UNITED
NATIONS

Case No : MICT-14-62 ES.1

Mechanism for International Criminal Tribunals

Date : 8 June 2018

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THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. Olefumi Elias

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THE PROSECUROR

v.

ALOYS SIMBA

DOMINIQUE NTAWUKULILYAYO

HASSAN NGEZE

NTABAKUZE'S APPLICATION FOR LEAVE TO INTERVENE IN THE MATTER REGARDING THE PRESIDENT'S REQUEST TO THE REPUBLIC OF RWANDA RELATED TO THE APPLICATION FOR EARLY RELEASE LODGED BY MSSRS. ALOYS SIMBA, DOMINIQUE NTAWUKULILYAYO AND HASSAN NGEZE, pursuant to RULE 83 of MICT RULES and ESTABLISHED INTERNATIONAL PRINCIPLES OF LAW

Counsel for the Applicant

Sandrine Gaillot, Esq.

The Office of the Prosecutor

Mr. Serge Brammertz

I. BACKGROUND

1. On April 26, 2018, taking notice of the prior Application for Early Release lodged by Mr. Simba and that his eligibility for such release would come into effect on July 27, 2018, the President of the Mechanism requested the Republic of Rwanda to submit observations to said Application for Early Release (the "Impugned Request"). Similar requests were also sent to the Republic of Rwanda with regards to Mr. Ngeze and Mr. Ntawukulilyayo (hereinafter, with Mr. Simba, collectively referred to as the "Applicants").[1]

2. On May 10, 2018, the Government of Rwanda ("GoR") filed an Omnibus Response to the President's Request, submitting preliminary elements of response as well as asking for an extension of time.

3. On May 15, 2018, the President of the Mechanism issued an Interim Order related to the Requests, granting the GoR's request for extension of time.

4. On May 25, 2018, the GoR submitted a Supplementary Request for Documents in respect of the Requests ("Supplementary Request"), stating that it was in the interests of justice to obtain further information and documents regarding the Applicants in order to be able to adequately respond to the President's invitation to submit observations.

5. On 30 May, Applicant Simba filed a confidential Response to the GoR's Supplementary Request of Documents wherein Counsel for Mr. Simba objected to the Supplementary Request;

6. On 31, May, the President issued a second Interim Order on the Supplementary Request, requesting Applicants, as well as the Republics of Benin and Mali, to file a substantiated response to the Supplementary Requests, if any, no later than 14 days from the date of the order.

APPLICABLE LAW

7. With the present Motion, Aloys Ntabakuze is seeking leave to intervene in the above-mentioned matter, as per Rule 83 MICT RPE and established Principles of International Law.

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[1] *Prosecutor v. Aloys Simba*, Case No. MICT-14-62-ES.I, Request to the Republic of Rwanda Related to Request for Early Release from Mr. Aloys Simba, 26 April 2018; *Prosecutor v. Dominique Ntawukulilyayo*, Case No. MICT-13-34-ES, Request to the Republic of Rwanda Related to Request for Early Release from Mr. Dominique Ntawukulilyayo, 26 April 2018; *Prosecutor v. Hassan Ngeze*, Case No. MICT-I3-37-ES.2, Request to the Republic of Rwanda Related to Application for Commutation of Sentence from Mr. Hassan Ngeze, 3 May 2018. The three above-mentioned requests are collectively referred to as the "Impugned Request".

8. Mr. Ntabakuze submits that he has *locus standi* to intervene in the matter currently before the President concerning the Request to the Republic of Rwanda related to the Applicants' Requests for Early Release, on two grounds:

    a. Mr. Ntabakuze, as the prospective Intervenor, is concerned that the President's decisions in this matter will affect his own interests; and

    b. Mr. Ntabakuze and his fellow prisoners, persons convicted by the International Criminal Tribunal for Rwanda, have a direct concern in the legal issues raised in this case.

9. Therefore, Mr. Ntabakuze seeks to act as an Intervenor in this matter so as to offer the President a different perspective on the issues before him.

10. *Locus standi* has long been recognized in international law and by the highest courts of most domestic jurisdictions. Most common law systems require that the Intervenor has "sufficient interest"[2] or "a special interest"[3] in the matter to which the application relates.

11. *Locus standi* has three requirements:

    a. That the applicant-intervenor be threatened by an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent (Injury-in-fact);

    b. That there exists a causal connection between the injury and the conduct complained of, so that the injury is fairly traceable to the challenged action and not the result of the independent action of some third party not before the court (Causation); and

    c. That it must be likely, as opposed to merely speculative, that a favorable court decision will redress the injury (Redressability).

12. Mr. Ntabakuze submits that he meets all three requirements, in that:

    a. The President's Impugned Request to the GoR and his invitation to submit observations instead of simply *notifying* the GoR, as mandated by the former ICTR RPE, causes an actual and imminent, as well as concrete and particularized injury to

[2] United Kingdom, Senior Courts Act 1981 s.31(3).
[3] *Australian Conservation Foundation v Commonwealth* [1980] HCA 53, (1980) 146 CLR 493 (13 February 1980).

Mr. Ntabakuze's and all similarly-situated Mechanisms' prisoners' legally protected interest, as their legally protected eligibility for early release is approaching, and they will all undeniably be adversely affected by the GoR's bias in relation to any matter concerning the prisoners as well as by the President's consideration of *any* submissions made by the GoR.

b. The injury will directly result from the Impugned Request and any submissions from the GoR that results therefrom, either in the Applicants' case or in any future application for early release; and

c. A decision by the President that is favorable to the Intervenor's submission, and thereby refusing to invite or entertain any submission by the GoR, will definitely redress the injury and replace all similarly-situated prisoners in the situation they were in prior to the Impugned Request.

SUBMISSIONS

Injury-in-fact:

13. In an unprecedented move by the President of the Mechanism, the GoR is currently being consulted on the early release applications of the Applicants. The Intervenor submits that the legal basis for such "consultation" is objectively illegitimate and that, inviting the GoR to make submissions and taking them into account will adversely affect the Intervenor's and the other prisoners' right to request consideration for early release upon their respective eligibility dates. Indeed, any submissions of the GoR, if taken into account, as well as the mere consultation of the GoR by the MICT and the unfortunate optics it carries, will effectively render the prisoners' right to request early release moot, given the unfair bias the GoR carries towards all prisoners convicted by the former ICTR, as their preliminary submissions can attest.

14. As such, the Impugned Request causes an injury-in-fact to a legally protected interest of the Intervenor and his fellow prisoners, that is concrete, particularized, as well as actual and imminent.

Causation:

15. Indeed, in their submissions the GoR makes a blanket statement about the ineligibility for early release due to the "gravity of the crimes" of aiding and abetting genocide, without taking

into account that, as the Appeals Chamber reiterated, the gravity of the crime requires consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes.[4] Also, the gravity of the crimes is a key factor that is taken into account in determining the sentence[5] and that, while Rule 151 MICT RPE provides that the President shall take this factor into account in determining whether pardon, commutation of sentence, or early release is appropriate, this appreciation cannot be done in a vacuum without considering (a) the particulars of the case of each Applicant, (b) the fact that such gravity was already appreciated and taken into account in sentencing, two-third of which has been completed by the time an Applicant for early release files his or her application, and (c) that other equally important factors are at play, such as, *inter alia*, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation with the Prosecutor. The list being non-exhaustive, compassionate and humanitarian grounds, such as the ailing health of a prisoner, should also be at the forefront of the President's consideration for early release.

16. Therefore, the GoR's one-sided consideration of the gravity of the crimes as a single factor is clear evidence of its strong bias against the ICTR convicted persons and as such its submissions will cause direct injury to the prisoners' right to be *actually* and *genuinely* considered for early release.

17. Furthermore, the GoR submits that the release of ICTR prisoners will cause irreparable harm to victims and that given "these men['s]" crimes - and by "these men" the GoR is encompassing any person convicted of similar crimes who may lodge an application for early release in the future - they are unworthy of consideration for early release. This unwarranted judgment is a direct attack on the principles and values of the international justice system, which is not only a punitive system but also a restorative system, in which judges but also accused persons, convicted persons, and victims all play a role, towards, if not reconciliation, at least the recognition that the past is the past and that when convicted persons have served their time, they too have the right to lead a free life, knowing that, however rehabilitated they are, they will always bear the burden of their convictions.

18. As the GoR concludes, "these foregoing considerations militate against early release as a matter of fact, law (...)", thereby admitting that it considers that <u>any</u> ICTR prisoner would be

[4] *Munyakazi Yussuf* (ICTR-97-36A-A) Appeal Judgement - 28.09.2011, at para. 185.
[5] *Rutaganda George* (ICTR-96-3-A), Appeal Judgment - 26.05.2003, at para. 591.

unfit for consideration for early release, because the idea of early release itself goes against its belief that involvement in a genocide should only be met with death or life in prison.

19. The GoR is also passing unsolicited judgment on the validity of well-established Tribunals' and MICT's jurisprudence regarding eligibility of prisoners for early release. As stated by the President in the Impugned Request,

> "all convicted persons supervised by the Mechanism are considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them, however, such a convicted person shall be merely eligible to apply for early release and not entitled to such release, which may only be granted by the President as a matter of discretion, after considering the totality of the circumstances in each case.[6]" [own emphasis added]

20. In doing so, the GoR is inviting itself into previously issued decisions on applications for early release and requesting the President to invalidate and disregard such decisions on the grounds that it was not consulted on the matter, all the while recognizing that such invitation for observations was unprecedented and not based in law.

21. The GoR further submits that as per Rule 149 MICT RPE, eligibility for early release is conditioned upon the domestic legislation of the enforcing State. It must have omitted the fact that, under art. 810 of the applicable law #2012-15 of the Government of Benin, issued on March 18, 2013, and providing for the Code of Criminal Procedure, a convicted person becomes eligible for early release after having served one half of their sentence. As such, the GoR's argument is moot and purely demonstrative of its obstinate efforts to deny eligibility for early release to all ICTR prisoners *by any means possible.*

22. As such, the Intervenor submits that the GoR's submissions are not only unwarranted, but also severely biased and will, if such invitation for observations becomes the norm as the

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[6] See *Prosecutor v. Radivoje Miletie*, Case No. MICT-15-85-ES.5, *Public Redacted Version of the 26 July 2017 Decision of the President on the Early Release of Radivoje Miletic*, 27 July 2017, paras. 20, 21; *Prosecutor v. Ljubisa Beara*, Case No. MICT-15-85-ES.3, *Public Redacted Version of the 7 February 2017 Decision of the President on the Early Release of Ljubi~a Beara*, 16 June 2017 ("Beara Decision"), paras. 23, 25; *Prosecutor v. Paul Bisengimana*, Case No. MICT-12-07, *Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application*, 11 December 2012 (public redacted version), paras. 17,20,21, 35.

Impugned Request seems to suggest, severely harm the Intervenor's and any prospective applicant's right to be considered for early release.

Redressability

23. Besides the lack of legal basis of the President's Impugned Request, as will be addressed below, the President should (a) refrain from taking into account any submissions made by the GoR, and (b) not invite the GoR to submit any observations in relation to any future application for early release lodged by any eligible ICTR prisoner, as the GoR is severely biased against ICTR prisoners, and as such should not be authorized to make submissions in such proceedings.

24. This is the only manner in which the Impugned Request and the harm caused to the Intervenor and all other similarly-situated prisoners can be redressed.

Lack of legal basis of the Impugned Request

25. In addition to the harm that will be caused to the Intervenor and all similarly situated prisoners of the ICTR, **the President's Impugned Request has no legal basis**.

26. According to the Impugned Request, the consultation was based on paragraph 4(d) of the Practice Direction on the Procedure for Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY, and the Mechanism ("Practice Direction"), as well as Rule 125 of the *former* ICTR Rules despite the fact that no such rule was adopted by the MICT RPE, which is now common to prisoners of both former Tribunals.

27. Furthermore, Rule 125 of the former ICTR Rules provides for a "notification" to the GoR and not a "consultation", *to wit*:

> **Rule 125 – Determination by the President**
>
> *The President shall, upon such notice, determine, in consultation with the Judges and after notification to the Government of Rwanda, whether pardon or commutation is appropriate.*

28. There can be no confusion as to the meaning of a "notification" as 125 Rule specifically distinguishes between consultation and notification in that Judges are "consulted" while the GoR is only "notified".

29. In addition, much like the International Criminal Tribunal for Rwanda ceased to exist, the ICTR Rules or Procedure and Evidence are no longer in force. The MICT's equivalent body of rules adopted the former ICTY RPE's version of Rule 125, namely Rule 124 ICTY RPE, which specifically does *not* require notification to the country of citizenship of the concerned prisoner, much less a "consultation". This new rule now supersedes Rule 125 ICTR RPE, as per the GoR's own admission.[7]

30. Upon information and belief, no State of the Former Yugoslavia has ever been *consulted* as such on an application for early release of any ICTY convicted person.

31. Besides the blatant injustice that results from the difference of treatment ICTR prisoners have been subjected to in comparison to their ICTY counterparts, the ICTR prisoners are now put in a position where *any* future application for early release will be treated differently than previous applications lodged before the Tribunal or the Mechanism, in that it will be subject to (a) a consultation process with the GoR, and (b) undeniable bias on the part of the very same government that has supported, lobbied for and facilitated the one-sided investigations into the events of the 1994 genocide. Without revisiting the opportunity lost on the ICTR to conduct a fair and equitable judicial process, free of political influence, for the global international community to witness and learn from, one can hardly argue that, twenty-four years after the facts, the GoR could offer an unbiased and equitable perspective on whether or not ICTR prisoners can be considered for early release.

32. Furthermore, the President's justification to request Rwanda's opinion on the matter are not based on law and, in doing so, the President effectively stepped out of his mandate by performing a function that is reserved to the Registrar under para. 4(d) of the Practice Direction.

33. This unilateral and unregulated change in procedure prospectively places all prisoners on an unequal footing in comparison to those who have had their applications for early release considered without the input of the GoR (including former ICTY prisoners who have ben released without States of the former Yugoslavia being consulted). As such, this difference of treatment is in violation of Art. 19(1) of the MICT Statute and established Principles of International Law.

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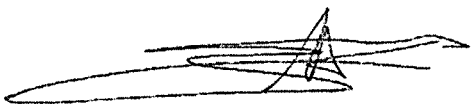
[7] *Omnibus Response of the Republic of Rwanda on the Requests for Early Release from Aloys Simba, Dominique Ntawukulilyayo and Hassan Ngeze and Request for Extension of Time*, MICT-14-62-ES.1, 10 May 2018, at p. 17.

II. CONCLUSION

34. For all these reasons, Mr. Ntabakuze prays the President to:

- **Grant** him leave to appear as an Intervenor in the proceedings related to the Application for Early Release lodged by the Applicants and the Request to the Republic of Rwanda to make observations thereupon;
- **Find** that the GoR is biased against the ICTR prisoners and as such unfit to make any material or substantive observations that could serve the interests of justice in the determination of eligibility for early release of *any* ICTR prisoner;
- **Reject** the GoR's Omnibus Response, Supplementary Request, and any future submission by the GoR;
- **Decide** any other *additional* appropriate remedy to ensure the protection of the rights of the prisoners, under the currently enforced MICT RPE, other applicable laws, and internationally recognized principles of law.

Respectfully submitted on 8 June 2018



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