UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No.: MICT-12-29-R
Date: 31 January 2017
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Pre-Review Judge**

Registrar: **Mr. Olufemi Elias**

Order of: **31 January 2017**

PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

PUBLIC

ORDER TO THE GOVERNMENT OF THE REPUBLIC OF TURKEY FOR THE RELEASE OF JUDGE AYDIN SEFA AKAY

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Michelle Jarvis
Mr. Richard Karegyesa
Mr. Mathias Marcussen
Ms. Sunkarie Ballah-Conteh

Government of the Republic of Turkey

Counsel for Mr. Augustin Ngirabatware:

Mr. Peter Robinson

1. I, Theodor Meron, Presiding Judge of the Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) and Pre-Review Judge in this case,[1] am seised of a "Motion for Order to Government of Turkey or for Temporary Provisional Release" filed by Augustin Ngirabatware on 10 November 2016 ("Motion"). The Prosecution responded on 18 November 2016.[2] Ngirabatware and the Prosecution filed further submissions with respect to the Motion on 18 December 2016 [3] and 19 December 2016, respectively.[4] The Government of the Republic of Turkey did not respond.[5]

I. BACKGROUND

2. On 18 December 2014, the Appeals Chamber affirmed Ngirabatware's convictions for committing direct and public incitement to commit genocide and instigating and aiding and abetting genocide, which were entered by Trial Chamber II of the International Criminal Tribunal for Rwanda.[6] Further, the Appeals Chamber reversed Ngirabatware's conviction for rape as a crime against humanity and imposed a sentence of 30 years of imprisonment.[7] Ngirabatware is currently in the custody of the United Nations Detention Unit in Arusha, Tanzania awaiting transfer to a State where his sentence will be served.[8]

3. On 8 July 2016, Ngirabatware filed a request for review of his convictions.[9] On 25 July 2016, the President assigned a Bench of the Appeals Chamber to consider the request composed of Judge Theodor Meron, Presiding, Judge Joseph E. Chiondo Masanche, Judge Aydin Sefa Akay, Judge Aminatta Lois Runeni N'gum, and Judge Gberdao Gustave Kam.[10] The Prosecution responded to the Request for Review on 19 September 2016, acknowledging that the

[1] *See* Order Designating a Pre-Review Judge, 17 August 2016, p. 1. *See also* Order Assigning Judges to Consider a Case Before the Appeals Chamber, 25 July 2016 ("Order of 25 July 2016"), p. 2.
[2] Prosecution Response to Motion for Order to Government of Turkey or for Temporary Provisional Release, 18 November 2016 ("Response").
[3] Further Submission on Motion for Order to Government of Turkey or for Temporary Provisional Release, 18 December 2016 ("*Ngirabatware* Further Submission").
[4] Prosecution Further Submissions on Motion for Order to Government of Turkey or for Temporary Provisional Release, 19 December 2016 ("Prosecution Further Submission"). *See also* Order for Further Written Submissions, 21 November 2016.
[5] *See infra* paras. 7, 8.
[6] *Augustin Ngirabatware v. The Prosecutor*, Case No. MICT-12-29-A, Judgement, 18 December 2014 ("Appeal Judgement"), para. 279; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Judgement and Sentence, pronounced on 20 December 2012, issued in writing on 21 February 2013, para. 1394.
[7] Appeal Judgement, para. 279.
[8] *See* Appeal Judgement, para. 279. *See also* Article 25 of the Mechanism's Statute ("Statute"); Rule 127 of the Mechanism's Rules of Procedure and Evidence ("Rules").
[9] Motion for Review of Judgement, 8 July 2016 (confidential) ("Request for Review"), paras. 2, 3, 16-31, 33, 39-41.
[10] Order of 25 July 2016, p. 2.

submissions advanced by Ngirabatware may amount to a new fact, which if proven, could impact his convictions and agreeing that, for a certain purpose, a hearing should be held.[11]

4. On or around 21 September 2016, Judge Akay was detained in Turkey in relation to allegations connected with the events of July 2016 directed against the constitutional order of Turkey.[12] He has remained in detention since that time.[13]

5. Pursuant to Article 29 of the Statute, the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 applies, *inter alia*, to the judges of the Mechanism, who enjoy privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law when engaged on the business of the Mechanism.[14] Judge Akay was engaged on the business of the Mechanism at the time of his arrest and detention.[15]

6. On behalf of the Secretary-General of the United Nations, the United Nations Office of Legal Affairs has formally asserted diplomatic immunity with respect to Judge Akay to the authorities of Turkey and requested his immediate release from detention and the cessation of all legal proceedings against him.[16] The Secretary-General's assertion of immunity creates a presumption which cannot be easily set aside by domestic authorities.[17] This full diplomatic immunity has not been waived by the Secretary-General.

7. On 28 November 2016, I invited the Government of the Republic of Turkey to file written submissions in response to the Motion, which seeks, in part, that I issue an order, pursuant to Article 28 of the Statute and Rule 55 of the Rules, to the Government of the Republic of Turkey to cease its prosecution of Judge Akay so that he can resume his judicial functions in this case.[18] The Government of the Republic of Turkey did not file a written response.[19] As a consequence, on 21 December 2016, I ordered that a public hearing be held on 17 January 2017 at the Mechanism's

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[11] Prosecution Response to Motion for Review of Judgement, 19 September 2016 (confidential), para. 2. *See also* Decision on Prosecution Motion for Variation of the Time Limit, 17 August 2016 (confidential); Prosecution Motion for Variation of Time Limit to Respond to Motion for Review of Judg[e]ment, 10 August 2016 (confidential).
[12] *See* Oral Hearing, T. 17 January 2017 pp. 1, 2; Order for Oral Hearing, 21 December 2016 ("Scheduling Order"), p. 1.
[13] *See* Oral Hearing, T. 17 January 2017 p. 2; Scheduling Order, p. 1.
[14] *See* Convention on the Privileges and Immunities of the United Nations, adopted by United Nations General Assembly Resolution A/RES/22(I)A, 13 February 1946 ("U.N. Convention on Privileges and Immunities").
[15] *See supra* para. 3.
[16] Letter dated 17 November 2016 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, U.N. Doc. S/2016/975, 17 November 2016, Annex I, para. 13. *See also* Decision on a Request for Invitation to the United Nations Office of Legal Affairs, 9 January 2017, pp. 1, 2.
[17] *See Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62 ("ICJ Advisory Opinion on *Differences Relating to Immunity from Legal Process*"), para. 61.
[18] Invitation to the Government of the Republic of Turkey, 28 November 2016, pp. 1, 2.
[19] Scheduling Order, p. 2.

Hague branch to provide Turkey with an additional opportunity to be heard in relation to Judge Akay's arrest and detention in Turkey.[20]

8. No representative of Turkey attended the hearing,[21] even though the Scheduling Order was served on multiple occasions on the Turkish Embassies on two continents, in Tanzania and The Netherlands, in accordance with the practice direction on the filing of documents before the Mechanism.[22] It follows from the foregoing that Turkey has had multiple opportunities to be heard in writing and in person in relation to Ngirabatware's request for an order for the immediate release of Judge Akay.[23]

9. At the hearing of 17 January 2017, Ngirabatware reiterated his requests for an order to the Government of the Republic of Turkey to cease its prosecution of Judge Akay so that he can resume his judicial functions in this case,[24] as well as for his "temporary provisional release" in view of the alleged undue delay in the review proceedings caused by Judge Akay's arrest and detention.[25] The Prosecution recognised "the fundamental importance of upholding immunity issues and principles and protections that have arisen in this case" and acknowledged that those principles were "integral [...] to the proper functioning of the [Mechanism]".[26] It argued, however, that an order to the Government of the Republic of Turkey is not "a guaranteed solution".[27] The Prosecution contended that, instead, to proceed without further delay, the following approaches could be considered: (i) the Mechanism's President, exercising his administrative power to assign judges and determine the composition of the Chambers, could reassign Judge Akay to another matter pending before the Mechanism without any interruption of his judicial mandate, thus preserving his immunity, and replace him with another judge on this bench so that this case can continue;[28] (ii) replacing Judge Akay on the bench in this case pursuant to Rule 19(C) of the Rules;[29] or (iii) interpreting the Mechanism's inherent authority to allow either for the continuation of the review proceedings in Judge Akay's absence, if it were determined that his absence would not impact deliberations, or for

[20] Scheduling Order, pp. 2, 3.
[21] Oral Hearing, T. 17 January 2017 p. 3.
[22] Registrar's Submission Regarding Order for Oral Hearing of 21 December 2016, 13 January 2017, paras. 1-6. *See* Practice Direction on Filings Made Before the Mechanism for International Criminal Tribunals, MICT/7/Rev.2, 24 August 2016, Article 11; Oral Hearing, T. 17 January 2017 pp. 3, 4. *See also* Decision on Motion to Reclassify Registrar's Submission, 16 January 2017; Motion to Reclassify Registrar's Submission, 13 January 2017.
[23] *See* Oral Hearing, T. 17 January 2017, pp. 1 -5.
[24] *See* Oral Hearing, T. 17 January 2017 pp. 12, 13, 21, 22, 29. *See also Ngirabatware* Further Submission, paras. 1, 13; Motion, paras. 1, 15, 2.
[25] *See* Oral Hearing, T. 17 January 2017 pp. 21, 22, 25, 26, 29. *See also Ngirabatware* Further Submission, paras. 1, 14, 15; Motion, paras. 2, 22.
[26] *See* Oral Hearing, T. 17 January 2017 p. 14.
[27] *See* Oral Hearing, T. 17 January 2017 p. 14.
[28] *See* Oral Hearing, T. 17 January 2017 pp. 15-18, 23, 26.
[29] *See* Oral Hearing, T. 17 January 2017 pp. 18, 27, 28.

the appointment of a reserve judge.[30] The Prosecution also opposed Ngirabatware's request for temporary provisional release, arguing that it was outside the competence of the Pre-Review Judge to consider such an application.[31]

10. Ngirabatware did not support the Prosecution's request for the replacement of Judge Akay,[32] stressing that "[i]f a Judge benefiting from diplomatic immunity is simply replaced and loses that immunity, then there is in fact no immunity for Judges whatsoever and that cannot be right".[33] He further underscored that "Judges cannot serve with integrity and impartiality if they [are] subject to arrest and replacement", which "goes to the very heart of the fairness of the proceedings" and that "[r]eplacing Judge Akay with another Judge would reduce diplomatic immunity of Judges of the Mechanism to an illusion".[34] In addition, Ngirabatware argued that given Judge Akay's detention, "it would [not] be fair to him or to any other litigant to assign him to some case".[35]

II. DISCUSSION

11. It is self-evident that justice and the rule of law begin with an independent judiciary.[36] The right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial enshrined in Article 19 of the Statute[37] and embodied in numerous human rights instruments.[38] The United Nations Human Rights Committee has stated that the right to an

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[30] *See* Oral Hearing, T. 17 January 2017 pp. 19, 27, 28.
[31] *See* Oral Hearing, T. 17 January 2017 pp. 23, 24. *See also* Prosecution Further Submission, n. 4; Response, paras. 2-5.
[32] *See* Oral Hearing, T. 17 January 2017 pp. 9, 10, 21, 28, 29.
[33] *See* Oral Hearing, T. 17 January 2017 p. 10.
[34] *See* Oral Hearing, T. 17 January 2017 p. 10.
[35] *See* Oral Hearing, T. 17 January 2017 p. 21.
[36] *See* United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 26 August - 6 September 1985, endorsed by United Nations General Assembly Resolutions A/RES/40/32 and A/RES/40/146 of 29 November 1985 and 13 December 1985, respectively ("U.N. Basic Principles on the Independence of the Judiciary").
[37] *See Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Judgement, 30 June 2016 (public with confidential Annex C), para. 42; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 179; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, para. 39; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 177, n. 239. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003, pp. 2-3 ("Judges [...] serve only the international community" and "disavow any influence by the policies of any government, including the government of their home country"); *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence, 4 September 1998, pp. 7-9.
[38] *See* Universal Declaration of Human Rights, 10 December 1948, United Nations General Assembly Resolution 217 A (III), Article 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."); International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."); American

independent and impartial tribunal "is an absolute right that may suffer no exception".[39] To uphold this right, in the exercise of their judicial functions, the judges of the Mechanism shall be independent of all external authority and influence, including from their own States of nationality or residence.[40] A corollary guarantee for the independence of the Mechanism's judges is contained in Article 29 of the Statute, which provides for full diplomatic immunity for judges during the course of their assignments – even while exercising their functions in their home country.[41] Accordingly, diplomatic immunity is a cornerstone of an independent international judiciary, as envisaged by the United Nations. The ability of the judges to exercise their judicial functions first and foremost from their home countries reflects the unique characteristics of the Mechanism, which was intended to ensure justice coupled with cost-savings and efficiency.[42] Turkey was a member of the United Nations Security Council at the time of the consideration of our Statute and voted in favour of its adoption,[43] a Statute which guarantees an independent judiciary and full diplomatic immunity for our judges while performing their work.[44] In this respect, Ngirabatware and the Prosecution do not

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Convention on Human Rights, Costa Rica, 22 November 1969, Article 8(1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."). *See also* African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 26 ("States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.").

[39] *Case of Miguel Gonzáles del Río v. Peru*, Communication No. 263/1987, para. 5.2.

[40] *See* U.N. Basic Principles on the Independence of the Judiciary, Principle 2 ("The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."); The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity as revised at the Round Table Meeting of Chief Justices, 25-26 November 2002, Value 1.1 ("A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."); The Burgh House Principles on the Independence of the International Judiciary, drafted by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, Preamble ("*Considering* the following principles of international law to be of general application: to ensure the independence of the judiciary, judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organisations under the auspices of which the court or tribunal is established"). *See also* Code of Professional Conduct for the Judges of the Mechanism, MICT/14, 11 May 2015, Article 2.1 ("In the exercise of their judicial functions, judges shall be independent of all external authority or influence.").

[41] *See, e.g.*, Article 29 of the Statute. *Cf. also* ICJ Advisory Opinion on *Differences Relating to Immunity from Legal Process*, paras. 60, 61, 67 (upholding the immunity of a United Nations Special Rapporteur against legal process in his national country); *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, paras. 51, 61 (holding that United Nations Special Rapporteurs enjoy privileges and immunities in their relation with the States of which they are nationals or on the territory of which they reside).

[42] *See* United Nations Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("UNSC Resolution 1966") (emphasizing that the Mechanism should be a "small, temporary and efficient structure"); *See also* Article 8(3) of the Statute.

[43] *See* United Nations Security Council Report, Special Research Report, No. 3, 17 September 2010, p. 1; U.N. Doc. S/PV.6463, 22 December 2010, p. 3.

[44] *See* Articles 19 and 29 of the Statute.

question the immunity enjoyed by the judges of the Mechanism and its fundamental importance to the proper functioning of the institution and their independence in exercising their judicial functions.

12. With the arrest of Judge Akay, proceedings on the merits of Ngirabatware's Request for Review have necessarily come to a standstill. To move the case forward, as suggested by the Prosecution,[45] by the substitution of a judge as a first reaction in response to the current situation is nothing short of violating a core principle that is fundamental to the administration of justice: an independent judiciary.

13. I have long maintained that upholding the integrity of our judicial system entails not exercising the powers conferred upon me as President arbitrarily and eschewing improper influences when determining the composition of judicial benches.[46] It is also evident, as correctly pointed by Ngirabatware, that reassignment of Judge Akay onto another case is simply an unfair and myopic solution since it would similarly halt proceedings in that case. While pragmatic, this solution will undoubtedly impinge on the fundamental principle of judicial independence as it would allow interference by a national authority in the conduct of a case and the exercise of judicial functions. As such, it will have a chilling effect on the administration of justice. Moreover, the inherent authority of the Mechanism cannot be interpreted, as the Prosecution suggests,[47] to include taking substantive decisions on the merits of a case in the absence of the consideration by all of the members of the bench. Judge Akay's views on this case matter to our solemn deliberations, and, in the present circumstances, decisions on the merits of this case cannot be taken even should they hold the support of a majority of the remaining judges. Moreover, it cannot be said that the integrity of the judicial system would be upheld if a replacement of a judge is viewed as a measure of first rather than last resort, especially where the avenues for the Government of the Republic of Turkey to implement the United Nations Secretary-General's assertion of immunity have neither been fully explored nor exhausted, including the execution of this request made by Ngirabatware. In this regard, I note that Judge Akay's release is also being sought pursuant to domestic legal proceedings in Turkey. An application before the European Court of Human Rights has also been filed.[48]

14. The paramount consideration of upholding the integrity of our judicial system is particularly poignant in the circumstances of the present case. Ngirabatware – notwithstanding his views on the strength of his request for review of his convictions – supports this fundamental principle,[49] and this is key. In particular, I note that Ngirabatware - despite acknowledging that he "would be the first to

[45] *See supra* para. 9.
[46] *See* Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 Am. J. Int'l L. 363-65 (2005).
[47] *See* Oral Hearing, T. 17 January 2017 pp. 19, 27.
[48] *See* ECHR Ref. No. 59/17.

benefit from the replacement of [...] Judge [Akay] and [that his] main desire is to proceed with the hearing which [he] believe[s] will exonerate [him] and lead to his permanent release"[50] - maintained that the replacement of Judge Akay would not be "an alternative that [he] can see is viable *under any circumstances*".[51]

15. This is not to say that judges can never be reassigned or replaced. But a judge has been arrested, immunity has been asserted, it has not been waived, and Judge Akay's continued presence on the bench has the full support of the person who is seeking relief. Judge Akay is an essential member of this bench. In the absence of extraordinary circumstances, his continued presence on the bench is essential to the preservation of judicial independence. To say Judge Akay can be replaced easily to facilitate the judicial process – at this initial stage and before other avenues have been exhausted – is to say we do not value judicial independence, value justice, value what is right.

16. I recall that, while the Mechanism will not lightly intervene in a domestic jurisdiction,[52] there is clear authority to order a state to terminate proceedings against individuals on the basis of the immunity they enjoyed as a result of their connection with the Mechanism.[53] Such orders have been implemented.[54] In the present circumstances, an order to Turkey to immediately cease prosecution and to release Judge Akay so that he can continue to exercise his judicial functions in this case is entirely appropriate and necessary to ensure that the review proceedings can conclude. Such an order is binding on Turkey pursuant to Resolution 1966 adopted by the United Nations Security Council under Chapter VII of the United Nations Charter on 22 December 2010. Article 9 of Security Council Resolution 1966 requires that all States comply with orders issued by the Mechanism.

[49] *See* Oral Hearing, T. 17 January 2017 pp. 10, 21, 28, 29.
[50] *See* Oral Hearing, T. 17 January 2017 p. 21.
[51] *See* Oral Hearing, T. 17 January 2017 p. 21 (emphasis added).
[52] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010 ("*Bagosora et al.* Decision of 6 October 2010"), para. 18.
[53] *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Order Directed to the Republic of Croatia, 18 February 2011, p. 2; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, paras. 36, 45, 67, 71; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Stay of Proceedings, 27 January 2011 ("*Bagosora et al.* Decision of 27 January 2011"), para. 10; *Bagosora et al* Decision of 6 October 2010, paras. 20-31.
[54] *See, e.g., Prosecutor v. Ante Gotovina et al.*,Case No. IT-06-90-A, Communication dated 12 October 2011 from the Ministry of Justice of the Republic of Croatia (Proceedings Pursuant to the Order of the ICTY Trial Chamber Dated 18 February 2011), 14 October 2011 (confidential), Registry Pagination. 3043; *Bagosora et al* Decision of 27 January 2011, para. 10.

17. In relation to Ngirabatware's request for temporary provisional release,[55] I consider that as Pre-Review Judge, I lack competence to entertain this request.[56] Tanzania, whose support would be required for the purpose of Ngirabatware's provisional release on its territory,[57] also does not support the request.[58] Any request for modifications of the conditions of detention in accordance with Rule 67 of the Rules should be made before the President.

III. DISPOSITION

18. For the foregoing reasons, pursuant to Articles 28 and 29(2) of the Statute and Rules 55 and 131 of the Rules, I hereby:

GRANT, in part, the Motion;

ORDER the Government of the Republic of Turkey to: (i) cease all legal proceedings against Judge Akay; and (ii) take all necessary measures to ensure Judge Akay's release from detention as soon as practicable, but no later than Tuesday, 14 February 2017, so that he can resume his judicial functions in this case; and

DISMISS the Motion in all other respects.

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

Done this 31st day of January 2017,
At The Hague,
The Netherlands.

Judge Theodor Meron,
Pre-Review Judge

[Seal of the Mechanism]

[55] *See* Oral Hearing, T. 17 January 2017 pp. 21, 22, 25, 26; *Ngirabatware* Further Submission, paras. 1, 14, 15; Motion, paras. 2, 22.
[56] *See* Rule 135 of the Rules. I find Ngirabatware's reliance on the competence of a Duty Judge at the International Criminal Tribunal for the former Yugoslavia ("ICTY") inapposite given the circumscribed nature of the corresponding competence of a Duty Judge at the Mechanism. *See* Oral Hearing, T. 17 January 2017 pp. 25, 26. *Compare* Rule 28 of the Rules (indicating that a Duty Judge will serve as a Single Judge on matters "not assigned to a Single Judge or Trial Chamber") *with* Rule 28(D) of the ICTY Rules of Procedure and Evidence (authorizing a Duty Judge to deal with applications in a case already assigned to a Trial Chamber if, *inter alia*, "satisfied as to its urgency or that it is otherwise appropriate to do so in the absence of the Trial Chamber"). In addition, while Rule 68(I) of the Rules applies, *mutatis mutandis*, to convicted persons who are in the custody of the Mechanism pending transfer to an enforcement state, the decision to authorize such provisional release principally rests with the Appeals Chamber, to the extent that it is already seised of the case. *See Prosecutor v. Zdravko 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, paras. 7, 8.
[57] *See* 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, Articles 38(1), 39(3).
[58] Oral Hearing, T. 17 January 2017 pp. 30, 31.

TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS/
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