

MICT-12-29-R  
02-11-2017  
(1909 - 1906)

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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: 2 November 2017

THE PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

*Public*

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REPLY BRIEF: SECOND RENEWED MOTION  
TO MODIFY CONDITIONS OF DETENTION

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Office of the Prosecutor  
Mathias Marcussen  
Thembile Segoete

Augustin Ngirabatware:  
Peter Robinson

**Received by the Registry**  
**Mechanism for International Criminal Tribunals**  
**02/11/2017 13:15**  
*Mwaipopo*

1. On 23 October 2017, due to the delay in holding a review hearing, Augustin Ngirabatware moved, pursuant to Rule 67, for modification of his conditions of detention until the commencement of that hearing.<sup>1</sup>

2. The Prosecution responded on 31 October 2017.<sup>2</sup> Dr. Ngirabatware now replies.

3. The Prosecution first contends that the appropriate remedy to address Dr. Ngirabatware's impending transfer from the United Nations Detention Facility ("UNDF") to a West African state is a stay of the planned transfer pending the review hearing.<sup>3</sup> However, this would leave Dr. Ngirabatware as the sole male occupant of the UNDF and create conditions akin to solitary confinement.

4. In the *Rasic* case, the ICTY Appeals Chamber upheld a decision suspending the service of a sentence of imprisonment where the defendant would have had to serve her sentence as the only woman at the United Nations Detention Facility ("UNDU") in The Hague.<sup>4</sup> Likewise, conditions of detention that would allow Dr. Ngirabatware to leave the UNDF during the day, or reside at a safe house with acquitted persons or persons who have already served their sentences, can mitigate the effect of the otherwise solitary confinement that would occur at the UNDF.

5. The Prosecution next contends that continued incarceration at the UNDF is warranted, despite the delay, because Dr. Ngirabatware's "claim to innocence rests on his application for review which is based on alleged facts that have yet to be proved."<sup>5</sup> This argument is circular: Dr. Ngirabatware can't get a timely hearing to prove his innocence so he can't have his conditions of detention modified because he hasn't proved his innocence. The President should reject the Prosecution's Kafkaesque reasoning.

6. The Prosecution next contends that modification of the conditions of detention poses a risk that Dr. Ngirabatware will fail "to be in detention in the event the Appeals

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<sup>1</sup> *Second Renewed Motion to Modify Conditions of Detention* (23 October 2017) ("Motion")

<sup>2</sup> *Prosecution Response to Ngirabatware's Second Renewed Motion to Modify Conditions of Detention* (31 October 2017) ("Response")

<sup>3</sup> *Response*, para. 2

<sup>4</sup> *Prosecutor v Rasic*, No. IT-98-32/1-R77.2-A, *Judgement* (16 November 2012), para. 27 affirming *Prosecutor v Rasic*, No. IT-98-32/1-R77.2-A, *Written Reasons for Oral Sentencing Judgement* (6 March 2012), para. 31: "the Trial Chamber took account of the particularly difficult circumstances that would be engendered by Jelena Rasic being the only female detainee in the UNDU and the quasi-solitary confinement regime that would follow"

<sup>5</sup> *Response*, para. 3

Chamber upholds his convictions at the conclusion of the review hearing.”<sup>6</sup> However, Dr. Ngirabatware has only asked to have the conditions of detention modified until the **commencement** of the review hearing.<sup>7</sup> Dr. Ngirabatware has every reason to obey all conditions while waiting for his review hearing, since it is his opportunity to be exonerated.

7. The Prosecution’s contention that the President lacks authority to modify the conditions of Dr. Ngirabatware’s detention<sup>8</sup> has already been rejected.<sup>9</sup>

8. Notably, the Prosecution has not provided any justification for the delay in holding the review hearing. While Dr. Ngirabatware is sympathetic to the various challenges faced by the Appeals Chamber in organizing the review hearing, including the illegal detention of Judge Akay and courtroom construction problems, he cannot be expected to bear the burden for these delays. The Appeals Chamber has found that a defendant is entitled to a remedy for undue delay, including reduction in the length of confinement.<sup>10</sup>

9. Since filing his *Motion for Review of Conviction* (8 July 2016) some 16 months ago, presenting strong evidence that he has been wrongfully convicted, Dr. Ngirabatware has conducted himself and this litigation in a principled and professional manner. It is wrong to continue to keep an innocent man locked up while his hearing is delayed due to circumstances beyond his control. **Modifying the conditions of Dr. Ngirabatware’s detention until the review hearing can be held is a reasonable balance under the circumstances.**

10. Therefore, the President is respectfully requested to modify the conditions of Dr. Ngirabatware’s detention by 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 UNDF, but be allowed to leave between 8 am and 7 pm each day, until the commencement of his review

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<sup>6</sup> *Response*, para. 4.

<sup>7</sup> *Motion*, paras. 2,13

<sup>8</sup> *Response*, para. 5

<sup>9</sup> *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.

<sup>10</sup> *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 395; *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 45; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 324

hearing.

Word count: 845

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Peter Robinson". The signature is written in dark ink and is positioned above the printed name.

PETER ROBINSON

Counsel for Augustin Ngirabatware



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