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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-12-29-R

THE PRESIDENT

Before: Judge Theodor Meron, President

Registrar: Mr. Olufemi Elias

Date Filed: 15 February 2017

THE PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

Public

MOTION TO REPORT GOVERNMENT OF TURKEY TO
UNITED NATIONS SECURITY COUNCIL AND FOR
MODIFICATION OF CONDITIONS OF DETENTION

Office of the Prosecutor
Serge Brammertz
Michelle Jarvis
Richard Karegyesa
Mathias Marcussen
Sunkarie Ballah-Conteh

Government of the Republic of Turkey

Augustin Ngirabatware:
Peter Robinson

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1. Augustin Ngirabatware respectfully moves, pursuant to Rule 8(A), that the President notify the United Nations Security Council that the Government of Turkey has failed to comply with its obligation to cease all legal proceedings against Judge Aydin Sefa Akay and to take all measures necessary to ensure Judge Akay's release from detention no later than 14 February 2017.

2. Dr. Ngirabatware further moves, pursuant to Rule 67, that the President modify his conditions of detention, ordering that he be detained at a safe house in Arusha where those acquitted and having served their sentences reside, or that he remain detained at the UN Detention Facility ("UNDF"), but be allowed to leave between 8 am and 7 pm each day, or, if that is not possible, ordering that he be detained at the UN Detention Unit in The Hague ("UNDU") until Judge Akay rejoins the Appeals Chamber bench hearing his case.

The Rule 8 Motion

3. Rule 8(A) provides in pertinent part:

...where the Trial Chamber is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Trial Chamber, the Trial Chamber may request the President to report the matter to the Security Council, who shall notify the Security Council thereof.

4. On 31 January 2017, the Pre-Review Judge ordered the government of Turkey to cease all legal proceedings against Judge Aydin Sefa Akay and take all measures necessary to ensure Judge Akay's release from detention no later than 14 February 2017 because he has diplomatic immunity.¹

5. Judge Akay remains in detention and the legal proceedings against him have not ceased.

6. The government of Turkey failed, when invited, to make written submissions on the issue of Judge Akay's detention,² refused to accept service of the *Order for Oral Hearing*,³ and failed to appear at the hearing.⁴

7. In addition to the Registrar's efforts to serve the *Order to the Government of*

¹ *Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay* (31 January 2017) ("Order")

² *Invitation to the Government of the Republic of Turkey* (28 November 2016); *Order*, para. 7

³ *Order for Oral Hearing* (21 December 2016); *Registrar's Submission regarding Order for Oral Hearing of 21 December 2016* (13 January 2017)

⁴ *Order*, para. 8

the Republic of Turkey for the Release of Judge Aydin Sefa Akay on the Government of Turkey, counsel for Dr. Ngirabatware sent the *Order* via e-mail on 31 January to Dr. Hakan Yavuz, the Judicial Counsel of the Embassy of Turkey to The Netherlands. He further sent the Turkish translation of the *Order* via e-mail to Dr. Yavuz and Sadik Arslan, Ambassador of Turkey to The Netherlands, on 8 February 2017. No failure notices were received after sending these e-mails. No responses were received either.

8. The government's knowledge of the *Order* is further evidenced by the comments of Turkey's Minister of Justice Bekir Bozdog during a news broadcast on 1 February 2017. Minister Bozdog, when asked about the order, insisted that Judge Akay did not have diplomatic immunity.⁵ United Nations Secretary-General Antonio Guterres met personally with Turkey's President Recep Erdogan in Istanbul on 11 February 2017⁶ and may have also discussed the order with him.

9. Rule 8(A) is similar to ICTY Rule 7 *bis*. When interpreting that Rule, the ICTY Appeals Chamber has said:

When faced with an allegation of non-compliance with an order or request issued under Article 29, a Judge, a Trial Chamber or the President must be satisfied that the State has clearly failed to comply with the order or request...[It] engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal.⁷

10. Rule 8(A) envisions a two-step process: first, the Chamber issuing the order informs the MICT President of the failure of the State to comply, and second, the President reports the violation to the Security Council. Because in this case, it was the President, in his capacity of Pre-Review Judge, who issued the *Order*, it is the President who decides both whether the Government of Turkey failed to comply with its obligation under Article 28 and whether to report that government to the Security Council.

⁵ For an article about the news interview in English see: <http://washingtonhatti.com/2017/02/01/turkish-justice-minister-after-cnn-gets-a-scolding-from-trump-it-targets-turkey/>. A video of the interview itself can be found on the Ministry of Justice's website: <http://www.basin.adalet.gov.tr/TvHaber/bozdog-tvnet-canli-yayininda-konustu>

⁶ <http://www.hurriyetdailynews.com/president-erdogan-meets-un-secretary-general-in-turkey-.aspx?PageID=238&NID=109631&NewsCatID=510>

⁷ *Prosecutor v Blaskic*, No IT-95-14-AR108 bis, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997), para. 35

11. When scrutinizing the behaviour of the Government of Turkey, there is no doubt that it has clearly failed to comply with the order to release Judge Akay by 14 February 2017. Therefore, it has breached its international obligation to cooperate with the MICT. The President should promptly report the government of Turkey to the Security Council.

The Rule 67 Motion

12. Rule 67 provides in pertinent part that “the President may, on the application of a Party, request modification of the conditions of detention of an accused.”

13. Because Turkey refuses to release Judge Akay, Dr. Ngirabatware’s case is at a standstill.⁸ He remains in prison for a crime he did not commit, waiting for a hearing he cannot have. He cannot even obtain consideration of provisional release: the Appeals Chamber cannot rule on his *Motion for Provisional Release* in the absence of Judge Akay and the Pre-Review Judge does not have the power to rule on his *Motion for Temporary Provisional Release*.⁹

14. Modification of the conditions of detention by the President, pursuant to Rule 67, appears to be the only vehicle for mitigating the prejudice to Dr. Ngirabatware as a result of Turkey’s continuing detention of Judge Akay.

15. Dr. Ngirabatware had requested in his *Motion for Temporary Provisional Release*, to be allowed to live in the safe house in Arusha with the ICTR acquitted persons and those who have served their sentences. If this is not possible as a modification of the conditions of detention, he requests that other alternatives be considered.

16. Dr. Ngirabatware respectfully suggests that the President can modify the conditions of his detention at the UNDF in Arusha to allow him to leave the facility daily from 8 am to 7 pm or at other hours to be determined by the President. Dr. Ngirabatware proposes to spend his days working on a voluntary basis for a non-governmental organisation, perhaps assisting them with funding and management issues. This would allow him to put to good use his PhD in Economics and his experience in obtaining and managing international assistance.

⁸ *Order*, para. 12

⁹ *Order*, para. 17

17. Granting Dr. Ngirabatware this limited freedom while awaiting the release of Judge Akay and resumption of his case at the MICT, and at the same time requiring him to spend nights at the UNDF, would strike a fair balance between recognizing the prejudice to him from the delay and keeping him in detention.

18. Unlike provisional release pursuant to Rule 70(I), modification of the conditions of detention does not require special circumstances. Nor does it require the consent of the host state. Therefore, Tanzania's earlier opposition to provisional release does not preclude modification of the conditions of detention, particularly in light of the government of Tanzania's willingness to remain at the disposal of the MICT if other assistance is required.¹⁰

19. If the President does not believe that modifying the conditions as proposed above is appropriate, and there are no means for Dr. Ngirabatware to have any modicum of freedom while awaiting the release of Judge Akay, Dr. Ngirabatware would request that, at the least, his conditions of detention be modified to provide for him to be detained at the UNDU in The Hague.

20. This alternative would provide him with a second-best situation—to have visits with his family. Dr. Ngirabatware's wife, daughter, and son, and his new granddaughter, all reside in Paris and are able to visit him very infrequently due to the expense of travel to Arusha. Modifying the conditions of detention by designating the UNDU as the place of detention, although still keeping Dr. Ngirabatware in prison for a crime he did not commit, would at least have the benefit of allowing him to have visits from his family to help him through this period of inactivity and waiting.

21. Dr. Ngirabatware fully supports the principles of judicial independence and integrity so eloquently expressed in the *Order*. He wishes the United Nations to be unyielding in its resolve to obtain the release of Judge Akay. At the same time, it is only fair that his conditions of detention be modified to mitigate the prejudice to him from the delay occasioned by the Government of Turkey's illegal detention of Judge Akay.

Conclusion

22. It is respectfully requested that the President (1) report the non-compliance of the Government of Turkey to the United Nations Security Council; and (2) modify the

¹⁰ *Id.*

conditions of detention for Dr. Ngirabatware until the Government of Turkey complies with its obligations.

Word count: 1629

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



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