

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: 23 October 2017

THE PROSECUTOR

v.

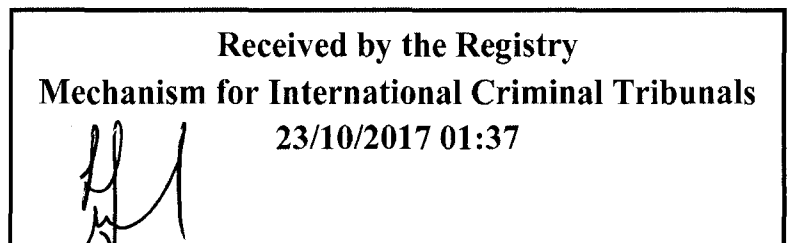
AUGUSTIN NGIRABATWARE

Public

SECOND RENEWED MOTION TO MODIFY CONDITIONS OF DETENTION

Office of the Prosecutor
Mathias Marcussen
Thembile Segoete

Augustin Ngirabatware:
Peter Robinson



1. Despite presenting compelling evidence of his innocence to the Mechanism in July 2016, Augustin Ngirabatware is yet to have a hearing on his *Motion for Review of Judgement*. He faces his tenth Christmas in prison for crimes he did not commit.

2. Because of the undue delay in organizing the review hearing, and the possibility of his transfer to serve his sentence in a West African country, Dr. Ngirabatware respectfully 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, with such conditions as the President deems appropriate, or that he remain detained at the UN Detention Facility (“UNDF”), but be allowed to leave between 8 am and 7 pm each day, until the commencement of his review hearing.

Procedural History

3. On 22 March 2017, the President denied Dr. Ngirabatware’s motion for modification of conditions of detention, but invited him to renew his motion “should there be no material change in the circumstances that are currently giving rise to the ongoing delay in the Ngirabatware case by 9 June 2017.”¹ Those circumstances were the unlawful detention of Judge Aydin Sefa Akay by the government of Turkey.

4. On 22 June 2017, the President denied Dr. Ngirabatware’s renewed motion for modification of conditions of detention as moot after Judge Akay was released from detention and rejoined the Appeals Chamber,² and the Appeals Chamber had granted Dr. Ngirabatware a review hearing.³ The Appeals Chamber also denied Dr. Ngirabatware’s motion for provisional release on 29 June 2017, as the review hearing appeared to be imminent.⁴

5. However, the review hearing has not yet been held, and on 16 October 2017 Dr. Ngirabatware was notified that his transfer to a West African country to serve his sentence is planned.

¹ *Decision on Motion to Report Government of Turkey to United Nations Security Council and for Modification of Conditions of Detention* (22 March 2017) at p. 4

² *Decision on Renewed Motion for Modification of Conditions of Detention* (22 June 2017)

³ *Decision on Ngirabatware’s Motion for Review* (19 June 2017)

⁴ *Decision on Motion for Provisional Release* (29 June 2017)(confidential)

Argument

6. Serving a sentence for a crime that one did not commit is incredibly painful. It generates feelings of helplessness at the failure of the judges of the Trial Chamber to see and find the truth, feelings of disbelief at the sheer injustice and the inability to correct it, and feelings of sorrow for the needless suffering of one's family. Dr. Ngirabatware has endured his wrongful incarceration without bitterness and with great dignity, and has fought for the principle of judicial independence even at the cost of some delay in his case.

7. However, the delay in holding the review hearing has now extended for four months since Judge Akay's release, is unrelated to any principle, and appears likely to continue for "the coming months".⁵ Now, Dr. Ngirabatware faces the further disruption and distress of being transferred from Arusha to a West African country while awaiting his hearing.

8. While Dr. Ngirabatware appreciates that there are many moving parts to organising a review hearing, the delay of more than 15 months is undue, and for an innocent person like Dr. Ngirabatware, unbearable. It is unfair to penalize him for problems of courtroom readiness or judicial availability.

9. In the only case at the ICTR or ICTY in which a hearing on a motion for review of judgement was held, the Appeals Chamber heard testimony on the motion approximately four months after the motion was filed. The entire review process was completed in that case in ten months and eleven days.⁶

10. In that case, the review involved only one count of conviction, and the accused was serving a sentence on portions of the conviction that were unchallenged. In Dr. Ngirabatware's case, his motion, if granted, would invalidate his entire conviction. Thus the risk for unjust imprisonment, and the need to avoid undue delay, is even greater in Dr. Ngirabatware's case. Every day he spends in prison is a day that can never be restored to him or his family.

⁵ Address to the UN General Assembly by Judge Theodor Meron, President of the Mechanism (18 October 2017)

⁶ *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Review Judgement* (8 December 2010), paras. 1, 6 (Application filed on 28 January 2010, hearing held on 3 June 2010)

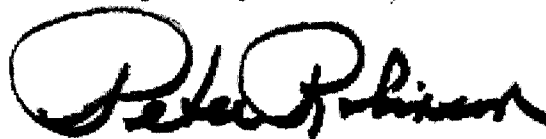
11. The undue delay, coupled with the possible disruption and distress from transfer across the African continent while awaiting the hearing, amounts to exceptional circumstances that imperatively demand modification of the conditions of detention.⁷ Although he evaded “justice” prior to his arrest, and is serving a long sentence that he cannot get a timely hearing to undo, Dr. Ngirabatware has every incentive to remain in Arusha under modified conditions of detention until his review hearing so that he can finally be exonerated. He should not continue to be penalized for the delay in holding a hearing that is not his fault.

12. In the *Milutinovic et al* case at the ICTY, a Trial Chamber considered that where the accused had already been in detention for three years, a further delay in the start of the trial was a factor to be weighed in favour of releasing the accused pending trial.⁸ Likewise in the *Bemba et al* case at the ICC, the Trial Chamber held that release was appropriate after the suspects had been detained for eleven months while awaiting trial.⁹ While the accused in those cases benefitted from the presumption of innocence, the showing of actual innocence made by Dr. Ngirabatware in his *Motion for Review of Judgement* (8 July 2016) cannot be ignored.

13. Balancing the harm of continued incarceration to an innocent man against the non-existent risk of flight, and weighing the further delay in holding the hearing due to circumstances beyond Dr. Ngirabatware’s control, the President is respectfully requested to modify the conditions of detention for Dr. Ngirabatware until the review hearing can be held.

Word count: 1132

Respectfully submitted,



PETER ROBINSON

Counsel for Augustin Ngirabatware

⁷ *Decision on Motion to Report Government of Turkey to United Nations Security Council and for Modification of Conditions of Detention* (22 March 2017) at p. 4

⁸ *Prosecutor v Milutinovic et al*, No. IT-99-37-PT, *Decision on Applications for Provisional Release* (14 April 2005) at para. 32

⁹ *Prosecutor v Bemba et al*, No. ICC-01/05-01/13, *Decision regarding Interim Release* (17 August 2015) at para. 16



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