

MICT-12-29-R
18-12-2016
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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-12-29-R

THE APPEALS CHAMBER

Before: Judge Theodor Meron, Pre-Review Judge

Registrar: Mr. John Hocking

Date Filed: 18 December 2016

THE PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

Public

FURTHER SUBMISSION ON
MOTION FOR ORDER TO GOVERNMENT OF TURKEY
OR FOR TEMPORARY PROVISIONAL RELEASE

Office of the Prosecutor
Abubacarr Tambadou

Government of the Republic of Turkey

Augustin Ngirabatware:
Peter Robinson

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Introduction

1. Judge Aydin Sefa Akay was arrested and remains detained by the government of Turkey in violation of his diplomatic immunity as a Judge of the Mechanism. His unlawful arrest has brought Dr. Augustin Ngirabatware's efforts to overturn his wrongful conviction to a standstill. The Pre-Review Judge should take a firm stand against this double injustice by ordering Turkey to release Judge Akay forthwith and by granting temporary release to Dr. Ngirabatware.

Procedural History

2. On 10 November 2016, Dr. Ngirabatware moved for an order directing the government of Turkey to cease its prosecution of Judge Aydin Sefa Akay so that Judge Akay can resume his judicial duties in this case. He also requested that the Pre-Review Judge order Dr. Ngirabatware's temporary provisional release if the delay occasioned by Judge Akay's imprisonment was prolonged.¹

3. On 18 November 2016, the Prosecution opposed the request for temporary provisional release.²

4. On 21 November 2016, the Pre-Review Judge requested further submissions from the Prosecution on the issue of the requested order to the Government of Turkey.³

5. On 24 November 2016, the Prosecution indicated that it was in the interest of justice for the government of Turkey to be given an opportunity to be heard before a decision was taken on the motion.⁴

6. On 28 November 2016, the Pre-Review Judge issued an invitation to the Government of Turkey to file a written submission in response to Dr. Ngirabatware's motion by 12 December 2016, and for Dr. Ngirabatware and the Prosecution to reply by 19 December.⁵

7. The Government of Turkey failed to file any written submissions.

Observations

8. Dr. Ngirabatware regrets the Government of Turkey's failure to even attempt to

¹ *Motion for Order to Government of Turkey or for Temporary Provisional Release* (10 November 2016)

² *Prosecution's Response to Motion for Order to Government of Turkey or for Temporary Provisional Release* (18 November 2016)

³ *Order for Further Written Submissions* (21 November 2016)

⁴ *Prosecution Response to Order for Further Submissions* (24 November 2016)

⁵ *Invitation to the Government of the Republic of Turkey* (28 November 2016)

justify its arrest and detention of Judge Akay. He appreciates that the domestic situation in Turkey is difficult and that the government faces many challenges. But that can never be an excuse for failing to follow its international obligations. If Turkey cannot be a trusted partner for member States of the United Nations and its organs, it should not expect cooperation on matters such as extradition and mutual assistance from those States or the United Nations.

9. Turkey was a member of the United Nations Security Council in 2010 when the Mechanism for International Criminal Tribunals was created. It voted in favor of the resolution creating the Tribunal.⁶ That resolution included Article 29(2) of the Statute, providing that “the judges of the Mechanism shall enjoy the same privileges and immunities, exemptions and facilities [as accorded to diplomatic envoys] when engaged on the business of the Mechanism.”

10. Turkey nominated a candidate for the first group of Judges of the Mechanism. On 20 December 2011, its candidate received the third-highest number of votes of all the 25 elected Judges. That candidate was Judge Aydin Sefa Akay, who had served with distinction on the International Criminal Tribunal for Rwanda.⁷

11. Judge Akay was sworn in as a Judge of the Mechanism on 27 April 2012.⁸ On 29 February 2016, the Security Council authorised the extension of the terms of the judges for an additional two-years.⁹ Secretary General Ban Ki Moon re-appointed Judge Akay for an additional two-year term commencing 1 July 2016.¹⁰ Judge Akay was assigned to the Appeals Chamber bench considering Dr. Ngirabatware’s *Motion for Review of Judgement* (8 July 2016) on 25 July 2016.¹¹

12. Judge Akay was considering Dr. Ngirabatware’s *Motion for Review of Judgement* and *Motion for Provisional Release* (1 September 2016) at the time of his arrest by the Government of Turkey on 21 September 2016. The UN Office of Legal Affairs, on behalf of the Secretary-General, formally asserted diplomatic immunity for

⁶ S/PV.6463, http://www.unmict.org/sites/default/files/documents/101222_sc_speeches_record_en.pdf

⁷ A/66/PV87 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/641/94/pdf/N1164194.pdf?OpenElement>

⁸ <http://www.unmict.org/en/news/additional-residual-mechanism-judges-sworn>

⁹ S/RES/2269 [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2269\(2016\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2269(2016))

¹⁰ A/70/973 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/204/87/pdf/N1620487.pdf?OpenElement>

¹¹ *Order Assigning Judges to a Case before the Appeals Chamber* (25 July 2016)

Judge Akay and requested his immediate release from detention and the cessation of all legal proceedings against him.¹² Yet he remains in prison in violation of Turkey's international obligations.

Relief Requested

13. Dr. Ngirabatware requests that his unopposed motion for order to the Government of Turkey be granted and that an order issue directing the Government of Turkey to release Judge Akay forthwith.

14. Dr. Ngirabatware further requests that he be granted immediate temporary provisional release. Contrary to the Prosecution's Response,¹³ the matter of temporary provisional release can be decided by a Single Judge,¹⁴ and the host country and State to which Dr. Ngirabatware seeks to be released (Tanzania) having been given the opportunity to be heard required by the Rules,¹⁵ has lodged no objection to the motion for temporary provisional release or the earlier motion for provisional release.

15. Turkey's continued detention of Judge Akay has unduly delayed consideration of Dr. Ngirabatware's motion for review. Dr. Ngirabatware should not have to spend his tenth Christmas in prison on a wrongful conviction for a crime he did not commit. He should be granted temporary provisional release while the Mechanism, and the United Nations Security Council if necessary,¹⁶ pursues all avenues to secure the release of Judge Akay.

¹² S/2016/975, para. 13 http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/975

¹³ *Prosecution's Response to Motion for Order to Government of Turkey or for Temporary Provisional Release* (18 November 2016) at paras. 1 and 3.

¹⁴ Rule 135 (B) provides that: The Pre-Appeal Judge shall ensure that the proceedings are not unduly delayed and shall take any measures related to procedural matters, including the issuing of decisions, orders, and directions with a view to preparing the case for a fair and expeditious hearing. ICTY jurisprudence establishes that a Single Judge can decide issues related to provisional release in the absence of the full bench. *Prosecutor v Prlic et al*, No. IT-04-74-AR65.1, *Decision on Motions for Reconsideration, Clarification, Request for Release, and Applications for Leave to Appeal* (8 September 2004) at para. 8; *Prosecutor v Krajisnik & Plavsic*, No. IT-00-39-AR73.2, *Decision on Interlocutory Appeal by Momcilo Krajisnik* (26 February 2002) at para. 17

¹⁵ See Rule 68

¹⁶ See Rule 8(A)

Word count: 1124

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is written in a cursive, flowing style with large, rounded letters.

PETER ROBINSON
Counsel for Augustin Ngirabatware

No. MICT-12-29-R



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