

MICT-12-29-R
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(1905 - 1900)

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Mechanism for International Criminal Tribunals

Case No: MICT-12-29-R

Date: 30 October 2017

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, President

Registrar: Mr. Olufemi Elias

THE PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

PUBLIC WITH CONFIDENTIAL ANNEX

**PROSECUTION RESPONSE TO NGIRABATWARE'S SECOND
RENEWED MOTION TO MODIFY CONDITIONS OF
DETENTION**

The Office of the Prosecutor:

Mr. Mathias Marcussen
Ms. Thembile Segoete

Augustin Ngirabatware
Peter Robinson

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1. For the reasons set out in the Prosecution's response to Ngirabatware's first and renewed motions for modification of his detention conditions,¹ the Second Renewed Motion should be dismissed.²

2. Ngirabatware bases his request on (i) the "possible disruption and distress from transfer across the African continent" to the enforcement state, and (ii) undue delay. Ngirabatware's contention that his transfer to a West African country may result in "possible disruption and distress" is speculative and lacks specificity. Furthermore, Ngirabatware does not explain the link between his transfer to the enforcement state and the need for his release to a safe house in Arusha or into the Tanzanian community for 11 hours each day.³ There is in fact no link. The appropriate remedy to address his transfer to the enforcement state is a stay of the planned transfer pending the review hearing.

3. Additionally, Ngirabatware makes the untenable claim that his imprisonment for an additional four months since Judge Akay's release amounts to undue delay⁴ and the length of the current proceedings are so exceptional in nature that his release from the UNDF is necessary.⁵ First, Ngirabatware is not an "innocent person"⁶ who is now being "penalize[d]"⁷ by being made to serve out his sentence pending the review hearing. He is serving his 30 year sentence for having been found guilty of direct and public incitement to commit genocide and instigating and aiding and abetting genocide. The remainder of his sentence to be served is considerable. His claim to innocence rests on his application for review which is based on alleged facts that have yet to be proved. Not only does Ngirabatware not benefit from the presumption of innocence, applying for a review of a conviction that has been affirmed on appeal does not amount to a "showing of actual innocence"⁸ under any reasonable

¹ 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, 27 February 2017 ("Response"); Prosecution Response to Ngirabatware's Renewed Motion to Modify Conditions of Detention, 5 June 2017.

² Second Renewed Motion to Modify Conditions of Detention, 23 October 2017 ("Second Renewed Motion").

³ Second Renewed Motion, para.2.

⁴ Second Renewed Motion, paras.7-8.

⁵ Second Renewed Motion, para.11.

⁶ Second Renewed Motion, para.8.

⁷ Second Renewed Motion, para.8.

⁸ Second Renewed Motion, para.12.

construction. The *Milutinovic et al.* case and the *Bemba et al.* case before the ICC⁹ concern accused who seek release pending trial and are therefore inapposite.

4. Second, aside from making a claim of undue delay, Ngirabatware fails to demonstrate that passage of an additional four months since Judge Akay's release are circumstances that are so exceptional in nature that they warrant his release. His continued detention is proportionate¹⁰ and remains within acceptable limits, particularly considering the seriousness of the crimes he has committed and the length of the penalty imposed. His continued detention is also necessary to avoid the risk of him not returning to the custody of the MICT and either further delaying the review proceedings or failing to be in detention in the event the Appeals Chamber upholds his convictions at the conclusion of the review hearing.¹¹ There is a heightened incentive for Ngirabatware to abscond in the current circumstances given that his convictions have been affirmed on appeal.¹²

5. Ngirabatware's request effectively amounts to a post-conviction request for provisional release. The Prosecution maintains its position that the President lacks the authority to grant such a request.¹³ In any event, and despite Ngirabatware's own

⁹ Second Renewed Motion, para.12.

¹⁰ See *Prosecutor v. Kordić & Cerkez*, Case No.IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004 ("Kordić Decision"), para.9.

¹¹ See Kordić Decision, para.9.

¹² See *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para.9; *Prosecutor v. Zelenović*, Case No. IT-96-23/2-ES, Decision on Motion for Provisional Release, 21 February 2008, para.11; *Prosecutor v. Krajišnik*, Case No. IT-00-39-ES, Decision on Krajišnik's Application for Custodial Visit, 17 June 2009, para.19. Ngirabatware avers that he has every incentive to remain in Arusha under modified conditions of detention and claims that the risk of flight is non-existent. Second Renewed Motion, paras.11, 13. See also Confidential Annex.

¹³ See *Prosecutor v. Tolimir*, Case No. MICT-15-95-ES, Public Redacted Version of the "Decision on Motion for Provisional Release" Filed on 28 January 2016, 23 February 2016, para.7 (confirming that Rule 68 applies to convicted persons in the custody of the Mechanism pending transfer to an enforcement State); *Prosecutor v. Borovčanin*, Case No. IT-05-88-AR65.12, Decision on Appeal from Decision on Ljubomir Borovčanin's Request for Provisional Release, 1 March 2011, paras.8-9; *Prosecutor v. Zelenović*, Case No. IT-96-23/2-ES, Decision on Motion for Provisional Release, 21 February 2008, paras.2-3; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, paras.2-5. See also Response, paras.8-9; *Prosecutor v. D. Nikolić*, Case No. MICT-15-85-ES.4, Prosecution Appeal of the Decision Granting Provisional Release to Drago Nikolić, 27 July 2015 (public redacted version filed 29 October 2015), paras.9-15. While the Motion effectively concerns release, the Prosecution maintains its position that Rule 67 does not apply to the modification of detention conditions of convicted persons. See Response, paras.5-7. Insofar as the President found that he had such authority, he cites no legal basis. See Decision on Motion to Report Government of Turkey to United Nations Security Council and for Modification of Conditions of Detention, 22 March 2017, fn.17. See also *Prosecutor v. Radić*, Case No.IT-98-30/1-A, Decision on Request for Provisional Release, 13 July 2005, para.3 ("Radić has not identified any provision of the Rules of Procedure and Evidence ("Rules") which empower the President to grant a convicted accused awaiting transfer to an enforcement State a right to provisional release. Indeed, under the Rules of this Tribunal there is no provision which permits a convicted

reliance exclusively on provisional release decisions,¹⁴ he neither addresses the cumulative preconditions for provisional release nor does he meet them: (i) the Host State has not provided a guarantee in support of his release, (ii) there are no special circumstances justifying his release having been convicted, and (iii) Ngirabatware's release poses a flight risk and threat to witnesses and victims.¹⁵ These preconditions that apply to provisional release also apply to any release or other modification of detention conditions resulting in the presence of a convicted person outside the UNDF.¹⁶

6. The request of Ngirabatware whose conviction has been affirmed on appeal, and in circumstances where he has not established the relevant preconditions, should be dismissed.

Word Count: 1,293



Mathias Marcussen
Senior Legal Officer
Officer-in-Charge

Dated this 30th day of October 2017
At The Hague, The Netherlands

accused to request such a release from the President, and accordingly I do not have the authority to consider the Request of Radić.”).

¹⁴ Second Renewed Motion, para.12.

¹⁵ See Response, paras.8-12.

¹⁶ See Response, para.9. See also Agreement Between the United Nations and the United Republic of Tanzania Concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, 26 November 2013, arts.26(1)-(2), 35, 37-39; *Prosecutor v. Ljubčić*, Case No. IT-00-41-PT, Decision on Request for Modification of Conditions of Detention, 23 November 2005, para.3; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Order of the President on the Renewed Defence Motion Concerning Conditions of Detention During Trial, 24 January 2005, para.17. Further, a detainee's rights and privileges in the UNDF are subject to a detainee's flight risk, the safety and security of the detainee and other persons, and good order. See 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, *inter alia*, Rules 3, 11, 35, 39, 42-43, 54, 64, 67, 72-73, 76, 87. As such concerns regulate conditions *within* the UNDF, they must apply with even more force to any release or detention *outside* the UNDF.



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