

MICT-12-29  
10-11-2016  
(1380 - 1376)

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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-12-29

THE APPEALS CHAMBER

Before: Judge Theodor Meron, Pre-Review Judge

Registrar: Mr. John Hocking

Date Filed: 10 November 2016

THE PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

*Public*

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MOTION FOR ORDER TO GOVERNMENT OF TURKEY  
OR FOR TEMPORARY PROVISIONAL RELEASE

[Oral Hearing Requested]

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Office of the Prosecutor  
Mr. Serge Brammertz  
Mr. Richard Karegyesa  
Mr. Abubacarr Tambadou

Government of the Republic of Turkey

Augustin Ngirabatware:  
Mr. Peter Robinson

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1. Dr. Augustin Ngirabatware moves, pursuant to Article 28 and Rule 55, for an order directing the government of Turkey to cease its prosecution of Judge Aydin Sefa Akay, a member of the Appeals Chamber bench in this case, so that Judge Akay can resume his judicial duties, including ruling on the pending motions for provisional release and review of the judgement. An oral hearing on this motion is requested.

2. Alternatively, Dr. Ngirabatware requests that the Pre-Review Judge order temporary provisional release for Dr. Ngirabatware due to the violation of his rights occasioned by the undue delay in deciding his motion for review of conviction occasioned by Judge Akay's arrest and detention in Turkey.

### **Procedural History**

3. On 20 December 2012, Dr. Ngirabatware was convicted by an ICTR Trial Chamber of incitement to commit genocide, genocide, and rape and sentenced to 35 years imprisonment.<sup>1</sup>

4. On 18 December 2014, Dr. Ngirabatware's conviction for incitement and genocide were upheld, and his conviction for rape reversed, by a MICT Appeals Chamber. His sentence was reduced to 30 years.<sup>2</sup>

5. On 8 July 2016, Dr. Ngirabatware filed a *Motion for Review of Judgement* with the MICT in which he presented new facts demonstrating that he was innocent of the crimes for which he had been convicted at the ICTR.<sup>3</sup>

6. On 25 July 2016, the MICT President assigned a bench of the Appeals Chamber to decide the motion. Among the members of the bench was Judge Aydin Sefa Akay of Turkey.<sup>4</sup>

7. On 17 August 2016, Judge Theodor Meron was designated as the Pre-Review Judge "with responsibility for all pre-review proceedings in the present case."<sup>5</sup>

8. On 1 September 2016, Dr. Ngirabatware filed a motion for provisional release, contending that the prosecution case had collapsed and he should not continued to be imprisoned pending a hearing and judgement on his motion for review.<sup>6</sup>

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<sup>1</sup> *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Judgement and Sentence* (20 December 2012).

<sup>2</sup> *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014).

<sup>3</sup> *Motion for Review of Judgement* (8 July 2016)(confidential)

<sup>4</sup> *Order Assigning Judges to Consider a Case before the Appeals Chamber* (25 July 2016)

<sup>5</sup> *Order Designating a Pre-Review Judge* (17 August 2016)

<sup>6</sup> *Motion for Provisional Release* (1 September 2016)

9. The Prosecution filed responses to the motion for provisional release<sup>7</sup> and motion for review.<sup>8</sup> Dr. Ngirabatware filed a reply on the provisional release issue,<sup>9</sup> but did not reply to the response on the motion for review since the Prosecution agreed that a hearing on that motion was required.

10. Dr. Ngirabatware has already served more than 9 years in prison for a crime he did not commit and is waiting for his motion for provisional relief to be decided and his wrongful conviction to be reviewed by the Appeals Chamber.

11. On 9 November 2016, MICT President Theodor Meron informed the United Nations General Assembly that the proceedings in Dr. Ngirabatware's case have come to a standstill as the result of the arrest of Judge Akay by the government of Turkey, and that this has implications for the fundamental rights of Dr. Ngirabatware to the determination of his claims within a reasonable time.<sup>10</sup>

12. Judge Meron also reported that the government of Turkey had not responded to a request made by the United Nations Office of Legal Affairs, on behalf of the UN Secretary-General, for the release of Judge Akay on the grounds that it violated his immunity as a Judge of the Mechanism.

#### **Legal Provisions**

13. Article 28 provides in pertinent part:

1. States shall cooperate with the Mechanism in the investigation and prosecution of persons covered by Article 1 of this Statute.

2. States shall comply without undue delay with any request for assistance or an order issued by a Single Judge or Trial Chamber in relation to cases involving persons covered by Article 1 of this Statute, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the Mechanism.

14. Rule 55 provides that:

At the request of either Party or proprio motu, a Judge or a Trial Chamber may

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<sup>7</sup> *Prosecution Response to Motion for Provisional Release* (13 September 2016)(confidential)

<sup>8</sup> *Prosecution Response to Motion for Review of Judgement* (20 September 2016)(confidential)

<sup>9</sup> *Reply Brief: Motion for Provisional Release* (16 September 2016)

<sup>10</sup> *Address to the UN General Assembly by Judge Theodor Meron* (9 November 2016)

issue such orders, summonses, subpoenas, warrants, and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

### Argument

15. The Chamber's powers under Article 28 may include any request or order, the purpose of which is to assist the Tribunal in its mandate.<sup>11</sup> An order to the government of Turkey to cease its prosecution of Judge Akay so that the review proceedings in this case can proceed is necessary to assist the Tribunal in its mandate.

16. Article 28 (2) provides a non-exhaustive list of the types of cooperation or assistance which the Tribunal may seek from States.<sup>12</sup> In other circumstances, the Appeals Chambers of the ICTR and ICTY have issued orders under Article 28 to States concerning domestic criminal proceedings which interfere with its mandate.

17. In the *Bagosora* case, the ICTR Appeals Chamber ordered the government of Rwanda to refrain from prosecuting a defence counsel for words spoken or written in the course of his representation of his client at the Tribunal, as such prosecution interfered with the proper functioning of the Tribunal.<sup>13</sup>

18. The Appeals Chamber found that while it would not lightly intervene in the domestic jurisdiction of a state, it had the duty to ensure the fairness of the proceedings at the Tribunal, and had competence under ICTY Article 28 and Rules 54 to issue any related order.<sup>14</sup>

19. In the *Gotovina* case, the ICTY Appeals Chamber used its powers under ICTY Article 29 and Rule 54 ordered the government of Croatia to cease all criminal proceedings against members of the defence team for acts performed in the

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<sup>11</sup> *Prosecutor v Bagosora et al, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance* (7 February 2005), para. 4; *Prosecutor v Nindliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006), para. 5

<sup>12</sup> *Id.*

<sup>13</sup> *Bagosora et al v Prosecutor*. No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010), para. 30

<sup>14</sup> *Id.*, para. 18

fulfillment of their official function before the Tribunal.<sup>15</sup>

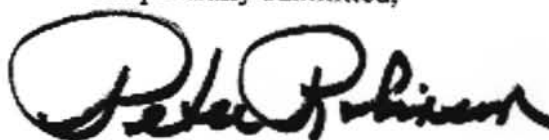
20. In both cases, the domestic prosecution infringed on the immunities conferred upon persons carrying out the mandate of the Tribunals and therefore impeded the work of those Tribunals. Likewise, President Meron has noted before the UN General Assembly that the domestic prosecution of Judge Akay infringes on the immunity conferred upon Judges of the Mechanism, is impeding the work of the Mechanism, and is denying Dr. Ngirabatware his right to due process.

21. For all of these reasons it is respectfully requested that the Pre-Review Judge order the government of Turkey, pursuant to MICT Article 28 and Rule 55 to cease its prosecution of Judge Akay so that he can resume his duties on the Appeals Chamber. Prior to issuing such an order, as a matter of fairness, the government of Turkey should be given the opportunity to be heard at an oral hearing. This hearing should be scheduled as soon as possible.

22. Dr. Ngirabatware has made a compelling showing in his *Motion for Review of Judgement* that his ICTR conviction is unsafe and that he is innocent of the crimes for which he has been convicted. Every day that he spends in prison for a crime he did not commit is a violation of his human rights. Therefore, if the cooperation of the government of Turkey cannot be secured so that these proceedings can continue expeditiously, Dr. Ngirabatware requests that the Pre-Review Judge grant him temporary provisional release to a safe house in Arusha until Judge Akay's return to the Appeals Chamber.

Word count: 1493

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter Robinson', written in a cursive style.

PETER ROBINSON

Counsel for Augustin Ngirabatware

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<sup>15</sup> *Prosecutor v Gotovina*, No. IT-06-90-AR73.5, *Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Government of Croatia* (14 February 2011), para. 71



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