

ICTR-98-41
29-6-2012
(40773-40764)

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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ICTR-99-45-428
29-06-2012
(S216-5207)

OFFICE OF THE PRESIDENT

Before: VAGN JOENSEN, President
Registrar: ADAMA DIENG, Registrar
Date: 29 June 2012

JUDICIAL RECORDS DIVISION
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IN RE:

André NTAGERURA;
Gratien KABILIGI;
Jérôme BICAMUMPAKA and
Casimir BIZIMUNGU

**MOTION SEEKING ORDERS FROM A TRIAL CHAMBER REGARDING THE
RELOCATION OF ACQUITTEES**
(Article 28 of the Statute of the Tribunal;
Rules 7bis, 19 and 54 of the Rules of Procedure and Evidence)

Counsel for the Petitioners

Mr. Philippe Larochelle
Mr. Sébastien Chartrand

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Martha Hosi
SIGNATURE: Martha Hosi DATE: 18 July 2012

INTRODUCTION

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1. In this Motion, Mrs Ntagerura, Kabiligi, Bicamumpaka and Bizimungu (hereinafter the "Petitioners") request that a Trial Chamber of the International Criminal Tribunal for Rwanda (hereinafter the "Tribunal") be appointed to deal with matters pertaining to their relocation following their acquittals by the Tribunal;
2. Rule 19 of the Rules Procedure and Evidence of the Tribunal (hereinafter the "Rules") vests the President of this Tribunal with the coordination of the work of the Trial Chambers. The Petitioners request the President of the Tribunal to assign a Trial Chamber to deal with the merits of the instant motion;

André NTAGERURA

3. Mr. André Ntagerura ("Ntagerura") is detained by the Tribunal since 17 May 1996;
4. He was acquitted by Trial Chamber III of the Tribunal on 25 February 2004, and had his acquittal upheld on appeal on 8 February 2006. Ntagerura is still in *de facto* custody of the Tribunal, his movements restricted in Tanzania, *solely* because he was an accused person before the Tribunal;
5. Since his acquittal, numerous attempts by and for Ntagerura have been made to secure his relocation, to many to be described here in details. Here is an overview of these proceedings;
6. At the request of Ntagerura, the Registrar of the Tribunal, Mr. Adama Dieng, on the basis of Article 28 of the Statute of the Tribunal (hereinafter the "Statute"), undertook steps to seek relocation of Ntagerura in France, in the USA, in Canada, in the Netherlands, and through the United Nations High Commissioner for Refugees (hereinafter "UNHCR"). To this day, all these efforts have been unsuccessful;
7. On 24 October 2007, Ntagerura filed his *Motion [...] Requesting an Order Directed at Canada and Asking the President to Report the Matter to the Security Council* (hereinafter "*Motion*");
8. On 31 March 2008, the Office of the President rendered the *Decision on Motion of André Ntagerura for Cooperation with Canada and for Reporting to the Security Council* (hereinafter "*Decision*");
9. Following the *Decision*, the President of the Tribunal denied entirely the *Motion* of Ntagerura;

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10. However, the President assigned himself and Judges Gustave Gberdao and Vagn Joensen from Trial Chamber III to “dispose of the Motion for Cooperation”. On 15 May 2008, Trial Chamber III denied the *Motion*;
11. On 13 June 2008, Ntagerura filed his *Motion [...] for Permission to Appeal a Decision of the President of the ICTR of 31 March 2008 and a Decision of Trial Chamber III dated 15 May 2008*;
12. After grating, on 11 September 2008, the Appellant leave to seek review of the decisions, the Appeals Chamber, on 18 November 2008, dismissed the Motion in its entirety;
13. Ntagerura also personally undertook immigrations procedures in Canada and in France;
14. Concerning Canada, Ntagerura lodged a request for permanent resident status at the Canadian High Commission in Nairobi, Kenya, on 21 May 2009;
15. In mid-2011, the Canadian immigrations authorities in Nairobi announced that the examination of his request was suspended pending a recommendation by the UNHCR;
16. On 2 April 2012, the UNHCR finally issued such recommendation to the Canadian immigration authorities. The matter is still pending;
17. As regard to France, where his wife and son are established, Ntagerura requested a visa at the French Embassy in Dar-es-salaam on 16 December 2010 seeking reunification with his family;
18. On 25 March 2011, French Embassy in Tanzania refused Ntagerura’s visa request, despite the fact that his wife and son live in France, arguing that his presence would threaten public order and compromise diplomatic relations between France and Rwanda;
19. On 25 May 2011, Ntagerura brought his case before the *Commission de recours contre les décisions de refus de visa d'entrée en France (CRRV)*. On 19 September 2011, the CRRV issued a decision rejecting Ntagerura’s request. this decision has been appealed and the matter is still under consideration;
20. Ntagerura respectfully requests the Trial Chamber that will be seized of the matter of his relocation to issue the necessary requests for cooperation under Article 28(2) of the Statute to facilitate his relocation to either Canada, France or Holland;

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Gratien KABILIGI

21. Mr. Gratien Kabiligi ("Kabiligi") is detained by the Tribunal since 18 July 1997, when he was arrested in Nairobi, Kenya;
22. He was acquitted by the Trial Chamber I of the Tribunal on 18 December 2008. The Prosecutor did not appeal the acquittal and the matter is now *res judicata*. Kabiligi is still in *de facto* custody of the Tribunal, his movements restricted in Tanzania, *solely* because he was an accused person before the Tribunal;
23. At the request of Kabiligi, the Registrar, Mr. Adama Dieng, on the basis of Article 28 of the Statute, undertook steps to seek relocation of Kabiligi in France, where his wife and children have settled in June 1998 and subsequently obtained French citizenship. France has refused the relocation of Kabiligi on his territory;
24. Kabiligi also personally undertook immigrations procedures to seek reunification with his family in France, requesting a visa at the French Embassy in Dar-es-salaam in September 2010;
25. On 16 November 2010, French Embassy in Tanzania refused Kabiligi's visa request, despite the fact that his wife and children live in France, arguing that his presence would threaten public order and compromise diplomatic relations between France and Rwanda;
26. In January 2011, Kabiligi brought his case before the Administrative Tribunal of Nantes, in France, on the basis of Article 8 of the *Convention Européenne de sauvegarde des Droits de l'Homme et des Libertés fondamentales* and of the *Convention Internationale des Droits de l'Enfant du 26 Janvier 1990*;
27. On 23 August 2011, the Administrative Tribunal of Nantes issued an order urging the Ministry of the Interior to grant Kabiligi's visa request. The Nantes Tribunal said that Foreigner and Interior Ministries were relying on unsupported allegations to refuse Kabiligi a long-term visa. Stressing the point, the presiding judge added that the international community wouldn't be disturbed by the fact that a state which signed the Treaty creating the ICTR should welcome on his territory a man acquitted by the very same tribunal;
28. On 8 September 2011, the Ministry of the Interior appealed the Nantes tribunal's ruling to the Council of State, on the grounds that Kabiligi's presence in France may threaten public order;
29. On 26 January 2012, the Council of State denied the motion and upheld the Nantes tribunal's ruling. Nevertheless, Kabiligi is still waiting on the matter to be solved and finally be reunited with his family in France;

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30. Kabiligi respectfully requests the Trial Chamber that will be seized of the matter of his relocation to issue the necessary requests for cooperation under Article 28(2) of the Statute to facilitate his relocation to France;

Jérôme BICAMUMPAKA

31. Mr. Jérôme Bicomumpaka ("Bicomumpaka") was arrested in Cameroun on 6 April 1999 and transferred to the ICTR on 31 July 1999;
32. On 30 September 2011, Bicomumpaka was acquitted by Trial Chamber II of the Tribunal. The Prosecutor did not appeal the acquittal and the matter is now *res judicata*;
33. To this day, Bicomumpaka is still in *de facto* custody of the Tribunal, his movements restricted in Tanzania, *solely* because he was an accused person before the Tribunal;
34. On 6 October 2011, during a meeting held at the Registry Office, Chiarra Biagoni, Assistant to the Registrar of the ICTR and responsible of the issue of the relocation of the acquittees, instructed Bicomumpaka to gather the necessary documents in view of applying to potential host countries, which he has been doing ever since. His immigration file will be completed and submitted in the upcoming weeks;
35. Bicomumpaka respectfully requests the Trial Chamber that will be seized of the matter of his relocation to issue the necessary requests for cooperation under Article 28(2) of the Statute to facilitate his relocation to Canada;

Casimir BIZIMUNGU

36. Mr. Casimir Bizimungu ("Bizimungu") was arrested in Kenya on 11 February 1999 and transferred to the ICTR on 23 February 1999;
37. On 30 September 2011, Bizimungu was acquitted by Trial Chamber II of the Tribunal. The Prosecutor did not appeal the acquittal and the matter is now *res judicata*;
38. To this day, Bizimungu is still in *de facto* custody of the Tribunal, his movements restricted in Tanzania, *solely* because he was an accused person before the Tribunal;
39. Since his acquittal, Bizimungu as been gathering the necessary documents and information in view of applying for permanent resident status in Canada;

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40. Bizimungu respectfully requests the Trial Chamber that will be seized of the matter of his relocation to issue the necessary requests for cooperation under Article 28(2) of the Statute to facilitate his relocation to Canada;

State Cooperation with the Tribunal

41. The obligation of Member states of the United Nations to cooperate with the Tribunal is set out in Article 28 of the Statute;
42. The Petitioners submit that giving effect to a request for relocation from the Tribunal would fall within the ambit of the obligation of States to cooperate under Article 28 of the Statute;
43. The Petitioners are fully aware that the Appeals Chamber of this Tribunal has rendered a decision *In re Ntagerura* on 18 November 2008 stating the contrary,¹ but submit that this decision is erroneous for the following reasons:

The correct interpretation of Article 28

44. The Appeals Chamber reasoned that Article 28 was not encompassing relocation since the obligations detailed in that article pertain “solely to the investigation and prosecution of persons accused of committing serious violations of international humanitarian law, and hence does not extend to relocation of acquitted persons”;²
45. It is submitted that the text of Article 28 itself does not support such a narrow interpretation. Indeed, the French version of Article 28 states that states must cooperate with the Tribunal “à la recherche et au jugement des personnes accusées [...]”;
46. The Petitioners submit that any “Judgement” rendered in the context of an International Criminal Tribunal necessarily comprises the steps necessary both for the detention or the relocation of persons being respectively convicted or acquitted following their judgment;
47. Moreover, as further argued below, the Petitioners submit that the Statute of the Tribunal is a “treaty” under Article 2(1)a) the *Vienna Convention on the Law of Treaties* (hereinafter “Vienna Convention”) and therefore should be interpreted in accordance with that Convention, including Article 33(1) which states that: “[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”;

¹ *In Re: André Ntagerura*, ICTR-99-46-A28, Decision on Motion to Appeal the President’s Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008, 18 November 2008 (“Ntagerura Appeal Chamber Decision”).

² Ntagerura Appeal Chamber Decision, para. 15.

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Relocation as a remedy under the Statute

48. In *Rwamakuba*, this Chamber has stated that:

“In the Chamber’s view, the power to give effect to the right to an effective remedy for violations of the rights of an accused or former accused accrues to the Chamber because this power is essential for the carrying out of judicial functions, including the fair and proper administration of justice.”

[...] the Tribunal, as a special kind of subsidiary organ of the U.N. Security Council, is bound to respect and ensure respect for generally accepted human rights norms. Indeed, the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights.”³

49. First, the Petitioners fail to see why accused are treated at par with former accused with regards to possible remedies, yet are treated differently when it comes to their relocation;
50. The Petitioners submit that relocation is the most suitable remedy to any persons being deprived of his liberty for the long periods of detention which have characterised all trials before the ICTR, during which the Petitioners were ostracized and separated from their respective families;
51. Therefore, considering that Article 28(2) of the Statute specifically states that cooperation matters are not exhaustively listed, and considering that the Petitioners are all entitled to an effective remedy following the violation of their rights, it is submitted that the minimum remedy they are entitled to following their acquittals is that the Tribunal properly exercises its jurisdiction under Article 28(2) of the Statute and directly seeks, from the concerned member states of the United Nations, the cooperation required to secure the relocations of the Petitioners in a country where their security is insured;
52. Support for the proposition that relocation is a proper remedy following an acquittal before the Tribunal can be found in the numerous requests by both the Registrar and the President of the Tribunal to the Security Council of the United Nations seeking its assistance to relocate acquitted persons, resulting in Security Council Resolution 2029 (2011) calling on states to further cooperate with the Tribunal on this issue;

³ *The Prosecutor v. André Rwamakuba*, ICTR-98-44C-T, *Decision on Appropriate Remedy*, 31 January 2007, para. 47-48.

53. Further, the Decision of the Appeal Chamber in 2008 only contained a request that the Registry made enquiries with the United Nations High Commission for refugees, a remedy which has thus far proven completely inefficient in securing the relocation of acquitted persons;

The interpretation of the Statute under International Law

54. As stated before, the Petitioners submit that the Statute of the Tribunal is a "treaty" under Article 2(1)a) the Vienna Convention and therefore should be interpreted in accordance with that Convention;

55. Since the Statute of the Tribunal (Resolution 955) was adopted by the States who were then composing the Security Council of the United Nations, it is also necessary to have recourse to the *Charter of the United Nations* (hereinafter "Charter") for the proper interpretation of the Statute of the Tribunal;

56. Following Article 24(1) of the Charter, the Security Council was acting on behalf of all Member states of the United Nations when they adopted the Statute of the Tribunal;

57. Following Article 25(1) of the Charter, the Members of the United Nations agree to accept and carry out the decisions of the Security Council;

58. On 8 November 1994, the Security Council, acting under Chapter VII of the Charter, adopted the Statute of the Tribunal (Resolution 955), a treaty which include a provision, Article 28, dealing with Cooperation and Judicial Assistance between States and the Tribunal;

59. Article 28(2) provides a non exhaustive list ("non-limited to") of cooperation matters for which States shall comply without undue delay;

60. Relocation of acquitted persons is not mentioned as a cooperation matter at Article 28(2) of the Statute;

61. The petitioners submit that a proper interpretation of Article 28(2) of the Statute leads to the conclusion that relocation of acquitted persons is included as a matter for cooperation under that provision of the Statute;

62. The Petitioners submit that the Security Council's interpretation of its Statute carries more weight than the interpretation that may have been done on this issue by the Trial or Appeal Chambers of the Tribunal;

63. In that respect, the repeated calls by the Security Council, by way of resolutions no less, to the member states of the United Nations to cooperate with the Tribunal on the issue of relocation of acquitted persons clearly indicates that the Security

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Council considers that relocation is a matter for cooperation under Article 28(2) of the Statute;

64. These resolutions of the Security Council shall be considered as agreements relating to the Statute of the Tribunal following Article 31(2)a) of the Vienna Convention, and useful indications of the meaning of Article 28(2) of the Statute;
65. Further, following Article 31(1) of the Vienna Convention, the Statute of the Tribunal shall be interpreted "in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and in the light of its object and purpose";
66. The basic object and purpose of the treaty is to create a Court to prosecute people suspected of having been involved in the Rwandan Genocide. The suspects, mostly Rwandan nationals, have been arrested in numerous countries in America, Europe and Africa;
67. Following their arrest in these countries, the suspects have been transferred in Arusha, Tanzania, where their trials were held;
68. In order to perform its functions, the Court created by the Treaty, which is extra-territorial, needs to rely not only for its daily operation but also for its subsistence, on State cooperation;
69. In this context, the Petitioners submit that a proper interpretation of Article 28(2) of the Statute leads to the conclusion that relocation is a matter for cooperation under that Article;
70. Any other interpretation would mean that the Tribunal would be deprived of the means to render effective judgment of acquittals, and to relocate acquitted persons even in the country from where they have been transferred;
71. Article 32 of the Vienna Convention stipulates that recourse may be had to supplementary means of interpretation when the interpretation under Article 31 leads to a result which is manifestly absurd or unreasonable;
72. The Petitioners submit that not including "relocation" as a possible cooperation matter is absurd and unreasonable, first, because it is specifically stated that the list of matters for cooperation is not exhaustive, second because arresting, prosecuting and judging individuals before the ICTR necessarily entails relocating these individuals when they are acquitted and third because the Security Council and therefore the Member states of the United Nations keep repeating through resolutions that States should cooperate with the Tribunal to facilitate the relocation of the Petitioners;

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NOTICE

73. The Petitioners stress that the remedy sought in the present motion shall in no way be construed as reparation for the prejudice suffered so far during their respective trials. The remedy sought in this motion is limited to relocation, and only endeavours to put an end to the perpetuation of that prejudice;

74. The Petitioners hereby reserve their rights to seek the proper remedies for the prejudice arising from their respective cases and suffered to date;


FOR ALL THE ABOVE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present motion;

DESIGNATE a Trial Chamber to adjudicate on the present motion;

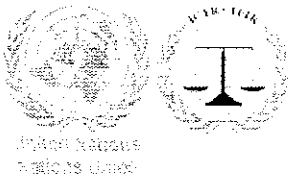
ALLOW each of the Petitioners to make specific submissions to such Trial Chamber concerning his relocation

29 June 2012



Philippe LAROCHELLE

338 rue St-Antoine Est, bureau 300
Montreal, (Quebec)
H2Y 1A3, Canada
philippe.larochelle@gmail.com



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