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23-08-2018
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International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-43

Date: 23 August 2018

Original: English

THE PRESIDENT OR SINGLE JUDGE

Before: Judge Theodor Meron

Registrar: Olufemi Elias

THE PROSECUTOR

v.

FRANCOIS-XAVIER NZUWONEMEYE

Public

MOTION FOR ORDER TO GOVERNMENT OF FRANCE

The Office of the Prosecutor:
Serge Brammertz

Government of France

Counsel for Francois-Xavier Nzuwonemeye:
Peter Robinson

Government of Tanzania

Received by the Registry
International Residual Mechanism for Criminal Tribunals
23/08/2018 22:22

No. MICT-13-43

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Introduction

1. In 2000, Francois-Xavier Nzuwonemeye (“Nzuwonemeye”) was arrested in France, transferred to the ICTR in Tanzania, and spent 14 years in detention for crimes he did not commit. When he was finally acquitted on appeal in 2014, France refused to take him back. Four-and-a-half years later, France still persists in this refusal despite a formal *note verbale* from the ICTR, diplomatic efforts by successive Presidents and Registrars of the ICTR and Mechanism, and seven resolutions of the UN Security Council. This is a motion for a judicial **order** to the Government of France to take him back.

Procedural History

2. Nzuwonemeye arrived in France in 1997 and applied for asylum. He lived in France with his wife and four children. His asylum case was still pending when he was arrested on 15 February 2000 at the request of the ICTR. He was transferred to Tanzania and detained at the United Nations Detention Facility in Arusha until his acquittal on appeal on 11 February 2014.¹

3. Since his release from detention, Nzuwonemeye has been marooned in Arusha. His wife and four children have now become French citizens. On 3 July 2014, the Registrar sent a *note verbale* to the government of France requesting that it take Nzuwonemeye back. France declined to do so.² Nzuwonemeye has also tried without success in French immigration proceedings to convince France to take him back. He remains unable to rejoin his family or secure employment.

Argument

I. Article 28 Applies to Nzuwonemeye

4. Article 28 of the ICTR Statute provides that:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
 - (a) The identification and location of persons;

¹ *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Judgement and Sentence* (17 May 2011), para. 95; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-A, *Judgement* (11 February 2014)

² The ICTR Registry informed Nzuwonemeye in 2014 that France had responded negatively to the *note verbale*, but declined to provide him with France’s response. Nzuwonemeye’s counsel again requested France’s response in July 2018, but the Registrar advised in August 2018 France had declined permission for its response to be disclosed.

- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

5. In the *Ntagerura* case, the ICTR Appeals Chamber held that since the wording of Article 28 was limited to the “investigation and prosecution of persons *accused* of committing serious violations of international humanitarian law”, it did not permit the court to make an order to a State with respect to persons who had been acquitted, as they were no longer “accused”.³

6. ICTR President Vagn Joensen noted in a subsequent report to the United Nations Security Council that “the fact that article 28 of the statute of the Tribunal does not obligate Member States to cooperate in matters of relocation has not assisted the Tribunal.”⁴

7. That language was changed in the Mechanism’s Statute. Article 28 of the Mechanism Statute does not use the term “accused”. Instead, it provides, in pertinent part, that:

1. States shall cooperate with the Mechanism in the investigation and prosecution of persons *covered by Article 1* of this Statute.
2. States shall comply without undue delay with any request for assistance or an order issued by a Single Judge or Trial Chamber in relation to cases involving persons covered by Article 1 of this Statute, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the Mechanism.

8. Thus, a State’s obligation to cooperate with the Mechanism pertains to “cases involving persons covered by Article 1 of this Statute.” Article 1 of the Mechanism Statute provides in pertinent part:

2. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered by paragraph 1 of this Article, considering the gravity of the

³ *In Re Andre Ntagerura*, No. ICTR-97-46-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), para. 15

⁴ S/2014/343, para. 39

crimes charged and the level of responsibility of the accused.

3. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are not among the most senior leaders covered by paragraph 2 of this Article, provided that the Mechanism may only, in accordance with the provisions of the present Statute, proceed to try such persons itself after it has exhausted all reasonable efforts to refer the case as provided in Article 6 of the present Statute.

9. “Persons covered by Article 1” are “persons indicted by the ICTY or the ICTR”. Nzuwonemeye was indicted by the ICTR.⁵ Therefore, the *Ntagerura* decision is distinguishable. Nzuwonemeye is a person covered by Article 28 of the Mechanism Statute. An order requiring a State to take him back after his acquittal is part of “the investigation and prosecution” of his case.⁶

10. This makes sense. In the interests of justice, “prosecution” of a case must be read to include actions occurring after the determination of guilt or innocence at the appeal, therefore truly encompassing the entirety of a case. Were an acquitted person ordered, for example, to reimburse the ICTR for the cost of his legal aid,⁷ it would be considered part of the prosecution of the case and a State would be expected to enforce such an order.⁸ An order to take back a person who a State has transferred to the ICTR is, in the same way, related to the prosecution of the case.⁹

11. The fact that the order sought in this case is not among the types of cooperation enumerated in Article 28(2) of the Mechanism Statute is of no relevance. Article 28(2) provides a non-exhaustive list of the types of cooperation or assistance that the Tribunal may seek from States.¹⁰ Article 28 includes any request or order, the

⁵ *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-I, *Amended Indictment* (23 August 2004)

⁶ *Prosecutor v Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion of Andre Ntagerura for Cooperation with Canada and for Reporting to the Security Council* (31 March 2008), para. 7: (“The question of whether an application for relocation of an acquitted person is part of the investigation and prosecution process would require being answerable in the affirmative.”)

⁷ See, i.e. *Prosecutor v Bemba*, No. ICC-01/05-01/08-3651-Red, *Order in Relation to Advanced Legal Assistance Fees* (17 July 2018)

⁸ See *Prosecutor v Prlic et al*, No. IT-04-74-A, *Order concerning Non-Receipt of Funds* (26 October 2016)

⁹ See also *Prosecutor v Ngirabatware*, No. MICT-12-29-R, *Order to the Government of Turkey for the Release of Judge Aydin Sefa Akay* (31 January 2017), para. 16, in which an order to a State took place after the Appeals judgement in that case had become final.

¹⁰ *Prosecutor v Bagosora et al*, ICTR-98-41-T, *Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance* (7 February 2005), para. 4; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye’s Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006), para. 5

purpose of which is to assist the Tribunal in its mandate.¹¹ The Mechanism and Tribunals have entered orders for types of cooperation not enumerated in Article 28.¹²

12. In addition, seven resolutions of the United Nations Security Council have established the obligation of Member States to assist in the relocation of acquitted persons. In Resolution 1995 (2011), the Security Council “call[ed] upon other States in a position to do so to cooperate with and render all necessary assistance to the International Tribunal in the relocation of acquitted persons and convicted persons who have completed serving their sentences.”¹³ That call was repeated in three more resolutions in 2011 and 2012.¹⁴

13. In Resolution 2194 (2014), the Security Council “reiterate[d] its call upon all States to cooperate with and render all necessary assistance to the International Tribunal and, from 1 January 2015, the Mechanism, for increased efforts towards the relocation of acquitted persons and convicted persons who have completed serving their sentences.”¹⁵ That call was repeated in 2015 and again in June 2018.¹⁶ France voted in favor of all seven resolutions.¹⁷

14. Therefore, the Mechanism has the authority under Article 28 of the Mechanism Statute to order France to take Nzuwonemeye back.

¹¹ *Prosecutor v Bagosora et al*, ICTR-98-41-T, *Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance* (7 February 2005), para. 4; *Prosecutor v Ndindliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye’s Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006), para. 5

¹² *Prosecutor v Ngirabatware*, No. MICT-12-29-R, *Order to the Government of Turkey for the Release of Judge Aydin Sefa Akay* (31 January 2017), para. 16; *Bagosora et al v Prosecutor*, 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), para. 18; *Prosecutor v Gotovina*, 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 Government of Croatia* (14 February 2011), para. 71

¹³ S/RES/1995 (6 July 2011), para. 7

¹⁴ S/RES/2029 (21 December 2011), para. 5; S/RES/2054 (29 June 2012), para. 6; S/RES/2080 (12 December 2012), para. 4

¹⁵ S/RES/2194 (18 December 2014), para. 3

¹⁶ S/RES/2256 (22 December 2015), para. 12; S/RES/2422 (27 June 2018), para. 3

¹⁷ France has agreed to take convicted persons onto its territory to serve their sentences. *Agreement between the Government of France and the United Nations concerning the Execution of Sentences Imposed by the International Criminal Tribunal for Rwanda* (2004). It has received two acquitted persons on its territory—Ignace Bagilishema and Jean Mpambara—but has refused to receive any other acquitted persons for the last decade.

II. The Requirements of Article 28 have been met

A. Efforts to Obtain Voluntary Cooperation

15. The applicant for an order to a State must first seek the State's voluntary cooperation.¹⁸ The Registrar asked France to take Nzuwonemeye back in 2014. Nzuwonemeye's counsel asked France to take him back in 2018.¹⁹ France has refused.²⁰ All efforts at voluntary cooperation have failed.

B. Necessity

16. An applicant for an order under Article 28 must show that such an order is necessary.²¹ The order to France is necessary to enforce Nzuwonemeye's right to family life--a fundamental right recognised in the major human rights instruments of the world.²² The Mechanism's President has stated that "international law recognises that all prisoners, whether in the pre-trial, trial, or post-conviction phases, have a right to maintain their family ties and contact with family members."²³ ICTY Chambers have also recognised the importance of this right.²⁴ This right extends to persons who are acquitted.²⁵

17. The order is also necessary because requiring an acquitted person to remain in the Host Country of the court that tried him is unfair and untenable. The headquarters agreement between the ICTR and Tanzania infers that an acquitted person is not to

¹⁸ *Prosecutor v Seselj*, No. IT-03-69-T, *Decision on Registry Submission Pursuant to Rule 33(B)...* on 22 June 2011 (21 July 2011)

¹⁹ Annex A

²⁰ France has failed to respond to the July 2018 letter.

²¹ *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006), para. 27; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of its Officials* (6 October 2006), para. 6, fn. 10

²² Universal Declaration of Human Rights (Article 16); International Covenant on Civil and Political Rights (Article 23); International Covenant on Economic, Social, and Cultural Rights (Article 10); European Convention on Human Rights (Article 8); European Social Charter (Article 16); and African Charter on Human and Peoples' Rights (Article 18).

²³ *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision of the President on Motion for Reconsideration and Review of Sentence of Milan Lukic* (28 January 2016), para. 21

²⁴ *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Defence Request for Provisional Release of Stanislav Galic* (23 March 2005), para. 18

²⁵ See Michels, *Compensating Acquitted Defendants for Detention in International Criminal Courts*, 8 *Journal of International Criminal Justice* 407 (2010), arguing that acquitted persons should be entitled to compensation for the harm that they suffered.

remain on Tanzanian territory.²⁶

18. The Mechanism's headquarters agreement is even more explicit than the ICTR's. Article 39 provides:

1. Where a person is released from the custody of the Mechanism following the person's acquittal at trial or on appeal, or for any other reason, the Mechanism shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to another State.

and

3. A person referred to in this Article shall not permanently remain on the territory of the host State except with the latter's consent. The host State shall facilitate the temporary stay of the person on its territory until the transfer under paragraph 1 of this Article takes place.²⁷

19. The ICTR and Mechanism have considered it appropriate that Nzuwonemeye be transferred to France after his acquittal. He was arrested in France and his wife and four children are French citizens. Because France has refused to comply with the ICTR and Mechanism's requests and diplomatic entreaties that it take Nzuwonemeye back, a judicial order is now necessary for the Mechanism to fulfill its obligation, under human rights instruments and the Headquarters Agreement, to ensure that Nzuwonemeye does not have to remain permanently in the Host Country separated from his family.

19. As noted in a recent law review article:

While ICTY President Meron stated that acquittals show the health of the international criminal justice system...the way in which the international community deals with, or rather neglects, acquitted individuals shows the chronic ailment of that very system.²⁸

20. The order to France to take Nzuwonemeye back imposes no greater burden than one that France has already agreed to undertake when dealing with asylum seekers in the European Union. Under the "Dublin Regulation", France has agreed to a

²⁶ *Prosecutor v Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion from Acquitted Person for Cooperation from Canada* (15 May 2008), para. 4. See *Agreement Between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Criminal Tribunal for Rwanda* (1995) S/1996/778, Appendix, Article XX(2).

²⁷ *Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals*

²⁸ Van Wijk and Hola, *Acquittals in International Criminal Justice: Pyrrhic Victories?*, 30 *Leiden Journal of International Law* 241, 261 (2017)

procedure where it is obligated to “take back” a person who first arrived in France and made an asylum claim there before going on to a third country. Under this agreement, France is also allowed to transfer persons to third countries, which must “take back” persons who first arrived in another EU country before going on to France.²⁹ France has frequently benefitted from this procedure, transferring 1,248 persons under the Dublin Regulation in the first six months of 2017.³⁰ Mr. Nzuwonemeye arrived in France in 1997 and made an asylum claim there before being arrested and transferred to the ICTR in Tanzania three years later.

21. The French Minister of Foreign Affairs has expressed the concern that voluntarily accepting an acquitted person in France would affect its diplomatic relations with Rwanda.³¹ The proposed order under Article 28, making it compulsory for France to take Nzuwonemeye back, will alleviate that concern since it will be a mandatory obligation imposed upon France by the Mechanism.

22. Nzuwonemeye is not requesting the Mechanism order France to grant him asylum or confer any particular immigration status on him. The order sought is that France take him back on its territory and put him in the same position that he was at the time of his transfer to the ICTR. France can adjudicate his immigration case according to its domestic laws and Nzuwonemeye can be there to participate and testify in those proceedings.

Request for Invitation and Oral Hearing

23. Nzuwonemeye respectfully requests that the Governments of France and Tanzania be invited to make written submissions on this motion. He further requests that an oral hearing be held due to the complexity and novelty of the issues, as well as the urgent need to highlight and resolve the fate of the ICTR acquitted persons.³²

²⁹ REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013, Article 18

³⁰ Assemblée Nationale, *Projet de loi de finances 2018—Rapport No. 273*, 12 October 2017 <http://www.assemblee-nationale.fr/15/rapports/r0273-tII.asp>

³¹ Van Wijk and Hola, *supra*, p. 248

³² See *Prosecutor v Ngirabatware*, No. MICT-12-29-R, *Invitation to the Government of the Republic of Turkey* (28 November 2016); *Prosecutor v Ngirabatware*, No. MICT-12-29-R, *Order for Oral Hearing* (21 December 2016); *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Scheduling Order for Hearing on General Ojdanic’s Second Application for Orders to NATO and States for Production of Documents* (7 September 2005)

Conclusion

24. For all of the above reasons, after hearing from the States concerned, the Mechanism should issue an order to France to take Nzuwonemeye back.

Word count: 2990

Respectfully submitted,

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PETER ROBINSON

Counsel for Francois-Xavier Nzuwonemeye

ANNEX “A”

PETER ROBINSON

Defence Counsel
Residual Mechanism for
International Criminal Tribunals
Churchillplein 1
2517JW The Hague
Netherlands
E-mail: peter@peterrobinson.com

23 July 2018

The Honorable Frederic Clavier
Ambassador of France
7, Ali Hassan Mwinyi road
P.O. Box : 2349
14110 - Dar Es Salaam
Tanzania

Dear Ambassador Clavier,

I represent Francois-Xavier Nzuwonemeye at the Residual Mechanism for International Criminal Tribunals. Major Nzuwonemeye was arrested in France in 2000 and transferred to the International Criminal Tribunal for Rwanda. He was released by the ICTR in 2014 when he was acquitted on appeal of all charges. Since then he has been stranded in Arusha unable to secure permission to rejoin his family in France.

We have decided to file a motion pursuant to Article 28 of the Mechanism's Statute for an order compelling the government of France to take Mr. Nzuwonemeye back on its territory. We will contend that having transferred him to the ICTR, France now has an obligation to take him back following his acquittal and release from custody.

Prior to filing a motion under Article 28, a party is expected to give the State an opportunity to voluntarily comply with the request. Although France has already refused to accept Mr. Nzuwonemeye when requested in a 2014 *Note Verbale* from the ICTR, I wanted to give the government of France an additional opportunity to agree to take back Mr. Nzuwonemeye.

Therefore, I would appreciate it if the government of France would consider that it has an obligation to take Mr. Nzuwonemeye back on its territory and voluntarily agree to do so.

If I have not had a positive response to this request within 30 days, I will go ahead and file the motion.

The Honorable Frederic Clavier
--page two--

In the meantime, I am available to answer any questions your government may have and to meet with anyone at any time to obtain France's voluntary cooperation on this matter.

Thank you very much for your consideration of this request.

Respectfully submitted,

A handwritten signature in cursive script, reading "Peter Robinson". The signature is written in dark ink and is centered on the page.

PETER ROBINSON

Counsel for Francois-Xavier Nzuwonemeye

PETER ROBINSON
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23 juillet 2018

A Son Excellence Monsieur Frédéric Clavier
 Ambassadeur de France
 7, Ali Hassan Mwinyi Road
 P.O. Box : 2349
 14110 - Dar Es Salaam
 Tanzania

Excellence Monsieur l' Ambassadeur Clavier,

Je représente François-Xavier Nzuwonemeye auprès du Mécanisme Résiduel pour les Tribunaux Pénaux Internationaux. Le Major Nzuwonemeye a été arrêté en France en 2000 et transféré au Tribunal Pénal International pour le Rwanda à Arusha en Tanzanie. Il a été libéré par le TPIR en 2014 après avoir été acquitté en appel de toutes les charges de génocide et de crimes contre l'humanité. Depuis lors, il a échoué à Arusha impossible pour lui d'obtenir l'autorisation de rejoindre sa famille en France.

Nous avons décidé de déposer une requête en vertu de l'Article 28 du statut du Mécanisme afin d'obtenir une ordonnance du Mécanisme obligeant le Gouvernement Français de reprendre M. Nzuwonemeye sur son territoire. Nous allons arguer que l'ayant transféré au TPIR, la France a maintenant l'obligation de le reprendre après son acquittement et sa remise en liberté.

Avant de déposer une requête en vertu de l'Article 28, nous voulons donner à l'État Français la possibilité de se conformer volontairement à la demande. Bien que la France ait déjà refusé d'accepter M. Nzuwonemeye lorsque demandé en 2014 dans une *Note Verbale* par le TPIR, nous voudrions donner au Gouvernement Français une occasion supplémentaire d'accepter de reprendre M. Nzuwonemeye.

Par conséquent, j'apprécierais si le gouvernement français considérait qu'il est obligé de reprendre M. Nzuwonemeye sur son territoire et acceptait de le faire de son plein gré.

Si je n'ai pas une réponse positive à cette demande dans les 30 jours, je vais aller de l'avant et déposer la requête auprès du Président du MICT.

A Son Excellence Monsieur Frédéric Clavier
--page deux--

En attendant, je me tiens à votre disposition pour répondre à toute question que votre Gouvernement peut avoir et pour rencontrer n'importe quelle autorité française et à n'importe quel moment pour obtenir la coopération volontaire de la France sur cette question.

Je vous remercie beaucoup pour la bonne attention que vous prêterez à ma demande.

Je vous prie d'agréer, Excellence Monsieur l'Ambassadeur, l'assurance de ma très haute considération.

Respectfully submitted,

A handwritten signature in cursive script, reading "Peter Robinson". The signature is written in dark ink and is centered on the page.

PETER ROBINSON

avocat pour Francois-Xavier Nzuwonemeye



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