



Mechanism for International Criminal Tribunals

Case No.: MICT-12-29-R

Date: 26 April 2017

Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Pre-Review Judge  
**Registrar:** Mr. Olufemi Elias  
**Decision of:** 26 April 2017

**PROSECUTOR**

**v.**

**AUGUSTIN NGIRABATWARE**

***PUBLIC***

**DECISION ON A MOTION TO INITIATE CONTEMPT  
PROCEEDINGS**

**The Office of the Prosecutor:**

**Government of the Republic of Turkey**

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

**Counsel for Mr. Augustin Ngirabatware:**

Mr. Peter Robinson

Received by the Registry  
Mechanism for International Criminal Tribunals  
26/04/2017 17:20

A handwritten signature in black ink, appearing to be a stylized 'P' followed by a long horizontal stroke.

**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 ("Pre-Review Judge");<sup>1</sup>

**RECALLING** that, on 31 January 2017, as a Pre-Review Judge, I ordered the Government of the Republic of Turkey to: (i) cease all legal proceedings against Judge Aydin Sefa Akay, a member of the bench of the Appeals Chamber in this case; and (ii) take all necessary measures to ensure Judge Akay's release from detention as soon as practicable, but no later than 14 February 2017, so that he can resume his judicial functions in this case;<sup>2</sup>

**RECALLING** that, on 6 March 2017, as a Pre-Review Judge, I found that the Government of the Republic of Turkey failed to comply with the Order of 31 January 2017 in accordance with its obligations under Article 28 of the Mechanism's Statute ("Statute") and that, pursuant to Rules 8(A) and 131 of the Mechanism's Rules of Procedure and Evidence ("Rules"), this matter shall be reported to the United Nations Security Council;<sup>3</sup>

**RECALLING** that, on 9 March 2017, pursuant to Article 28 of the Statute and Rule 8(A) of the Rules, the President of the Mechanism reported the Government of the Republic of Turkey to the United Nations Security Council for its failure to take action to comply with the Order of 31 January 2017;<sup>4</sup>

**BEING SEISED OF** the "Motion to Initiate Contempt Proceedings", filed on 3 April 2017 by Mr. Augustin Ndirabatware ("Motion"), in which he submits that the President of the Republic of Turkey, Mr. Recep Tayyip Erdoğan, and the Minister of Justice, Mr. Bekir Bozdağ, have failed to comply with the Order of 31 January 2017, and requests that I refer the matter to the President of

<sup>1</sup> Order Designating a Pre-Review Judge, 17 August 2016, p. 1; Article 12(3) of the Mechanism's Statute ("Statute"). See also Order Assigning Judges to Consider a Case Before the Appeals Chamber, 25 July 2016 ("Order of 25 July 2016").

<sup>2</sup> See Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017 ("Order of 31 January 2017"), paras. 4, 18; Order of 25 July 2016, p. 2. On or around 21 September 2016, Judge Akay was detained in the Republic of Turkey in relation to allegations connected with the events of July 2016 directed against the constitutional order of Turkey, and has remained in detention since that time. See Decision on Republic of Turkey's Non-Compliance with its Obligation to Cooperate with the Mechanism, 6 March 2017 ("Decision of 6 March 2017"), p. 1.

<sup>3</sup> Decision of 6 March 2017, pp. 1, 2.

<sup>4</sup> Letter dated 9 March 2017 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, UN Doc. S/2017/204. See also Press Release, Mechanism Notifies United Nations Security Council of Turkey's Non-Compliance, 16 March 2017, available at <http://www.unmict.org/en/news/mechanism-notifies-united-nations-security-council-turkey%E2%80%99s-non-compliance>.

the Mechanism for designation of a Single Judge to consider initiating contempt proceedings in accordance with Rule 90 of the Rules;<sup>5</sup>

NOTING that the Government of the Republic of Turkey did not respond to the Motion;<sup>6</sup>

NOTING that, in response, the Prosecution opposes the Motion arguing, *inter alia*, that the Mechanism does not have the power to hold State officials responsible for purported inaction or non-compliance with an order for which the State is responsible under international law;<sup>7</sup>

NOTING that, in reply, Ngirabatware submits that it may be appropriate to invite submissions on the matter from the Government of the Republic of Turkey, the United Nations Office of Legal Affairs, and *amicus curiae*, and requests that an oral hearing be held;<sup>8</sup>

CONSIDERING that, as a Pre-Review Judge, I am “vested with the power to address problems arising during the review proceedings on behalf of the Appeals Chamber” and shall take any measures necessary to ensure the proper preparation of this case for a fair and expeditious hearing;<sup>9</sup>

CONSIDERING, further, that the Motion relates specifically to the Government of the Republic of Turkey’s failure to comply with the Order of 31 January 2017 issued by the Pre-Review Judge, and thus I consider this matter to be within my competence;

CONSIDERING that, pursuant to Rule 90 of the Rules, the Mechanism in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with the administration of justice;

CONSIDERING, however, that in matters pertaining to State obligations, it is well-established that State officials “are mere instruments of a State and their official action can only be attributed to the State”,<sup>10</sup> that, subject to certain limited exceptions,<sup>11</sup> “[t]hey cannot be the subject of sanctions or

<sup>5</sup> Motion, paras. 1, 2, 5, 22-35.

<sup>6</sup> I have been informed by the Registry of the Mechanism that the Motion was duly served on the Government of the Republic of Turkey. The time limit for filing a response, if any, expired on 13 April 2017. See Rule 153(B) of the Rules.

<sup>7</sup> Prosecution Response to Ngirabatware’s Motion to Initiate Contempt Proceedings, 12 April 2017 (“Response”), paras. 1-3, 5. See also Response, para. 4.

<sup>8</sup> Reply to Prosecution Response to Motion to Initiate Contempt Proceedings and Request for Oral Hearing, 16 April 2017 (“Reply”), para. 13. See also Reply, paras. 4-12.

<sup>9</sup> See Decision of 6 March 2017, p. 2, referring to *Prosecutor v. Drago Josipović*, Case No. IT-95-16-R, Order Designating a Pre-Review Judge, 25 April 2002, p. 2; Rule 135(B) of the Rules.

<sup>10</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, 29 October 1997 (“*Blaškić Appeal Decision*”), para. 38. See also *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić Appeal Decision*”), paras. 20.

<sup>11</sup> For instance, those responsible for war crimes, crimes against humanity, and genocide cannot invoke immunity from national or international jurisdiction even if they perpetrated the crimes while acting in their official capacity (see

penalties for conduct that is not private but undertaken on behalf of a State", and "cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act";<sup>12</sup>

**CONSIDERING** that "[i]t is the State which is bound by [the obligation to cooperate with the Mechanism under Article 28 of the Statute] and it is the State for which the official or agent fulfils his function that constitutes the legitimate interlocutor of the [Mechanism]" and "shall therefore incur international responsibility for any serious breach of that provision by their officials";<sup>13</sup>

**CONSIDERING** that the Mechanism "is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules" and "also has a power to report this judicial finding to the [United Nations] Security Council";<sup>14</sup>

**CONSIDERING**, however, that the Mechanism "is not vested with any enforcement or sanctionary power *vis-à-vis* States" and that "[i]t is primarily for its parent body, the [United Nations] Security Council, to impose sanctions, if any, against a recalcitrant State";<sup>15</sup>

**CONSIDERING** that, following a competent judicial determination, the President has reported the Republic of Turkey's non-compliance with its obligations under Article 28 of the Statute to the United Nations Security Council;

**CONSIDERING** that the Mechanism has, therefore, taken appropriate measures provided for in the Statute and the Rules to address Republic of Turkey's non-compliance with the Order of 31 January 2017 and that the procedure envisaged under Rule 90 of the Rules is not applicable in this case;

**CONSIDERING** that the parties have made detailed submissions, where they, by and large, rely on the same well-established jurisprudence but disagree about its interpretation with respect to the remedies available in case of non-compliance by a State with an order issued by the Mechanism;<sup>16</sup>

*Blaškić* Appeal Decision, paras. 41, 42). See also *Blaškić* Appeal Decision, para. 51; *Krstić* Appeal Decision, paras. 24-27.

<sup>12</sup> *Blaškić* Appeal Decision, para. 38. See also *Blaškić* Appeal Decision, paras. 42-44.

<sup>13</sup> *Blaškić* Appeal Decision, para. 44.

<sup>14</sup> *Blaškić* Appeal Decision, para. 33. See also *Blaškić* Appeal Decision, para. 37.

<sup>15</sup> *Blaškić* Appeal Decision, para. 33.

<sup>16</sup> See Response, paras. 2-4, citing, *inter alia*, *Blaškić* Appeal Decision, paras. 25, 28, 33, 34, 36, 38, 41, 43, 44; *Krstić* Appeal Decision, paras. 23-28; Reply, paras. 7, 8, citing, *inter alia*, *Blaškić* Appeal Decision; *Krstić* Appeal Decision, para. 26.

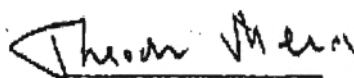
**CONSIDERING**, therefore, that the information before me is sufficient to reach an informed decision, and, accordingly, that it is not necessary to invite further oral or written submissions on the matter;<sup>17</sup>

**FOR THE FOREGOING REASONS,**

**HEREBY DENY** the Motion.

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

Done this 26th day of April 2017,  
At The Hague,  
The Netherlands

  
Judge Theodor Meron,  
Pre-Review Judge

[Seal of the Mechanism]



<sup>17</sup> See, e.g., *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-AR73.1, Decision on Request for Oral Argument, 16 March 2011, p. 2, n. 8 and references cited therein.



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Rev: April 2014/Rév. : Avril 2014