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# NETHERLANDS CASE TRANSFER MONITORING PROPOSAL

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PRESENTED BY THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS

## BACKGROUND

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On 9 October 2015, The Kenyan Section of the International Commission of Jurists (ICJ Kenya) received a request from the First Secretary, Justice, Security and Good governance, Netherlands Embassy in Kigali, Rwanda to consider acting as an independent monitor in two cases to be transferred by the Netherlands to Rwanda. A follow up call with [redacted] on 12 October 2015, was held to discuss further the expectations of the Ministry in relation to the monitoring process. Based on that discussion, ICJ Kenya prepared the following proposal for consideration by the Netherlands, Ministry of Justice and Security. Further discussions held on 25 November 2015, with [redacted] Ministry of Justice on further considerations to be input into the proposal have now been incorporated into this updated proposal.

## ABOUT ICJ KENYA

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Since 1959, ICJ Kenya has been a leading organization in advocacy for the adoption of policy reforms that ensure state compliance with international human rights obligations, specifically related to impunity and the ICC. ICJ Kenya has been involved in high level advocacy on legislative reforms. ICJ Kenya has previously worked in 18 African countries promoting rule of law and Human Rights and is presently facilitating the implementation of the Rome Statute in multiple Eastern African countries (Kenya, Uganda, Rwanda, South Sudan, and Tanzania.)

ICJ Kenya has been carrying out and has been involved in capacity building of the media, victims groups, Parliament, the judiciary, and community paralegals workers on human rights in various parts of Kenya and human rights capacity building for parliamentarians. ICJ Kenya is a recipient of the Civil Society of the Year Awards (CSOYA) and emerged top in the governance and management category and first runners up in the financial management categories in the year 2011.

## ICJ KENYA'S TRIAL MONITORING EXPERIENCE

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ICJ Kenya has been involved in the monitoring of many high profile trials around the African continent, including the following:

- 2005: the trial of [redacted], leader of the Ugandan opposition for treason
- 2007: the trial of Engineer [redacted] the leader of Ethiopia's official opposition, and 75 others for treasons and attempted genocide
- 2007: observation of a reference from Uganda to the Africa Committee on the Rights of the Child

- 2007 fact finding mission to Zimbabwe to investigate claims of harassment of the legal profession by government
- 2008: trial of advocate [ ] who later became the Minister for Constitutional Affairs of Zimbabwe, for incitement to violence
- 2010: hearing of the appeal on the removal of Justice [ ] as Chief Justice of Gibraltar, before the Privy Council of the United Kingdom
- 2015: hearing of the [ ] case, a genocide suspect transferred by the International Criminal Tribunal for Rwanda to stand trial in Rwanda.
- 2015: hearing of the [ ] case, a genocide suspect transferred by the Residual Mechanism of International Criminal Tribunals to stand trial in Rwanda.

These experiences have put ICJ Kenya in an excellent position to undertake the proposed monitoring exercise. ICJ Kenya carried out the above monitoring in a professional manner that respected the rights of accused and that took into account the sensitive diplomatic circumstances of each case.

## PROPOSED PLAN OF ACTION FOR MONITORING

ICJ Kenya will develop a comprehensive work plan for the monitoring of the two cases transferred from the Netherlands. The model of the monitoring will focus on the fair trial rights of the accused persons in the light of the condition of article 6 of the European Convention on Human Rights and Fundamental Freedoms and will also be based on further discussions with representatives of the Ministry of Security and Justice, as well as our own experiences in monitoring the MICT trials and other African trials. This model will meet the project goals, which include ensuring absolute credibility and independence of the monitoring team as well as sufficient staffing to monitor the relevant aspects of the cases transferred.

ICJ Kenya will designate a three-person, team of legal monitors. Two of the Monitors will be ICJ Kenya staff members, with the other Monitor being a legal expert who will serve as a consultant. The Monitoring team will receive logistical support from ICJ Kenya. The monitors will travel to Kigali and observe key events during the pre-trial, and trial until the judgment is delivered. The Monitors will and to provide regular input and oversight of the monitoring efforts through monitoring reports as required by the Memorandum of Understanding it will develop with the Ministry. The monitors are based in Nairobi and will travel to Kigali, when necessary to monitor the cases. The roles of the members of the team are described below.

### ROLES OF THE MONITORING TEAM

#### Monitors and ICJ Kenya staff:

- General oversight of the monitoring mission
- Periodic travel to Kigali to monitor all relevant events related to the multiple phases of the trial

- Communicate regularly and effectively with the Ministry of Security and Justice or the Ministry of Foreign Affairs to transmit monitoring information and reports
- Coordinate all logistical arrangements for the monitoring project
- Coordinate communication among the monitors.
- Communicate regularly with the contact person from the Ministry of Security and Justice on issues arising that may need to be attended to.

ICJ Kenya is confident that the model above will provide sufficient credibility, independence, and quality control for this sensitive project, and that it will ensure that the goals for monitoring the transfer of the two cases are achieved. The three-person monitor team will ensure that before any reports are released to the Ministry or to the public they have been reviewed by several team members. This will enhance quality control and ensure that any diplomatic considerations come into play throughout the process. This model also ensures that the monitoring is firmly grounded in the mandate of the Ministry, as well as international principles for monitoring the fair trial rights of defendants. Finally, this model builds in an internal documentation process to ensure that best practices and lessons learned from this historic monitoring project can be disseminated within Rwanda and throughout the region and the continent.

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#### MONITORING PROTOCOLS AND BASE DOCUMENTS

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##### Goals

- To monitor the Rwandan justice system in the two specific cases and assess its compliance with international standards and best practices, fair-trial rights relating to human rights, and to report on the same.

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#### SUGGESTED PLAN OF ACTION FOR MONITORING

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ICJ Kenya bases all of its programming on applicable national laws, regional African human rights standards, and any relevant international standards and guidelines. In this particular case article 6 of the European Convention on Human Rights is the basis for the monitoring of the two cases. Accordingly, the primary base documents guiding the development of ICJ Kenya's monitoring protocol include:

- Decision on the Transfer of the two accused persons.
- Organic Law No. 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States. (The Transfer Law).
- Fundamental international instruments providing for the right to a fair trial, more specifically article 6 of the European Convention on Human Rights and Fundamental Freedoms.

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## PRE TRIAL STAGE

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### Preliminary Assessment

#### Initial meeting by all the Monitors, the Ministry's representatives with Key interlocutors in Rwanda.

After the transfer of the Accused persons and before the commencement of the Trial, ICJ Kenya will organise an introduction meeting for all the monitors with key interlocutors in Rwanda together with representatives from the Ministry. This meeting will be used to introduce the monitors and the monitoring arrangement.

#### **Evaluating in-country condition**

ICJ Kenya will undertake an assessment of both the legislative and administrative criminal justice structure in Rwanda. Legislatively, this assessment will include:

##### *National Instruments particularly:*

- Organic Law No. 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, the Transfer Law
- Other applicable laws in Rwanda such as the Constitution of Rwanda and the Criminal Procedure Code.

##### *International Instruments*

European Convention on Human Rights.

Furthermore, the Dutch extradition files, the verdict and advises of the Dutch court, the decision of the Dutch Minister of Security and Justice and the decision of the Dutch judge in the injunction procedure will be taken into account.

### Operation of the Prosecution and Defence

The key rights that ICJ Kenya will be monitoring in the pre-trial stage include:

- Right of suspect to information (including right to be informed of charges)
- Right to legal counsel at the pre-trial stage, including custody hearing
- Right to trial within a reasonable time after detention
- Rights upon arrest (including the right to be notified of reasons for arrest, right to counsel, right not to be compelled to confess guilt, right to silence, and right to an interpreter)
- Specific rights concerning the right to a fair trial in the light of 6 ECHR, the right to have access to a (foreign) lawyer that is paid by the government, if the person involved is indigent.
- Other Specific conditions set out in the transfer decision by the Dutch Court.

#### *Access to files*

ICJ Kenya will ensure all trial monitors have access to the relevant case files before the trial process begins so as to properly follow proceedings from the very beginning to the end and properly gauge whether due process is followed throughout the trial process.

#### *Meeting with the defense lawyer*

If appropriate, ICJ Kenya monitors will meet with the defence lawyer(s) before the trial process and during the trial process. Defense counsel may be able to raise concerns and alert the monitors about any discrepancies. This will be done in obeisance to the principles of impartiality and non-interference and will not access the case on its merit but procedure and due process.

#### *Meeting with the prosecutor*

In order to maintain balance and impartiality the ICJ Kenya monitors will also meet with relevant key State officials, including the prosecutor. They too can highlight possible areas of discrepancy that may arise and give further and better particulars to the monitors to enhance the observation process.

#### *Meeting with the defendant*

The ICJ Kenya team will also seek an interview with the Accused. Although the defence counsel interview may suffice concerning procedural issues, the purpose of such an interview would be to understand the accused's perspective when concerns on their fair trial and due process arise in the course of trial. Such observation and interview will be done securely within the principle of impartiality and non-interference with the trial process.

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## TRIAL STAGE

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### **Right to a Fair Trial in the light of 6 ECHR**

The Accused's right to a fair trial is the focal point of this monitoring exercise, and will be the primary area of concern for ICJ Kenya's monitoring exercise. The right to a fair trial is based on two major factors:

1. A legal framework that meets international standards of best practice.
2. A judicial and administrative system that ensures implementation of the legal foundations for a fair trial.

The transferring Court has made a determination that the legal framework for a fair trial is already in place in Rwanda. Accordingly, the focus of our monitoring efforts will be on observing the operation of the Rwandan justice system during the process of trying the accused. This will entail observation of all court proceedings, regular communication with the Prosecution and defence counsel, and benchmarking against key standards particularly those set out under article 6 of the ECHR.

Monitoring media statements by all parties involved will also be imperative.

### **Witnesses: Availability and Protection**

ICJ Kenya recognizes that when a trial cannot be properly conducted because witnesses are unavailable or afraid to testify, a substantial injustice is done. As such, ICJ Kenya will assess the recruitment and treatment of witnesses for the trial. This applies to both prosecution witnesses and defence witnesses. Starting with the Transfer Law, and referencing international standards, ICJ Kenya will assess Rwandan policies and procedures to protect highly vulnerable and sensitive witnesses. This applies particularly to defence witnesses, where there would be considerable scrutiny and tension associated with their appearance on behalf of the Accused.

**Ability of the Defence to Operate**

ICJ Kenya will pay particular attention to the ability of the defence to conduct its case. Defence counsel must be able to carry out its duties, uninhibited by political interference and the fear of prosecution.

ICJ Kenya will observe the treatment of defence counsel, with a critical eye for any interference. ICJ Kenya will maintain regular communication with members of the defence team, will monitor treatment of the team in court, and assess any undue limitations on their ability to present a robust defence. Any incidences of concern will be reported through the monthly reports.

The monitors will also observe judicial conduct during all trial phases

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POST-TRIAL

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**Wrapping up/Other Business**

After the conclusion of the trials, ICJ Kenya would undertake the following activities:

1. Preparation of a comprehensive report for the Ministry, that will be made public by ICJ Kenya, by referring to the 'persons extradited by the Netherlands' and not mentioning their names.
2. Handing over any material that the monitors could have collected in the course of the monitoring process to the Netherlands government.

In the event that more cases are referred to Rwanda, ICJ Kenya will continue to offer monitoring services.

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LOGISTICS PLAN

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ICJ Kenya has been working in Kigali for the past six years, including monitoring two cases transferred for Trial in Rwanda by the Mechanism for International Criminal Tribunals. As a result, the organization has experience operating in Rwanda and can draw on its contacts to easily establish on-the-ground presence necessary for this monitoring process.

As described in the attached checklist, ICJ Kenya will require minimal support from the Ministry. ICJ Kenya expects that the Ministry will assist with travel expenditures for the monitoring team from their country of residence to Kigali, will provide upkeep

expenses, will complete a detailed and comprehensive MOU with the Government of Rwanda focused on the security, privileges and immunities of the monitoring team, and will provide initial input and advice on operational issues in Kigali.

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### **RESOURCE MOBILIZATION**

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ICJ Kenya understands that the Ministry will provide funding for the monitoring. ICJ Kenya has prepared an annual projected budget for the monitoring project. In the event any of the funds remain unutilized the budgets will be rolled over to the monitoring of the subsequent years. Accordingly, ICJ Kenya is committed to the implementation of the model proposed above.