

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE NO.: MICT-12-29-R

THE PROSECUTOR
OF THE TRIBUNAL
v.
AUGUSTIN NGIRABATWARE

TUESDAY, 17 JANUARY 2017
1430H
APPEALS CHAMBER

Before the Judges:

Theodor Meron, Pre-Review and Presiding Judge

For the Registry:

Mr. Ram Doraiswamy
Ms. Allison Perlin

For the Prosecution:

Ms. Michelle Jarvis
Mr. Mathias Marcussen
Mr. Iain Reid

For Mr. Augustin Ngirabatware:

Mr. Peter Robinson

Court Reporter:

Viva Voce Reporting Ltd.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDGE MERON: Please be seated.

Good afternoon, everyone.

Registrar, would you please call the case.

THE REGISTRAR: Thank you, Your Honour this is case number MICT-12-29-R, The Prosecutor versus Augustin Ngirabatware.

JUDGE MERON: Thank you.

As you know, I am Judge Meron, the Presiding Judge and the Pre-Review Judge in this case. This hearing was scheduled by an order of 21 December 2016. It is being held pursuant to Rules 70, 131, and 135 of the Rules. In accordance with Rules 70(G) and 131 of the Rules, the presence of Mr. Ngirabatware is not required at the hearing. Today's hearing is held at The Hague branch of the Mechanism due to the urgency of the matter and the recent transition of the Mechanism's branch in Arusha to new facilities.

Before we continue, I would like to briefly recount the events giving rise to today's hearing. On 8 July 2016, Mr. Ngirabatware filed a request for review of his convictions, which were affirmed by the Appeals Chamber on 18 December 2014. On 25 July 2016, a Bench of the Appeals Chamber was assigned to consider this request.

On or around 21 September 2016, Judge Aydin Sefa Akay, a Judge of

1 the Mechanism and a member of this Bench, was detained in Turkey in
2 relation to allegations connected with the events of July 2016 directed
3 against the constitutional order of Turkey. To our knowledge, Judge Akay
4 has remained in detention since that time. Accordingly, consideration of
5 the merits and other aspects of Mr. Ngirabatware's case have necessarily
6 come to a standstill.

7 Prior to his election as a Judge of the Mechanism, Judge Akay was
8 a judge of the International Criminal Tribunal for Rwanda. The United
9 Nations Office of Legal Affairs, on behalf of the United Nations
10 Secretary-General, has formally asserted diplomatic immunity with respect
11 to Judge Akay and requested his immediate release from detention and the
12 cessation of all legal proceedings against him, which would allow him to
13 resume his judicial functions at the Mechanism.

14 The primary purpose of the hearing today is to provide the
15 Government of the Republic of Turkey and the parties an opportunity to be
16 heard in relation to a motion filed by Mr. Ngirabatware on 10
17 November 2016. In his motion, Mr. Ngirabatware requests that an order be
18 issued to the Government of the Republic of Turkey, pursuant to Article
19 28 of the Statute and Rule 55 of the Rules, to cease its prosecution of
20 Judge Akay so that can he resume his judicial functions as a member of
21 the Bench in this case. Alternatively, Mr. Ngirabatware requests an
22 order for his "temporary provisional release" because Judge Akay's arrest
23 and detention are causing undue delay in the adjudication of
24 Mr. Ngirabatware's request for review of his convictions.

25 The Government of the Republic of Turkey, Counsel for

1 Mr. Ngirabatware, and the Prosecution have been invited to attend today's
2 hearings.

3 Appearances of the parties. First, is a representative of the
4 Government of the Republic of Turkey present in this courtroom?

5 If not, could the Registrar please indicate this for the record.

6 THE REGISTRAR: Yes, Your Honour, thank you. The Registry has
7 not been informed of any representation from the Republic of Turkey, to
8 date. Thank you.

9 JUDGE MERON: I thank the Registrar.

10 Now Counsel for Mr. Ngirabatware. Mr. Robinson.

11 MR. ROBINSON: Thank you and good afternoon, Your Honour.
12 Peter Robinson on behalf of Augustin Ngirabatware.

13 JUDGE MERON: Thank you, Mr. Robinson.

14 Counsel for the Prosecution.

15 MS. JARVIS: Good afternoon, Your Honour, Michelle Jarvis
16 appearing for the Prosecution together with co-counsel Mathias Marcussen
17 and our Case Manager today is Mr. Iain Reid.

18 JUDGE MERON: Thank you, Ms. Jarvis.

19 As mentioned earlier, the Government of the Republic of Turkey
20 has been invited to attend today's hearings. As the Registry just
21 indicated, there is no representative of the Government -- no
22 representative of the Republic of Turkey present in the courtroom.

23 I have been informed that on 21 December 2016, the Registry
24 transmitted by e-mail a note verbale containing the Scheduling Order to
25 the Embassies of the Republic of Turkey in Dar Es Salaam, Tanzania and

1 The Hague, The Netherlands. The Registry used the e-mail addresses
2 indicated on the web sites of the embassies. The service was done in
3 accordance with the relevant practice direction on filings made before
4 the Mechanism. Efforts were also made to serve the Scheduling Order by
5 courier, but service was refused by both embassies. On 10 January 2017
6 the Registry contacted the Embassy of the Republic of Turkey in The Hague
7 and was informed that the Embassy was not accepting any documents sent
8 from the Mechanism and that any documents should be sent to the e-mail
9 address indicated on the Embassy's web site. As I previously noted, this
10 service via e-mail was done on 21 December 2016, consistent with our
11 relevant practice direction. Before we continue, and before I give the
12 parties an opportunity to make submissions, on the desirability of the
13 orders requested by Mr. Ngirabatware, I would like to briefly summarise
14 some additional relevant background of this case.

15 I would like to recall, first, that on 18 December 2014,
16 Mr. Ngirabatware's convictions for committing direct and public
17 incitement to commit genocide and instigating and aiding and abetting
18 genocide were affirmed by the Appeals Chamber. He was sentenced to 30
19 years of imprisonment.

20 On 8 July 2016, Mr. Ngirabatware filed a request for review of
21 his convictions and, on 1 September 2016, he requested to be granted
22 provisional release until the completion of the review proceedings. The
23 Prosecution opposes this request for provisional release.

24 On 10 November 2016, Mr. Ngirabatware filed the motion giving
25 rise to this hearing. The Prosecution opposes his request for temporary

1 provisional release.

2 On 18 December 2016, Mr. Ngirabatware reiterated his requests.

3 On 28 November 2016, I invited the Government of the Republic of
4 Turkey to file written submissions in response to Mr. Ngirabatware's
5 motion. The Government of the Republic of Turkey did not file a written
6 response. Therefore, on 21 December 2016, I ordered that this hearing be
7 held in order to provide the Government of the Republic of Turkey an
8 additional opportunity to make oral submissions in relation to
9 Judge Akay's arrest and detention in Turkey.

10 On 22 December 2016, Mr. Ngirabatware filed a request seeking
11 that the United Nations Office of Legal Affairs be invited to attend this
12 hearing, to make submissions principally on the basis of the United
13 Nations' assertion of Judge Akay's diplomatic immunity. On 9
14 January 2017, I denied Mr. Ngirabatware's request because the purpose of
15 today's hearing is not to establish the basis on which the United Nations
16 asserted diplomatic immunity but to allow the Government of the Republic
17 of Turkey and the parties an opportunity to be heard in relation to
18 Ngirabatware's motion of 10 November 2016.

19 I would like now to hear the views of the parties in relation to
20 Mr. Ngirabatware's request that an order be issued to the Government of
21 the Republic of Turkey, pursuant to Article 28 of the Statute and Rule 55
22 of the Rules, to cease its prosecution of Judge Akay so that he can
23 resume his judicial functions as a member of the Bench in this case.

24 First, I would like to invite Counsel for Mr. Ngirabatware to
25 make submissions on this case.

1 And I would turn to you, Mr. Robinson.

2 MR. ROBINSON: Thank you, Your Honour.

3 First, let me say that I'm disappointed that the Government of
4 Turkey has not accepted the invitation to appear here today and advance
5 its position on Dr. Ngirabatware's motion. In fact, as you noted, the
6 Government of Turkey refused at both its Embassy in Tanzania and in
7 The Netherlands to even receive the invitation, and turned away the
8 diplomatic couriers who sought to deliver them. I also sent your order
9 to the Turkish Ambassador here in The Hague by e-mail with a letter on
10 the 26th of December and got no response.

11 This morning, I rode my bicycle to the Turkish embassy and tried
12 to contact the Judicial Counsellor to the Turkish Embassy,
13 Dr. Hakan Yavuz, to discuss the matter with him. He wasn't available to
14 see me but I spoke with him by telephone. He said that he was aware of
15 the motion but that he could not speak to me about Judge Akay. And when
16 I asked him if there was anyone else in the Government of Turkey who I
17 could speak to, he told me, "Not at the moment." He did provide me his
18 e-mail address and I again sent him your order for an oral hearing.

19 If I could just give you a little background on how this case has
20 gotten to this point. First of all, I'll tell you that when I was a
21 lawyer in California, I participated in some small way in having a person
22 who was serving a life sentence for a murder he never committed to be
23 released, and that experience was the most satisfying thing that I have
24 ever done as a lawyer, even to this day, and it makes me feel that it is
25 the highest calling of a Defence lawyer to assist somebody who is wrongly

1 convicted. And in that spirit, after working here at the International
2 Tribunals, when I was asked to represent Dr. Ngirabatware for free on a
3 pro bono basis after studying his case and being convinced of his
4 innocence, I undertook to do that. And I spent my own funds hiring an
5 investigator in Rwanda, travelling to Rwanda myself, to Uganda, to
6 Tanzania, to try to develop new facts that could show that his conviction
7 was wrongful and should be reviewed.

8 And we were fortunate to be able to do that, which culminated in
9 the motion for review of his conviction that we filed in July of this
10 year. And so I decided to represent Augustin Ngirabatware because I
11 believed in justice, and today I'm asking you to take steps to remove a
12 serious obstacle to justice in his case. Dr. Ngirabatware's case is at a
13 critical juncture, we have this new evidence that shows that he is
14 innocent of the crimes for which he was convicted. Our evidence is so
15 dramatic that even the Prosecutor has agreed that we are entitled to a
16 hearing on our motion for review of the conviction, although they don't
17 agree at this point that his conviction should be overturned. We would
18 have had that hearing by now, were it not for the arrest of a member of
19 the Appeals Chamber Bench, Judge Akay by the Government of Turkey,
20 despite Judge Akay having diplomatic immunity which prohibited his
21 arrest.

22 And now we are completely blocked. My client is sitting in
23 prison for a crime he didn't commit. He celebrated his 60th birthday on
24 Thursday alone in his cell and unless Turkey releases Judge Akay, there
25 is no mechanism for him to prove his innocence and win his freedom.

1 You've already given the Government of Turkey the opportunity to
2 respond to our motion in writing. When they didn't respond, you called
3 this oral hearing to give them another chance to state their position.
4 In the best legal tradition, you have bent over backwards to be fair to
5 the Government of Turkey and it's in that spirit that I address you
6 today.

7 As an advocate preparing for a trial or a hearing you go through
8 the process of trying to understand your opponent's best argument and
9 understand how you can refute it. So I've thought about what Turkey
10 might argue in response to our motion, and I want to put that forward for
11 your consideration even in their absence.

12 First of all, the motion was brought under Article 28 of the
13 Mechanism Statute that provides that states shall co-operate with the
14 Mechanism in the investigation and prosecution of persons covered by the
15 Statute, and Rule 55 which provides that a Judge or Trial Chamber "may
16 issue such orders, summonses, subpoenas, warrants and transfer orders as
17 may be necessary for the purposes of an investigation or for the
18 preparation or the conduct of the trial." Turkey might have argued that
19 the Mechanism lacks the power to make an order under these provisions
20 because the provisions speak of investigation, prosecution, preparation
21 or conduct of a trial and Dr. Ngirabatware has already been convicted.
22 However, in an analogous situation, the Mechanism has held that the
23 Prosecutor's obligation to disclose exculpatory material under Rule 73
24 applies to persons who have already been convicted like Dr. Ngirabatware
25 and are seeking review of their convictions. Likewise, the Mechanism has

1 held that a person seeking review of his conviction is entitled to access
2 confidential material from other ICTR or ICTY cases, upon a showing of a
3 legitimate forensic purpose. Since Article 24 of the Mechanism's Statute
4 provides for a procedure for a convicted person to obtain review of his
5 conviction, I submit that it would be incongruous and unfair if such a
6 person, or the Prosecution in responding to a motion for review, could
7 not seek the assistance of a state if such assistance was necessary to the
8 conduct of review proceedings.

9 But, nevertheless that could be an argument raised by the
10 Government of Turkey in response our motion.

11 The Government of Turkey might also contend that even if Article
12 28 and Rule 55 apply to post-conviction review proceedings, it doesn't
13 give the Mechanism the power to interfere in domestic criminal
14 proceedings. However, this issue has already been considered by the ICTR
15 in connection with the arrest of a Defence counsel in Rwanda and the ICTY
16 in connection with the prosecution of Defence team members in Croatia.
17 These cases have been cited in our motion, and I won't repeat them here
18 other than to note that in both cases the court held that the Tribunals
19 did indeed have the power to order a state to cease and desist a domestic
20 prosecution against persons benefiting from immunity afforded to United
21 Nations personnel when it interfered with ongoing proceedings at the
22 Tribunals. Nevertheless, this could be an argument raised by the
23 Government of Turkey in response to our motion.

24 The Government of Turkey might also contend that the order we
25 have requested is not necessary because the Mechanism can simply replace

1 Judge Akay on the Appeals Chamber with another case and proceed to review
2 Dr. Ngirabatware's conviction. Indeed, the jurisprudence of the ICTR and
3 ICTY provides that an order pursuant to Article 28 and Rule 55
4 directed to a state should not be issued unless it is necessary to a fair
5 determination of this case. Your Honour has stated publicly that you
6 would not replace Judge Akay on the Appeals Chamber for this case and
7 that position is a correct one. If you were to replace Judge Akay, he
8 would lose his diplomatic immunity. Turkey could simply release him and
9 immediately rearrest him and there would be no issue of diplomatic
10 immunity. Replacing Judge Akay with another Judge would reduce
11 diplomatic immunity of Judges of the Mechanism to an illusion. If a
12 Judge benefitting from diplomatic immunity is simply replaced and loses
13 that immunity, then there is in fact no immunity for Judges whatsoever
14 and that cannot be right. Judges cannot serve with integrity and
15 impartiality if they're subject to arrest and replacement. That goes to
16 the very heart of the fairness of the proceedings.

17 Nevertheless that can be an argument raised by the Government of
18 Turkey in response to our motion.

19 The Government of Turkey might contend that Judge Akay doesn't
20 have full diplomatic immunity but only functional immunity. Since his
21 arrest was for conduct unrelated to his work as a Judge of the Mechanism,
22 it did not violate this functional immunity. The Government of Turkey
23 may refer to Article 29(2) of the Mechanism Statute which provides that
24 the Judges of the Mechanism shall enjoy the privileges, immunities,
25 exceptions, and facilities accorded to diplomatic envoys, in accordance

1 with international law. And might refer to Article 38(1) of the
2 Vienna Convention on Diplomatic Relations which provides that: "Except
3 insofar as additional privileges and immunities may be granted by the
4 receiving State, a diplomatic agent who is a national of or permanent
5 resident in that State shall enjoy only immunity from jurisdiction, and
6 inviolability, in respect of official acts performed in the exercise of
7 his functions." However this argument would ignore Article 29(1) of the
8 Mechanism Statute which provides that the convention on the privileges
9 and immunities of the United Nations is what applies to the Mechanism.
10 That convention was interpreted in 1989 by the International Court of
11 Justice in an advisory opinion, in what is known as the Mazilu case. In
12 this case, the immunity of a person from Romania, who had been appointed
13 as a United Nations special rapporteur was at issue. Romania argued that
14 Mazilu could not invoke immunities against the state in which he was a
15 national and in which he resided. The court rejected that argument,
16 confirming, interpreting the Convention on the privileges and immunities
17 of the United Nations as being designed to ensure the independence of
18 international officials in the interests of the United Nations. The
19 court held that this independence must be respected by all states,
20 including the state of nationality and the state of residence. It ruled
21 that during the term of their assignment UN personnel benefit from
22 immunity under the convention whether or not they travel and that the
23 immunity applies in their state of nationality or of residence. Nine
24 years later in 1998, in an advisory opinion issued in a case involving
25 Malaysia, the International Court of Justice again ruled on the UN

1 convention. Malaysia had arrested a UN special rapporteur who lived in
2 Malaysia and who made allegedly defamatory comments about the government
3 while in Malaysia. The court again held that diplomatic immunity of UN
4 officials applied even when they were residing in their own country and
5 not travelling abroad.

6 In addition, the court held that when national courts are
7 seized of a case in which immunity of a United Nations agent is in issue,
8 they should immediately be notified of any finding by the
9 Secretary-General concerning that immunity. That finding and its
10 documentary expression creates a presumption which can only be set aside
11 for the most compelling reasons and is thus to be given the greatest
12 weight by national courts. And as you well know in the case of
13 Judge Akay, the UN Secretary-General has made a finding that Judge Akay
14 has full diplomatic immunity. Nevertheless, that can be an argument
15 raised by the Government of Turkey in response to our motion.

16 I have tried to think hard of the arguments that could be made by
17 the Government of Turkey and to present them to you fairly. I have tried
18 to uphold the spirit of giving the Government of Turkey the fairest
19 possible hearing despite their refusal to participate in these
20 proceedings. When you do deliberate on the motion, I think that you will
21 find that the motion is well founded and that it should be granted
22 despite these arguments. Turning to the issue of provisional release.

23 JUDGE MERON: [Microphone not activated]

24 THE INTERPRETER: Microphone for the President, please.

25 [Previous translation continues]

1 MR. ROBINSON: ...Let me make one or two more points before I turn
2 to provisional release, and that is, if you do issue an order to the
3 Government of Turkey to release Judge Akay, I also request that you set
4 a deadline for it to do so. Such a deadline would avoid any ambiguity as
5 to whether Turkey has complied with the order and I suggest that the
6 deadline be within 48 hours which is the customary time within which
7 a detained person must be released.

8 There's a number of other steps involving Rules 8 and 90 of the
9 Mechanism's Rules of Procedure and Evidence that can be taken to ensure
10 Turkey's co-operation with the Mechanism. I won't elaborate on them now,
11 unless you would like me to. But, today, I ask you to take the first
12 step and issue an order to the Government of Turkey to release
13 Judge Akay.

14 Thank you.

15 JUDGE MERON: Thank you very much for your comprehensive
16 presentation which I'm sure will benefit the Court in its considerations.

17 The Prosecution on the question of the order to the Government of
18 Turkey. We'll leave for a later stage in today's hearing the question of
19 the provisional release.

20 Ms. Jarvis.

21 MS. JARVIS: Thank you, Mr. President.

22 Your Honour, the Defence of course are seeking an order to the
23 Government of Turkey to cease prosecution of Judge Akay so as to permit
24 adjudication of the pending issues before this Chamber within a
25 reasonable time. Your Honour, we can only concur with Mr. Robinson and

1 his submission that we believe in the interests of justice and we
2 consider that a way forward has to be found so that the fair trial issues
3 that have arisen in this case can be resolved without any further delay.

4 We also, of course, recognise the fundamental importance of
5 upholding immunity issues and principles and protections that have arisen
6 in this case. Those principles are enshrined in the MICT charter for
7 very good reason, and they are integral, as we readily acknowledge, to
8 the proper functioning of the MICT. We understand the degree of concern
9 expressed by Your Honour in relation to the immunity issues and the need
10 to find a solution in this case that is compatible with upholding those
11 governing principles. However, Your Honour, as I will explain in my
12 submissions today, an order to Turkey is not a guaranteed solution to the
13 fair trial issues that have arisen to date. Rather, we submit, ensuring
14 an immediately available review Bench that can move forward with
15 deliberations in this case is the priority. That does not necessarily
16 mean taking action that will prejudice Judge Akay's status as a MICT
17 Judge, but certainly, Your Honour, an order for provisional release is
18 not an acceptable remedy. Let me turn, first of all, to the question of
19 the order to Turkey as requested by Your Honour. The problem, of course,
20 Your Honour, and as alluded to by Mr. Robinson, an order to Turkey
21 concerning Judge Akay does not guarantee a solution to the impasse that
22 has arisen in this case. The effectiveness of an order depends on what
23 Turkey will do in follow-up and most importantly the time-frame within
24 which it does it. While it is not, of course, to be lightly presumed
25 that a state will refuse to comply with a legitimate order of this Court,

1 at the very least, the events to date do give cause for concern about the
2 prospect of timely compliance with any order issued. Given the delay
3 that has already occurred, it is imperative to adopt a solution that will
4 guarantee that this case can move forward without further delay.

5 Your Honour, we submit the most appropriate solution to the fair
6 trial issues at stake here is to ensure that adjudication of the pending
7 issues can proceed without further delay, notwithstanding Judge Akay's
8 absence. And as I alluded to, this doesn't necessarily mean removing
9 Judge Akay from MICT work and so need not necessarily have implications
10 for his status as a MICT Judge. There are different avenues through
11 which this could potentially be done. One, of course, is through the
12 administrative power of Your Honour as President of the MICT to determine
13 the composition of a review Bench under Article 12 of the MICT Statute
14 and Rule 23(A) of the MICT Rules of Procedure and Evidence. Your Honour,
15 the consistent practice of the ICTY and the ICTR Appeals Chamber is that
16 the President can change the composition of an Appeals Bench as an
17 administrative matter prior to the oral hearing on appeal. And this has
18 been done routinely as a matter of case management and justified, for
19 example, on the basis of the need to expedite the hearing and resolution
20 of an appeal.

21 JUDGE MERON: Has this ever been done without the consent of the
22 Judge concerned, Ms. Jarvis?

23 MS. JARVIS: Your Honour, that is not a matter that is known to
24 me in light of the nature of the orders that it issued --

25 JUDGE MERON: You have been here for so many years, have you

1 heard of a president replacing a Judge or changing a Judge from a panel
2 without his consent?

3 MS. JARVIS: Your Honour, it's --

4 JUDGE MERON: What would be the implications on due process in
5 this court?

6 MS. JARVIS: Your Honour, the president has routinely rotated
7 Judges from assignments within the Tribunal and we submit the same could
8 be done in relation to the MICT, as a matter of workload management,
9 expeditious hearing of an appeal, and resolution of the matter. So what
10 we suggest is that it would be within Your Honour's discretion to
11 consider whether a rotation of Judge Akay onto another MICT assignment
12 would be appropriate in the circumstances --

13 JUDGE MERON: Ms. Jarvis, I'm really listening very carefully to
14 you, but from my experience at least I do not recall a president of this
15 Court removing a Judge from a panel without consulting that Judge and
16 obtaining his consent. I also would think that such an action would
17 cause considerable repercussion regarding that Judge who has been
18 removed, in terms of his judicial independence. I am very much
19 interested in your argument, but I wish you would have addressed also the
20 issue which I am raising.

21 MS. JARVIS: Your Honour, even if there isn't a precedent of
22 having to invoke this administrative process in the absence of consulting
23 the Judge in question or their consent, this may well be one opportunity
24 that would -- or one occasion, one circumstance that would justify very
25 seriously considering that option given the nature of the issues that

1 have arisen and the very difficult impasse that has resulted from Judge
2 Akay's unavailability. We would submit that finding a solution that does
3 not unduly prejudice Judge Akay in his position as a MICT Judge, but
4 would nevertheless allow the proceedings to continue without prejudicing
5 the rights of the accused to a timely resolution of these issues would be
6 very, very considerable arguments in favour of exercising the
7 administrative power open to Your Honour in the way that we suggest.

8 Your Honour, certainly, if that is not an option that you
9 consider open to you, there is a rule that, of course, deals --

10 JUDGE MERON: Before you go further, could you kindly react to
11 the argument made by the Counsel for Mr. Ngirabatware, when he suggested
12 that, for me, to change the composition of the Bench, would go against,
13 if I understood him correctly, it would go against the principle of
14 judicial independence.

15 MS. JARVIS: Your Honour, I believe that what Mr. Robinson was
16 referring to was a situation where Judge Akay would be removed from his
17 MICT assignments in totality. So he would no longer be assigned to any
18 MICT work and therefore would no longer have the immunities that apply to
19 a Judge of this Mechanism when assigned --

20 JUDGE MERON: What does it mean removing him in his totality? In
21 totality in contrast to a sort of partial removing? Could you spell it
22 out.

23 MS. JARVIS: Your Honour, the difference is that what we have
24 envisaged under your administrative power to change the compositions of
25 the Bench is a rotation which has routinely happened in the past. So

1 that in light of workload considerations, availability of Judges and
2 related matters, Your Honour could simply change the assignment of
3 Judge Akay, from this particular case where the need to move forward has
4 become urgent, onto an assignment whether there is not the same degree of
5 pressing need about time sensitivity. So that would be the difference,
6 Your Honour. In the scenario we propose there would be no prejudice to
7 the immunity to Judge Akay and therefore no prejudice to the independence
8 of the Judge. It would simply be a question of defining what his
9 particular MICT assignments are in light of the situation currently
10 facing him.

11 JUDGE MERON: Does the timing of his future hypothetical
12 assignment have no bearing on the question of immunity if he is removed
13 from this case and, say, assigned in x time from now to another case.
14 Does it really have -- is it helpful?

15 MS. JARVIS: So long as the assignment was done by way of
16 rotation so there was no gap in the assignment, I submit, Your Honour,
17 there should be no impact on the immunity question, if that is the most
18 pressing concern.

19 JUDGE MERON: It is an interesting idea.

20 MS. JARVIS: Thank you, Your Honour.

21 One of the other avenues as I mentioned to Your Honour is, of
22 course, under the rules that govern what is to happen in the situation
23 where a Judge is absent for a prolonged period of time and that is, of
24 course, MICT Rule 19(C) which gives the president the authority to
25 replace a Judge who is unavailable for more than a short duration.

1 Your Honour, if none of these options are considered appropriate,
2 then the Chamber could consider or Your Honour could consider whether
3 another framework would be appropriate in application of the MICT's
4 inherent jurisdiction to efficiently and fairly regulate its own
5 proceedings. This inherent jurisdiction, as you will well know,
6 Your Honour, has been recognised in previous cases such as the Tadic case
7 on the contempt issue of 31 January 2000. In considering how to
8 interpret the inherent jurisdiction of the court, the procedural rules at
9 other courts may provide some helpful avenues to consider. For example,
10 the Residual Special Court For Sierra Leone Rules provide that where it
11 is not possible to replace an absent Judge the remaining Judges can
12 continue in the event that they consider the Judge's absence would not
13 affect their decision one way or the other. That's Residual Special
14 Court For Sierra Leone Rule 16(B). The Rules of the Residual Special
15 Court For Sierra Leone and also the ECCC, also permit the temporary
16 assignment of reserve or alternative Judges to deal with certain matters.
17 That's Residual Special Court For Sierra Leone Rule 16bis(D) and ECCC
18 Rules 77(8) and 79(4).

19 Your Honour, the remainder of my submissions really concern the
20 issue of provisional release and in light of the fact that I have not yet
21 heard my friend's submissions on those, I will pause there. I do just
22 want to emphasise, of course, Your Honour, on the issue of the order and
23 Judge Akay's immunity, there is no dispute, I think, among the parties in
24 this case that upholding the immunity principles and the corresponding
25 integrity of the MICT process is of fundamental concern. We note that

1 processes are already underway seeking to uphold these principles and
2 thereby defending the integrity of the MICT processes. We know OLA has
3 formally asserted immunity on behalf of the Secretary-General and that
4 communications between the Office of Legal Affairs and the Republic of
5 Turkey are underway. We also see in the Convention on Privileges and
6 Immunities a procedure for resolving disputes between the UN and
7 Member States about the application of the convention involving the
8 jurisdiction of the ICJ. So there are various avenues that potentially
9 apply to protecting the immunity principle in this case. We would submit
10 as a general matter that any action taken by the MICT to uphold the
11 immunity protections on behalf of its personnel should obviously be taken
12 in close co-ordination with the Office of Legal Affairs on behalf of the
13 Secretary-General in whom decision-making power concerning privileges and
14 immunities for UN personnel ultimately reside.

15 Thank you, Your Honour.

16 JUDGE MERON: Thank you, Ms. Jarvis. I can assure you that the
17 MICT has been working closely on those issues with the UN Secretariat and
18 the Office of Legal Affairs. At the same time, ultimately the issues are
19 of judicial nature and the buck stops here.

20 MS. JARVIS: [Microphone not activated]

21 JUDGE MERON: Now I understand that the primary point which is
22 moving you and I understand it, is the need to get the case going and
23 that's why you suggested what you suggested. It was my understanding
24 from Mr. Robinson that he would not consider it right for me to replace
25 Judge Akay in order to -- to establish in one way or another, a different

1 panel and to proceed with the case of Mr. Ngirabatware.

2 Did I understand you correctly?

3 MR. ROBINSON: Yes, Mr. President.

4 JUDGE MERON: Do you have anything to say in response to
5 Ms. Jarvis.

6 MR. ROBINSON: Yes, thank you. I do have some things to say.

7 Actually, I'm disappointed for the second time today because I
8 don't really think that manipulating the assignment system to give
9 Judge Akay a fictitious assignment would be a solution. He can't sit on
10 any case. He is in jail and I don't think it would be fair to him or to
11 any other litigant to assign him to some case, so I think that suggestion
12 is not a good one.

13 We would be the first to benefit from the replacement of the
14 Judge and that's our -- and our main desire is to proceed with the
15 hearing which we believe will exonerate Dr. Ngirabatware and lead to his
16 permanent release. But that's not an alternative that we can see is
17 viable under any circumstances. The way I see it, the only way
18 Dr. Ngirabatware can have a hearing is for Judge Akay to be released and
19 to join the Bench. And so that's the direction in which we have
20 proceeded with our motion and that's the direction that we would like you
21 to take.

22 May I move to the issue of provisional release?

23 JUDGE MERON: Yes, please do.

24 MR. ROBINSON: I'm going to be very brief on this topic. We have
25 asked you to apply Rule 68(I) of the Mechanism's Rules of Procedure and

1 Evidence and find that the continuing detention of Judge Akay by the
2 Government of Turkey constitutes special circumstances warranting the
3 temporary provisional release of Dr. Ngirabatware to a safe house in
4 Arusha until Judge Akay is released and the proceedings can resume. This
5 is not our favourite option because it's temporary and we have witnesses
6 who we would like to call who can come and finish this case for us.
7 Dr. Ngirabatware is not happy to be sitting in a safe house in Arusha
8 while his case cannot be heard by this Mechanism. But if you consider
9 that he has already spent nine years in prison, we filed our motion on
10 8th of July. The Prosecution responded on the 19th of September,
11 agreeing that we should have this hearing and there's no prospect, at
12 this point, of having that hearing in the near future. And so the
13 temporary provisional release of Dr. Ngirabatware strikes a balance of
14 mitigating the prejudice to him from the delays caused by the Government
15 of Turkey and at the same time, ensuring his appearance when the
16 proceedings resume. And if someone complains about it, you can just
17 refer them to the Government of Turkey. As soon as it releases Judge
18 Akay, Dr. Ngirabatware's provisional release can be terminated and we can
19 have the hearing on the merits.

20 Thank you.

21 JUDGE MERON: Thank you.

22 Ms. Jarvis.

23 MS. JARVIS: Your Honour, if I may just respond to the point Mr.
24 Robinson made at the beginning of his second submission about the
25 Prosecution's position amounting to a manipulation of the assignment

1 situation. Your Honour, a number of points in response to that. Of
2 course, the basis of our submission is that it is for Your Honour to
3 decide whether there is another acceptable and appropriate assignment
4 that Judge Akay could be placed into, given the situation that's arisen.
5 If Your Honour's determination is that there is not such an assignment,
6 then obviously this would not be a workable proposal. So we're not
7 suggesting that there should be any manipulation of the situation.

8 But what --

9 JUDGE MERON: You did not answer my question whether a
10 post-arrest assignment would be helpful in terms of immunities.

11 MS. JARVIS: Your Honour, as I understand the situation. The
12 immunity of the MICT Judges apply for any times at which they are
13 assigned to MICT business. Judge Akay's been assigned to MICT business
14 up until now. If Your Honour were to rotate him onto another assignment
15 consecutively, I can't see any argument that there would be a period of
16 time in which he was not assigned to MICT business or any argument that
17 would suggest therefore that there had been a gap in the immunity
18 protection. But that is entirely a matter for Your Honour.

19 I would, though, in response to this suggestion of manipulation
20 say that, what we consider to be a far worse situation, of course, is
21 refusing to apply the clearly applicable legal framework for dealing with
22 the absence of a Judge in this situation, and that is, of course, the
23 framework that we have proposed to Your Honour today.

24 Your Honour, when it comes to provisional release, we emphasise
25 in the strongest terms that provisional release is neither an available

1 or acceptable solution to the issues that have arisen in this case. As a
2 preliminary point, Your Honour, and as we've mentioned in our written
3 pleadings, provisional release is not a matter that you have capacity to
4 decide in your position as Pre-Review Judge. Pursuant to Rule 68,
5 provisional release can only be ordered by the full Bench assigned to
6 this case. It is not a matter that is procedural in nature falling
7 within the competence of the Pre-Review Judge acting alone.

8 Your Honour, as further support for that position, we refer to
9 the Rukundo decision of 18 August 2003 where the Appeals Chamber found it
10 had been an error by the Trial Chamber to assign responsibility to a
11 single Judge of the Trial Chamber to decide a provisional release motion,
12 and I quote: "Considering that Rule 65 of the Rules sets out the
13 procedure to be followed in deciding an application for provisional
14 release and that the provision for 'a Trial Chamber' to adjudicate
15 indicate in respect of the application may not be circumvented by
16 delegating the decision to a single Judge pursuant to the provision
17 of ... 73(A) of the Rules."

18 So, Your Honour, we consider that the position is entirely clear
19 and it is not a matter for Your Honour in your position as Pre-Appeal
20 Judge.

21 Your Honour, in any case, the conditions for provisional release
22 have not been satisfied here. We have, in our submissions, and we rely
23 on those written submissions, referred to the flight risk posed by
24 Mr. Ngirabatware and also the reality that the special circumstances
25 condition has not been satisfied. It cannot be satisfied based on an

1 argument of the merits in this case, and that has also been clearly
2 determined in the case law of both this Tribunal and the -- of the ICTY
3 and the ICTR.

4 I would also note, Your Honour, that there is no guarantee from
5 the State to which Mr. Ngirabatware seeks to be released.

6 So, Your Honour, in conclusion, we submit in the strongest terms
7 that in this situation provisional release is not an answer to the fair
8 trial issues, nor is the order to Turkey given the lack of clarity about
9 whether this would provide a timely solution. In those situations,
10 Your Honour, we submit that a way has to be found to move this case
11 forward with a fully composed Bench.

12 Thank you.

13 JUDGE MERON: Thank you. Well, the Prosecutor has raised an
14 interesting point on which your reaction would be appreciated. She
15 suggested that a sole Judge, as Review Judge, I cannot -- it would be
16 outside of my competence to decide on a question pertaining to
17 provisional release for Mr. Ngirabatware under the Rules. She appears to
18 have a point which requires attention.

19 MR. ROBINSON: Yes, that's correct, Your Honour, and that was
20 raised by the Prosecution in its written pleadings and we responded by
21 pointing you to cases which Duty Judges of the ICTY have, in fact, dealt
22 with matters of provisional release when the Bench wasn't available. And
23 I've cited those two cases in my memorandum, and I think that that
24 answers the question that there is a mechanism for, in a situation where
25 the full Bench is not available, urgent matters of provisional release be

1 decided by a single Judge.

2 Thank you.

3 JUDGE MERON: Presuming you're speaking of provisional release
4 not on -- of modification of conditions of detention; correct?

5 MR. ROBINSON: That's correct.

6 JUDGE MERON: Thank you.

7 Now I have a question to Ms. Jarvis. She has raised various --
8 very interesting scenarios, suggesting how I can reactivate - let's use a
9 neutral term - the Bench, and she has suggested that without creating a
10 gap between this case and another gap, I could assign Judge Akay to
11 another panel.

12 Did I understand you correctly?

13 MS. JARVIS: Your Honour, yes. Our submission is that if you
14 considered there was another MICT assignment that would be appropriate
15 for Judge Akay, that would be an option open to you.

16 JUDGE MERON: Now, I would like your help because you, as an
17 experienced Prosecutor, know that we Judges must respect to maintain our
18 integrity and to act in accordance with our judicial obligations, we have
19 to respect judicial practices. I'm sure you know what is the practice in
20 MICT as it was in the ICTY, as it was in the ICTR, before a Judge is
21 assigned to a case. If I can help you, the practice is quite simple.
22 The Presiding Judge never, ever, assigns a case -- Judge to a case
23 without getting in touch with the Judge and ask him about his
24 availability.

25 Now could you suggest how I could inquire into the availability

1 of Judge Akay when he's in detention as to whether he is available to be
2 on another case? Would that correspond to the Rules?

3 MS. JARVIS: Your Honour, it's entirely a matter for you. We
4 have put forward a number of avenues that we consider might provide
5 thoughtful, pragmatic solutions to a very difficult issue that --

6 JUDGE MERON: Yes, but do help me with that. You are saying that
7 I could assign him to maintain, to save his immunity, to another case. I
8 cannot assign -- nobody assigns Judges to a case without talking to a
9 Judge, without ascertaining his conditions, his availability. How do I
10 do that with regard to Judge Akay?

11 MS. JARVIS: Your Honour, if you consider that given the practice
12 that has been adopted on assignment of Judges up until now is
13 incompatible with this solution, then we would simply reiterate our
14 submission that the alternative is then to look at avenues, such as
15 Rule 19(C) and potentially the inherent jurisdiction of the court to find
16 a solution that would be workable in this case. What we fundamentally
17 maintain, however, is that it is not a solution, not on any view, not to
18 find a way to compose a full Bench and move forward with the adjudication
19 of the issues in this case.

20 JUDGE MERON: Even when the Counsel for Mr. Ngirabatware is
21 clearly opposed to this course of action?

22 MS. JARVIS: Your Honour --

23 JUDGE MERON: You say I should move forward. I have consulted
24 the Counsel for Mr. Ngirabatware. He's opposed to the various avenues
25 that you are suggesting.

1 MS. JARVIS: Your Honour, Rule 19(C) is entirely clear. In a
2 situation where a Judge is absent for more than a short duration, it is
3 for the President to assign a Judge in his place or her place who can
4 allow the adjudication of the case to move forward. That is crystal
5 clear in the framework of the Mechanism.

6 Now, Your Honour, if you consider that in the circumstances of
7 this case that is not the solution that you would like to implement, then
8 the challenge is to find another solution that will allow the objectives
9 that you are seeking to uphold to be met. We have raised a number of
10 possible angles for consideration. We don't suggest that you must follow
11 one or other of them. We have simply attempted to assist Your Honour in
12 thinking through some of the issues. But our bottom line is: The Rules
13 require the absence of Judge Akay on the Bench to be remedied at this
14 point in time.

15 JUDGE MERON: Normally we would expect that the Counsel for
16 Mr. Ngirabatware would be making this argument for a quick moving
17 forward. In this case, it's the Prosecution.

18 The Counsel of Mr. Ngirabatware I would ask one question, if I
19 may, before concluding. Would you react in more detail to the argument
20 made by Ms. Jarvis regarding Rule 19(C).

21 MR. ROBINSON: Yes, Mr. President. Using Rule 19(C) would
22 involve replacing Judge Akay and stripping him of his immunity. And,
23 just like -- I've already addressed the fact that that would be
24 completely unfair.

25 And I'd like to point out, Mr. President, that this is a broader

1 issue than what the Prosecution is talking about when it comes to
2 judicial independence. If a state can arrest a Judge and the Judge has
3 to be replaced because of that action, then our Judges are subject to the
4 restrictions that any state may choose to impose upon them by taking away
5 their immunity in one form or another. That goes to the very heart of
6 judicial independence. We don't want Judges having to answer to their
7 states or be fearful of their states if they take a certain decision or
8 they don't. They have to be completely independent. That's why they
9 have diplomatic immunity.

10 So it's no answer to replace a Judge on a particular case and
11 shift him to some meaningless work. That strikes at the very heart of
12 judicial independence, and it's unacceptable. And I have to say for
13 Dr. Ngirabatware's behalf that the easiest thing would be to have you
14 replace a Judge and move forward. And we want to move forward. That's
15 what we desperately want. But not at the expense of a lack of integrity
16 and independence of the system itself.

17 And the answer to the problem is: Turkey has to release
18 Judge Akay, and you should release Dr. Ngirabatware on temporary release
19 while that situation is pending.

20 Thank you.

21 JUDGE MERON: Thank you. I -- Ms. Jarvis, I really would not
22 like you to think that I'm not thinking very seriously about the points
23 you have raised. But perhaps the most important overarching principle
24 which makes us work and which creates -- provides for credibility and
25 support for international justice is the principle of judicial

1 independence. When I have informed the General Assembly of the
2 United Nations and the Security Council that I do not consider it
3 appropriate to consider replacing Judge Akay, I explained this on the
4 broad principle of judicial independence. And I'm sure you will
5 understand that in whatever we do, we Judges must take that principle as
6 lodestar for our comportment.

7 I will very seriously consider the arguments which have been
8 made, including several arguments and possibilities suggested by
9 Ms. Jarvis, and I will try, realising and knowing the urgency of the
10 situation, I will try to issue a decision as soon as I can.

11 I believe there are no other issues and, therefore, the Court
12 will now rise.

13 MS. JARVIS: Your Honour, if I may.

14 JUDGE MERON: Oh, sorry. I'm terribly sorry. Please.

15 MS. JARVIS: I apologise. I realise that I omitted to put on the
16 record one aspect of the Prosecution's response to the provisional
17 release motion which is quite important, and that is that in the event
18 that provisional release would be granted upon the Defence motion, the
19 Prosecution seeks a stay of the decision to enable us to challenge the
20 decision.

21 Thank you.

22 JUDGE MERON: Actually, I'm glad that you made this session
23 continue for another minute, but I think that there is one point which I
24 have not mentioned, and for transparency and information I would like to
25 share it with the Court and the public at large, and that is on

1 21 December 2016, the Government of the United Republic of Tanzania filed
2 a confidential correspondence indicating that it does not support the
3 release of Mr. Ngirabatware onto the territory of Tanzania.

4 I think we can now -- we can now call this meeting to a close.
5 And thank you very much, the Prosecutor and Counsel for Mr. Ngirabatware

6 --- Whereupon the hearing adjourned at 3.32 p.m.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25