



Mechanism for International Criminal Tribunals

Case No. MICT-12-29-R

Date: 19 June 2017

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Joseph E. Chiondo Masanche
Judge Aydin Sefa Akay
Judge Aminatta Lois Runeni N'gum
Judge Gberdao Gustave Kam

Registrar: Mr. Olufemi Elias

Decision of: 19 June 2017

PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

PUBLIC AND REDACTED

DECISION ON NGIRABATWARE'S MOTION FOR REVIEW

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Richard Karegyesa
Mr. Abubacarr Tambadou
Ms. Sunkarie Ballah-Conteh

Counsel for Augustin Ngirabatware:

Mr. Peter Robinson

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A handwritten signature in black ink, appearing to be 'P. Robinson', written over a white background within a black rectangular box.

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively);¹

RECALLING that, on 18 December 2014, the Appeals Chamber: (i) affirmed Augustin Ngirabatware’s convictions for committing direct and public incitement to commit genocide and instigating and aiding and abetting genocide; (ii) reversed Ngirabatware’s conviction for rape as a crime against humanity; and (iii) imposed a sentence of 30 years of imprisonment;²

RECALLING that, on 5 May 2016, the Appeals Chamber granted, in part, Ngirabatware’s request for assignment of counsel and exceptionally directed the Registrar to assign Ngirabatware counsel for the purpose of assisting him in relation to his potential request for review and to remunerate counsel at the equivalent of three months of work at the expense of the Mechanism because it could not exclude that the potential grounds for review advanced by Ngirabatware may have a chance of success;³

BEING SEISED OF the “Motion for Review of Judgement” filed confidentially by Ngirabatware on 8 July 2016 (“Motion”),⁴ in which he seeks a review of his convictions on the basis that, following the rendering of the Appeal Judgement, [REDACTED],⁵ and requests that a hearing be held;⁶

NOTING that, in response, the Prosecution submits that: (i) [REDACTED] may, *prima facie*, amount to a new fact and, if proven, may affect Ngirabatware’s convictions; (ii) agrees that an evidentiary hearing should be held, but notes that [REDACTED]; and (iii) reserves the right to call rebuttal evidence and make final submissions on the merits of the Motion after all the evidence has been heard;⁷

NOTING that the arrest of a member of the Bench, Judge Aydin Sefa Akay, on or around 21 September 2016 in the Republic of Turkey and his subsequent detention – notwithstanding the

¹ See Order Assigning Judges to Consider a Case Before the Appeals Chamber, 25 July 2016.

² *Augustin Ngirabatware v. The Prosecutor*, Case No. MICT-12-29-A, Judgement, 18 December 2014 (“Appeal Judgement”), paras. 3, 252, 279. See also *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Judgement and Sentence, pronounced on 20 December 2012 and issued in writing on 21 February 2013 (“Trial Judgement”), para. 1394.

³ See Decision on Prosecution’s Motion Regarding Protected Witnesses and Ngirabatware’s Motion for Assignment of Counsel, 5 May 2016 (confidential) (“Decision of 5 May 2016”), paras. 20-22, 31. See also Motion for Assignment of Counsel, 19 February 2016 (confidential).

⁴ Motion for Review of Judgement, 8 July 2016 (confidential with confidential Annexes A-D).

⁵ Motion, paras. 2, 3, 10-15, 18, 19, 22, 23, 26, 30, 33, 39, 40, Annexes A-D.

⁶ Motion, paras. 4, 42.

⁷ Prosecution Response to Motion for Review of Judgement, 19 September 2016 (confidential), paras. 2-4.

formal assertion of diplomatic immunity by the United Nations – prevented Judge Akay from exercising his judicial functions in this case;⁸

NOTING that, following Judge Akay’s provisional release from detention on 14 June 2017, the Appeals Chamber is now able to consider the merits of the Motion;

CONSIDERING that, pursuant to Article 24 of the Statute of the Mechanism (“Statute”) and Rules 146, 147, and 148 of the Rules of Procedure and Evidence of the Mechanism (“Rules”) a request to have the Appeals Chamber review a final judgement will be granted, if the moving party shows that: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the trial or appeal proceedings; (iii) the new fact could not have been discovered through the exercise of due diligence; and (iv) the new fact could have been a decisive factor in reaching the original decision;⁹

CONSIDERING that [REDACTED] contain new information of an evidentiary nature that relates to [REDACTED] that could not have been taken into account at trial or on appeal and therefore constitute a new fact,¹⁰ which, if proved, could have been a decisive factor in reaching the original decision [REDACTED];¹¹

CONSIDERING that [REDACTED],¹² the new fact was neither known to Ngirabatware nor could have been discovered through the exercise of due diligence;

FINDING, therefore, that a review of the Appeal Judgement is warranted;

NOTING that, in these circumstances, Ngirabatware is entitled to assigned counsel at the expense of the Mechanism for the purpose of assisting him in relation to the review proceedings;¹³

⁸ See Decision on Republic of Turkey’s Non-Compliance with its Obligation to Cooperate with the Mechanism, 6 March 2017; Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, paras. 4-6, 12, 15.

⁹ See *Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-R.1, Decision on Sreten Lukić’s Application for Review, 8 July 2015, para. 5; *Prosecutor v. Milan Lukić*, Case No. MICT-13-52-R.1, Decision on Milan Lukić’s Application for Review, 7 July 2015, para. 5; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on Request for Review, 29 May 2013 (“*Kajelijeli Review Decision*”), para. 7; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-R.1, Decision with Respect to Veselin Šljivančanin’s Application for Review, 14 July 2010 (“*Šljivančanin Review Decision*”), p. 2.

¹⁰ See *Kajelijeli Review Decision*, paras. 24, 32, 43.

¹¹ See Decision of 5 May 2016, paras. 3, 21, referring to [REDACTED].

¹² See Motion, paras. 16, 18, 20, 22, 24, 26, 28, 30, Annexes A-D.

¹³ See *Ngirabatware Decision* of 5 May 2016, para. 20; *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka’s Request for Review and Assignment of Counsel, 13 July 2015, para. 8; *Aloys Ntabakuze v. The Prosecutor*, Case No. MICT-14-77-R, Decision on Ntabakuze’s *Pro Se* Motion for Assignment of an Investigator and Counsel in Anticipation of his Request for Review, 19 January 2015, para. 9.

CONSIDERING that, pursuant to Rule 147 of the Rules, a hearing to consider evidence on the new fact (“Review Hearing”) will be held;

CONSIDERING that the Review Hearing will allow the parties to provide supporting and rebuttal evidence concerning the new fact and that, before setting the date and structure of the Review Hearing, it is appropriate to allow adequate time for preparation and to consider the scope of the evidence, if any, the parties wish to present;¹⁴

FOR THE FOREGOING REASONS,

GRANTS the Motion;

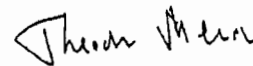
ORDERS the parties to submit in writing, no later than 31 July 2017, a list of evidence and witnesses, if any, each propose to introduce at the Review Hearing;

FURTHER ORDERS the parties to include with respect to each piece of evidence or witness: (i) a brief description of anticipated relevance; and (ii) the proposed time allocation for any witness;

INFORMS the parties that a scheduling order for the Review Hearing will be issued in due course.

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

Done this 19th day of June 2017,
At The Hague,
The Netherlands



Judge Theodor Meron, Presiding

[Seal of the Mechanism]



¹⁴ *Šljivančanin* Review Decision, p. 4. Cf. Rules 55 and 131 of the Rules.



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