UNITED
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Case No.: MICT-13-37-ES.2

Mechanism for International Criminal Tribunals

Date: 24 June 2018

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THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. Olufemi Elias

Date: 24 June 2018

PROSECUTOR

v.

HASSAN NGEZE

PUBLIC

NGEZE DEFENCE RESPONSE TO GOVERNMENT OF RWANDA'S "OMNIBUS RESPONSE", "SUPPLEMENTARY REQUEST", AND THIRD-PARTY FILINGS

The Office of the Prosecutor
Mr. Serge Brammertz

Counsel for Mr. Ngeze
Ms. Mirjana Vukajlović

I. Introduction

1. On 8 March 2018, Mr. Hassan Ngeze filed before Judge Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals ("Mechanism" or "MICT"), an application for commutation of his 35-year sentence (the "Application").

2. Defence Counsel for Mr. Hassan Ngeze was provided with Mr. Ngeze's Application only on 13 June 2018, in French. This has seriously affected Mr Ngeze's right to an effective defence in relation to various documents opposing his Application that have been received by the President of the Mechanism.

3. On 10 May 2018, the Republic of Rwanda filed its "Omnibus Response of the Republic of Rwanda on the Requests for Early Release from Aloys Siba, Dominique Ntaqukuliyayo and Hasan Ngeze and Request for Extension of Time" ("Omnibus Response"). In its response, the Republic of Rwanda requested 14 additional days "to make further submissions" in relation to the matter.

4. On 25 May 2018, the Ministry of Justice of Rwanda filed the "Supplementary Request for Documents by the Republic of Rwanda in Respect of the Requests for Early Release from Aloys Simba, Dominique Ntawukulilyayo and Hassan Ngeze" ("Supplementary Request").

5. On 11 June 2018, the Ministry of Justice of Rwanda filed the "Statement of the Government of Rwanda in Opposition to Applications for Early Release from Aloys Simba, Dominique Ntawukulilyayo and Hassan Ngeze" ("Statement in Opposition to Applications"), and "The Government of Rwanda's Supplemental Brief in Opposition to Application for Early Release of Hassan Ngeze" ("Supplemental Brief").

6. Furthermore, numerous third parties lacking *locus standi* in the proceedings have addressed several documents to the President of the Mechanism opposing and supporting Mr. Ngeze's Application.

7. In order to guarantee Mr. Ngeze's right to an effective legal representation, the Defence hereby files Mr. Ngeze's substantiated response to the "Omnibus Response", the "Supplementary Request" and other third-parties' filings, in accordance with the 14 June 2018 President's Decision on Hassan Ngeze's Request for an Extension of Time.

8. The Defence believes that the voluminous "Statement in Opposition to Applications" and "The Government of Rwanda's Supplemental Brief in Opposition to Application for Early Release of Hassan Ngeze" require substantive effort to be analysed, therefore it hopes for the adequate time in order to properly address all the relevant issues.

II. Response to the "Supplementary Request"

9. The Defence for Mr. Ngeze perceives the filing in question as a call to full applicability of paragraph 4 of the Practice Direction, therefore we do support acquisition of all the listed documents and distribution of copies to the convicted person and the President of the MICT.

10. In addition, Mr. Ngeze requests submission of his full medical report from the Registry, and its distribution to the President and the Applicant, pursuant to paragraph 5 of the Practice Direction.

11. However, the Government of Rwanda ("GOR") is not a party in this procedure, therefore it is not entitled to disclosure or access to any other but public material from the case record, in relation to Mr. Ngeze or any other Applicant. The above-mentioned information is considered confidential pursuant to paragraph 8 of the Practice Direction, hence it should not be available to the GOR.

12. Equally, the Defence for Mr. Ngeze is of the view that the GOR should not analyse or weight elements in determination of Application. This should be exclusively done by the President while exercising his discretional right.

III. Response to "Omnibus Response"

a. "Omnibus Response" is based on the incorrect interpretation of the MICT Rules and relevant jurisprudence

13. The President of Mechanism called on the Government of Rwanda to express their views on the Application and file their response to the request in question. Although the Mechanism Rules of Procedure and Evidence contain no such provision, the President decided to ask GOR for their views "in light of the previous practice of the ICTR" and in the interest of justice.[1]

14. Unfortunately, this noble gesture on behalf of the President led to numerous unfounded filings by the GOR. In order to preserve its decision, and act in the interest of justice, the President called for the additional views and information, subsequent to receipt of the first Rwanda's Response.[2]

15. Following the President's request to the relevant authorities of Rwanda to express their views on the Application, numerous third parties filed their views, although clearly lacking *locus standi.*

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[1] Prosecutor v. Hassan Ngeze, Case No. MICT-13-37-ES.2. Request to the Republic of Rwanda Related to Application for Commutation of Sentence from Mr. Hassan Ngeze, 3 May 2018.

[2] Prosecutor v. Hassan Ngeze, Case No. MICT-13-37-ES.2; Interim Order Related to The Request To The Republic of Rwanda On The Early Release Applications from Mr. Dominique Ntaqukuliyayo, Mr. Hassan Ngeze, And Mr. Aloys Siba; 15 May 2018, pg.3; Prosecutor v. Hassan Ngeze, Case No. MICT-13-37-ES.2; Interim Order on The Supplementary Request For Documents by The Republic of Rwanda In Respect of The Requests for Early Release from Aloys Siba, Dominique Ntaqukuliyayo and Hassan Ngeze of The President of the Mechanism, 31 May 2018, pg.2.

16. The interest of justice should be universal, and equally applicable to all participants in the proceedings. However, the opportunity which was given to Rwanda to express their views led to injustice to Mr. Ngeze. It was misused for the purpose of a "second trial" against him, by collecting "expert reports", statements of victims, organising the civil sector representatives and legal scholars, and even calling for a public hearing where "the international community can be reminded of why these three men were convicted and sentenced in the first place [...]".[3]

17. Moreover, the filings of the GOR, including the "Omnibus Response", were constructed in a way to criticise the final conviction, to thwart the rights of the convicted persons, and to undermine the exercise of the President's discretion. This approach is a consequence of the misinterpretation of the Rules, applicable law and jurisprudence, which will be addressed in more detail in the following paragraphs.

b. Mr. Hassan Ngeze is eligible for the Commutation of Sentence and Early Release

18. The Government of Rwanda gives the incorrect and narrow assertion that "the MICT rules adopt the law of the imprisoning state for the purposes of determining when a prisoner is eligible for early release.[4]

19. According to Article 35 of Law no. 1-003 of 27 February 2001 on the Prison System and Supervised Education, in conjunction with Rule 25 of Decision No. 10-002 MJ-DNAPES of 6 August 2010 on the Internal Regulations of Prisons and Supervised Education, both of the Republic of Mali, a convicted person may be eligible for provisional release. or semi-custodial treatment "upon sufficient proof of their improvement [...]" and receive "favourable consideration" for conditional release where his or her "conduct and work has been satisfactory".[5] Regardless of whether Mr. Ngeze is eligible for early release under the

[3] "Omnibus Response", page 19.
[4] "Omnibus Response", pages 3 and 16-17.
[5] *See Prosecutor v. Youssouf Munyakazi*, Case No. MICT-12-18-ES.1, Public Redacted Version of the 22 July 2015 Decision of the Presdient on the Early Release of Youssouf Munyakazi, para 11; *Prosecutor v. Ferdinand Nahimana*,

domestic law of Mali, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules, the early release of persons convicted by the and International Criminal Tribunal for ex-Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") "falls exclusively within the discretion of the President" of the MICT.[6]

20. Article 26 of the Statute of the MICT establishes that individuals convicted by the ICTR are eligible for pardon or commutation of their sentence if the President of the Mechanism so decides "on the basis of the interests of justice and the general principles of law" and if the applicable law of the State in which the person convicted is imprisoned so allows. In such cases, the State shall notify the Mechanism about the eligibility of the convicted individual for pardon, commutation of sentence or early release.[7] However, the serving State notification of eligibility is not a *conditio sine qua non* of an Application for early release, as the Republic of Rwanda is wrongly interpreting existing rules and jurisprudence.[8]

21. In this regard, individuals convicted by the ICTR "may directly petition the President for pardon, commutation of sentence or early release, if he or she believes that he or she is eligible [...]".[9] Upon direct petition from a convicted individual, the President shall determine whether pardon, commutation of sentence or early release is appropriate for the specific case.[10]

22. Furthermore, in its Request to the Republic of Rwanda, dated 3 May 2018, the President already confirmed Mr. Ngeze's eligibility to apply for commutation and early release:

> considering that a convicted person may apply for pardon, commutation of sentence, or early release even before the completion of two-thirds of his or her sentence in exceptional circumstances, such as cases involving extraordinary

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Case No. MICT-13-37-ES.1, Public Redacted Version of the 22 September 2016 Decision of the Presdient on the Early Release of Ferdinand Nahimana, para 11.

[6] *Ibid.*

[7] Rules of Procedure and Evidence, Rule 149.

[8] "Omnibus Response", pages 3 and 16.

[9] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the ICTY, the ICTY or the Mechanism ("Practice Direction"), paragraph 3.

[10] Rules of Procedure and Evidence, Rule 150.

cooperation with the Prosecution, humanitarian emergencies, or on the basis of clear and compelling humanitarian grounds.[11]

23. In making a determination on the petition by the convicted person, the President shall take into account, among other factors, the gravity of the crimes for which the respective individual was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation and any substantial cooperation of the prisoner with the Prosecutor.[12]

A. The gravity of the crime or crimes for which the prisoner was convicted

24. In its "Omnibus Response" the Republic of Rwanda stated that early release of three applicants is "unwarranted as a matter of law because of the gravity of their crimes - *i.e.* aiding and abetting genocide", since all the other factors are "subordinate".[13]

25. In assessing an application for commutation of sentence, the President of the Mechanism shall take into account the gravity of the crime or crimes for which the prisoner was convicted. In this regard, the decision to grant such an application is, ultimately, made by the President in exercise of his discretion.

26. Although there is no precise test for analysing the gravity of an international crime, both the jurisprudence and the practice of other international courts have developed several

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[11] Request to the Republic of Rwanda Related to Application For Commutation of Sentence From Mr. Hassan Ngeze, 3 May 2018, referring to Prosecutor v. Radivoje Miletić, 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 Miletić, 27 July 2017, paras. 20, 21; Prosecutor v. Ljubiša 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 Ljubiša 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, II December 2012 (public redacted version), paras. 17, 20, 21, 35. See, e.g., Beara Decision, paras. 47-49; Prosecutor v. Drago Nikolić, Case No. MICT-15-85-ESA, Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or other Relief of Drago Nikolić, 13 October 2015, para. 21; Prosecutor v. Mladen Naletilić, Case No. IT-98-34-ES, Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of Mladen Naletilić, 26 March 2013, paras. 32-35; Prosecutor v. Dragan Obrenović, Case No. IT-02-60/2-ES, Decision of President on Early Release of Dragan Obrenovic (public redacted version), 29 February 2012, paras. 25-28 ("Obrenović Decision").

[12] Rules of Procedure and Evidence, Rule 151.

[13] "Omnibus Response", page 2 and 4.

factors which may be taken into account in this regard. For instance, in the context of the admissibility analysis of situations and cases before the International Criminal Court ("ICC"), the Office of the Prosecutor has considered the nature and scale of the crimes, the number of victims, the manner in which the crimes were committed, and the *degree of participation of the individual accused - or convicted.*[14] A similar approach has been followed by the ICC jurisprudence, highlighting the position and role of the accused as relevant factors for the assessment of gravity.[15]

27. Indeed, the jurisprudence of the International Criminal Tribunals has determined that "*the closer a person is to actual participation in the crime, the more serious the nature of his crime*".[16] On this note, it has been established that "*a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons*".[17]

28. On 28 November 2007, the Appeals Chamber of the ICTR affirmed Mr. Ngeze's conviction for directly and publicly *inciting* the commission of genocide, *aiding and abetting* the commission of genocide in the *préfecture* of Gisenyi, and *aiding and abetting* the commission of extermination as a crime against humanity, while reversing every other count for which the Trial Chamber initially convicted Mr. Ngeze.[18]

29. Thus, Mr. Ngeze was ultimately convicted on the basis of his role as an *accessory* to the crimes committed by others, and, consequently, not as a *principal* to those crimes. Mr. Ngeze

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[14] Office of the Prosecutor of the ICC, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 42.
[15] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8-US-Corr, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, paras. 51-52
[16] Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeals Chamber Judgment, 21 July 2000, para. 227. The jurisprudence of the International Criminal Tribunals also refers to the form and degree of participation of the accused as factors to take into account in the analysis of *gravity*; see Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Chamber Judgement, 14 January 2000, para. 852; Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgement, 29 July 2004, para. 683; Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgement, 30 November 2006, para. 443; Prosecutor v. Semanza, Case No. ICTR-97-20-A, Appeals Chamber Judgement, 20 May 2005 para. 385.
[17] Prosecutor v. Thomas Lubanga, Case No. ICC-01/04.01/06 A-5, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 462.
[18] Prosecutor v. Nahimana et al, Case No. ICTR-99-52-A, Appeals Chamber Judgement, 28 November 2007, p. 346.

did not commit any acts of murder or extermination himself, nor did he control -in any way- those who committed such acts in Rwanda. Therefore, Mr. Ngeze's accessorial role in the Rwandan genocide, as reflected in the modes of liability attributed to him by the Appeals Chamber, should be legally considered in favour of granting his application for commutation of sentence and early release.

30. In any case, the assessment of gravity in these terms should be understood solely as what it is: an analysis of one of the eligibility criteria for commutation of sentence and early release, as established by the law. This necessary exercise is conducted and presented to the President of the Mechanism by Mr. Ngeze's Defence team, acting in legal representation of his interests.

31. Accordingly, the assessment of gravity should not be understood as lack of remorse by Mr. Ngeze for the crimes on the basis of which he was convicted. On the contrary, as will be shown below, Mr. Ngeze has publicly acknowledged recognition of genocide in Rwanda and, more importantly, his sincere remorse and respect for the victims.

32. In the alternative, the jurisprudence on the commutation of sentence shows that, in granting an application by a convicted individual, the President has not grounded his decisions on the relatively low gravity of the crimes that form the basis of the respective convictions. On the contrary, notwithstanding the gravity of the crimes committed, the President has decided, in favour of the commutation of sentences in light of other factors.[19]

33. Moreover, the co-accused in the proceedings against Mr. Ngeze, the first accused Mr. Nahimana, was already granted early release, regardless of his conviction for the crimes of

[19] Prosecutor v. Vuković, Case No. IT-96-23/1-ES, Decision of the President on Commutation of Sentence, 11 March 2008 ("Vuković Decision") para.9; Prosecutor v. Tadić, Case No. IT-94-1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić, 17 July 2008, Public Redacted, ("Tadić Decision"), para.17.

direct and public incitement to commit genocide and persecution as a crime against humanity pursuant to Article 6(3) of the ICTR Statute.[20]

34. The aforementioned examples of assessment of criteria are, at the same time, clear examples of exercise of discretion, as well as of individual nature of each application.

B. The treatment of similarly-situated prisoners

35. The Government of Rwanda (GOR) also wrongly interpreted the second considered criteria in making a determination on the petition by the convicted person, *i.e.* the treatment of similarly-situated prisoners. According to the GOR the MICT rules are not precise, nor applicable to the ICTR prisoners. Moreover, for the GOR, the MICT decisions regarding early release of ICTY prisoners are "inapposite".[21]

36. According to Article 25(2) of the Statute, "[t]he Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States".

37. Rule 151 requires the President of the Mechanism to consider the need for equal treatment of similarly-situated prisoners as separate criteria. In this regard, the persons sentenced by the ICTY, the ICTR, and the prisoners under the supervision of the Mechanism in general, should be treated as "similarly situated" prisoners.

38. Despite of the fact that the two-thirds practice originates from the ICTY, the standard is applicable to all convicted persons whose sentence is supervised by the Mechanism.[22]

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[20] *Prosecutor v. Ferdinand Nahimana*, Case No. MICT-13-37-ES.1, Public Redacted Version of the 22 September 2016 Decision of the Presdient on the Early Release of Ferdinand Nahimana.
[21] "Omnibus Response", page 3.
[22] See Prosecutor v. Ohed Ruzindana, Case No. MICT-12-10-ES, Public Redacted Version of Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014 ("Ruzindana Decision"), para. 14; Prosecutor v. Omar Serushago, Case No. MICT-12-28, Public Redacted Version of Decision of the President on the Early Release

39. Equally, the ICTY jurisprudence in favour of commutation *i.e.* remission of sentence, and early release of prisoners who served less than two-thirds of their sentences, should be considered.[23]

C. The prisoner's demonstration of rehabilitation

40. The Government of Rwanda in Section C of its "Omnibus Response" deals with the rationale for early release, and allege that Mr. Ngeze provide no rational for his Application, nor he shows remorse.[24]

41. Rule 151 of the Rules provides that the President shall take into account, *inter alia*, the prisoner's demonstration of rehabilitation.

42. Mr. Ngeze fully accepts and condemns the genocide which occurred in Rwanda in 1994. He has unequivocally shown recognition of Tutsi victims.[25] Equally, he is fully aware of the importance and necessity of the reconciliation process.[26]

43. In addition, Mr. Ngeze has publicly filed the Declaration where he personally recognises the existence of genocide perpetrated against the population of Tutsi in Rwanda in 1994. He specifically asked for the Declaration to be distributed to the Government of Rwanda, the United Nations officials, the African Union, and different Embassies in Mali. In his

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of Omar Serushago, 13 December 2012 ("Serushago Decision"), para. 16-17; Prosecutor v. Paul BisenKimana, Case No. MICT -12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, II December 2012 (public redacted version) ("Bisengimana Decision"), para. 17- 20; Prosecutor v. Momir Nikolić, Case No.MICT-14-65-ES, 14 March 2014, para (public redacted version) ("Momir Nikolić Decision") para.18, 19.

[23] See Prosecutor v. Milomir Stakić, Case No, MICT-13-60-ES, Decision of the President on Sentence Remission of Milomir Stakić, 17 March 2014; "Beara Decision"; "Momir Nikolić Decision"; "Obrenović Decision"; Prosecutor v. Vladimir Šantić, Case No. IT-95- I6-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Šantić, 16 February 2009 (public redacted version) ("Šantić Decision).

[24] "Omnibus Response", page 14.

[25] *See* Une demande de commutation de peine pour des raisons humanitaires qui est basee exclusivement sur les pouvoirs dlscretionnaires du President du Mecanisme, 8 March 2018, page 3-4 ; Ngeze's Supplementary request to the President of the Mechanism regarding the second correction to the application for commutation of sentence to a shorter sentence and eraly release, 4 May 2018, page 2; Ngeze's Deuxieme lettre a L'Honorable Theodore Meron, President du Mecanisme des tribunaux penaux internationaux, 6 June 2018, page 4;

[26] *See* Ngeze's Deuxieme lettre a L'Honorable Theodore Meron, President du Mecanisme des tribunaux penaux internationaux, 6 June 2018, page 5-6.

statement, Mr. Ngeze genuinely expressed his deep regret and continuous remorse, whilst apologising to the victims and asking for their forgiveness, in front of the "entire humanity".[27]

D. Substantial cooperation of the prisoner with the Prosecutor

44. At the moment, there is no detailed report of any cooperation that the convicted person has provided to the Office of the Prosecutor, pursuant to paragraph 4(c) of the Practice Direction.

45. The Prosecution never sought any cooperation from Mr. Ngeze, and "an accused or convicted person is not obliged to cooperate with the Prosecution".[28]

46. Moreover, Mr. Ngeze has offered his help to the Prosecution more than once.[29]

47. Accordingly, the factor of cooperation with the Prosecution should be either considered in favour of Mr. Ngeze's Application, due to his multiple standing offers to cooperate, or at least neutral and irrelevant to the overall assessment of his Application.[30]

E. Additional elements to consider

48. Pursuant to paragraph 9 of the Practice Direction the President of the Mechanism may take into account "any other information that he or she considers relevant" to supplement the criteria specified in Rule 151 of the Rules.

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[27] Declaration personnelle de reconnaissance du genocide perpetre contre la population de l'ethnie Tutsi au Rwanda en 1994, 4 June 2018; see aslo Engagement Personnel, 11 June 2018; Demande de transmission ma declaration personnelle de reconnaissance du genocide perpetre contre la population de l'ethnie tutsie au Rwanda en 1994 comme document faisant partie du projet Combattre l'Exclusion pour Preserver la Paix», 8 June 2018.

[28] Prosecutor v. Radomir Kovač, Case No. IT-96-23&23/1-ES, Public and redacted version of the 27 March 2013 decision of president on early release, para 30 ("Kovač Decision").

[29] *See* Une demande de commutation de peine pour des raisons humanitaires qui est basee exclusivement sur les pouvoirs discretionnaires du President du Mecanisme, 8 March 2018, page 2.

[30] "Kovač Decision"; Prosecutor v. Dragan Zelenović, Case No. IT-96-23/2-ES, Decision of President on application for pardon or commutation of sentence of Dragan Zelenović, 10 June 2010 ("Zelenović Decision"), paragraph 19;. Prosecutor v. Milan Gvero, Case No. IT-05-88-ES, Decision of President on early release of Milan Gvero, 28 June 2010 ("Gvero Decision"), para 15.

1. Health of the convicted person/ Humanitarian Concerns

49. Again, the Government of Rwanda gives its interpretation of the Rule 151, stating that "severity of health is not a condition countenanced" by this Rule.[31]

50. Rule 151 does not specify this additional element for consideration. However, the four criteria specified above are non-exhaustive, therefore leaving the space for the President's discretion, who can take in consideration any other relevant information.

51. The convicted person's health "may be taken into account in the context of the application for early release, especially when the seriousness of the condition makes it inappropriate for the convict to remain in prison any longer"[32], whilst state of prisoner's health constitutes "a mitigating factor".[33]

52. Indeed, it has been established that "the medical situation" of a prisoner may be "particularly relevant" in considering his or her application for pardon or commutation of sentence.[34]

53. Mr. Ngeze has been hospitalised six times since he was detained, for different illnesses. He is constantly fighting for the right to adequate medical care in a timely manner ever since. However, Mr. Ngeze's right to adequate and timely medical care has been also affected by the continuous hindering of communications with his Defence team by Koulikoro Prison authorities. The latter, notwithstanding the Registrar's "obligation to ensure efficient communication with detainees and convicted persons, even after they have been transferred

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[31] "Omnibus Response", page 15.
[32] "Bisengimana Decision" paras. 32-33; see also "Gvero Decision" para 10 and para 13.
[33] "Bisengimana Decision" para. 33.
[34] Prosecutor v. Plavšić, Case No. IT-00-39 & 40/l-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, 14 September 2009, para. 11; Prosecutor v. Strugar, Case No. IT-0l-42-ES, Decision of the President on the Application for Pardon or Conunutation of Sentence of Pavle Strugar, 16 January 2009, para. 12.

to a State in which their sentence is to be served, so as to ensure that they may exercise their rights provided for under the Statute and the Rules in full."[35]

54. Unfortunately, the general situation in Republic of Mali health sector is unsatisfactory, and "one of the causes of Mali's low health indicators is weak health systems performance".[36]

55. The full medical record of Mr. Ngeze is still not available for consideration, therefore this specific circumstance will be addressed in more detail later in the proceedings, in the comprehensive confidential filing on additional elements to consider in determination of his Application for commutation and early release.

56. Nevertheless, Mr. Ngeze has already shown the existence of humanitarian factors in his direct filings,[37] therefore the GOR position that Mr. Ngeze provides no rational for his Application is unfounded.[38]

c. Third parties' submissions [39]

57. The President should not take into account filings submitted by third parties, regardless of the source, information provided, or expressed opinion.

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[35] *See Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-R, Decision on Emmanuel Ndindabahizi's Motion of 1 December 2008, 17 December 2008, pp. 3, 4.
[36] *See* USAID/Mali, Health Strategy, October 1, 2013 to September 30, 2018, 11 September 2013, page 7.
[37] *See* Une demande de commutation de peine pour des raisons humanitaires qui estbases exclusivement sur les pouvoirs dlscretionnaires du President du Mecanisme, 8 March 2018 ; Ngeze's Deuxieme lettre a L'Honorable Theodore Meron, President du Mecanisme des tribunaux penaux internationaux, 6 June 2018.
[38] "Omnibus Response", page 14.
[39] Letter Opposing Commutation of Sentence and Early Release of ICTR Convicts by "Members of the International Community", received on 6 June 2018; Letter Re: Applications for Early Release of Aloys Simba, Dominique Ntawukulilyayo and Hassan Ngeze, by Jean Yves St-Denis, received on 7 June 2018; Submission of Additional Information Relevant to the Request for Early Release of Hassan Ngeze, by Stephen J. Rapp, received on 30 May 2018; Letter by Frank Chalk, Concordia University, received on 04 June 2018; Letter by Kelly Ryan, received on 20 June 2018; "No early release for genocidaires", letter by Beth Lilach, Holocaust Memorial and Tolerance Center, received on 20 June 2018; Letter In response to the letter opposing commutation of sentence and early release of ICTR convicts, by "Members of the Political Rwandan Activists Group for Democracy", received on 20 June 2018.

58. Undoubtedly, the authors of different third-parties' submissions filed in this proceeding are lacking *locus standi.* There is no other interest on their part but to publicly express their somewhat one-sided view, completely undermining the rights of convicted persons.

59. Based on Decision on Dominique Ntawukulilyayo Request for Legal Aid issued on 12 June 2018, in which the President noted that "only parties mentioned in Request to Rwanda, First Interim Order and Second Interim Order have standing to make submissions in this regard", all filings submitted by third parties shall not be taken into account when considering the Application.[40]

60. Accordingly, Mr. Ngeze will refrain from further analysis of these submissions as redundant.

d. Decision on Application exclusively within the discretion of the President of the MICT

61. Article 26 of the Statute of the MICT envisages that the ultimate decision on pardon and commutation of sentences is in the exclusive discretion of the President of the MICT. In addition, Article 12 of the Practice Direction makes clear that the President's decision is final and not subject to appeal.

62. Based on the above analysis of the GOR submissions, the only possible conclusion is that the serious misinterpretation of the Rules, applicable law and jurisprudence was performed, in attempt to undermine the exercise of President's discretion. Moreover, the opportunity given to the GOR to express their view on the Application was misused in the purely political sense, eroding the reconciliation process, and diminishing the foundations of the MICT.

63. The very nature of the MICT, and its predecessor tribunals, make it particularly vulnerable to accusations of mistreatment from the countries and victims directly affected by the serious violations of International Humanitarian Law. However, in order for continued viability of

[40] *Prosecutor v. Ntawukulilyayo,* Case No. MICT-13-34-ES, Decision on Dominique Ntawukulilyayo Request for Legal Aid, 12 June 2018, footnote 18.

the MICT, it is equally necessary to show the adequate care and respect for the rights of convicted persons.

64. Mr. Ngeze was already tried, convicted, and sentenced to 35 years of imprisonment. He has served 21 years of his sentence. Moreover, even the convicted persons sentenced to life imprisonment may be considered eligible for early release.[41] Article 110(3) of the Rome Statute of the ICC provides that when a person has served 25 years of a life sentence, the ICC shall review the sentence to determine whether it should be reduced. A person sentenced to life imprisonment should not be placed in a more advantageous position than an individual sentenced to a fixed term of years, such as Mr. Ngeze.

65. Accordingly, the President, by using his discretional power, should not take into account any of the GOR submissions. Mr. Ngeze strongly holds that the GOR views are tainted with bias and attempt to undermine the independence of the Mechanism in carrying out its functions.

66. Firstly, the President's request to the Government of Rwanda for their view was not based in law. It was merely done in respect of the pre-existing Rules of the ICTR, where Rule 125 provided solely for notification to the GOR. It can be considered that the notification has been done.

67. Secondly, taking into account the Rwanda's unjustified opinion would constitute exactly the opposite of what was intended - a blatant violation of the interests of justice. Namely, it will cause irreparable harm to the Applicant and other ICTR convicted persons who are still serving their sentences.

68. Article 19 (1) of the Statute of the Mechanism ("MICTS") establishes the "Rights of the Accused", where regardless of their procedural status, all persons shall be equal before the Mechanism.[42]

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[41] Prosecutor v Galić, No. MICT-14-83-ES, Reasons for the President's Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion, 23 June 2015, paras. 24.
[42] Article 19(1), MICTS.

69. By taking into consideration the GOR submissions the Applicant will be put in an unequal position *vis-a-vis* the previous convicted persons who applied for the commutation of sentence and early release before the *ad hoc* Tribunals, including the similarly situated ICTR convicts such as Nahimana or Rukundo, where the same view from the GOR was not requested.

70. It is only the President, the convicted person and, in any case, the State enforcing the sentence, whose involvement and participation in the post-conviction proceedings for pardon, commutation of sentence, or early release, is allowed by the law. Even the Office of the Prosecutor has a very limited role in the determination of an early release- delivery of report on cooperation that the convicted person has provided to the Office of the Prosecutor. The participation of the Republic of Rwanda in these proceedings is, thus, unwarranted, unlawful, unjustified and unnecessary.

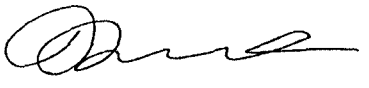
71. Lastly, the discretionary power of the President in reaching a determination in relation to Mr. Ngeze's Application must be always preserved. Indeed, precedence shows that requests for early release have been granted even over the objections of the sentencing Judges of a specific ICTR and ICTY cases.[43] Accordingly, the decision to grant the early release of a convicted person rests only on the President, who, after analysing the available information, can decide that granting commutation of sentence and early release is in the interest of justice, notwithstanding objections from States, third-parties, the Prosecution or even sentencing judges.

72. It is the submission of the Defence that the circumstances of the case of Mr. Ngeze, the interest of justice, as well as the applicable law and jurisprudence discussed in this brief, should result in granting his request for commutation of sentence and early release.

[43] Prosecutor v. Ruzindana, Case No. MICT-12-10-ES, Decision of the President on Early Release of Obed Ruzindana (13 March 2014), para. 25; "Vuković Decision", paras.12-13.

73. The GOR's Omnibus Response, Supplementary Request, and any future submission by the GOR should be not taken into account in the process of determination on Application, since that would not only create inequality among similarly-situated convicted persons but would also not be an appropriate reflection of basic principles of law.

Respectfully submitted,



Atty. Mirjana Vukajlović

24 June 2018

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