveat is that many observations are objective facts but the inferences I make can be questioned, although are difficult to refute. It is my profound conviction that, in order to know the realities in Rwanda, one will have to dig a little deeper into the layers of truth. I have only scratched the surface, which is still much more than what others have been doing who judge on the functioning of the justice system in Rwanda, especially those in other jurisdictions, whose sources are mainly Rwanda government sources.

6. First of all, I have not disqualified all the lawyers in Rwanda for their incompetence. What I have stated, based on my and others observations in court proceedings, is that in four of the five cases there is no defense and that the defense attorneys in Bandora were substandard and did not present an effective defense. If there are qualified lawyers and if Gashabana and Nyibizi are those qualified lawyers, I have not seen them and the two lawyers, at least during the time I was in Rwanda, did not present themselves as qualified lawyers. Abandoning clients does not seem like a qualified lawyer to me, frankly. There is no indication, let alone proof, they have a defense strategy, except to fight the Ministry. And after three years of court proceedings you would have seen any indication of a strategy.

7. I do maintain my opinion in my additional report and my testimony in court that I am convinced that there are no defense attorneys who can perform a credible defense investigation, certainly not abroad. This is not necessarily a criticism to the attorneys, but an obvious fact as lawyers not very often have the knowledge, expertise, experience and skills to perform such an investigation. That is why defense teams hire qualified investigators. But under Rwanda [case] law, a defense investigator cannot be appointed and the lawyers will have to personally conduct this task. It is totally unrealistic.

8. More importantly, I have little doubt left that, if these qualified lawyers exist in Rwanda, you will not see them in the transfer genocide cases. Simply because these lawyers will challenge both the authorities in general as well as the court. These lawyers will not accept everything the Minister has determined in his policies, they will fight for sufficient resources to perform a credible defense investigation, they will delay proceedings with their motions and filings before the court. And this is not accepted. Consequently, they will be removed from the case as happened in Uwinkindi and will happen soon in Munyagishari. More 'cooperative' lawyers will be appointed.

9. I believe that, four years after the referral decision in Uwinkindi, Rwanda has proven they were not ready for these cases, certainly not on respect of defense issues. Even after four years, there

are no final policies, regulations and, very important, an organization that executes these regulations professionally. Even as we speak, drafts of contracts with defense attorneys are discussed, clauses are taken out or taken in, the fees issue has not been concluded definitely and defense attorneys are moved out of the case and replaced. One court orders that the defendant be submitted a list to choose his defense attorney, another court now finds that there is no right to choose a lawyer from a list when indigent and rules the RBA needs to appoint a lawyer. Whether this is a purely legal decision or is motivated by the need to speed up trials and sideline lawyers who are critical who have to be sidelined as non-cooperative is an open question. The decision of the Minister to keep the execution of legal aid to himself is in my view not a very wise decision as it makes the whole thing too political. It is him against the defense lawyers. The usual language that everything is solved now and the defense attorneys can concentrate on their cases, no longer suffices.

10. I don't think there can be any disagreement that the situation is messy. The damage is huge. There may be still options to repair the situation but, in my opinion, it needs external mediation and support.

11. I do not need to repeat the events that have led to the unfortunate situation in Uwinkindi. When the Minister unilaterally ended the contract with the attorneys in the middle of the crucial part of the trial and considering he had already rejected a budget proposal submitted by the defense to conduct an investigation abroad, what else could the defense attorneys do and bring it to the court?

12. The court's approach in this is, to put it mildly, ambiguous. They have consistently ruled that these are issues they will not interfere in and need to be discussed with the Minister. When the attorneys exactly did that and claimed they could not plead the case while they were negotiating, the court apparently had no problem interfering when they ruled that the attorneys had voluntarily withdrawn and ordered the RBA to replace them. What the judges should have done is put more pressure on the Minister and decide the case could not continue and they would monitor the progress in the negotiations. For reasons I still do not understand, the Supreme Court, in its ruling in appeal, excluded the issue of voluntary withdrawing from the case and only considered the decision of the High Court to order the RBA to appoint new defense attorneys as lawful, while clearly the decision that the defense attorneys had voluntarily withdrawn was questionable.

13. A next interesting question is how the new defense attorney, Mr. Ngaboniza was appointed and why he was appointed. When I discussed the case with him I asked him. He told me that it was the President of the RBA who personally called him and requested him to take over the case. I asked him how much experience he had. He said he was a defense attorney for only five years. He has no international experience and did not even defend a genocide case in Rwanda. He had been a military judge in Rwanda and in this capacity he had tried genocide cases. I do not think he qualifies as a competent, experienced lawyer that has been before the ICTR. I believe he fits into the category of 'cooperative' lawyers who will not delay the case.

14. In Munyagishari, the situation is very similar. The latest ruling is that the RBA will appoint new defense attorneys to Munyagishari and I predict it will be the same as in Uwinkindi.

15. I have never made comments on the 15 million fee decision. Whether that is sufficient is a difficult to answer question. The Minister's decision is clearly sparked by his conviction that the defense attorneys were delaying the case [but see hereafter]. Even if that is true, the 15 million fee will definitely lead to defense attorneys minimizing their efforts. Even if they do not do anything they will still get that money. The Gashabana's of Rwanda will most certainly never take these cases. Bandora's lawyers have told that, if they had known the amount of work involved, they would have never accepted the case. Their conduct in court, as I have analyzed earlier, clearly supports that view. Being cooperative pays off, doesn't it?

16. Effectively, the competent, experienced lawyers, who you refer to, who have operated in the ICTR theatre, will not be seen in these cases.

17. The next thing I am worried about is the influence the Minister and the Ministry has had on the proceedings. To an extent that I even question the independence of the judges. I have seen a number of events that I believe are a real concern in this respect.

18. First of all I believe it is clear that the origin of the recent difficulties in the proceeding is with the Minister. I believe it was him personally who decided that the proceedings were taking too long and the cases should be concluded. Based on the minutes of the meetings with the defense attorneys and other documents, there can be no doubt he decided to act. A question ofcourse is: what were his motives and why he didn't leave it to the judges. He claims it was the limited budget and the fact that it got depleted by the defense attorneys delaying tactics. But I put that into question. Based on his legal aid policy, promulgated in September of 2014 he had budgeted 100.000.000 Rwandan Francs each year for four years for hiring lawyers for the transfer cases. If he pays each defense attorney 1 million a month, he can hire eight lawyers for these cases to stay within the budget. If the Minister spends 15 million Francs in a case and the case takes five years, he spends 3 million Francs per case per year. To spend 100.000.000 in a year he needs 33 cases, while there are only five. So, his assertion that he depleted the budget is not very convincing.

19. Secondly, the Minister has always blamed the defense attorneys for the delays in court. But the reality ofcourse is that the judges decided on postponements during all these years. Sometimes these postponements were triggered by requests of the defense attorneys, but not always. In Uwinkindi the composition of the chamber changed in 2014 leading to an additional postponement. Many times the courts have been extremely indecisive in matters that should not take long to decide. Has the Minister started to get critical to the judges?

20. Whatever the reason, there has been a clear pattern since the end of 2014 where the judges started to accelerate the proceedings. Firstly in Uwinkindi ofcourse where the judges have quickly rejected every motion and request by the defense and decided to proceed with the case without defense. When the defense attorneys decided to appeal the decisions of the High Court in January, I was told that the High Court would wait for the Supreme Court's ruling, as they did in the past. But I found out end of February that the High Court had changed its position and was now proceeding with the case. To my surprise they went on hearing witnesses, both prosecution witnesses as well as defense witnesses without any presence of defense attorneys. The judges had taken three years to take their time in deciding all kinds of preliminary matters and now, all of a sudden, they finished the witnesses in just a couple of days and without defense attorneys.

21. Then the court decided to close the case by requesting the prosecution to present its closing arguments. When the day, which was set for that, arrived, the prosecution requested a postponement of two weeks or so as they had not finalized the preparations. The postponement was given and when the next date arrived, the court decided to postpone the case till the Supreme Court had ruled in appeal. I have tried to find out why the court had changed position but I couldn't get a clear answer.

22. What had changed was that the President of the MICT had decided to put a full chamber of the deferral request. This immediately sparked tension in the prosecution in Rwanda and I have no doubt this also caused the change in position of at least the Prosecution fearing they would be criticized of hearing witnesses without any defense. If the court had not allowed the prosecution a slight delay in their closing arguments, Uwinkindi's case would have been closed. Clearly, the recent decision to have the new defense attorneys represent Uwinkindi and the possible re-hearing of the witnesses have come under pressure and was by no means a voluntary step.

23. Interestingly, the court does not show any sign of speeding up Mugesera or Mbarushimana. It is very well possible because the defense attorneys are not paid by public funds, they have no lawyers defending them and there is no real incentive.

24. The Bandora case always has been presented by the Minister and the Ministry as an example of how cases should be conducted. The minutes of the meetings are clear about that. It is no surprise that after the defense attorneys signed their contract in September 2014 accepting the 15 million, the case was over in a matter of a limited number of trial days. I have sufficiently described what I think of their defense in my additional report. I was rather kind to them when I described their functioning. Bandora picked his lawyers himself, fair enough, but they clearly fail the test on competent, experienced lawyers in transfer cases at an international level.

25. On May 15th 2015 the High Court convicted Bandora to a surprisingly 30 years imprisonment. In their ruling, available in English, they consider that Bandora had been cooperative with the court, reason for his reduced sentence. The truth of the matter is that Bandora had not been cooperative at all. In summer 2014 Bandora had run out of funds to pay his lawyers and the lawyers indicated to the court they could not plead the case without a contract which they applied for. While this was ongoing, they did not appear in court, were fined by the court but, surprisingly, not replaced as happens in Uwinkindi and Munyagishari. After they touched the 15 million Francs, the case was done in a few trial days. Additionally, Bandora has never admitted the facts and his role.

26. In light of the events as they have been unfolding in the last half year or so, there can be no doubt that the court has given a clear message in this judgment to the attorneys in the other cases by saying that if you cooperate, meaning: if you do not delay the case, you will get rewarded.

27. In April of 2015, the first stone of the new court building in Nyanza was laid. On the occasion, the Chief Justice, Mr. Sam Rugege, held a speech. The newspaper summarized his speech by saying Rugege warned the saboteurs of the Rwandan justice system. He was quoted as having said: "There are people who want to tarnish the image of our judiciary with the purpose of discouraging more countries from sending more suspects to be tried in Rwanda," and "*Others try*

*to delay court processes so that an impression is created that we are unable to handle those cases with international dimensions.* However, we assure such people that justice will be done in conformity with international standards."

28. Apart from the fact that this language is inappropriate for a Chief Justice and his judges are responsible for the delays as they decided on postponements, I can hardly believe his remarks on the delaying of the court proceedings was a loose remark and should be separated of what we have seen happening in the court proceedings in Uwinkindi and Bandora.

29. In conclusion: I believe there are clear indications that external factors have brought the judges of the High Court, at least in Uwinkindi and Bandora, to speed up the trial at the cost of credible defense. It will never be known whether the judges received an instruction to speed up or whether they did not need an instruction and knew what to do. The change in position in Uwinkindi is clearly the result of the MICT decision, not of a respect for defense rights.

30. The next logical question is what could be behind this speeding up of proceedings and removal of attorneys. I believe there is sufficient indications at this moment to be worried about what the justice system believes a defense in a genocide case should entail. Again I am worried that it does not look particularly good and it points towards controlling and limiting the defense in these cases where it impedes of fair trial issues. Some of these issues have been raised during the referrals in Munyagishari and Uwinkindi before the ICTR but rejected as unfounded or speculative. I believe they might be true after all.

31. Generally, all defense attorneys claimed it is very hard to defend genocide defendants especially from abroad as society in general but their family, partners, clients and the like in particular do not accept they defend a defendant on genocide. They tell they lose clients. This seems relevant as private lawyers make their income on commercial cases rather than criminal cases. You wonder what will happen to defense attorneys who will be successful and get their clients an acquittal.

32. In the contracts that the defense attorneys signed there was a clause to the effect that the Minister could unilaterally end the contract in case the defense attorney openly criticized the Minister or the Ministry. This clause has been removed now from the new contracts offered by the Ministry but they may still be valid under the existing contracts such as in Bandora. Apart from what the clause says and whether the clause is valid or not, I continuously sense that defense attorneys are conscious not to criticize. The clause does not make much difference.

33. In Mugesera, the defendant was given the opportunity to comment on the prosecution witnesses presented in the case. Mugesera said that one victim witness had been lying and called the witness a liar. The prosecutor in the case immediately reprimanded Mugesera that he could not call the witness a liar. The judge joined in criticizing Mugesera and used softer language to make Mugesera clear he could not use this kind of language to qualify the witness. Apparently victim witnesses do not lie.

34. In the case of Bandora the defense attorneys said it was a shame that the prosecutor had brought witnesses to court who testified they were forced by the prosecutors to wrongfully accuse the defendant. Again, the prosecutors objected to the wording "a shame" and again, the judges,

more softly joined in that criticism. At the end, the defense attorney openly apologized in court to the prosecutors.

35. A crucial element of the trial in Bandora was in October 2014 when two prosecution witnesses retracted their statements claiming they had been visited by the prosecutors in the court room who requested him to wrongfully accuse the defendant. The statements by these two witnesses did not attract much attention and the defense never requested anything to the court in examining what exactly had happened, although it seemed relevant. I questioned the defense attorney afterwards why he had not requested that this incident were to be investigated. The defense attorney replied he thought it was sufficient for him the witnesses had retracted their statements. Although it is hard to prove, there is certainly a likelihood, in light of the other observations, that it is not expected from defense attorneys to request a further examination of alleged conduct by the prosecution. Surprisingly, in the verdict of the High Court in Bandora, the incident was reduced to mentioning the witnesses had retracted their statements. The fact that the witnesses claimed the prosecutors had requested them to falsely accuse the defendant did not make it to the verdict.

36. Recently, Mugesera [who is definitely more qualified to litigate his case than his lawyer, probably after he became experienced after ten years of litigation in Canada] commented on prosecution witnesses and requested the court to call an investigator as a witnesses because he believed that several witnesses had coordinated their statements. The judges refused and said that they could not do that and referred him to the prosecutor.

37. What I also need to account is the fact that earlier in 2015 the Dutch ambassador was called to the office of the Prosecutor-General where also his advisor was present. He asked the ambassador whether it was true that she had a monitor in the court proceedings and that he had heard she was very critical, which could cause problems. The day after this conversation I requested the Dutch ambassador a copy of the draft report her monitor had submitted to her, but she refused it and I am sure the report never left her drawer again.

38. The points I make here, touch upon a broader aspect which is the fact that genocide cases in Rwanda are not considered complex cases where witnesses' evidence, where the case is completely reliant on, could pose major credibility issues. Cases are summarily investigated and presented as evidence in court. I believe victim witnesses are seen as not able to lie or at least not able to not speak the truth. I have spoken a couple of times to the Head of the Legal Aid Forum, which is presumed to be the champion of defending legal aid interests. When I asked him whether all attorneys were capable of defending the accused in these case he replied without any hesitation they all were. When I suggested these cases were extreme complex he quipped: "Not in Rwanda". He prided himself to have been part of the gacaca system where no defense attorneys were operating, which he did not see an impediment to the fairness of the gacaca trials.

39. The same bias can be found in the Bandora verdict. With all the caveats possible [partly secondary sources, no original transcripts of the testimonies, language issues] I was convinced that there was no evidence to convict Bandora. The witnesses I heard testifying and the detailed transcripts of the legal officer of the Dutch embassy convinced me. And the verdict does not summarize any pertinent evidence. The case seems to evolve around whether or not Bandora participated in a meeting prior to attacking and killing Tutsi's in his home town. Without making any distinction between whether the witnesses had heard during gacaca trials or made all sorts of

inferences themselves [Bandora was the MRND chief so he must have been at that meeting] and without any witness knowing what happened in that meeting [if it happened at all], the judges not only infer that during that meeting a conspiracy took place to kill the Tutsi's but also that Bandora participated in that meeting, did not distance himself from the meeting and therefor certainly had genocidal intent. One wonders if any witness could have countered these inferences.

40. I have my questions about the role of the RBA and their independence. The Executive Secretary is a former staff member of the Ministry of Justice. The Minister became a member of the RBA in the crucial phase of the conflict with all the pomp and circumstance. The RBA has, at first, not objected to the contentious paragraphs in the contracts that clearly restricted the independence of the defense attorneys. The RBA has initially agreed with the 15 million flat fee when the minister proposed it in mid-2014. Now they seem to object. The RBA has not defended Gashabana, while there was all the reason to do so. And finally, when a new lawyer was appointed in Uwinkindi, the President of the RBA personally handpicked a former military with clearly less sufficient experience than dozens of other lawyers and who is probably not on the lists the RBA has compiled themselves, but likely a cooperative attorney.

41. Uwinkindi and his lawyers intended to present alternative versions of the genocide as their defense [par 162 referral decision]. The referral chamber rejected Uwinkindi's argument that such a line of defense is untenable in the legal climate in Rwanda referring to the Transfer Law guarantees and depending on monitoring mechanisms. Whether such a defense is really untenable in Rwanda we will probably never know, because it is highly unlikely the current defense attorneys or any defense attorney will make that argument. There is little doubt that no witness will take any chance by supporting the events as described by Uwinkindi.

42. It is equally unlikely that any defense attorney will undertake a credible defense investigation. Firstly because they have no investigator available, as the courts have ruled it out as inconsistent with Rwandan law, secondly because they simply have no time to conduct a serious investigation as it will most likely kill their daily business in the firm they work for and lastly because resources have not been made available so far. It is also unlikely that defense attorneys can operate abroad in refugee camps and the like without the cooperation of the countries, which would require mutual legal assistance on the request of Rwanda. Gashabana has been the only attorney who has requested a budget. Although the budget was very detailed and included cities where he intended to go, the budget has been refused as unrealistic, but it remains unclear what was unrealistic about the budget. The Minister just does not want to spend a whole lot of money on this and the challenges posed by these defense investigations are simply too big to handle. Gashabana clearly gave it up and told me he would have to plead the case without witnesses from abroad.

43. I consider the defense investigations abroad as the litmus test for the fairness of the proceedings, just as the referral chambers in ICTR did [see par 148 Munyagishari: Defence "may well entail considerable work outside of Rwanda" ..."the accused should be assigned a defense lawyer [...] with previous international experience particularly in eliciting testimony from witnesses based abroad"]. We will have to see if any defense attorney ever gets to conduct one. My prediction is that we will see Bandora type of defenses. They will be 'cooperative' with the court and make no attempt to travel abroad. Instead they will summarily pull a small list of witnesses from Rwanda,

mainly incarcerated witnesses. Other witnesses will be not be presented or refused by the court as happened in Bandora.

44. I made a last attempt to get the views from the defense attorneys Gashabana and Nuibizi. Nyibizi hang up when he heard my voice on the phone. I texted him why he didn't want to speak with me but did not reply. I spoke ion length with Gashabana. When he heard my questions he said we had to stop the conversation as the Supreme Court had ruled and it was final. He did not appear afraid but clearly he was aware of risks when he spoke to me. However, I was able to keep the conversation ongoing. When I asked him if he believed that his successor would also submit a budget for a defense investigation he said: "Then he will also be dismissed. Come back after six months and you will see for yourself". Gashabana said he will still supporting the idea of referral but only when the High Court would respect the ICTR referral decisions. He had filed a submission in referral cases himself when he was President of the Bar.

45. What looms is a situation where defendants are convicted without [sufficient] evidence and, through strict control and direction by the Ministry, embraced by the judges, capable and experienced defense attorneys are sidelined and replaced by handpicked lawyers who do not have any trust from their clients, are not conducting any credible defense investigation and are cooperative with the court. From the outside it will look consistent with fair trial. In fact it is flawed.

46. I do not claim that all is bad intent. Certainly on behalf of the prosecution service I have seen a sincere desire to comply with fair trial rights. What is the matter, I believe, is that this is all new to Rwandan institutions and it takes time to learn. There seems to be an innate attitude averse of anything that criticizes, confronts or challenges what government institutions present. The fact that these are genocide cases makes it more complex.

47. I do not take the position that extraditions should be stopped or referrals revoked. To the contrary, there is only one way which is the way ahead. But Rwanda needs pushes from external persons or institutions and we have the obligation to provide for and contribute to these pushes. Therefor I strongly advocate for forms of hybrid solutions. I believe this has been a missed chance years ago, when there were better opportunities to create hybrid systems in Rwanda. The case of the War Crimes Chamber in Bosnia and ICTY's role in it, could serve as an example. But there is still time to amend what was not fixed earlier. I have therefor recommended to have foreign defense attorneys team up with local attorneys and defend the cases with external donor funds. Equally important is it to have foreign judges sit in the High Court chamber, which was foreseen when Rwanda adjusted their laws to facilitate that and what the ICTR, when referring the cases, expected to happen [par 114 Uwinkindi referral decision].

48. I believe that my analysis and suggestions are in the interest of Rwanda and the broader aspects of justice. That is what I seek to do.

[End of text]

Certified as drafted by me, Marten Wittevee in my role as advisor to the NPPA in genocide cases.

Done,
May 30th 2016