

MICT-12-29-R
27-02-2017
(1455 - 1451)

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UNITED
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Mechanism for International Criminal Tribunals

Case No: MICT-12-29-R

Date: 27 February 2017

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. Olufemi Elias

The Prosecutor

v.

Augustin Ngirabatware

Public

**PROSECUTION RESPONSE TO NGIRABATWARE'S MOTION TO
REPORT THE GOVERNMENT OF TURKEY TO THE UNITED
NATIONS SECURITY COUNCIL AND FOR MODIFICATION OF
CONDITIONS OF DETENTION**

Office of the Prosecutor

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Government of the Republic of Turkey

Augustin Ngirabatware

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27/02/2017 16:48

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1. Ngirabatware's request for modification of his conditions of detention¹ should be dismissed. Other than seeking a Security Council notification regarding the continued detention of Judge Akay, he is not requesting that steps be taken by the MICT to render decisions on his motions for review and provisional release. He cannot, in the circumstances, use the resulting delay as a lever to obtain release or changes to his conditions of detention that are not justified under the applicable legal framework. He is effectively asking the President to order *de facto* provisional release when Rules 67 and 68 do not vest such authority in the President. In any event, the pre-conditions to such release are not met.

2. Regarding Ngirabatware's request to report Turkey to the Security Council pursuant to Rule 8(A), this is a matter for the Pre-Review Judge and the President of the MICT, if satisfied that Turkey has not complied with the order for the release of Judge Akay.²

Ngirabatware cannot use his acceptance of delay to obtain release or more favourable conditions of detention that are not otherwise justified

3. Ngirabatware was convicted of genocide and is now serving his sentence, which was confirmed by the Appeals Chamber. Unless reviewed by the Appeals Chamber, he should continue to serve his sentence. While the arrest of Judge Akay raises serious issues regarding the immunity of the MICT judges, none of them affect the conditions and circumstances of Ngirabatware's detention, which fully comply with UN standards. There is therefore no basis for modifying his conditions of detention.

4. While Ngirabatware has the right to a decision on his motions for review and provisional release, he has at no point requested a solution that would ensure those motions are disposed of without further delay. To the contrary, while the President has indicated that Judge Akay could be replaced in extraordinary circumstances,³ Ngirabatware does not suggest that his current situation rises to that level. Ngirabatware cannot then use the resulting delay to obtain *de facto* provisional release and modifications to the conditions under which he serves his sentence.

¹ *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-R, Motion to Report Government of Turkey to United Nations Security Council and for Modification of Conditions of Detention, 15 February 2017 ("Motion").

² *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017 ("January 2017 Order").

³ January 2017 Order, para.15.

Rule 67 is not applicable to Ngirabatware

5. On a plain reading, Rule 67 applies only to the detention of *accused persons on remand* pending conclusion of trial and appeal proceedings and not to a “convicted person” serving his sentence.⁴ In no way does Rule 67 confer on the President authority to modify the conditions of detention in respect of a convicted person in post-appeal circumstances.

6. The Appeals Chamber has held that an individual who has exhausted all appeals, like Ngirabatware, and whose conviction has been affirmed cannot be considered an “accused”.⁵ Ngirabatware’s pending review application does not change his status as a convicted person. A combined reading of Rules 126, 127 and 145 confirms the conclusion that Rule 67 only applies until such time as a decision on appeal has been delivered and that, thereafter, any detention considerations would fall outside of the scope of Rule 67.⁶

7. Furthermore, Ngirabatware has not cited any authority in support of his reliance on Rule 67 in the post-appeal context. Accordingly, there is no basis upon which a more expansive interpretation of Rule 67 can be sustained. If Ngirabatware has complaints about the actual conditions of his detention, including the frequency of family visits and opportunities to put his professional experience to use, they should be addressed under the complaints process available to detainees or under the sentence enforcement framework.⁷

Provisional release can only be ordered pursuant to Rule 68

8. Even assuming *arguendo* that the President had authority to modify the conditions of detention, he cannot grant Ngirabatware conditions of detention that amount to a *de facto* provisional release. Having regard to the wording of Rule 68, the authority regarding provisional release lies with the Appeals

⁴ Rules 125-127, for example, clearly refer to the “convicted person” rather than an “accused”.

⁵ *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-R, Decision on Motion for Provisional Release, 12 March 2009, para. 4.

⁶ Pursuant to Rule 126(A), Rule 67 applies until a decision on any appeal against the trial judgement has been delivered. Following an appeal judgement, Rule 145 stipulates that a sentence pronounced by the Appeals Chamber shall be immediately enforced. Pursuant to Rule 127, the convicted person shall remain in the custody of the Mechanism pending finalisation of arrangements for his transfer to the State where his sentence shall be served.

⁷ Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 5 June 1998, Rules 61 (family visits), 70-71 (“work programme” opportunities), 72-75 (recreational activities), 82-86 (complaint procedure, including the detainee’s right to make complaints to the Commanding Officer and, if unsatisfied with the Commanding Officer’s decision, to the Registrar, who shall forward it to the President); *see also Prosecutor v. Tolimir*, MICT-15-95-ES, Order Assigning a Judge to Conduct an Inquiry, 9 February 2016 (finding that the relevant detention rules apply *mutatis mutandis* to the Mechanism). When a detainee has complaints concerning detention conditions, he must avail himself of the remedies available and first raise such complaints with the Commanding Officer. *See Ntabakize v. Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012, para.23.

Chamber,⁸ which cannot be circumvented by the impermissible application of Rule 67.

Provisional release pre-conditions must be met

9. Any measure that would involve the release of a convicted person serving his sentence to a safe house, or into the community for 11 hours a day, can only be ordered if the requirements of Rule 68 are met. Such forms of release give rise to the very same concerns as those that are present in a provisional release scenario: the same criteria must then necessarily apply.

10. Agreement of the host state would be required. In Ngirabatware's case, Tanzania has already indicated that it does not support Ngirabatware's release to a safe house in Arusha.⁹ Its expression of willingness to "remain at the disposal of the MICT" cannot be interpreted as an agreement to accept Ngirabatware's unsupervised release from the UNDF for 11 hours each day.¹⁰

11. Special circumstances would also be required to justify release,¹¹ contrary to Ngirabatware's submission.¹² Yet, no special circumstances have been established. Ngirabatware does not even attempt to make out this requirement in his latest submissions. Further, he cannot rely on the purported merits of his motion for review to justify a request for provisional release as he has previously sought to do.¹³

12. Finally, requirements that Ngirabatware not pose a flight risk, or a danger to victims and witnesses, are not met.¹⁴

Conclusion

13. Referral of Turkey to the Security Council is a matter for Judge Meron, as Pre-Review Judge and President, under the terms of Rule 8(A). Ngirabatware's request for modification of his conditions of release, however, should be denied.

⁸ See also January 2017 Order, fn.56.

⁹ January 2017 Order, para.17.

¹⁰ *Contra*, Motion, para.18.

¹¹ *Prosecutor v. Tolimir*, MICT-15-95-ES, Decision on Motion for Provisional Release, 28 January 2016 (public redacted version filed 23 February 2016), para.8 and the sources cited therein.

¹² Motion, para 18.

¹³ *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-R, Prosecution Response to Motion for Provisional Release, 13 September 2016 (confidential) ("Provisional Release Response"), paras.4-5.

¹⁴ *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-R, Transcript, 17 January 2017, T.24-25; Provisional Release Response, paras.6-7; see also *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-R, Prosecution Response to Motion for Order to Government of Turkey or for Temporary Provisional Release, 18 November 2016.

Dated at Arusha this 27th day of February 2017


Richard Karegyesa
Senior Legal Officer

Word Count

1313



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