



Mechanism for International Criminal Tribunals

Case No.: MICT-12-29-R

Date: 9 November 2017

Original: English

**THE PRESIDENT OF THE MECHANISM**

**Before:** Judge Theodor Meron, President

**Registrar:** Mr. Olufemi Elias

**Decision of:** 9 November 2017

**PROSECUTOR**

v.

**AUGUSTIN NGIRABATWARE**

***PUBLIC***

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**DECISION ON SECOND RENEWED MOTION TO MODIFY  
CONDITIONS OF DETENTION**

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**The Office of the Prosecutor**

Mr. Mathias Marcussen  
Ms. Thembile Segoete

**Counsel for Mr. Augustin Ngirabatware**

Mr. Peter Robinson

**Received by the Registry  
Mechanism for International Criminal Tribunals**

**09/11/2017 13:40**

A handwritten signature in black ink, appearing to be the initials 'MR'.

**I, THEODOR MERON**, President of the International Residual Mechanism for Criminal Tribunals (“Mechanism”);

**NOTING** the “Judgement and Sentence” issued by Trial Chamber II of the International Criminal Tribunal for Rwanda on 20 December 2012 in the case of *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T;

**NOTING** the “Judgement” issued by the Appeals Chamber of the Mechanism on 18 December 2014 in the case of *Augustin Ngirabatware v. The Prosecutor*, Case No. MICT-12-29-A;

**NOTING** the “Motion for Review of Judgement” filed confidentially on 8 July 2016 by Mr. Augustin Ngirabatware (“Request for Review” and “Ngirabatware”, respectively);

**NOTING** that on 25 July 2016, I assigned a bench of the Appeals Chamber to decide on Ngirabatware’s Request for Review (“Appeals Chamber”);<sup>1</sup>

**RECALLING** the “Decision on Motion to Report Government of Turkey to United Nations Security Council and for Modification of Conditions of Detention” rendered on 22 March 2017 (“22 March Decision”), wherein I, *inter alia*, denied Ngirabatware’s request for modification of his conditions of detention and invited him to make a renewed application should there be no material change in the circumstances that were giving rise to the ongoing delay in his case by 9 June 2017;<sup>2</sup>

**RECALLING** the public and redacted version of the “Decision on Ngirabatware’s Motion for Review” filed on 19 June 2017 (“Decision on Motion for Review”), wherein the Appeals Chamber, *inter alia*, granted the Request for Review and ordered the parties to submit in writing a list of evidence and witnesses, if any, that each party proposes to introduce at an eventual review hearing (“Review Hearing”);<sup>3</sup>

**RECALLING** the “Decision on Renewed Motion to Modify Conditions of Detention” rendered on 22 June 2017 (“22 June Decision”), wherein I held that Ngirabatware’s request for modification of his conditions of detention until such time as Judge Akay “rejoins the Appeals Chamber bench hearing [Ngirabatware’s] case” had become moot given, as demonstrated by the issuance of the Decision on Motion for Review, that Judge Akay had resumed his duties as a member of the bench of the Appeals Chamber in this case;<sup>4</sup>

**BEING SEISED OF** the “Second Renewed Motion to Modify Conditions of Detention” filed by Ngirabatware on 23 October 2017 (“Second Renewed Motion”), wherein Ngirabatware requests, pursuant to Rule 67 of the Mechanism Rules of Procedure and Evidence, that I 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 (“Safe House”), with such conditions as I deem

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<sup>1</sup> Order Assigning Judges to Consider a Case before the Appeals Chamber, 25 July 2016.

<sup>2</sup> 22 March Decision, p. 4.

<sup>3</sup> Decision on Motion for Review, p. 2-3.

<sup>4</sup> 22 June Decision, p. 2.

appropriate, or that he remain detained at the United Nations Detention Facility (“UNDF”), but be allowed to leave between 8am and 7pm every day, until the commencement of the Review Hearing;<sup>5</sup>

**NOTING** that Ngirabatware remains in the custody of the Mechanism at the UNDF, pending transfer to a State where his sentence will be served;

**NOTING** that Ngirabatware contends, *inter alia*, that “[t]he undue delay, coupled with the possible disruption and distress from transfer across the African continent while awaiting the [Review Hearing], amounts to exceptional circumstances that imperatively demand modification of the conditions of detention” and that it is unfair to penalize Ngirabatware for the delay in the Review Hearing of more than 15 months;<sup>6</sup>

**NOTING** the public with confidential annex “Prosecution Response to Ngirabatware’s Second Renewed Motion to Modify Conditions of Detention” filed by the Office of the Prosecutor of the Mechanism on 31 October 2017 (“Response” and “Prosecution”, respectively), wherein the Prosecution argues, *inter alia*, that: (i) “the appropriate remedy to address his transfer to the enforcement [S]tate is a stay of the planned transfer pending the review hearing”;<sup>7</sup> and (ii) Ngirabatware Second Renewed Motion “effectively amounts to a post-conviction request for provisional release” the cumulative preconditions for which have neither been addressed nor met in the present case;<sup>8</sup>

**NOTING** the public “Reply Brief: Second Renewed Motion to Modify Conditions of Detention”, filed by Ngirabatware on 2 November 2017, wherein Ngirabatware contends, *inter alia*, that: (i) if his planned transfer to an enforcement State was delayed, and he was the sole male occupant at the UNDF, this would create conditions akin to solitary confinement and this scenario could be mitigated by allowing him to leave the UNDF during the day or him residing at the Safe House;<sup>9</sup> (ii) he has every reason to obey all conditions on the modification of the conditions of his detention while waiting for his Review Hearing;<sup>10</sup> and (iii) “while his hearing is delayed due to circumstances beyond his control”, the modification of his conditions of “detention until the Review Hearing can be held is a reasonable balance under the circumstances”<sup>11</sup>;

**NOTING** the public “Prosecution Motion Seeking Leave to File a Sur-Reply and Sur-Reply to Defence Reply to Prosecution Response to Ngirabatware’s Second Renewed Motion to Modify Conditions of Detention”, filed by the Prosecution on 6 November 2017 (“Sur-Reply”), wherein the Prosecution argues, *inter alia*, that Ngirabatware: (i) posits new arguments in his Reply that should

<sup>5</sup> Second Renewed Motion, paras. 2, 13.

<sup>6</sup> Second Renewed Motion, paras. 8-9, 11.

<sup>7</sup> Response, para. 2.

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

<sup>9</sup> Reply, paras. 3-4.

<sup>10</sup> Reply, para. 6.

<sup>11</sup> Reply, paras. 8-9.

have been raised in the Second Renewed Motion and, therefore, seeks leave to file its Sur-Reply;<sup>12</sup> and (ii) Ngirabatware offers no support for his claim that a stay of his transfer to an enforcement State would leave him as the sole male occupant of the UNDF and create conditions akin to solitary confinement;<sup>13</sup>

**CONSIDERING** the Sur-Reply appropriately addresses further issues raised in the Reply and, therefore, it is in the interests of justice that this information be taken into account in my judicial determination;

**RECALLING** the Decision on Motion for Review whereby the Appeals Chamber determined that information of an evidentiary nature “that could not have been taken into account at trial or on appeal” has been identified which constitutes a new fact, which was neither known to Ngirabatware nor could have been discovered through the exercise of due diligence, warranting a Review Hearing;<sup>14</sup>

**CONSIDERING** that the new fact has not been proved and that Ngirabatware’s conviction is subject to the outcome of the review proceedings;<sup>15</sup>

**CONSIDERING** further that the proper preparation of the Review Hearing is continuing and that the Appeals Chamber anticipates scheduling the Review Hearing in the near future;<sup>16</sup>

**CONSIDERING** that I have not yet received from the Registrar the required information pursuant to the Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve his or her Sentence of Imprisonment,<sup>17</sup> recommending enforcement States for the enforcement of Ngirabatware’s sentence and, therefore, Ngirabatware’s contention that the possible disruption and distress from his potential transfer to an enforcement State while awaiting the Review Hearing is speculative and hypothetical;

**CONSIDERING** further that the claim of potential solitary character of Ngirabatware’s ongoing confinement at the UNDF, while awaiting the Review Hearing, assumes that all other prisoners currently detained at the UNDF will be transferred for enforcement of sentence in the near future and is likewise speculative and hypothetical at the present time, as I have not yet received from the Registrar the required information pursuant to the Practice Direction recommending enforcement States for the majority of prisoners currently detained at the UNDF awaiting transfer, including Ngirabatware;

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<sup>12</sup> Sur-Reply, para. 1.

<sup>13</sup> Sur-Reply, para. 2.

<sup>14</sup> Decision on Motion for Review, pp. 2, 3.

<sup>15</sup> Decision on Motion for Review, pp. 2, 3; Decision on Motion for Provisional Release, 29 June 2017 (confidential), para. 10.

<sup>16</sup> Decision on Request for Status Conference, 3 October 2017, p. 2.

<sup>17</sup> MICT/2 Rev. 1, 24 April 2014 (“Practice Direction”).

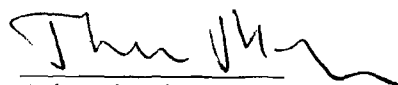
**OBSERVING** that, in any future decision on designation of an enforcement State for Ngirabatware and the timing of any transfer pursuant thereto, I would take into account the impact of the proximity of a Review Hearing in reaching a decision;

**FOR THE FOREGOING REASONS,**

**HEREBY GRANT** the Prosecution leave to file the Sur-Reply and **DENY** the Second Renewed Motion.

Done in English and French, the English version being authoritative.

Done this 9th day of November 2017,  
At The Hague,  
The Netherlands.



Judge Theodor Meron  
President

**[Seal of the Mechanism]**





**TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE  
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<b>Date Created/ Daté du :</b>	09 November 2017	<b>Date transmitted/ Transmis le :</b> 09 November 2017	<b>No. of Pages/ Nombre de pages :</b> 5
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