Ministerie van Veiligheid en Justitie

> Retouradres Postbus 20301 2500 EH Den Haag

[redacted]

Directie Wetgeving en Juridische Zaken
Sector Juridische Zaken

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Ons kenmerk
731464

Bij beantwoording de datum en ons kenmerk vermelden. Wilt u slechts één zaak in uw brief behandelen.

Datum 12 februari 2016
Onderwerp Besluit op bezwaar

Geachte [redacted]

Bij brief van 2 oktober 2015, ontvangen op 5 oktober 2015, heeft [redacted] namens [redacted] bezwaar gemaakt tegen mijn besluit van 28 augustus 2015, kenmerk 675878.

Met deze brief wordt op het bezwaar beslist.

Besluit
Ik verklaar uw bezwaarschrift gegrond. Voor de motivering van mijn besluit verwijs ik naar de beoordeling van het bezwaar.

Verloop van de procedure
Op 23 juni 2015 heeft mijn ministerie ontvangen het verzoek van 23 juni 2015 van [redacted] op grond van de Wet openbaarheid van bestuur (hierna: Wob) om openbaarmaking van, samengevat weergegeven, twee expertrapporten van de heer Witteveen en alle correspondentie en informatie die betrekking heeft op deze rapporten.

Bij besluit van 28 augustus 2015, kenmerk 675878, is het verzoek afgewezen.

Bij brief van 2 oktober 2015, ontvangen op 5 oktober 2015, heeft [redacted] als gemachtigde van [redacted] hiertegen bezwaar gemaakt.

Bij brief van 8 oktober 2015 is de ontvangst van het bezwaarschrift bevestigd.

Bij brief van 3 november 2015 hebt u te kennen gegeven dat u de zaak van [redacted] overneemt.

Bij brief van 3 november 2015 hebt u de gronden van bezwaar aangevuld. Daarnaast hebt u te kennen gegeven dat [redacted] af ziet van het recht te worden gehoord.

Bij brief van 11 december 2015 heb ik mijn beslissing op bezwaar met zes weken verdaagd.

Directie Wetgeving en Juridische Zaken
Sector Juridische Zaken

Datum
12 februari 2016

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In de brief van 20 januari 2016 is aan u medegedeeld dat de beslistermijn is verlengd tot 9 februari 2016, nadat u hiermee eerder telefonisch heeft ingestemd.

Bij brief van 10 februari 2016 heeft u mij in gebreke gesteld vanwege overschrijding van de termijn voor het nemen van een beslissing op uw bezwaar.

Ten aanzien van de ontvankelijkheid
Uw bezwaarschrift is ingediend binnen zes weken na bekendmaking van het besluit. Het voldoet ook aan de overige door de Algemene wet bestuursrecht (hierna: Awb) gestelde eisen zodat het bezwaarschrift ontvankelijk is.

Beoordeling van het bezwaar

Nieuwe zoekslag
Alvorens ik inga op uw gronden van bezwaar en mijn beoordeling daarvan, merk ik het volgende op. In het kader van de door mij te verrichten heroverweging naar aanleiding van uw bezwaar heb ik een nieuwe zoekslag verricht binnen mijn ministerie, meer specifiek binnen het Directoraat-Generaal Rechtspleging en Rechtshandhaving.

De nieuwe zoekslag heeft **9** nieuwe documenten opgeleverd die onder de reikwijdte van uw Wob-verzoek vallen. In het kader van de inventarisatie bij het primaire besluit heb ik reeds **3** documenten gevonden. Ik heb alle documenten, in totaal **12**, op de inventarislijst, die als bijlage 2 bij dit besluit is gevoegd, opgenomen. Deze documenten heb ik in chronologische volgorde op de inventarislijst weergegeven. Dat betekent dat de nummering van de reeds bij het primaire besluit gevonden documenten als volgt is gewijzigd. Document 2 bij het primaire besluit is thans op de inventarislijst onder nummer 9 opgenomen en document 3 bij het primaire besluit is thans op de inventarislijst onder document 8 opgenomen. De nieuwe documenten heb ik onder de nummers 2, 3, 4, 5, 6, 7, 10, 11 en 12 op de inventarislijst opgenomen. Op de beoordeling van de nieuwe documenten ga ik in na de samenvatting en behandeling van de gronden van uw bezwaar hieronder.

Gronden van uw bezwaar
In uw bezwaarschrift hebt u – kort samengevat – het volgende aangevoerd:

a) U geeft aan dat ik openbaarmaking van de documenten met nummers 1 en 9 (bij het primaire besluit nummers 1 en 2) op grond van artikel 10, tweede lid, aanhef en sub a, van de Wob heb geweigerd. Ten aanzien van de schending van het vertrouwen van Engeland door openbaarmaking stelt u zich op het standpunt dat het niet vaststaat dat Engeland de stukken niet openbaar wil maken, omdat stukken waaruit dit blijkt niet zijn verstrekt;
b) U geeft aan dat ik openbaarmaking van de e-mailberichten onder nummer 8 (bij het primaire besluit nummer 3) op grond van artikel 10, tweede lid, aanhef en sub e, van de Wob, betreffende de bescherming van de persoonlijke levenssfeer, heb geweigerd. U geeft aan dat, voor zover informatie wordt gevraagd die uitsluitend het beroepsmatig handelen van ambtenaren betreft, een beroep op de bescherming van de persoonlijke levenssfeer in beginsel niet mogelijk is. U stelt zich op het standpunt dat zonder nadere motivering niet valt in te zien dat het belang van de eerbiediging van de persoonlijke levenssfeer aan de orde is, en zo ja, of dat belang zwaarder moet wegen dan het belang van openbaarmaking. Verstrekking van documenten met weglating of het onleesbaar maken van

persoonsgegevens kan een oplossing bieden. Ook heb ik, volgens u, ten onrechte nagelaten te bezien of niet door anonimisering aan de door de uitzonderingsgronden te beschermen belangen tegemoet gekomen kan worden; c) U geeft aan dat ik openbaarmaking van de e-mailberichten onder nummer 8 (bij het primaire besluit nummer 3) op grond van artikel 11, eerste lid, van de Wob heb geweigerd. U geeft aan dat zonder nadere motivering niet valt in te zien waarom openbaarmaking van een geanonimiseerde, samengevatte of tot feiten beperkte versie van de documenten niet mogelijk is. Daarnaast stelt u dat ik ten onrechte heb nagelaten te bezien of niet door anonimisering aan de door de uitzonderingsgronden te beschermen belangen tegemoet gekomen kan worden.

Overwegingen ten aanzien van de gronden van bezwaar
Met betrekking tot deze argumenten overweeg ik het volgende.

Ad a.
In mijn besluit van 28 augustus 2015 heb ik overwogen dat ik het zeer voorzienbaar acht dat bij openbaarmaking van de documenten met nummers 1 en 9 (bij primaire besluit nummers 1 en 2) sprake zou zijn van een schending van de vertrouwensband met Engeland, omdat de rapporten in kwestie ten behoeve van aldaar lopende uitleveringsprocedures zijn gemaakt. Inmiddels is er sprake van gewijzigde omstandigheden, omdat de rechter uitspraak heeft gedaan in deze procedures en de rapporten in de procedures door de rechter zijn gebruikt. Engeland heeft geen bezwaar meer tegen openbaarmaking. Artikel 10, tweede lid, aanhef en onder sub a, van de Wob is daardoor niet meer van toepassing. Ik heb daarom besloten om de desbetreffende informatie alsnog openbaar te maken.

Ad b en c.
Ik heb geconstateerd dat een van de ambtenaren wiens naam en e-mailadres in het document met nummer 8 (bij het primaire besluit nummer 3) onleesbaar is gemaakt, beroepsmatig in de openbaarheid treedt. Om deze reden maak ik de onleesbaar gemaakte naam in document 8 (bij primaire besluit document 3) alsnog openbaar. Daarnaast ben ik tot de conclusie gekomen dat het document, buiten de onleesbaar gemaakte persoonlijke beleidsopvattingen en persoonsgegevens, voldoende informatie bevat om alsnog gedeeltelijk openbaar te maken. Ik verklaar uw bezwaar onder b en c dan ook gegrond.

Beoordeling nieuwe documenten
Ik heb de nieuw gevonden documenten 2, 3, 4, 5, 6, 7, 10, 11 en 12 beoordeeld op grond van de Wob en overweeg daarover het volgende.

<u>Reeds openbare documenten</u>
Het document met nummer 3 is reeds openbaar en voor een ieder beschikbaar. De Wob is niet van toepassing op reeds openbare documenten. Voor dit document verwijs ik u naar de vindplaats www.unmict.org.

<u>Deels of niet openbaar te maken documenten</u>
Ik heb besloten de door u gevraagde informatie opgenomen in de documenten met de nummers 2, 4, 5, 7, 10 en 12 deels openbaar te maken en ik heb besloten de door u gevraagde informatie opgenomen in de documenten met nummers 6 en 11 niet openbaar te maken. Voor de motivering verwijs ik naar onderstaande overwegingen.

Het belang van de betrekkingen van Nederland met andere staten en met internationale organisaties
Op grond van artikel 10, tweede lid, aanhef en onder a, van de Wob blijft verstrekking van informatie achterwege, voor zover het belang daarvan niet opweegt tegen het belang van de betrekkingen van Nederland met andere staten en met internationale organisaties.

Bij de documenten met nummers 5, 6 en 11 is het belang van de betrekkingen van Nederland met een internationale organisatie in het geding. Dit belang zou kunnen worden geschaad indien de hier bedoelde informatie openbaar wordt gemaakt. De documenten 6 en 11, respectievelijk aangeduid als "Confidential – not for distribution" en beschreven in een e-mail als "[z]oals je begrijpt is dit document in deze vorm niet geschikt voor verdere verspreiding", zijn door de heer Witteveen, in zijn capaciteit als VN-adviseur, in vertrouwen gedeeld met mijn medewerkers. Ik ben van oordeel dat het belang van de betrekkingen van Nederland met de Verenigde Naties (hierna: de VN) zwaarder moet wegen dan het belang van openbaarheid, aangezien openbaarmaking van deze documenten zou kunnen leiden tot een vertrouwensbreuk tussen Nederland en de VN, waardoor de contacten met de VN stroever zullen gaan verlopen.

Daarnaast is bij passages uit de documenten met nummers 5, 6 en 11 het belang van de betrekkingen van Nederland met een andere staat in het geding. Dit belang zou kunnen worden geschaad, indien de hier bedoelde informatie openbaar wordt gemaakt. De documenten omvatten de bevindingen van de heer Witteveen omtrent het uitleveren van genocideverdachten aan Rwanda. Hierin staan passages waarin hij zijn conclusies en mening over het functioneren van het Rwandese justitiële systeem beschrijft. Ik ben van oordeel dat het belang van de betrekkingen van Nederland met Rwanda zwaarder moet wegen dan het belang van openbaarheid, aangezien als gevolg van het openbaar maken van deze informatie deze contacten op bepaalde punten stroever kunnen gaan lopen, waardoor bijvoorbeeld het onderhouden van diplomatieke betrekkingen of het voeren van bilateraal overleg met Rwanda moeilijker zal gaan dan voorheen. Ik heb daarom besloten de desbetreffende informatie niet openbaar te maken.

De eerbiediging van de persoonlijke levenssfeer
Op grond van artikel 10, tweede lid, aanhef en onder e, van de Wob, blijft verstrekking van informatie achterwege voor zover het belang daarvan niet opweegt tegen het belang dat de persoonlijke levenssfeer wordt geëerbiedigd.

In de documenten met nummers 2, 4, 5, 6, 7, 10, 11 en 12 staan persoonsgegevens. Ik ben van oordeel dat ten aanzien van deze gegevens het belang dat de persoonlijke levenssfeer wordt geëerbiedigd zwaarder moet wegen dan het belang van openbaarheid. Daarom heb ik de persoonsgegevens verwijderd uit deze documenten.

Voor zover het de namen van ambtenaren betreft is hierbij het volgende van belang. Weliswaar kan, waar het gaat om beroepshalve functioneren van ambtenaren, slechts in beperkte mate een beroep worden gedaan op het belang van eerbiediging van hun persoonlijke levenssfeer. Dit ligt anders indien het betreft het openbaar maken van namen van de ambtenaren. Namen zijn immers persoonsgegevens en het belang van eerbiediging van de persoonlijke levenssfeer kan zich tegen het openbaar maken daarvan verzetten. Daarbij is van belang dat het hier niet gaat om het opgeven van een naam aan een individuele burger die

met een ambtenaar in contact treedt, maar om openbaarmaking van de naam in de zin van de Wob. Voorts betreft het geen namen van ambtenaren die vanuit hun functie regelmatig in de openbaarheid treden.

Het voorkomen van onevenredige benadeling
Op grond van artikel 10, tweede lid, aanhef en onder g, van de Wob, blijft verstrekking van informatie achterwege voor zover het belang daarvan niet opweegt tegen het belang van het voorkomen van onevenredige bevoordeling of benadeling van bij de aangelegenheid betrokken natuurlijke personen of rechtspersonen dan wel van derden.

Openbaarmaking van de documenten met nummers 6 en 11 zou naar mijn oordeel leiden tot onevenredige benadeling van de Staat en in het bijzonder van mijn ministerie. Op 27 november 2015 heeft de voorzieningenrechter in kort geding de uitlevering van twee van genocide verdachte personen met de Rwandese nationaliteit aan Rwanda geweigerd, tenzij de Staat de door de heer Witteveen in zijn rapport van 3 juni 2015 (met dit besluit openbaar gemaakt onder documentnummer 9) genoemde bezwaren op adequate wijze wegneemt. Tegen de beslissing van de voorzieningenrechter heeft de Staat beroep ingesteld. Dit beroep loopt momenteel. De bijlage bij het e-mailbericht van 26 maart 2015 en het memo van 18 juni 2015 van de heer Witteveen, die zien op de uitlevering van genocide verdachten aan Rwanda, maken onderdeel uit van het beroep. Openbaarmaking van deze documenten zal tot een onevenredige benadeling van mijn ministerie als procespartij leiden. Verder zijn deze documenten, respectievelijk aangeduid als "Confidential – not for distribution" en beschreven in een e-mail als "[z]oals je begrijpt is dit document in deze vorm niet geschikt voor verdere verspreiding", door de heer Witteveen in zijn capaciteit als VN-adviseur in vertrouwen gedeeld met mijn medewerkers. De onevenredige benadeling van mijn ministerie bestaat daarom ook uit het feit dat openbaarmaking van de documenten een negatief effect kan hebben op de bereidwilligheid van derden om vertrouwelijke documenten te delen met mijn ministerie, waardoor in de toekomst belangrijke informatie niet bij mijn ministerie terecht komt.

Daarnaast zou openbaarmaking van de documenten met nummers 5, 6 en 11 naar mijn oordeel leiden tot onevenredige benadeling van de heer Witteveen. In de documenten, die zien op het uitleveren van genocide verdachten aan Rwanda, staan passages die bevindingen van de heer Witteveen omtrent het functioneren van het Rwandese justitiële systeem bevatten. Deze documenten zijn door de heer Witteveen in vertrouwen gedeeld met mijn medewerkers, en hij heeft bij het opstellen van de documenten geen rekening gehouden met het feit dat deze openbaar zou worden. De onevenredige benadeling bestaat uit het feit dat openbaarmaking van bepaalde passages een negatief effect kan hebben op de mogelijkheden voor de heer Witteveen in de toekomst zijn werk daar uit te voeren.

Ik ben van oordeel dat het belang van het voorkomen van bovenstaande onevenredige benadeling zwaarder moet wegen dan het belang van openbaarheid.

Persoonlijke beleidsopvattingen in stukken bestemd voor intern beraad
Artikel 11, eerste lid, van de Wob, bepaalt dat in geval van een verzoek om informatie uit documenten, opgesteld ten behoeve van intern beraad, geen informatie wordt verstrekt over daarin opgenomen persoonlijke

beleidsopvattingen.

Uit de wetsgeschiedenis blijkt dat onder het begrip "documenten opgesteld ten behoeve van intern beraad" onder meer moeten worden begrepen: nota's van ambtenaren en hun politieke en ambtelijk leidinggevenden, correspondentie tussen de onderdelen van een ministerie en tussen ministeries onderling, concepten van stukken, agenda's, notulen, samenvattingen en conclusies van interne besprekingen en rapporten van ambtelijke adviescommissies. Ten aanzien van deze stukken moet van de bedoeling om ze als stukken voor intern beraad beschouwd te zien, uitdrukkelijk blijken of men moet deze bedoeling redelijkerwijs kunnen vermoeden. Deze beperking op de informatieverplichting is in de Wob opgenomen omdat een ongehinderde bijdrage van ambtenaren en van hen die van buiten bij het intern beraad zijn betrokken bij de beleidsvorming en -voorbereiding gewaarborgd moet zijn. Zij moeten in alle openhartigheid onderling en met bewindspersonen kunnen communiceren. Staatsrechtelijk zijn slechts de standpunten die het bestuursorgaan voor zijn rekening wil nemen relevant. Onder persoonlijke beleidsopvattingen worden verstaan: meningen, opinies, commentaren, voorstellen, conclusies met de daartoe aangevoerde argumenten.

De documenten met nummers 2, 5, 6, 10 en 11 zijn opgesteld ten behoeve van intern beraad omtrent uitleveringszaken naar Rwanda. Deze documenten bevatten persoonlijke beleidsopvattingen, zoals conclusies en opmerkingen met betrekking tot het Rwandese justitiële systeem en lopende uitleveringsprocedures. Ik verstrek daarover geen informatie.

Ik acht het niet in het belang van een goede en democratische bestuursvoering, indien de standpunten van ambtenaren zelfstandig worden betrokken in de publieke discussie. Ik zie dan ook geen aanleiding om met toepassing van artikel 11, tweede lid, van de Wob, in niet tot personen herleidbare vorm informatie te verstrekken over deze persoonlijke beleidsopvattingen.

Passages buiten de reikwijdte van de Wob
Een aantal passages in het document met nummer 7 zien niet op de gevraagde informatie in het oorspronkelijke verzoek en vallen daarmee buiten de reikwijdte van de Wob. Om die reden heb ik de betreffende passages onleesbaar gemaakt in het document.

Ik ben, buiten de om hiervoor toegelichte redenen onleesbaar gemaakte passages, van oordeel dat documenten met de nummers 2, 4, 5, 7, 10 en 12 voldoende informatie bevatten om deze gedeeltelijk openbaar te maken.

Ingebrekestelling
De termijn om op uw bezwaar te beslissen is geëindigd op 9 februari 2016. Gelet op artikel 4:17, eerste en derde lid, van de Awb, heeft u recht op een dwangsom vanaf de dag waarop aan drie voorwaarden is voldaan:
1. er zijn twee weken verstreken nadat de beslistermijn is overschreden,
2. er zijn twee weken verstreken nadat ik van u een schriftelijke ingebrekestelling heb ontvangen, en
3. er is nog geen beslissing op uw bezwaar genomen.

In uw geval is aan deze drie voorwaarden niet voldaan, omdat de beslissing op uw bezwaar genomen is voor het verstrijken van twee weken nadat de

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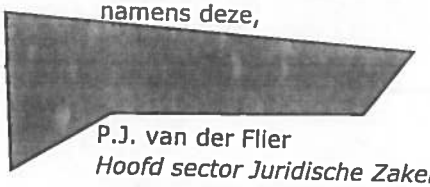
beslistermijn is overschreden en nadat ik van u een schriftelijke ingebrekestelling heb ontvangen. Ik ben u dan ook geen dwangsom verschuldigd.

Besluit
Gelet op hetgeen hiervoor is overwogen, verklaar ik uw bezwaar gegrond en herroep het bestreden besluit, voor zover het betreft documenten 1 en 9. Documenten 1 en 9 maak ik alsnog openbaar. Voor zover het de in document 8 opgenomen persoonsgegevens betreft herroep ik tevens het bestreden besluit en voor het overige handhaaf ik mijn weigering om document 8 openbaar te maken. Ten aanzien van documenten 2, 4, 5, 6, 7, 10, 11 en 12 beslis ik tot gedeeltelijke openbaarmaking.

Vergoeding kosten bezwaar
U heeft verzocht om vergoeding van de kosten van bezwaar met een beroep op artikel 7:15, tweede lid, van de Awb. Daarover beslis ik als volgt.

Op grond van dit artikel worden de kosten die in verband met de behandeling van het bezwaar redelijkerwijs zijn gemaakt, vergoed voor zover het bestreden besluit wordt herroepen wegens een aan het bestuursorgaan te wijten onrechtmatigheid. Gelet op de bovenvermelde beslissing is daarvan sprake. Het aan u toe te kennen bedrag is als volgt vastgesteld: 1 punt x factor 1 = €496,-. Dit bedrag wordt binnen zes weken na bekendmaking van dit besluit aan u betaald.

Hoogachtend,
De Minister van Veiligheid en Justitie,
namens deze,



P.J. van der Flier
Hoofd sector Juridische Zaken,
tevens Juridisch Adviseur van het
Ministerie van Veiligheid en Justitie

BEROEPSCLAUSULE
U kunt tegen deze beschikking beroep instellen bij de afdeling bestuursrecht van de rechtbank Den Haag, postbus 20302, 2500 EH Den Haag. Het beroepschrift moet binnen zes weken na de dag waarop de beschikking u is toegezonden door de rechtbank zijn ontvangen. U kunt ook digitaal beroep instellen bij genoemde rechtbank via http://loket.rechtspraak.nl/bestuursrecht. Daarvoor moet u wel beschikken over een elektronische handtekening (DigiD). Kijk op de genoemde site voor de precieze voorwaarden.

Het beroepschrift moet op grond van artikel 6:5 van de Algemene wet bestuursrecht zijn ondertekend en bevat ten minste de naam en adres van de indiener, de dagtekening, de omschrijving van het besluit waartegen het beroep is gericht, zo mogelijk een afschrift van dit besluit, en de gronden waarop het beroepschrift rust.
Van de indiener van het beroepschrift wordt griffierecht geheven door de griffier van de rechtbank. Nadere informatie over de hoogte van het griffierecht en de wijze van betalen wordt door de griffie van de rechtbank verstrekt.

Bijlage 1 – Relevante artikelen uit de Wob

Artikel 1

In deze wet en de daarop berustende bepalingen wordt verstaan onder:

a. document: een bij een bestuursorgaan berustend schriftelijk stuk of ander materiaal dat gegevens bevat;
b. bestuurlijke aangelegenheid: een aangelegenheid die betrekking heeft op beleid van een bestuursorgaan, daaronder begrepen de voorbereiding en de uitvoering ervan;
c. intern beraad: het beraad over een bestuurlijke aangelegenheid binnen een bestuursorgaan, dan wel binnen een kring van bestuursorganen in het kader van de gezamenlijke verantwoordelijkheid voor een bestuurlijke aangelegenheid;
d. niet-ambtelijke adviescommissie: een van overheidswege ingestelde instantie, met als taak het adviseren van een of meer bestuursorganen en waarvan geen ambtenaren lid zijn, die het bestuursorgaan waaronder zij ressorteren adviseren over de onderwerpen die aan de instantie zijn voorgelegd. Ambtenaren, die secretaris of adviserend lid zijn van een adviesinstantie, worden voor de toepassing van deze bepaling niet als leden daarvan beschouwd;
e. ambtelijke of gemengd samengestelde adviescommissie: een instantie, met als taak het adviseren van één of meer bestuursorganen, die geheel of gedeeltelijk is samengesteld uit ambtenaren, tot wier functie behoort het adviseren van het bestuursorgaan waaronder zij ressorteren over de onderwerpen die aan de instantie zijn voorgelegd;
f. persoonlijke beleidsopvatting: een opvatting, voorstel, aanbeveling of conclusie van een of meer personen over een bestuurlijke aangelegenheid en de daartoe door hen aangevoerde argumenten;
g. milieu-informatie: hetgeen daaronder wordt verstaan in artikel 19.1a van de Wet milieubeheer;
h. hergebruik: het gebruik van informatie die openbaar is op grond van deze of een andere wet en die is neergelegd in documenten berustend bij een overheidsorgaan, voor andere doeleinden dan het oorspronkelijke doel binnen de publieke taak waarvoor de informatie is geproduceerd;
i. overheidsorgaan:
   1°. een orgaan van een rechtspersoon die krachtens publiekrecht is ingesteld, of
   2°. een ander persoon of college, met enig openbaar gezag bekleed.

Artikel 6

1. Het bestuursorgaan beslist op het verzoek om informatie zo spoedig mogelijk, doch uiterlijk binnen vier weken gerekend vanaf de dag na die waarop het verzoek is ontvangen.
2. Het bestuursorgaan kan de beslissing voor ten hoogste vier weken verdagen. Van de verdaging wordt voor de afloop van de eerste termijn schriftelijk gemotiveerd mededeling gedaan aan de verzoeker.
3. Onverminderd artikel 4:15 van de Algemene wet bestuursrecht wordt de termijn voor het geven van een beschikking opgeschort gerekend vanaf de dag na die waarop het bestuursorgaan de verzoeker meedeelt dat toepassing is gegeven aan artikel 4:8 van de Algemene wet bestuursrecht, tot de dag waarop door de belanghebbende of belanghebbenden een zienswijze naar voren is gebracht of de daarvoor gestelde termijn ongebruikt is verstreken.
4. Indien de opschorting, bedoeld in het derde lid, eindigt, doet het bestuursorgaan daarvan zo spoedig mogelijk mededeling aan de verzoeker, onder vermelding van de termijn binnen welke de beschikking alsnog moet worden gegeven.
5. Indien het bestuursorgaan heeft besloten informatie te verstrekken, wordt de informatie verstrekt tegelijk met de bekendmaking van het besluit, tenzij naar verwachting een belanghebbende bezwaar daar tegen heeft, in welk geval de informatie niet eerder wordt verstrekt dan twee weken nadat de beslissing is bekendgemaakt.
6. Voor zover het verzoek betrekking heeft op het verstrekken van milieu-informatie:
   a. bedraagt de uiterste beslistermijn in afwijking van het eerste lid twee weken indien

het bestuursorgaan voornemens is de milieu-informatie te verstrekken terwijl naar verwachting een belanghebbende daar bezwaar tegen heeft;

b. kan de beslissing slechts worden verdaagd op grond van het tweede lid, indien de omvang of de gecompliceerdheid van de milieu-informatie een verlenging rechtvaardigt;

c. zijn het derde en vierde lid niet van toepassing.

Artikel 10

1. Het verstrekken van informatie ingevolge deze wet blijft achterwege voor zover dit:
   a. de eenheid van de Kroon in gevaar zou kunnen brengen;
   b. de veiligheid van de Staat zou kunnen schaden;
   c. bedrijfs- en fabricagegegevens betreft, die door natuurlijke personen of rechtspersonen vertrouwelijk aan de overheid zijn meegedeeld;
   d. persoonsgegevens betreft als bedoeld in paragraaf 2 van hoofdstuk 2 van de Wet bescherming persoonsgegevens, tenzij de verstrekking kennelijk geen inbreuk op de persoonlijke levenssfeer maakt.

2. Het verstrekken van informatie ingevolge deze wet blijft eveneens achterwege voor zover het belang daarvan niet opweegt tegen de volgende belangen:
   a. de betrekkingen van Nederland met andere staten en met internationale organisaties;
   b. de economische of financiële belangen van de Staat, de andere publiekrechtelijke lichamen of de in artikel 1a, onder c en d, bedoelde bestuursorganen;
   c. de opsporing en vervolging van strafbare feiten;
   d. inspectie, controle en toezicht door bestuursorganen;
   e. de eerbiediging van de persoonlijke levenssfeer;
   f. het belang, dat de geadresseerde erbij heeft als eerste kennis te kunnen nemen van de informatie;
   g. het voorkomen van onevenredige bevoordeling of benadeling van bij de aangelegenheid betrokken natuurlijke personen of rechtspersonen dan wel van derden.

3. Het tweede lid, aanhef en onder e, is niet van toepassing voorzover de betrokken persoon heeft ingestemd met openbaarmaking.

4. Het eerste lid, aanhef en onder c en d, het tweede lid, aanhef en onder e, en het zevende lid, aanhef en onder a, zijn niet van toepassing voorzover het milieu-informatie betreft die betrekking heeft op emissies in het milieu. Voorts blijft in afwijking van het eerste lid, aanhef en onder c, het verstrekken van milieu-informatie uitsluitend achterwege voorzover het belang van openbaarmaking niet opweegt tegen het daar genoemde belang.

5. Het tweede lid, aanhef en onder b, is van toepassing op het verstrekken van milieu-informatie voor zover deze handelingen betreft met een vertrouwelijk karakter.

6. Het tweede lid, aanhef en onder g, is niet van toepassing op het verstrekken van milieu-informatie.

7. Het verstrekken van milieu-informatie ingevolge deze wet blijft eveneens achterwege voorzover het belang daarvan niet opweegt tegen de volgende belangen:
   a. de bescherming van het milieu waarop deze informatie betrekking heeft;
   b. de beveiliging van bedrijven en het voorkomen van sabotage.

8. Voorzover het vierde lid, eerste volzin, niet van toepassing is, wordt bij het toepassen van het eerste, tweede en zevende lid op milieu-informatie in aanmerking genomen of deze informatie betrekking heeft op emissies in het milieu.

Artikel 11

1. In geval van een verzoek om informatie uit documenten, opgesteld ten behoeve van intern beraad, wordt geen informatie verstrekt over daarin opgenomen persoonlijke beleidsopvattingen.

2. Over persoonlijke beleidsopvattingen kan met het oog op een goede en democratische bestuursvoering informatie worden verstrekt in niet tot personen herleidbare vorm. Indien degene die deze opvattingen heeft geuit of zich erachter heeft gesteld, daarmee heeft

ingestemd, kan de informatie in tot personen herleidbare vorm worden verstrekt.
3. Met betrekking tot adviezen van een ambtelijke of gemengd samengestelde adviescommissie kan het verstrekken van informatie over de daarin opgenomen persoonlijke beleidsopvattingen plaatsvinden, indien het voornemen daartoe door het bestuursorgaan dat het rechtstreeks aangaat aan de leden van de adviescommissie voor de aanvang van hun werkzaamheden kenbaar is gemaakt.
4. In afwijking van het eerste lid wordt bij milieu-informatie het belang van de bescherming van de persoonlijke beleidsopvattingen afgewogen tegen het belang van openbaarmaking. Informatie over persoonlijke beleidsopvattingen kan worden verstrekt in niet tot personen herleidbare vorm. Het tweede lid, tweede volzin, is van overeenkomstige toepassing.

Bijlage 2 – Inventarislijst

Nr.	Document	Beoordeling	Wob	Afzender	Ontvanger
1	Expert report by Martin Witteveen, advisor international crimes to the National Public Prosecution Authority (NPPA) in Rwanda (19 september 2014)	Openbaar		M. Witteveen	-
2	E-mailbericht van M. Witteveen aan het Ministerie van Veiligheid en Justitie (26 september 2014)	Deels openbaar	10.2.e 11 lid 1	M. Witteveen	Ministerie van Veiligheid en Justitie
3	Bernard Munyagishari's request to revoke referral order (Mechanism for International Criminal Tribunals, MICT) (3 maart 2015)	Reeds openbaar, vindbaar op www.unmict.org		MICT	-
4	Diverse e-mailberichten tussen M. Witteveen en het Ministerie van Veiligheid en Justitie (13 maart 2015)	Deels openbaar	10.2.e	M. Witteveen	Ministerie van Veiligheid en Justitie
5	E-mailbericht van M. Witteveen aan het Ministerie van Veiligheid en Justitie (26 maart 2015)	Deels openbaar	10.2.a 10.2.e 10.2.g 11 lid 1	M. Witteveen	Ministerie van Veiligheid en Justitie
6	Bijlage met bevindingen omtrent uitlevering naar Rwanda bij e-mailbericht van M. Witteveen aan het Ministerie van Veiligheid en Justitie (26 maart 2015)	Geweigerd	10.2.a 10.2.e 10.2.g 11 lid 1	M. Witteveen	Ministerie van Veiligheid en Justitie
7	Diverse e-mailberichten tussen M. Witteveen, het United Nations Development Programme (UNDP) en het Ministerie van Veiligheid en Justitie (24 mei – 2 juni 2015)	Deels openbaar (deels niet onder de reikwijdte van de Wob)	10.2.e	Ministerie van Veiligheid en Justitie	M. Witteveen, UNDP
8	Diverse e-mailberichten tussen M. Witteveen, het OM en het Ministerie van Veiligheid en Justitie (1-2 juni 2015)	Deels openbaar	10.2.e 11 lid 1	M. Witteveen	OM, Ministerie van Veiligheid en Justitie
9	Additional expert report by Martin Witteveen, advisor international crimes to the National Public Prosecution	Openbaar		M. Witteveen	-

	Authority (NPPA) in Rwanda (3 juni 2015)				
10	E-mailbericht van M. Witteveen aan het Ministerie van Veiligheid en Justitie (12 juni 2015)	Deels openbaar	10.2.e 11 lid 1	M. Witteveen	Ministerie van Veiligheid en Justitie
11	Memo van M. Witteveen aan J. Arguin, Chief Appeals and Legal Advisory Division MICT (18 juni 2015)	Geweigerd	10.2.a 10.2.e 10.2.g 11 lid 1	M. Witteveen	J. Arguin, Chief Appeals and Legal Advisory Division MICT
12	E-mailbericht van M. Witteveen aan het Ministerie van Veiligheid en Justitie (19 juni 2015)	Deels openbaar	10.2.e	M. Witteveen	Ministerie van Veiligheid en Justitie

Codering weigeringsgronden:

A	Het belang van de betrekkingen van Nederland met andere staten en met internationale organisaties (art. 10, tweede lid, sub a Wob)
B	De eerbiediging van de persoonlijke levenssfeer (art. 10, tweede lid, sub e Wob)
C	Het voorkomen van onevenredige benadeling (art. 10, tweede lid, sub g Wob)
D	Persoonlijke beleidsopvattingen in stukken bestemd voor intern beraad (art. 11, eerste lid, Wob)
E	Niet onder de reikwijdte van het Wob-verzoek

doc. nr. 1

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
September 19th 2014

Introduction and Qualifications

1. I am Martin Witteveen. I was born in 1957 in Amsterdam, the Netherlands. I am a citizen of the Netherlands. I am married with three children. I am currently residing in Kigali, Rwanda. My permanent residence is in Amersfoort, the Netherlands.

2. I am a legal practitioner. I have been a practitioner almost my entire professional career. I have had two careers, one in my national jurisdiction from 1984 up until 2004 and an international career in the field of international crimes till today.

3. From 2004 till 2008 I served as an Investigation Team leader in the Office of the Prosecutor [hereafter: OTP] of the International Criminal Court [hereafter: ICC]. I was leading the team for the investigation into the situation of Northern Uganda, primarily the case against Joseph Kony et al. As Investigation Team leader I led a team of around ten investigators conducting a criminal investigation into alleged war crimes and crimes against humanity committed by the Lord's Resistance Army [LRA] in Northern Uganda. I was involved in the planning and execution of the investigation and participated in the decision making by senior management. I conducted multiple field missions in [Northern] Uganda with a primary responsibility for witness protection, organization and networking. During my tenure in the OTP, I also developed a network with national jurisdictions aimed at cooperation and developing investigation standards.

4. Between 2008 and 2012 I was an investigation judge in the district court in The Hague, the Netherlands for international crimes. As investigation judge I conducted pre-trial investigations in criminal cases of international crimes for which the district court in The Hague is competent. During the pre-trial investigations, I heard numerous witnesses, mostly abroad during which the prosecution and the defense team were present and had the opportunity to examine the witnesses. During these years, I conducted investigations into two criminal cases of genocide in Rwanda, one criminal case against the leadership of the Tamil Tigers in the Netherlands, one criminal case of an Afghan general allegedly involved in atrocities during the 80's in Afghanistan as well as various cases of human trafficking around the world. I have conducted approximately 30 field missions to Rwanda, each mission one to two weeks in length. Other field missions were conducted in countries such as Kenya, Malawi, Mali, Benin, South Africa, India, Indonesia and many other countries in Europe and elsewhere.

5. From 2012 till recently I worked for a Rule of Law mission of the European Union in Palestine, named EUPOL COPPS. My responsibility was to advise and assist the Palestinian Prosecution in capacity building.

6. Since June 24th 2014, I am based in Kigali, Rwanda. I am an Advisor on International Crimes for the National Public Prosecution Authority [hereafter: the NPPA], in Rwanda. I specifically work with the International Crimes Unit [Hereafter: ICU], consisting of a number of prosecutors who represent the government during trials as well as the Genocide Fugitive Tracking Unit [hereafter: GFTU], which investigates cases of genocide whereby the suspect is believed to be outside of Rwanda and tracks the suspects abroad and prepares indictments and extradition requests.

7. I am based in the office of the GFTU in Kigali, Rwanda. I have a room and a desk amidst the staff of the Unit. The ICU is located in the Headquarters of the NPPA about a mile away. I am fully embedded in the NPPA, I have been provided equipment, such as a laptop, a security pass and have access to files. Whenever there is a court session I try to attend together with the staff of the units. I have access to any person in and outside Rwanda for discussion and collecting information in the context of my work. The Prosecutor-General is aware of this and has no objections against my range of persons for consultations even if these persons are critical of the NPPA or any other authority in Rwanda.

8. I am not financially dependent on the NPPA or any other authority in Rwanda. This assignment has an initial duration of one year, renewable and is funded by the government of the Netherlands. I am fully paid in all aspects by the Dutch government. For technical reasons I am functionally embedded in the UNDP in Rwanda. They provide me logistical support such as their health and security systems, IT technology etc. and pay my duty travels.

9. In my national career, between 1984 and 2004, I served as a national prosecutor mainly in the field of organized crime. During these years I served as a prosecutor on loan to the island of St. Martin on the Dutch Antilles. In my last years as prosecutor I served as national prosecutor for the fight against synthetic drugs.

10. Recently, I have developed other responsibilities outside the scope of my official work. Since 2011, I have served as a member on the Board of a large NGO with headquarters in the USA and field offices in almost twenty countries in the developing world. The NGO, named International Justice Mission [IJM], aims to support national authorities to fight violent crimes, such as human trafficking and bonded labor through developing criminal investigations.

11. I am also on the Board of Advisors of a project by the American Bar Association [ABA] on corporate liability for international crimes and other violations of human rights. This year I also drafted an investigation manual for Transparency International.

12. I have published scientific articles on criminal investigations in international crimes both nationally and internationally[1].

Scope of this report

13. I have drafted this report on the request of John Bosco Siboyintore, the Head of the Genocide Fugitive Tracking Unit [GFTU] of the NPPA. Siboyintore requested me to share my experiences on investigations conducted in Rwanda with the Crown Prosecution Service [CPS] in London, England. John Bosco Siboyintore coordinates the efforts for tracking and extradition and in this capacity is responsible for the submission of the extradition request to the United Kingdom in the case against Dr. Vincent Bajinya and others. He is in contact with the Crown Prosecution Service [CPS] of the United Kingdom.

14. This report and the assertions therein are solely based on my own knowledge and experiences accrued during my work in the ICC, as investigation judge, primarily in the Rwandan cases and during my time in Kigali, Rwanda. I will base myself on my own primary sources: my factual observations, events I was personally involved in, emails, personal conversations and relevant documents in my own cases. I will use the knowledge and information I accrued over the years through my contacts in the international network of authorities involved in investigating, prosecuting and adjudicating cases of international crimes. I will make references to authoritative documents such as verdicts and rulings in the ICTR as well as in national jurisdictions.

15. I will as much as is possible not rely on secondary sources, such as reports from non-governmental organizations, institutions, news articles etc. I assume these are known to the court and the court will know how to evaluate them.

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[1] *"Closing the gap in truth finding: from the facts of the field to the judge's chamber"*; In: Collective Violence and international criminal justice, An interdisciplinary approach, Edited by: Alette Smeulders, Intersentia, 2010;
"Dealing with Old Evidence in Core International Crimes Cases: The Dutch Experience as a Case Study", in Morten Bergsmo and CHEAH Wui Ling (editors), Old Evidence and Core International Crimes, FICHL Publication Series No. 16 (2012), Torkel Opsahl Academic EPublisher, Beijing;
"De rechter-commissaris in WIM-zaken", Strafblad 2009, 3 [The investigation judge in cases of international crimes];
"De nieuwe battleground in ons strafproces: hoe toetst de rechter de betrouwbaarheid van getuigenverklaringen", Strafblad, November 2012 ["The new battleground in our criminal process: how does the judge test the reliability of witness statements"].

16. I will explicitly refrain from making observations on the human rights and political situation in Rwanda. Firstly, that is not my expertise. I have never done any extensive analysis on these topics nor do I have first-hand information on these situations. I do not believe the court is assisted when I make these observations based on secondary sources, which in my judgment has no added value. Secondly, I do not see how these general observations on the human rights and political situation can help the court in making a legal determination whether Dr. Bajinya and others will receive a fair trial in Rwanda. It is my sincere belief that inferences made from these general observations, whatever the credibility of these observations are, have no relevance for this individual case. I have analyzed court rulings on extradition requests in national jurisdictions and found that the judges in those jurisdictions have equally disregarded allegations of a political nature, alleged human rights abuses and inferences made on the basis of these political observations.

17. Wherever I use the term "genocide [in Rwanda]" or "Rwandan genocide" I mean the genocide against the Tutsi ethnicity as defined by consistent jurisprudence of the ICTR.

General observations

18. In recent years a number of cases against Rwandans for their alleged role in the genocide have been transferred to Rwanda. The International Criminal Tribunal for Rwanda [hereafter: ICTR] has applied the so called 11bis Rule and transferred six cases, of which two in which the individual defendant has been physically transferred to Rwanda[2]. Apart from these six cases, in 2005 the Prosecutor of the ICTR has transferred[3] another 25 cases to the Prosecutor General of the NPPA in Rwanda of suspects who were investigated by the Prosecutor of the ICTR but never indicted[4]. Other jurisdictions have extradited and sometimes expelled or deported Rwandan citizens to Rwanda for prosecution[5]. In these jurisdictions courts have made rulings about the legality of these

[2] The cases of Pheneas Munyarugarama, Fulgence Kayishema, Bernard Munyagishari, Aloys Ndimbati, Ladislas Ntaganzwa, Charles Ryandikayo, Charles Sikubwabo, and Jean Uwinkindi, who all had been indicted by the ICTR, are transferred to Rwanda. Munyagishari and Uwinkindi are both physically transferred to Rwanda and standing trial.

[3] By letters of 23rd February 2005 and 26th July 2005 to the Prosecutor of the NPPA in Rwanda. Letters in possession of the author.

[4] The staff in the GFTU has informed me there in total some 50 cases transferred by the Prosecutor of the ICTR over the years but I have not been able to track them as by closing of this report.

[5] In 2012 Leon Mugesera was deported from Canada and is now charged in Rwanda with incitement to commit genocide. In 2013 Charles Bandora was extradited from Norway to Rwanda and is now in trial for involvement in the genocide. In 2014 Emmanuel Mbarushimana was extradited to Rwanda from Denmark and will be charged with involvement in the genocide.

extraditions[6]. As a result, there is now a growing body of jurisprudence that sets out the legal boundaries of extradition of fugitives to Rwanda for prosecution and responds to various issues related to the extradition such as the question whether the defendants will receive a fair trial in Rwanda.

19. Although each extradition is judged on the basis of the legal parameters of each individual jurisdiction, a number of tests on principles surfaces as paramount, certainly in Europe as these jurisdictions are governed by the rights of a defendant as enshrined in the European Convention on Human Rights and applied and interpreted by the European Court of Human Rights.

20. Based on the case law as outlined above, in summary, the courts in the respective jurisdictions are satisfied with at least the following issues:

    a. The laws in Rwanda have been sufficiently updated and modernized to allow the transferred cases to be tried according to an international standard[7].
    b. Rwanda established jurisdiction for the crime of genocide in 1996 retroactively for the period of 1994 in full accordance with international criminal law and international jurisprudence[8].

In other jurisdictions rulings have been made to extradite but the person is not transferred yet. In 2009 the Minister of Justice in Sweden decided to extradite Sylvere Ahorugeze after the Supreme Court in Sweden in 2009 had ruled that he could be extradited to Rwanda. Ahorugeze is now in Denmark. The European Court of Human Rights in its ruling of November 27th, 2011 upheld the decision of the Swedish minister to extradite Ahorugeze. In the Netherlands, in June 2014 the Supreme Court upheld a decision by the district court in The Hague of December 2013 to approve the extradition of Jean-Claude Iyamuremye to Rwanda on charges of genocide. Also in June of 2014 the district court in The Hague approved another extradition to Rwanda, that of Jean Baptiste Mugimba. In Norway, a second case of extradition is pending. Eugene Nkurianabahizi's extradition is approved by the district court in Oslo and the case is now on appeal.

[6] ICTR referral decision Uwinkindi, June 20th 2011 at: http://www.unictr.org/Portals/0/Case/English/Uwinkindi/decisions/110628.pdf
ICTR referral decision Munyagishari, June 6th 2012 at: http://www.unictr.org/Portals/0/Case/English/Munyagishari/decisions/120606.pdf
ECHR in: Ahorugeze, October 27th 2011, at: http://www.asser.nl/upload/documents/20130116T105021-ECtHR%20CASE%20OF%20AHORUGEZE%20v.%20SWEDEN%2027-10-2011.pdf
Supreme Court Sweden re; *Ahorugeze*, May 26th 2009.
Supreme Court Denmark re: *Mabarushimana*, November 6th 2013.
Oslo District Court re: *Bandora*, July 11th 2011.
Supreme Court the Netherlands re: *Iyamuremye*, June 17 2014 and District Court The Hague re: Iramuremye, December 20th 2013.
District Court The Hague re: *Mugimba*, July 11th 2014.

[7] The guarantees Rwanda provides are codified in the so-called Transfer Law, more specifically in article 14 of that Law. Under this Law, the transfer from the ICTR to Rwanda of the Uwinkindi and Munyagishari cases has taken place and the cases are now adjudicated.

c. The death penalty has been abolished and replaced by life imprisonment with the possibility of amnesty[9].
d. Prison facilities, to which the transferred defendants will be subjected, are of international standards. ICTR monitor reports indicate that various problems in the prison facilities have been solved[10].
e. The authorities have guaranteed that the transferred defendants will receive a fair trial in all aspects.
f. The defendant will have the free choice of a lawyer, who can be a national from another country than Rwanda[11].
g. The *Transfer Law* shields the defense counsel against prosecution for denial of the genocide.
h. Problems with payment to defense counsel are solved[12] as well as initial difficulties for defense counsel to speak privately with their clients.
i. The *Transfer Law* guarantees the rights for the defendant to cross examine prosecution witnesses and hear evidence for the defense[13].
j. Effective witness protection has been established by both the Prosecution Service and the High Court in Rwanda separately for both prosecution and defense witnesses.

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[8] ECHR, Dimsic v. Bosnia and Herzegovina, 10 April 2012, Allication No. 51552 10 [para 23] and ECHR, Maktouf and Damjanovic v. Bosnia and Herzegovina, 18 July 2013, Application Nos. 2312.08 and 34179.08 [para. 55]. Furthermore, in 1975, Rwanda had acceded the Genocide Convention of 1948, but genocide was punishable before that according to international customary law. See ICJ, Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, 28 May 1951, 1951 ICJ Reports p. 23; ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Chamber Judgement, 21 May 1999, Case No. ICTR-95-1-T (para. 88); ICTY, Prosecutor v. Jelisić, Trial Chamber Judgement, 14 December 1999, Case No. IT-95-10-T (para. 60); ICTY, Prosecutor v. Krstić, Trial Chamber Judgement, 2 August 2001, Case No. IT-98-33-T (para. 541).

[9] Organic Law no. 31/2007 of 25th July 2007.

[10] See ICTR monitor reports in the transfer cases of Uwinkindi and Munyagishari, found at: http://unmict.org/cases.html under the respective names of the defendants. In the monitoring report in the case of Uwinkindi dated July 14 2014, it is stated that Uwinkindi has expressed to the monitors that ever since the new Prison Director has been appointed, everything is running smoothly. See: http://unmict.org/files/cases/uwinkindi/other/en/140704.pdf, para. 36.

[11] The Rwandan Bar Association can accredit a foreign defense lawyer who will then be eligible to represent defendants in courts in Rwanda and afforded the same rights and enumerations as indigenous defense lawyers.

[12] The Ministry of Justice has decided that defense attorneys will receive a lump sum of 15.000.000 RwFr for each case. This decision has been submitted by the Minister to the Rwandan Bar Association in a letter dated July 11, 2014. In the letter, the Minister requests the Rwandan Bar Association to forward this decision to its members and compile a list of defense attorney who are willing to take these cases. The letter is in Kinyarwanda and in possession of the GFTU. Mr. Siboyintore has summarized the letter for me in English.

[13] This issue will be further elaborated in para 30.

21. In addition to all the amendments of Rwandan laws to bring them up to the level of an international standard, The Supreme Court Law was also amended to enable the courts to have a foreign judge sit on the court.

22. Among all the principles and tests, the test whether the defendant will receive a fair trial in Rwanda has taken center stage.

23. The right to a fair trial is multifaceted and comprises of many rights. The extradition request points to the Rwandan legislation in this respect and alleges that these rights are guaranteed in the Rwandan law, including the Transfer Law, which governs criminal cases received from foreign jurisdictions.

24. To rebut the assertion that the defendants will receive a fair trial, the defense will have to make a concrete and convincing argument these defendants will not receive a fair trial[14]. It will not suffice to make general allegations on the human rights and political situations, whatever the credibility of these allegations are. References to other criminal cases or alleged threats to other persons are not so relevant. What is relevant is information that is sufficiently credible to believe that Bajinya and others are in jeopardy of receiving an unfair trial. Currently five defendants are standing trial in Rwanda on genocide charges after their cases have been transferred to Rwandan authorities. Prior to being extradited or transferred to Rwanda during court procedures, each of these defendants has also alleged that their rights would be violated, they would be charged with political crimes etc. In none of these cases, these allegations have become reality.

25. Similarly, it is not so relevant to allege that politicians in Rwanda have made public comments on the guilt of suspected persons in Rwanda before their guilt or innocence was established in a court of law. Every prosecutor or judge in a national jurisdiction will have had experience with this, even to an extent to say that what happens in Rwanda appears rather bleak in the face of the publicity that some defendants in western countries have to face. The relevant question is not what politicians say, but whether

[14] It should be borne in mind that in extradition cases the onus is on the defense to make a credible case that the defendants will not receive a fair trial. The burden of proof should not be reversed on the receiving state. Additionally, it should not be the practice to make negative inferences on a lack of information from the receiving state. See also *Mark A. Drumbl, Prosecution of Genocide v. The Fair Trial Principle, Comments on Brown and others v. The Government of Rwanda and the UK Secretary of State for the Home Department*, page 304 "Evidence and Burden of Proof". In: Journal of International Criminal Justice 8 (2010), 289-309. Found at: http://law.wlu.edu/library/articles/8JIntlCrimJust289.pdf

there is credible evidence that judges lose their independence, neutrality and objectivity in the face of this publicity.

26. In conclusion on this general paragraph, I state that I have never seen credible evidence in recent years or even since the Bizimungu incident nor have I witnessed or experienced events or occurrences in Rwanda indicating that any authority in Rwanda has interfered in specific criminal cases more specifically in cases of genocide, fired judges because of undesired verdicts, and instructed the judiciary to do something or not to do something in a criminal case.
    Similarly, I have never seen any credible evidence in recent years nor have I witnessed or experienced events or occurrences in Rwanda suggesting that judges in a specific criminal case, more specifically in cases of genocide, have lost their independence, neutrality and objectivity. I cannot see why assertions about an autocratic, repressive regime or whatever qualification is used, will lead to an unfair trial for Bajinya and others.
    I have not seen any credible evidence or witnessed events or occurrences indicating that Bajinya and others are threatened by government officials or accused of political crimes.
    I have not seen any credible evidence that leads to believe that Bajinya and others will face charges of other crimes than their alleged involvement in genocide, which is not a political crime.

27. The rule of specialty will prohibit charges of a different nature than mentioned in the extradition request. None of the five transfer defendants, currently standing trial in Rwanda have been charged with any other crime than authorized by the extraditing country[15].

28. Equally, the case against Bajinya and others is scheduled to be tried not by a *gacaca* court but a specialized chamber in the High Court of Rwanda, whose judges will be appalled to hear that they are accused of bias and loss of independence.

29. In summary: I profoundly believe there is no basis for allegations of unjustly and wrongly applying criminal justice, violating all sorts of rights of individuals in Rwanda and making negative inferences on how Banjinya and others will be treated on the basis of secondary sources on the political and human rights situation in Rwanda. To the

[15] In Uwinkindi, after his transfer to Rwanda, credible evidence has been submitted by counsel for the victims to the Prosecutor – General of the NPPA that Uwinkindi has committed rape during the genocide. Nevertheless, the prosecutor has not added this crime to his indictment for the reason that the ICTR had not transferred Uwinkindi on that charge.

contrary, I believe there is a vast body of evidence and other information pointing towards the conclusion that Rwanda has built a functioning and credible justice system adjudicating genocide cases transferred from other jurisdictions, has been very cooperative in dealing with investigations and trials in other countries and has respected all the fair trial rights. I will outline in detail my own experiences first before giving an overview of experiences in other countries.

Defense witnesses and credibility of witnesses

30. One of the most fundamental fair trial rights is the right to present evidence for the defendant, examine prosecution witnesses and present defense witnesses. It is alleged that Rwandan authorities will discourage defense witnesses from providing evidence or worse and interfere in the process of collecting evidence for the defense, including hearing witnesses. As a result defense witnesses, allegedly, will be too scared to testify in trial in Rwanda due to a fear of reprisals or even being killed.

31. Maybe even more fundamental is the persistent and constant criticism that prosecution witnesses are biased, intentionally lie and conspire with other witnesses to nail down the defendants, all of this orchestrated, inspired and even incited by the Rwandan authorities.

32. It is my profound conviction that these allegations lack any factual basis and that, throughout the years, practice on the ground has shown the contrary.

33. In this part of the report I will share my experiences during my work in two criminal cases of the Rwandan genocide and highlight the role of the Rwandan authorities. In the remainder of this part of the report I will summarize experiences in other jurisdictions, including how courts have dealt with these allegations.

34. First of all, it is worth noting that the Transfer Law provides for the defense to cross examine prosecution witnesses and have witnesses for the defense heard[16]. The provisions in the Transfer Law on this point far exceeds the rights of the defense in ordinary cases in Rwanda, based on the Law relating to the Code of Criminal procedure, which has a more civil law approach. In the current trials of the five transferred

[16] Transfer Law, Article 14 and 14bis of Organic Law No. 11/2003 of 16/03/2007, concerning transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States, citing the Body of Principles which guarantees the same standards both upon transfer and after conviction. Witnesses may now testify in three more ways in addition to providing viva voce testimony before the relevant High Court in Rwanda: via deposition in Rwanda; via video-link taken before a judge at trial, or in a foreign jurisdiction; or via a judge sitting in a foreign jurisdiction

defendants mentioned earlier, defense witnesses have not be heard as the trials are not in that phase yet[17]. The defense in Uwinkindi, however, has been afforded a budget to conduct a pretrial defense investigation with the purpose of compiling a witness list[18].

35. It also needs to be highlighted that the European Court of Human Rights, judging in individual criminal cases, has not acknowledged an unlimited right to hear witnesses. The ECtHR respects the legal systems of individual member states and has formulated minimum rules in this respect[19].

Experiences from the Netherlands

36. As a background it is necessary to first explain that under the Dutch legal system, at least in serious cases, there is a pretrial judicial investigation phase led by the investigation judge. The investigation judge has its own office in the district court and by law is banned from participating in the trial in the same case. Although the witness list is to a great extent determined by the trial court during pretrial sessions, the investigation judge, at least me in cases of international crimes, has a certain degree of freedom to decide which investigation is necessary. The pretrial investigation, conducted by the investigation judge, is typically the forum in which the defense can exercise its rights. The defense can submit its requests for investigations to the investigation judge directly and approach the investigation judge formally and informally for all matters during the investigation.

37. For the most part, the pretrial investigation consists of hearing witnesses during formal hearing sessions in the presence of the defense and the prosecution. Statements are recorded with the assistance of a clerk/assistant and if necessary an interpreter assists in translation during the hearing.

38. An investigation judge has the authority to hear witnesses in other jurisdictions, conduct crime site visits, appoint expert witnesses etc. The investigation judge drafts his own requests for assistance to authorities in foreign jurisdictions and if necessary, confers with these authorities on the conditions under which hearings abroad take place.

The case of Yvonne Ntacyobatabara

[17] In the case of Mugesera the defense submitted a list of 57 defense witnesses on May 30th 2014.
[18] The defense in Uwinkindi will present a list of tenths of witnesses, most of who reside abroad. The defense witnesses residing in Rwanda will be examined by the Court on October 1st with a view of protection measures.
[19] See e.g. ECHR 29 September 2009 *Delili v. Germany,* appl. No. 15065/05

39. Yvonne Ntacyobatabara, a Dutch citizen of Rwandan descent, was arrested in June of 2010 in the Netherlands and charged with multiple counts of genocide and war crimes. Her case was tried by the District Court in The Hague at the end of 2012. She was convicted in March 2013 on only the charge of incitement to commit genocide and sentenced to six years and eight months of imprisonment, the maximum sentence possible.

40. Between June 2010 and September 2012, I, in my role as investigation judge, conducted a pretrial investigation, as described above, during which I heard 72 witnesses and conducted other investigations. I heard the vast majority of those witnesses in Rwanda with the assistance of the NPPA in Rwanda. Eighteen of the 72 witnesses were defense witnesses. Four of the eighteen defense witnesses were heard in Kigali, Rwanda. I heard the other defense witnesses in South-Africa, Malawi, Kenya, Belgium, Canada, the United States and in my office in The Hague. I conducted in total around thirty missions to the various countries to conclude all the hearings, most of them to Rwanda.

41. The hearings of the witnesses in Rwanda, both prosecution witnesses and defense witnesses, were conducted on the basis of a general request for mutual legal assistance which I had drafted and signed and which was sent through diplomatic channels to the authorities in Rwanda. The execution of the request was signed off by the then Prosecutor-General, Mr. Martin Ngoga.

42. Before the commencement of the first hearing, I concluded an agreement with the Genocide Fugitive Tracking Unit [GFTU] of the NPPA that I was to be given freedom to hear the witnesses in a manner that I choose and was consistent with the requirements under Dutch law. The Rwandan authorities would not be present during the hearings. The hearings would be supported by the Rwandan authorities in terms of logistical support and by the Witness and Victim Protection and Support Unit [hereafter: WVPSU] of the NPPA.

43. All the hearings of the witnesses were conducted without the presence of a representative of the NPPA. In my opinion, this constitutes a rather unique situation. During all my years of service in the justice sector, only very few countries have allowed me to hear witnesses on my own. Certainly, European countries do not allow this.

44. In practice, most witnesses were contacted by the Dutch Police, which assisted me in organizing the hearings. This was not a matter of principle but a matter of limited

capacity on the side of the GFTU as they sometimes receive multiple rogatory commissions at the same time. The WVPSU supported the witnesses, unless they declined the support, in terms of supplying food and, if necessary, lodging. All the witnesses were requested to speak to a psychologist prior to the hearing and after the hearing. Most of the witnesses did so, which was facilitated by the WVPSU .

45. All the hearings were conducted in a meeting room in the High Court in Kigali. On my specific request a court building was made available for the hearings as I did not want the witnesses to be heard in a police building or a building of the Prosecution Service. This was facilitated by the GFTU. One defense witness was heard in a conference room of a hotel in Kigali, Rwanda on her request.

46. During the hundreds of hours of witness hearings there was no single occasion where Rwandan authorities have intervened in a hearing or exerted any influence on either me or the witnesses. None of the witnesses has expressed concern about their safety or security or about fear for reprisals from Rwandan authorities. Some witnesses have shown signs of anxiety, but these were, in my observation, not caused by Rwandan authorities but because of their relationship with the case in general or the defendant specifically. Some witnesses feared reprisals from the defendant or associated persons.

47. Almost all of the witnesses had no idea in which case they were going to testify. They seemed to be totally unprepared and not informed in which case they were testifying. At the beginning of each hearing I explained to the witnesses the procedures of the hearing but deliberately refrained from informing them the name of the defendant in whose case they were heard. With the exception of a few, none of them seemed to be interested to know the name and focused on the events rather than the name.

48. All the observations above apply equally to prosecution and defense witnesses. I have not observed any difference in general attitude from defense witnesses vis-à-vis prosecution witnesses. One defense witness, who was heard in Rwanda, was the daughter of a prosecution witness. The other witness, heard in Rwanda, was a friend of the defendant and the Rwandan ambassador to Canada at the time of the hearing. Her cooperation was only possible with the explicit agreement of the government of Rwanda, which authorized her to testify before me, knowing she would be a defense witness. The other defense witnesses heard in Rwanda were friends of the defendant.

49. The other defense witnesses, all of Hutu ethnicity, were heard in the countries mentioned, after extensive preparation, using formal procedures and sometimes intense lobbying with the local authorities.

50. Three of the children of the defendant were heard, one of them in Nairobi, Kenya, where she lived. They explained they did visit Rwanda on occasion for mostly family and business reasons. They did not show any sign of anxiety or fear from the Rwandan government.

51. The witness who was heard in South-Africa was a refugee in South-Africa and was on a wanted list of the Rwandan authorities. Despite his difficult circumstances he was more than willing to testify before me, knowing that the authorities in South-Africa were aware of the hearing and his status.

52. One witness, who was heard in Nairobi, Kenya, was a high level representative of the *Coalition pour la Defense de la Republique* [CDR] at the time of the genocide. He lived under a false identity in an unnamed African country and also appeared on a wanted list in Rwanda. Despite that, he was willing to be heard in Nairobi after receiving guarantees for his security.

53. The authorities in Malawi authorized and assisted in the hearing of two other defense witnesses who had refugee status in Malawi, but were willing to cooperate.

54. The witness in the United States was a neighbor of the defendant at the time of the genocide. She was very reticent to testify, but accepted to be heard after having received explanation about the hearing.

55. The two witnesses in Canada were also neighbors of the defendant at the time of the genocide. They had no concern whatsoever about testifying.

56. The witness who was heard in Belgium was the son of another neighbor, who, according to a number of witnesses, was implicated in a killing of a Tutsi man on behalf of the defendant. This witness was clearly and visibly concerned due to the allegations that were made.

57. The witnesses who were heard in my office in The Hague were less relevant for the purpose of this report. One of these witnesses was Paul Rusesabagina, who was the manager of the Mille Collines hotel during the genocide and a friend of the defendant.

58. The authorities in Rwanda were aware that I heard a number of defense witnesses abroad. However, they never requested me any information about these hearings, nor asked me for their identities or a copy of their statements. During the trial of Mrs. Ntacyobatabara before the district court in The Hague, all the statements were summarized before the defendant. Most of the time a representative of the Rwandan embassy in The Hague observed the trial. I have never received any indication that the information discussed during trial was submitted to the NPPA in Rwanda. It was never discussed with me, indicative of the lack of interest on the topic on the side of the Rwandan authorities.

59. In summary, the assistance rendered to me by the NPPA during the investigations and hearings in Rwanda, was complete, professional, of high standard and absent of any undue influences or interferences. The circumstances under which I could conduct hearings and other investigation activities created the best possible conditions in which I could pursue truth finding in these complex cases, which enabled the trial judges in the district court in The Hague to adjudicate the case and render their judgment. The NPPA has set a high standard and were exemplary for how other countries could also cooperate in these matters.

60. During the trial of Yvonne Ntacyobatabara, the defense pled extensively on the reliability and credibility of the witnesses. The defense claimed there was a conspiracy within an extensive group of witnesses aimed at giving false evidence against the defendant driven by financial motives. Through a conviction these witnesses were alleged to benefit in civil procedures before the local gacaca court where they claimed financial compensation from the defendant. Moreover, the defense claimed that the incriminating witnesses were lying and invoked a study by an American Law Professor who has researched witness evidence in various tribunals, such as the ICTR[20].

61. In its verdict, the District Court in The Hague has rejected these defense arguments. In an extensive ruling the court explains why it has come to the conclusion that "the position of the defense concerning the existence of a group of persons that made the agreement to render false statements about the defendant does not surpass the level of speculation and suggestion"[21].

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[20] Nancy Combs, *Fact Finding without Facts, The Uncertain Evidentiary Foundations in International Criminal Convictions*. Cambridge University Press, 2010.

[21] District Court The Hague in: Yvonne Ntacyobatabara [Basebya], March 1, 2013. Found at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:8710&keyword=09%2f748004-09, Chapter 8 "Assessment of the evidence" and Chapter 9 "General meritorious defense".

62. In its ruling, the Court defines an extensive framework in which they evaluate the credibility and reliability of the witnesses and their statements. Factors relevant for the court include the personality of the witness, its relationship to the defendant and the facts, possible motives of the witness and other more general assessment criteria such as consistency [internal and external], the circumstances under which the statement was provided and plausibility.

63. Based on this framework the court then assesses the witnesses and their statements and either come to the conclusion they are reliable or disqualify them. The court is in a position to make these extensive evaluations because the hearings of the witnesses have included all these aspects. Moreover, the defense has been given the opportunity to examine witnesses in support of the views of the defense.

The case of Joseph Mpambara

64. Joseph Mpambara, a Rwandan citizen with fugitive status in the Netherlands, was convicted by the Court of Appeal in The Hague, Netherlands in July 2011 to life imprisonment for his role in several attacks and the killing of Tutsis during those attacks at the time of the genocide.

65. During the trial in first instance and in the appeals procedure a pretrial investigation was conducted during which tens of witnesses were heard. During the appeals phase, I, in my role as investigation judge, heard 32 witnesses. Almost all of these witnesses were victim witnesses and they were heard in Kigali, Rwanda. Three witnesses were defense witnesses. They were convicts of the ICTR who were serving their sentences in UN prisons in Mali and Benin. Among them was the former prime minister of Rwanda at the time of the genocide, Jean Kambanda.

66. Everything that I have stated in the above during the witness hearing in the case of Yvonne Ntacyobatabara applies to the hearings in the case of Mpambara. I heard the witnesses in the Supreme Court Building in Kigali, Rwanda. The ICTR convicts were heard after extensive preparations and cooperation by both national authorities as well as the ICTR.

67. In its ruling[22] the court has found evidence that two of the incriminating witnesses in the case have disappeared and could not be heard by the investigation judge. Moreover, the court found that great pressure has been exerted on a number of witnesses not to tell the truth and the court is convinced that the disappearance and pressure has come from family members of the defendant.

68. The court has defined a similar framework for the assessment of the reliability and credibility of the witnesses as defined in the Yvonne case, explained above. The court has performed the assessment and found some witnesses to be reliable and has disqualified others.

Information from other jurisdictions

69. The Netherlands are by no means the only jurisdiction where cases of the Rwandan genocide have been investigated and adjudicated. A number of countries, mainly in Europe, have done similar cases. A number of these cases will be summarized hereunder.

Finland

70. In June of 2010 a court in Finland convicted Francois Bazaramba to life imprisonment on multiple charges of genocide. During the trial, 68 witnesses were heard. The entire court was moved to Kigali, Rwanda and later to Dar es Salaam, Tanzania to hear witnesses in the case. In Kigali, 38 witnesses were heard with the full cooperation of the NPPA and in Dar es Salaam, fifteen witnesses were heard. The fifteen witnesses were defense witnesses. During these hearings the defendant participated via a video link with his location in Finland[23].

71. The Finnish police conducted a pretrial investigation during which 124 witnesses were heard, ten of whom were defense witnesses. Under Finnish law only rarely can a defense attorney call a defense witness to testify in trial. The defense attorney will have to request the police to hear the witness first in the presence of the defense attorney. In this fashion, the police heard these ten witnesses in various countries in Africa such as Burundi, Zambia, South-Africa and Congo Brazzaville. One witness was heard in Rwanda. The defense had informed the police that this witness did not want to be heard in

[22] District Court The Hague in: Joseph Mpambara, March23, 2009. Found at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2009:BK0520&keyword=BK0520, Chapter 5 "The Investigation", para. 31 and 32.

[23] See the press release by the court at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Finland/Bazaramba_Press_Release_EN.pdf

Rwanda but chose to be heard in Burundi. Upon arrival in Burundi, the witness angrily rejected to be heard in Burundi and demanded the hearing would be relocated to Rwanda, which was acceded to[24].

72. Mr. Elfgren has supplied the NPPA a statement about his experiences with Rwandan authorities during the investigation[25].

73. The defense in Bazaramba has alleged during the trial that the accusations against Bazaramba were fabricated and politically motivated by the current Rwandan government to consolidate its domination. The court in Finland which adjudicated his case, has carefully examined these allegations but has not found a factual basis for them[26].

Canada

74. In Canada, two Rwandans were tried before a Canadian court on charges of genocide. On May 22nd, 2009 the Superior Court in Montreal, Quebec, Canada convicted Desire Munyaneza to life imprisonment for his role in the genocide in Rwanda. This conviction was recently upheld by the Appeals Court of Quebec, Canada on May 7th 2014. On July 5, 2013 the Superior Court in Ontario, Canada found Jacques Mungwarere not guilty of his alleged role in the genocide in Rwanda and acquitted him.

75. In the case of Desire Munyaneza the court heard evidence from 30 prosecution witnesses, fourteen of whom were heard by the judge in the presence of the defense and the prosecution in Kigali, Rwanda. The other fourteen witnesses were heard in court in Montreal, Quebec, Canada. The Court heard 36 defense witnesses. 24 of the defense witnesses were heard abroad: three in Paris, France, seven in Kigali, Rwanda and fourteen in Dar es Salaam, Tanzania. The other twelve defense witnesses were heard in court in Montreal, Quebec, Canada[27].

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[24] Info based on email exchange July 2014 between author and Thomas Elfgren, Head of the National Bureau of Investigation of the Finnish Police and the lead investigator.

[25] Elfgren's statement has been submitted to the CPS in London and is also in possession of the NPPA in Kigali and the author.

[26] District Court Porvoo in: Bazaramba, June 11,2010. Found at: http://www.internationalcrimesdatabase.org/upload/ICD/Upload973/Bazaramba%20Judgment%20-%20part%20B.pdf, Chapter 4 "On the Overall Reliability of the Evidence", more specifically, para. 4.6. "Political reasons" and 4.8. "Personal disputes and other motives".

[27] See: *Judgment in the case of Desire Munyaneza*, May 22, 2009, Chapter II: TRIAL. Found at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Canada/Munyaneza_Judgement_22-5-2009_EN.pdf

76. All commissions that were undertaken either by the Canadian Police, the Prosecution Service, the defense team as well as the commission conducted by the Court in Montreal to hear all the witnesses, both defense witnesses as well as prosecution witnesses, were supported by the NPPA in Rwanda. They provided full support such as security arrangements, availability of witnesses including detainees and logistical support, including facilities. The transfer of ten witnesses from Rwanda to Canada was also supported by the Rwandan Witness Protection Unit, who accompanied the witnesses on their journey to Canada[28].

77. The defense team had full access to persons in Rwanda they wanted to speak, prior to being heard as witnesses. The Office of the Crimes against Humanity and War Crimes Section of the Ministry of Justice in Ottawa, Canada requested to the Rwandan authorities that the defense be afforded the same treatment and cooperation as was provided to the Prosecution Service[29]. Defense counsel was in direct contact with the NPPA in Rwanda in processing requests and providing access to witnesses to the defense. No incidents were reported[30] and the court in the case made no adverse findings about the treatment of defense witnesses.

78. During the trials of Munyaneza the defense, especially in appeals, as in the cases in the other foreign jurisdictions, alleged that the evidence provided by defense witnesses was tainted due to collusion, contamination and conspiracy among a number of witnesses. The Court of Appeals examined these allegations but did not find sufficient evidentiary basis for these allegations to take them seriously and found the defense allegations speculative[31].

79. In the case against Mungwarere, 25 witnesses testified for the defense. All witnesses who resided in Rwanda, gave their testimony from outside Rwanda with the cooperation of the Rwandan authorities. Other defense witnesses who resided in countries outside Rwanda testified from their country of residence in full cooperation of the authorities in those countries[32]. In preparation for the hearing of the defense

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[28] Information obtained from the GFTU in the NPPA in July 2014.

[29] Letter dated July 12th 2010 by Terry Beitner, Director and General Counsel of the Crimes Against Humanity and War Crimes Section of the Ministry of Justice in Ottawa, Canada to the NPPA, Rwanda. Letter in possession of the author.

[30] Before the trial one prosecution witness complained to have been harassed by a relative of the defendant.

[31] Court of Appeal, Province of Quebec, Montreal in: Desire Munyaneza, May 9, 2014, page 51 "The Judge's assessment of the evidence", especially par. iii on page 55.

[32] See for a full description of the trial including reports on the testimony of defense witnesses: *Canadian Center for International Justice: CCIJ's Public Cases and Interventions*, Jacques Mungwarere, at: http://www.ccij.ca/programs/cases/index.php?DOC_INST=19

witnesses, the defense requested access to tens of persons in Rwanda, mainly detainees in a letter from the defense team to the Prosecutor General of Rwanda[33]. Subsequently, the Prosecutor – General instructed the Commissioner – General of the Rwanda Correctional Service [RCS] to provide full access to these witnesses[34]. During several trips to Rwanda the defense team spoke to the witnesses without any interference from the authorities in Rwanda.

80. All defense witnesses and the defense team have benefited from the same services as the prosecution team. No complaints have been reported and the court did not make any adverse findings to this topic.

81. By letter dated October 23, 2013 the General Counsel of the Public Prosecution Service of Canada, PPSC, Luc Boucher and the Counsels for the PPSC, Genevieve de Passille and Timothy Radcliffe informed the NPPA of the acquittal of Mungwarere by the Ontario Superior Court of Justice in Ottawa, Canada. In the letter, Boucher and others thank the NPPA for their cooperation in the investigation and praise the NPPA for their "extraordinary collaboration" without which the prosecution of Mungwarere on the merits of the case would have been impossible. Boucher and others explain in the letter the importance of international cooperation in cases as the one of Mungwarere and state to the NPPA that "your unit set an exceptional standard in serving the public interest"[35].

82. During the trial of Mungwarere before the *Cour Superieure de Justice* in Ontario, Canada, the credibility and reliability of the evidence provided by the witnesses was assessed by the trial judges. In conclusions, the court found that a number of witnesses have intentionally provided false testimony against Mungwarere and some witnesses had even been cooperating to provide this false testimony. However, this did not lead the court to disqualify all the witnesses' testimony. The witnesses who were qualified as reliable did not provide sufficient evidence to convict the defendant who as subsequently acquitted[36].

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[33] Letter dated April 23rd 2012 from *Roy Larochelle Avocats* Inc to the Prosecutor General of Rwanda. Letter in possession of the author of this report.

[34] Undated letter from the Prosecutor General of Rwanda to the Commissioner General of the Rwanda Correctional Service [RCS] in Kigali, which letter includes the dates of the commissions by the defense teams to Kigali, Rwanda, all in May of 212. Letter in the possession of the author of this report.

[35] Letter dated October 23rd, 2013 by the Public Prosecution Service of Canada to John Bosco Siboyintore of the GFTU of the NPPA. Letter in possession of the author.

[36] *Cour Superieure de Justice de Ontario*, Canada in Jacques Mungwarere, July 5, 2013, para. 1219 – 1260.

Sweden[37]

83. On June 20th 2013 the City Court in Stockholm, Sweden convicted[38] Stanislas Mbanenande to life imprisonment on multiple charges of genocide. On June 19, 2014 the Court of Appeal in Stockholm, Sweden confirmed the sentence imposed by the City Court.

84. The trial against Mbanenande by the City Court of Stockholm came after a pre-trial investigation by the Swedish Police and the Public Prosecutor in Stockholm. In the pre-trial investigation around 80 witnesses were heard in Rwanda during several missions to Rwanda, mainly in the area of Kibuye. During those interviews the defense counsel of Mbanenande was mostly also present. While staying with the mission in Kibuye and elsewhere, the defense counsel consulted with family members and others to investigate options for defense witnesses. The interviews in Rwanda in this stage, including the presence of the defense counsel, were approved by the NPPA upon request by the prosecutor in the case.

85. During the trial phase around 40 witnesses were heard. The entire court and trial was moved to Kigali, Rwanda during one session where witnesses were giving evidence live in the Supreme Court building in Kigali. Other witnesses gave their evidence from Kigali in the court building in Stockholm, Sweden via video link. During trial only a few witnesses for the defense were heard but they were not from Rwanda. The defense has not requested the court to hear witnesses from Rwanda.

86. Under Swedish law the defense can conduct their own investigation which can be financially funded and the defense can request the prosecutor to hear witnesses for the defense.

87. During all these interviews and hearings no Rwandan authority has been present. Authorities, the NPPA included, has never required into the results of the investigations, interviews and hearings or requested copies of the testimonies.

[37] The information in this part of the report is based on a lengthy telephone conversation between the author and Tora Holst, Chief Public Prosecutor in Sweden and the lead prosecutor in the case against Mbanenande on August 7th 2014 as well as the verdict by the City Court as mentioned hereunder.

[38] The verdict by the City Court in Stockholm is translated in English and available. For the appeals verdict the ruling is not available at the date of the closing of this report, but a press release was issued: http://www.internationalcrimesdatabase.org/Case/3263

88. Similarly, none of the witnesses has complained about undue influence, threat or worse. The witnesses were routinely asked about any influence or threat but with the exception of one witnesses, every witness said there had been no influence or threat.

89. According to the Swedish prosecutor the cooperation with the Rwandan authorities has been very good throughout the pre-trial investigation and trial.

90. During the trial, the defense counsel for Mbanenande has made various allegations on the lack of reliability of the investigation and has claimed that the statements have been fabricated, that Mbanenande is a target of the government of Rwanda because of his political opposition, that Mbanenande was not willing to be part of the Rwandan community in Sweden, that the Rwandan authorities have interfered in the investigations and other allegations.

91. After investigating those claims and in lengthy reasoning, the City Court in its ruling dismisses these claims[39]. Allegations about the political situation in Rwanda and alleged human rights abuses, the lack of independence of the judiciary etc. has been rebutted by the court by referencing to the ruling of the European Court of Human Rights in Ahorugeze and the ICTR rulings in the transferred cases. In this context the City Court has referred to a statement by a member of the Swedish Security Service stating that members of the opposition in Rwanda must be of a certain caliber for the regime to have an interest in them.

92. After investigations, the City Court has ruled that there have been no concrete circumstances indicating that those witnesses heard in the case have been influenced to falsely accuse Mbanenande and that, to the contrary, all witnesses have stated there was no such influence and that their testimony is truthful. The City Court mentions one witness for the prosecution who made an incriminating statement towards the defendant and was afterwards visited by a man who asked him to retract his statement, offering him financial compensation.

93. In conclusion, the City Court rules:

> *"In summary, there is no reason to make remarks regarding the reliability and robustness of the investigation. No concrete circumstances have been brought*

[39] The references made hereafter all are taken from Chapter VI ["Grounds"], A ["Criminal liability"], ii ["The City Courts' examination of the reliability and robustness of the investigation"] pages 44 through 55 of the verdict. Verdict in English translation in possession of author.

forth which indicate that the investigation has been fabricated and arranged or that there has been improper involvement in the investigation on the Rwandan authorities' part. On the contrary, the robustness and content of the investigation speaks against the defense's theory".

Norway

94. On February 14th 2013 the district court in Oslo, Norway convicted Sadi Bugingo to an imprisonment of 21 years for his involvement in the genocide in Rwanda. The conviction came after a trial in which 48 witnesses were heard[40]. 21 of those witnesses testified in person before the court in Oslo and 27 witnesses testified through a video link from Rwanda in the trial in the court in Oslo. These witnesses included both prosecution and defense witnesses. During the pre-trial police investigation, some 300 witnesses were interviewed. The conviction is appealed.

95. In total, sixteen defense witnesses were heard during the trial. Six of those witnesses were heard via video link from Rwanda, facilitated by the NPPA. The others were based in other African countries and were heard through a telephone line to the court room in Oslo and a few defense witnesses were brought to the court room to testify live.

96. The defense attorneys in the Bugingo case travelled to Rwanda and other African countries to speak to the witnesses prior to being interviewed by the police. Under Norwegian law, the defense can request the police during the pre-trial investigation to hear witnesses on their behalf.

97. There have been no indications of fear or unwillingness to testify in the defense of Bugingo. Allegations by the defense that the testimonies of the witnesses were influenced by the authorities in Rwanda were rejected by the judges in the court, who found that the only credible information pointing and influencing the witnesses came from the defendant.

98. The Norwegian police and prosecution, during any stage of the proceedings noted that the Rwandan authorities gave them full freedom to conduct investigations without any interference from the Rwandan authorities. The authorities never inquired or requested information from the investigation.

[40] The information provided here is based on information provided by the Police Prosecutor, Marot Formo in a statement which she supplied to the NPPA and is in possession of the author.

99. Equally, the defense attorneys in the Bugingo case were facilitated by the Rwandan authorities to conduct their preliminary conversations with potential defense witnesses without any interference or undue influence.

100. As was the case in trials in other jurisdictions, the defense in the Bugingo case has questioned the credibility of the witnesses and reliability of the evidence they provided on various grounds. The defense has claimed that the witnesses have lied intentionally because the Rwandan authorities influenced them, the witnesses were paid or acted out of jealousy or personal vengeance.

101. The court has rejected these allegations after examining all the evidence. The court finds the investigation carried out by the Norwegian authorities "exhaustive, thorough and unbiased" and has not found any indication the Rwandan authorities have influenced the hearing of the witnesses as they have not interfered and were not present. The court only finds indications of influencing witnesses by the defendant through evidence presented originating in telephone intercepts and money transfers[41].

102. In the appeals phase of the Bugingo case, which is ongoing at present, more witnesses will be interviewed in August 2014 in Rwanda and other African countries, including defense witnesses.

103. Mrs. Marit Formo, Police Prosecutor in Norway has supplied a statement to the Rwandan authorities about the experiences during the investigation and trial.

Detention facilities

104. When defendants are extradited to Rwanda and their cases transferred, the defendants are incarcerated in a prison with special provisions. Pretrial detainees are imprisoned in Kigali Central Prison, commonly known as "1930", convicts will be incarcerated in Mpanga prison, a new state of the art prison designed to meet international standards and currently housing convicts from the Sierra Leone Tribunal.

105. Currently, all defendants transferred or extradited from foreign jurisdictions are and will be incarcerated in the special wing of the Kigali Central Prison. This is a matter of convenience as the prison is in the same city as the High Court where the cases are adjudicated. Mpanga prison, with its state of the art facilities, is hours away from Kigali.

[41] Oslo District Court in: Said Bugingo, February 14, 2013, Chapter 5.6. "The defendant's objections to the submitted evidence". Found at: http://www.internationalcrimesdatabase.org/Case/919. English translation of the verdict is in the possession of the author.

Authorities have now decided that in the near future, the defendants will be incarcerated in Mpanga prison when the High Court is in recess or the case is adjourned for a longer period of time[42].

106. I am not an expert on detention facilities and the international minimum standards. I will therefore refrain from drawing conclusions whether the detention facilities in Rwanda are meeting minimum international standards. In this part of the report I will provide observations from a visit to Kigali Central Prison on Wednesday, July 30th 2014, where I was guided through the facility by the Deputy Director of Kigali Central Prison, Janet Bugingo. The information provided by Mrs. Bugingo and my own observations are listed hereunder.

107. It needs to be pointed out first though that the issue of proper detention facilities was discussed in the referral cases in the ICTR concerning Uwinkindi and Munyagishari as well as other defendants for the ICTR who were not arrested. In the referral case of Uwinkindi, the Trial Chamber simply stated that adequate detention facilities are guaranteed by the Referral Law, which is also applicable to transfers from other jurisdictions[43]. In the referral case of Munyagishari the Trial Chamber used a similar reasoning, referring to a number of earlier referral decisions where various chambers of the Tribunal found the detention facilities in Rwanda to be compliant with international standards. The Trial Chamber further rejected claims that in practice the facilities would not be compliant as speculative[44] and relied on the monitor mechanism installed by the Tribunal.

108. Various courts in Europe, in ruling on extradition of Rwandans to Rwanda on charges of genocide have often referred to the decisions of the ICTR mentioned above as well as to monitor reports submitted by the ICTR's monitors and publicized on the website of the tribunal and the ruling by the European Court of Human Rights in Ahorugeze.[45]

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[42] Information provided by Head of the GFTU of the NPPA, July 2014.

[43] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 June 2011, para. 58-60 referring to the Transfer Law, Article 23 of Organic Law No. 11/2003 of 16/03/2007, concerning transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States, citing the Body of Principles which guarantees the same standards both upon transfer and after conviction.

[44] *Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11bis., Decision on the Prosecutor's Request of Case to the Republic of Rwanda, 6 June 2012, para. 79-85.

[45] See: District Court The Hague, Netherlands in the extradition case of Jean Baptiste Mugimba, July 11th 2014, para 6.11.5 [Dutch only], District Court The Hague in the advisory report in the extradition case of Jean Baptise Mugimba, July 11th 2014, para 3 [Dutch only], Supreme Court ruling in the extradition case of Mbarushimana dated

109. Currently, five defendants whose cases are either referred to Rwanda or have been extradited to Rwanda are detained in Kigali Central Prison. Their cells are located in a separate wing of the prison. This wing consists of a total of eight spacious cells, a number of showers and toilets, a corridor, storage rooms as well as an outdoor space where the detainees stay during the day. During my visit I witnessed the detainees sitting at tables in the outdoor space, reading or working. The wing, described here is only locked from the outside. Inside, the detainees are free to move in any area of the wing without difficulty, except each other's cells. The wing is not a modern building, but clean.

110. Inside their wing, the detainees are wearing normal clothing, only when leaving the wing do they wear the prison pink suits. In the wing there is a TV, located in one of the halls, where the detainees can watch the TV. In their cells the detainees can make tea and coffee. Each of the detainees is provided a lap top computer and a printer.

111. Detainees are provided with three meals a day by the kitchen following a menu. Each of the meals provided by the prison to the detainees is logged and the detainees sign for the reception of their meals. I have seen that log, specifying which food item was provided to the detainee. The food supplied represents a variety of types of food. Logging the meals was installed after detainees had complained about the food. After the prison started to log, the complaints have stopped.

112. The detainees are also supplied various items for personal hygiene or use, such as soap, shaving foam, after shave, bed sheets, pens, papers etc. Each item provided is logged by the prison and the detainee signs off for the reception of this item. I have seen this log.

113. Each Friday, detainees can receive visitors who are located in Rwanda. There is a 30 minutes slot to receive visitors. The prison makes an exception for visitors coming from abroad, who can visit any time of the week, provided it is arranged prior to the visit.

114. Each week the detainees are offered to exercise at a playing field on the premises of the prison during two hours on two separate days.

November 6th 2013, para 4 under the Courts reasons and findings, Oslo District Court in the extradition case of Charles Bandora dated July 11th 2011, page 14.

115. Each week the detainees are provided a cell phone and allotted 10 minutes to make a phone call to anywhere in the world. Incoming calls can be received every Saturday and Sunday between 08:00 AM and 12:00 PM. All outgoing the calls are logged. I have seen the log.

116. Detainees can receive their defense lawyers for consultation at any time from Monday to Friday between 08:00 AM and 12:00 PM. They meet their defense lawyers either in the briefing room in the main building or in a half open space outside the wing. The meetings with the defense lawyers are not monitored. There is no guard during the meeting. During my visit to the prison I witnessed the building of two separate rooms adjacent the special wing for the meetings with the lawyers. During my visit I also witnessed a meeting between a European detainee, not being one of the transfer cases and his European lawyer in the briefing room. I saw no person in the room where the meeting between the detainee and the lawyer took place.

117. Detainees receive medical care. Either a doctor will visit the prison and examine the detainee or the detainee will be brought to King Faisal hospital in Kigali, which is the generally recognized as the best hospital in Kigali. During my visit to the prison I saw a dispensary outside the special wing where medical care was provided to prisoners. All medical examinations and treatments are logged. I have seen various logbooks of medical treatments of the detainees. All expenses regarding the medical treatments are born by the prison.

118. In general, the atmosphere in the prison, including the special wing, is very informal and social. Unlike the situation in Europe, at least in The Netherlands, which I am familiar with, detainees are together during all of the day if they wish to. They talk together or do things together if they so desire. One of the detainees in the special wing provided English lessons to another prisoner. The climate in Kigali induces this situation.

119. During my discussion with the Deputy Director of the prison, she observed that the ICTR monitors, when they visited the prison, do not ask her or the prison Director for a response to what the detainees had brought up.

Conclusions

120. Based on this factual assessment, outlined above, I conclude that Rwanda has a functional justice system capable of investigating, prosecuting and adjudicating cases of genocide transferred from other jurisdictions, applying international standards and guaranteeing fair trial rights for defendants.

121. Rwanda, throughout the years, has amended the laws and brought them to a level in line with international standards and ensuring the right to a fair trial for defendants facing the charges of the crime of genocide.

122. Cases of genocide, transferred from other jurisdictions are adjudicated by the International Crimes Chamber of the High Court of Rwanda with professional and independent judges. These judges have for many years received and are still receiving training from specialists such as from senior staff members in the ICTR.

123. The prosecution of the defendants transferred from other jurisdictions is assigned to national prosecutors within the NPPA, most of who have had a professional career in the NPPA for at least fifteen years, are equally qualified and receive training and assistance to equip them for their responsibilities.

124. Rwanda has a professional Bar Association with dedicated defense attorneys defending their clients. Throughout the years staff members of the ICTR have trained defense attorneys in Rwanda through the Rwandan Bar Association.

125. Transfer cases of genocide are monitored by various institutions. Jurisdictions who transfer cases often appoint monitors to follow the case and report. Both the Office of the Prosecutor [OTP] as well as the Court of the ICTR have appointed monitors who attend all trial sessions and have access to documents filed in a case, prosecutors, all other relevant persons and the prison. The reports of the monitors for the ICTR are public and often used by national courts in rulings on extradition requests. NGO's, often critical towards the Rwandan authorities, equally monitor trials and report to the public. In such an environment both prosecutors and judges are overly cautious not to make mistakes and not to lose the confidence of the international community. Trials are conducted in an open court and the media in Rwanda reports on the trials.

126. Allegations of abuse of power by the political leadership of Rwanda, oppressive and repressive measures against political opponents in Rwanda and abroad and undue influence on the independence of judges are not relevant in the context of this extradition case, as it has not been in the extradition cases in the other countries in Europe so far. There is no information that suggests that the judges in the Special Chamber in the High Court dealing with the transferred genocide cases are controlled or even influenced by any government agency in Rwanda. Equally, there is no reason to

believe the government of Rwanda has any other interest in Bajinya et al than to charge them with genocide crimes.

127. The individuals concerned are not political opponents of the government of Rwanda, even if they present themselves as "would be" opponents for this occasion, consistent with the attitude of other Rwandans in extradition cases across Europe. In recent years and even beyond, there is no evidence to conclude that any authority has influenced courts or individual judges in adjudicating genocide cases. Genocide cases are not political cases, as explicitly stated in the Genocide Convention and cases are tried by the most professional judges in Rwanda. The rule of specialty, which applies in extradition cases, prevents the receiving country from charging any other crime than the crimes approved by the jurisdiction which is extraditing the defendant. Thus far, the prosecutor of the NPPA has strictly abided by this principle.

128. There is now a firm body of evidence, based on years of experience with working with the judicial system in Rwanda by authorities, police, prosecutors as well as judges, in other jurisdictions in genocide investigations, prosecutions and trials that convincingly proves that Rwandan authorities are not only aware of what international standards entail but actually apply them in practice and even do more than that. During all those years of work with Rwandan authorities there has not been one report of undue influence by authorities in Rwanda in any stage of investigation, prosecution or trial. The Rwandan authorities are even mentioned as to have set an "exceptional standard" in a case, where the defendant has been acquitted of charges of genocide.

129. This report does not claim that there are no challenges in investigating, prosecuting and adjudicating cases of genocide in Rwanda after defendants have been transferred. To the contrary, every investigator, prosecutor and judge dealing with these cases has personally experienced how difficult truth finding is: there is a lack of documentary and forensic evidence, witnesses' memory has been highly impacted by the lapse of time, differences in language and culture pose high risk of misunderstandings, witnesses have a different understanding of the truth and feelings of revenge in victims' communities can corrupt the process of truth finding[46].

130. But these obstacles apply evenly whether these investigations, prosecutions and trials take place in Rwanda or in foreign jurisdictions. And it is fair to say that cultural and linguistic issues will not apply when these cases are handled in Rwanda. And all the other obstacles can be overcome when investigators, prosecutors and judges apply

[46] I have extensively written about these challenges, see footnote 1.

professional standards and use the right investigative techniques. There is no reason to believe that Rwandan authorities are less capable in doing that than foreign authorities.

131. The Genocide Convention explicitly stipulates that persons charged with the crime of genocide shall be tried firstly by a competent tribunal of the State in the territory where the genocide was committed[47]. The Convention therewith reflects the preference for the state where the genocide occurred, in this case Rwanda. Naturally, this rule only applies when that state fulfills all the requirements and meets the minimum international standard in dealing with those cases. This expert reports asserts that Rwanda fulfills those requirements and meets those standards and therefore should be provided the opportunity to adjudicate these cases.

132. One of the biggest criticisms against the ICTR has been that it provided justice in cases in a country far away from the location of the crimes in Rwanda and that reconciliation processes were not part of the adjudication of cases. By transferring cases this criticism can be addressed.

133. In genocide cases the principle of *"aut dedere aut judicare"* applies, expressing that impunity in these cases should not exist and there is a legal obligation on states under international law to prosecute these cases or extradite the defendants to a country that has jurisdiction.

134. Here is the dilemma: The ICTR has closed down and does not try any more cases. Some of the national jurisdictions across the globe have exercised universal jurisdiction for the crime of genocide and investigated, prosecuted and adjudicated criminal cases but the result, in light of the overwhelming challenge, is minimal[48]. Among the countries that have not established universal jurisdiction for the crime of genocide covering the Rwandan genocide, are powerful countries that have failed to act to prevent the genocide. Now, these countries put high requirements to the judicial system in Rwanda but at the same time do not come to the aid of Rwanda to meet those requirements.

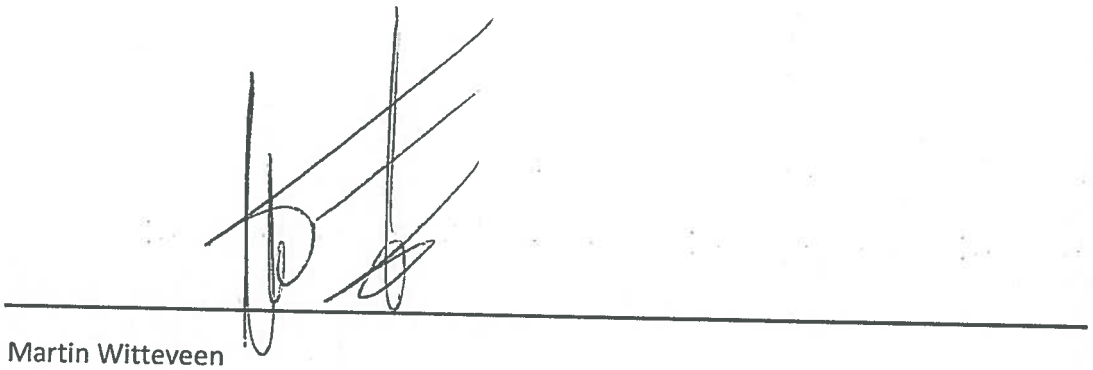
135. Nevertheless, Rwanda has emerged itself from a total destruction of its country and judicial system and created a functioning system for transferred cases from abroad including genocide cases. In the past years Rwanda has shown that the system they built

[47] Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, article 6.
[48] I have counted nineteen cases in ten jurisdictions, mainly in Europe over a period of 20 years.

does function in these transferred cases and if issues arise, they have shown great dedication and resilience to solve these issues.

136. There is really no reason why defendants of genocide should not be transferred to Rwanda. If foreign jurisdictions still have concerns or demands, they should assume the same dedication, resilience and flexibility as the Rwandan authorities have displayed and raise the issues and solve them. There are sufficient options, but

137. Impunity is not an option.



Martin Witteveen

Kigali, September 19th 2014.

[End of text]

doc. nr. 2

[redacted] B

Onderwerp: Adobe Reader user sent you a file
Bijlagen: SIGNED EXPERT REPORT BY MARTIN.pdf

Van: Martin Witteveen [mailto:[redacted]
Verzonden: vrijdag 26 september 2014 15:33
Aan: [redacted] BD/DJOA/IR
Onderwerp: Adobe Reader user sent you a file
Dag[redacted]

B

Dank voor je mail.
Hierbij mijn expert report dat gebruikt wordt in de zaak in Londen en ook de Noorse officier van justitie heeft interesse getoond.
Het is nog niet het perfecte rapport, maar ik geloof dat ik toch heel veel informatie heb kunnen verwerken.

Ben heel benieuwd welke punten Nederland nog heeft.

Schroom niet om mij in te zetten in Rwanda of voor andere dingen.

[redacted] D

Groet,
Martin

Sent from my iPad

doc. nr. 4

[redacted] B

Onderwerp: uitlevering [PRDF-11001011]

Van: Martin Witteveen [mailto:[redacted]
Verzonden: vrijdag 13 maart 2015 15:45
Aan [redacted] - BD/DJOA/AIRS
CC: [redacted] BD/DJOA/AIRS
Onderwerp: Re: uitlevering
Dank [redacted] B

Duidelijk.
Ik zal mijn analyse over het gebrek aan effectieve verdediging ook aan jullie sturen omdat ik niet wil dat er kritische info niet bij jullie terecht komt.
Ik hoop dat jullie de optie van het leveren van een advocaat met middelen in overweging willen nemen.

Groet,
Martin

Sent using OWA for iPad

From: [redacted] - BD/DJOA/AIRS [redacted] B
Sent: Friday, March 13, 2015 1:36:08 PM
To: Martin Witteveen
Subject: uitlevering
Hoi Martin,
Op basis van de informatie die we krijgen, onder andere van de advocaat en het Ministerie van BZ, maken wij een beoordeling of een uitlevering plaats zou kunnen vinden of niet. Eén van de criteria is het recht op een eerlijke procedure, zoals neergelegd in artikel 6 EVRM. Wanneer er sterke aanwijzingen zijn dat een uitlevering zal leiden tot een oneerlijk proces, zou dit een obstakel kunnen vormen voor de uitlevering (tussenvormen zijn natuurlijk ook mogelijk). Ook door de ambassade wordt gekeken naar artikel 6 EVRM, dit wordt ook betrokken in de beslissing om I en M al dan niet uit te leveren.
Met vriendelijke groet, | Kind regards,

[redacted] B
Specialistisch adviseur| Afdeling Internationale aangelegenheden en Rechtshulp in Strafzaken | Senior legal advisor | The Department of International affairs and Mutual Legal Assistance in Criminal Matters

.....
Ministerie van Veiligheid en Justitie | Ministry of Security and Justice
Directoraat-Generaal Rechtspleging en Rechtshandhaving | Directorate General for the Administration of Justice and Law Enforcement
Directie Juridische en Operationele Aangelegenheden | Legal and Operational Affairs Department
Turfmarkt 147 | 2511 DP | Den Haag
Postbus 20301 | P.O. Box 20301 | 2500 EH | Den Haag | The Netherlands
.....
T [redacted]
M
F
airs@minvenj.nl
www.rijksoverheid.nl/venj
werkdagen: maandag, dinsdag, donderdag, vrijdag tot 13.30
(verder werk ik woensdagochtend in de even weken en vrijdagmiddag in de oneven weken)
.....
Voor een veilige en rechtvaardige samenleving
.....

Dit bericht kan informatie bevatten die niet voor u is bestemd. Indien u niet de geadresseerde bent of dit bericht abusievelijk aan u is toegezonden, wordt u verzocht dat aan de afzender te melden en het bericht te verwijderen. De Staat aanvaardt geen aansprakelijkheid voor schade, van welke aard ook, die verband houdt met risico's verbonden aan het elektronisch verzenden van berichten.

Ministerie van Veiligheid en Justitie

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[redacted] B

Onderwerp: uitleveringen
Bijlagen: [redacted]

Van: Martin Witteveen [mailto:[redacted]
Verzonden: donderdag 26 maart 2015 11:52
Aan: [redacted] - BD/DJOA/AIRS
CC: [redacted] - BD/DJOA/AIRS; [redacted] - BD/DSP/PS
Onderwerp: uitleveringen

Dag [redacted]] B

Zoals eerder aangekondigd zend ik je hierbij een document met mijn bezwaren tegen uitleveringen. Het gaat alleen om de naar mijn mening onacceptabele situatie rond de verdediging. [redacted]

Ik ben niet tegen uitlevering, maar tegen uitlevering zonder flankerende maatregelen. [redacted]] A, C, D

[redacted]] D

[redacted]] A, C, D

Ik ben bezig met een bredere orientatie op de rol van de verdediging en waarheidsvinding. Dat doe ik in het kader van mijn rol als expert witness in de Londense zaken en ook om de PG hier te adviseren, maar weet nog niet hoe ik dit ga inbrengen.

[redacted]] A, C, D

Verder zend ik ook ter info het recente verzoek van de franse advocaat van Munyagishari voor *deferral* waarin dezelfde problematiek wordt uitgewerkt. Let ook op de bijlagen. [redacted]] A, C, D

Ben benieuwd hoe ICTR omgaat met de toenemende problemen. Er zijn net nieuwe *monitors* benoemd.

Zoals je begrijpt is dit document in deze vorm niet geschikt voor verdere verspreiding.
Graag tot nadere toelichting bereid.

Groet,
Martin

Martin Witteveen
Advisor International Crimes to the NPPA in Rwanda
Cell: [redacted] B
P.O Box: 445 Kigali - Rwanda
www.undp.org.rw Follow us: :

doc. nr. 7

[redacted] B

Onderwerp: Briefing participants Forum - version 002 RSC opm[redacted]docx B

From: [redacted] BD/DJOA/AIRS [mailto:[redacted]
Sent: 02 June 2015 18:37
To: Martin Witteveen
Subject: RE: Briefing participants Forum - version 002 RSC opm[redacted]docx

B

Hoi Martin, ik ben as maandagavond en dinsdag in Londen, misschien kunnen we daar afspreken? Als je tijd hebt? Kunnen we oa de verhouding uitzetting uitlevering bespreken.

Dank voor je rapport! Ik de k dat t een goed beeld geeft, ook al vinden we t niet nodig om een advocaat mee te sturen.

Groeten[redacted] B

From: Martin Witteveen
Sent: dinsdag 26 mei 2015 8:19:14
To: [redacted] BD/DJOA/AIRS
Subject: Re: Briefing participants Forum - version 002 RSC opm[redacted]docx B

Jammer dat ik jullie niet heb kunnen overtuigen.
Ben benieuwd op welke informatie het standpunt is gebaseerd.

Sent using OWA for iPad

From: [redacted] BD/DJOA/AIRS[redacted]
Sent: Monday, May 25, 2015 9:03:00 PM
To: [redacted] BD/DEIA/IBP; Martin Witteveen; [redacted]
Subject: RE: Briefing participants Forum - version 002 RSC opm[redacted]docx

B

Hallo [redacted] Martin en [redacted]

[redacted] E - buiten reikwijdte Wob-verzoe

[redacted] Vanuit AIRS behandelen we de uitlevering van personen naar Rwanda. In de beschikking van zowel de eerste persoon waarin de minister al een beslissing heeft genomen, als de voorgenomen beschikking, is het standpunt dat de verdediging voldoende is in de zin dat er geen sprake is van schending van artikel 6 door de personen uit te leveren. Er is in Rwanda recht op bijstand en dit wordt ook gesubsidieerd. Ook is niet gebleken dat personen helemaal verstoken blijven van verdediging. In die zin is er vanuit oogpunt van uitlevering geen noodzaak om hierop te investeren.

[redacted] E - buiten reikwijdte Wob-verzoek

[redacted]

E-
buite
reikwijd
Wob-
verzoek

Groeten [redacted]

[redacted]

E-
buite
reikwij
Wob-
verzoe

Ministerie van Veiligheid en Justitie

Ministry of Security and Justice

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Van: Vogelenzang, N. (LP Rotterdam) [mailto
Verzonden: dinsdag 2 juni 2015 16:35
Aan: - BD/DJOA/AIRS; - BD/DJOA/AIRS
CC: BD/DJOA/AIRS
Onderwerp: RE: uitlevering

OK, dank voor het meedenken.
s er binnenkort trouwens een afspraak met de landsadvocaat over de zaak van ?.

Van: - BD/DJOA/AIRS [mailto
Verzonden: dinsdag 2 juni 2015 16:24
Aan: Vogelenzang, N. (LP Rotterdam); BD/DJOA/AIRS
CC: - BD/DJOA/AIRS
Onderwerp: RE: uitlevering

Hallo Nicole,

Wij hebben het rapport (vluchtig) bekeken,

Groeten

Van: Vogelenzang, N. (LP Rotterdam) [mailto:N.Vogelenzang@om.nl]
Verzonden: dinsdag 2 juni 2015 11:56
Aan: BD/DJOA/AIRS; BD/DJOA/AIRS
Onderwerp: FW: uitlevering

Hoi

Martin gaat volgende week getuigen in Londen en heeft een aanvulling op zijn eerdere rapport geschreven
Ik heb van hem toestemming gekregen dit ook met jullie te delen ☺

Hoor graag en tot straks!

Gr Nicole

Van: Martin Witteveen [mailto:
Verzonden: maandag 1 juni 2015 9:33
Aan: Vogelenzang, N. (LP Rotterdam)
CC: (Landelijk Parket Rotterdam)
Onderwerp: uitlevering

B

Dag Nicole,

Hoop dat alles ok is met je.

Ik schijn toch echt volgende week in Londen te getuigen in die uitleveringszaken.

D

Wil het je graag laten lezen.
Neem aan dat je gezien hebt dat de MICT in een volledige kamer heeft gezet op het verzoek tot terugverwijzing naar MICT.] B

Groet,
Martin

Martin Witteveen
Advisor International Crimes to the NPPA in Rwanda
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doc. nr. 9

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 3rd, 2015

Introduction and personal circumstances

1. This additional expert report builds on my expert report dated September 19th, 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[1].

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[2] 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

[1] See the Expert Report dated September 19th 2015, par. 129 – 137.
[2] *Ibid.*, par. 120.

transfer cases both expeditiously and with respect for the rights of the defendants as enshrined in the Rwandan laws and the international conventions.

12. During the court proceedings I witnessed, and based on other information I gathered[3], 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[4]. I have noted that both in Uwinkindi as well as in

[3] See paragraphs 16 – 18 hereafter for my explanation which sources of information I used.
[4] See for the case of Uwinkindi: *Decision on Prosecutor's Request for Referral to the Republic of Rwanda*, dated June 28th 2011, Chapter 9: "Right to an Effective Defence" at: http://www.unictr.org/sites/unictr.org/files/case-

Munyagishari, the defence has lodged applications for the deferral of the cases and raised issues of fair trial[5]. 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[6], my personal encounters and discussion with the defence attorneys[7] 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

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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 6th 2012, Chapter 10: "Right to an Effective Defence" at: http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-05-89/trial-decisions/en/120606.pdf.
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 3rd 2013, Chapter III, C., 1 "First Condition", par. 101 and further. Found at: http://www.unictr.org/sites/unictr.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].

[5] See Uwinkindi's request for deferral, dated December 28th 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 13th 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 3rd 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.

[6] 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].

[7] 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.

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 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[8]. I have additionally spoken to the monitor[9] 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 28th, 2011[10]. 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[11].

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[12].

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.

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[8] I met the new ICTR monitoring team during a lunch on March 16th 2015 in Kigali.
[9] Vincent Lyimo, a retired Tanzanian judge.
[10] http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-01-75/trial-decisions/en/110628.pdf
[11] 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
[12] All reports can be found here: http://www.unmict.org/en/cases/mict-12-25

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 Uwinkindi, the Minister unilaterally[13] 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[14].

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[15]. 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[16].

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[17], which the defence team had already

[13] Invoking his right to do so under the then valid contract.
[14] See for the attorney's summary of the version of the conflict: monitor report March 2015, par. 31 – 40, monitor 2nd 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.
[15] 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.
[16] 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.
[17] 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.

submitted to the court earlier, were also heard but not examined by the defence. Closing arguments have been postponed[18].

25. When the trial of Uwinkindi reopened on June 2nd, 2015, Uwinkindi requested the court to postpone the trial till the MICT has taken a decision on his request to defer the case[19]. 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 5th 2015.

Munyagishari

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

27. Since his arrival in Rwanda, the case against Munyagishari has not made much progress[20]. 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

[18] 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 fines yet, that were imposed by the High Court after they did not appear in court. On April 24th 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/ .

[19] See footnote 5.

[20] 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 .

as pro bono attorneys[21]. In trial Munyagishari is largely defending 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[22].

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 25th 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[23].

Mugesera

30. Leon Mugesera was deported from Canada to Rwanda on January 23rd 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

[21] In the last two court sessions, the last one on June 3rd 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.
[22] A summary of his view can be found in the monitoring report of January 2015, par. 24 – 28.
[23] 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

34. Charles Bandora was extradited from Norway to Rwanda on March 9th, 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 4th, 2013.

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[24] and in appeal Bandora was convicted in absentia[25]. 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 fives transfer cases to have been transferred from abroad, he is the first whose case has been concluded by the High Court[26]. 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 14th 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[27].

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

[24] 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.

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

[26] On May 15th 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.

[27] See: http://www.newtimes.co.rw/section/article/2014-06-26/76393/ .

incriminated Bandora, some witnesses retracted their earlier, incriminating statements, two witnesses were ten and fourteen years old at the time of 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[28]. 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 prosecutors in the case in prison, prior to their testimony in court, who promised they would be

[28] 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.

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[29] 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[30] 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[31], although there are no signs of bad intent of 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 3rd, 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.

[29] In fact another witness testified that the same had happened to him but this time by the defence attorneys.
[30] 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.
[31] 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 25th, 2015[32]. 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[33].

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[34].

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.

[32] Where I was present and I understood this was his first appearance in High Court.
[33] 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.
[34] Information supplied by Victor Mugabe, Executive Director of the Rwandan Bar Association on May 14th 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[35]. 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[36].

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[37].

Relevance of defence in genocide cases

[35] 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.

[36] 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.

[37] 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;

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[38], 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[39] 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 [40].

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[38] Under Rwandan law, there is no investigation magistrate to conduct pre-trial judicial investigations.

[39] 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.

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

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[41].

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[42], 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 inabilities 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[43].

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[41] 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.

[42] 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.

[43] 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 ; 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. Timothy Longman & Théonèste 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[44]. 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[45].

Final conclusions

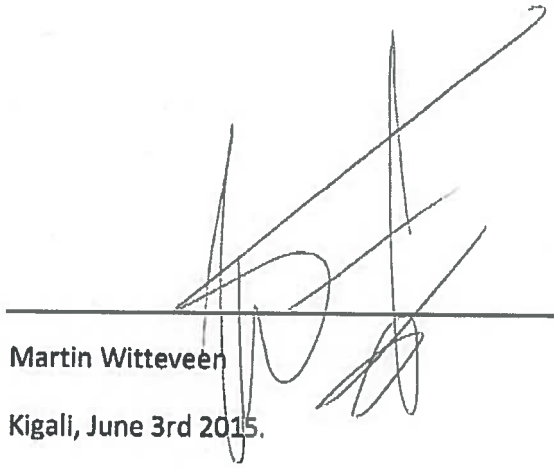
61. I make all these notions and put them together in this context, not to assert that establishing the truth in Rwanda genocide cases is not possible. In fact, based on my years of experience in criminal cases of mass atrocities in Africa and elsewhere, including Rwanda genocide cases, I am certain 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[46].

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

[44] 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].
[45] I have not been able to locate the verdict. I know there is no English translation of the French veersion. 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.
[46] 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]

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[redacted] B

Onderwerp: aanvullend rapport
Bijlagen: AdditionalExpertReport.pdf

Van: Martin Witteveen [mailto[redacted]
Verzonden: vrijdag 12 juni 2015 10:42
Aan: [redacted] BD/DJOA/AIRS
CC: BD/DEIA/IBP
Onderwerp: aanvullend rapport
Dag[redacted]
B

Hierbij, voor je archief, mijn officiele aanvullende rapport inzake de uitleveringszaken in Londen.
Ik ben drie dagen ge-cross-examined in Londen door vijf advocaten. Het was een feest.
Ze waren zeer goed voorbereid. Hadden ook Nederlandse perspublicaties en alles.
Blij dat we zo'n system in Nederland niet hebben.
Alle ogen zijn nu gericht op wat de MICT doet.

[redacted]

Ga er maar vanuit dat dit rapport ook in Nederland opduikt.

[redacted]
D

Groet
Martin

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[redacted] B

Onderwerp: laatste analyse
Bijlagen: ConfidentialMemoArguin.docx

Van: Martin Witteveen [mailto[redacted]
Verzonden: vrijdag 19 juni 2015 9:22
Aan[redacted] - BD/DJOA/AIRS
CC: - BD/DEIA/IBP
Onderwerp: laatste analyse

B

Dag [redacted] en [redacted]

Mijn jaar in Rwanda komt ten einde.

Ik heb nog een allerlaatste analyse gemaakt van de transfer zaken. Deze is gericht aan Arguin in de MICT omdat hij een lang commentaar had geschreven op mijn expert report voor Londen waar ik vorige week heb getuigd als expert witness en dus meer informeel.

Ik hoop nog steeds dat er beweging komt in de toestand rond deze zaken en dat mensen bereid zijn de problemen te erkennen.

Groet en veel succes. Hoop jullie in Den Haag weer te spreken.

,
Martin.