



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR-99-46-A28
18 November 2008
(130/H – 121/H)

P.T.

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. Adama Dieng

Decision of: 18 November 2008

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IN RE.
ANDRÉ NTAGERURA

Case No. ICTR- 99-46-A28

ICTR Appeals Chamber

Date: 18 November 2008

Action: P.T.

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**DECISION ON MOTION TO APPEAL THE PRESIDENT'S DECISION OF
31 MARCH 2008 AND THE DECISION OF TRIAL CHAMBER III OF 15
MAY 2008**

Counsel for the Appellant:

Mr. Philippe Laroche
Mr. Avi Singh
Mr. Goran Sluiter

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Motion of André Ntagerura to Appeal a Decision of the President of the ICTR dated 31 March 2008 and a Decision of Trial Chamber III dated 15 May 2008", filed on 19 September 2008 ("Motion" and "Appellant", respectively). The Registrar filed his response on 25 September 2008¹ and the Appellant filed his reply on 1 October 2008.²

A. Background

2. On 25 February 2004, the Appellant was acquitted of all charges by the Trial Chamber.³ This verdict was subsequently affirmed on appeal.⁴ However, since his acquittal, the Appellant has remained under the authority of the Tribunal in Tanzania, pending relocation to a third country.⁵ The Appellant asserts that his "continued *ultra vires de facto* detention" infringes his fundamental and due process rights.⁶

3. On 24 October 2007, the Appellant filed a motion before the President of the Tribunal in which he claimed that, on 8 April 2004, the Registrar requested Canada to grant him asylum, and that this request was ignored.⁷ He further claimed that subsequent requests to Canada by the Registrar and his Counsel have also been ignored.⁸ The Appellant *inter alia* requested the President to order Canada to comply with the Registrar's request of 8 April 2004 and to notify the United Nations Security Council of Canada's refusal to implement the terms of this request "3 years and 5 months" after it had been made.⁹ On 31 March 2008, the President ruled that "in order for the applicant to have the opportunity for the invocation of Article 28 [of the Statute of the Tribunal] it

¹ Registrar's Submissions under Rule 33 (B) of the Rules on the Motion of André Ntagerura to Appeal a Decision of the President of the ICTR dated 31 March 2008 and a Decision of Trial Chamber III dated 15 May 2008 (Article 28 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence), 25 September 2008 ("Response").

² Reply of André Ntagerura to Registrar's Submissions under Rule 33 (B) of the Rules on Ntagerura's Appeal of a Decision of the President of the ICTR dated 31 March 2008 and a Decision of Trial Chamber III dated 15 May 2008 (Article 28 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence), 1 October 2008 ("Reply").

³ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004.

⁴ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, *Dispositif de l'Arrêt concernant l'Appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki*, 8 February 2006 ("Disposition"); *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006.

⁵ Decision on the Motion by an Acquitted Person for Cooperation from Canada - Article 28 of the Statute, 15 May 2008 ("Decision of the Trial Chamber"), para. 1.

⁶ Motion, para. 1.

⁷ Motion of André Ntagerura Requesting an Order Directed at Canada and Asking the President to Report the Matter to the Security Council (Article 28 of the Statute of the Tribunal; Rules 7 *bis*, 19 and 54 of the Rules of Procedure and Evidence), 24 October 2007 ("Motion of 24 October 2007"), para. 3.

⁸ Motion of 24 October 2007, paras. 3-11.

would be necessary for a Trial Chamber or a Judge to consider whether a request for the assistance of the Member State should be made.”¹⁰ He then denied the Motion of 24 October 2007 in part, and referred it to Trial Chamber III for consideration.¹¹ On 15 May 2008, Trial Chamber III denied the Motion of 24 October 2007.¹² The Appellant filed a motion before the Appeals Chamber in which he sought leave to appeal the Decision of the President and the Decision of the Trial Chamber.¹³ On 11 September 2008, the Appeals Chamber granted the Appellant leave to seek review of the Decision of the President and the Decision of the Trial Chamber, insofar as they relate to the Registrar’s enforcement of the Appeals Chamber’s order to effect his acquittal.¹⁴

B. Submissions

4. The Appellant contends that the Decision of the President and the Decision of the Trial Chamber do not address the continued violation of his right to a fair trial, which includes his right to a complete and effective acquittal.¹⁵ He argues that his right to life, which includes his right to family, education, and employment, has been and continues to be violated.¹⁶ He claims that his right to liberty, which is incorporated in his right to a fair trial, is also violated, as he is kept in a safe house and his movements are restricted.¹⁷ The Appellant argues that his liberty should not be curtailed merely because the Tribunal has not used available means to enforce his right to a fair trial.¹⁸

5. The Appellant submits that the violation of his right to a fair trial has been further aggravated by the Decision of the President and the Decision of the Trial Chamber, for lack of redress.¹⁹ He asserts that these decisions violate his due process and fair trial rights and further claims that “*ex parte* information outside the record of the matter” was considered without being disclosed to him.²⁰ He also asserts that the Decision of the President and the Decision of the Trial Chamber were “mutually contradictory” in that the Decision of the President reasoned that relocation was within the ambit of the investigation and prosecution envisioned in Article 28 of the

⁹ Motion of 24 October 2007, para. 39.

¹⁰ Decision on Motion of André Ntagerura for Cooperation with Canada and for Reporting to the Security Council, 31 March 2008 (“Decision of the President”), para. 7.

¹¹ Decision of the President, p. 3.

¹² Decision of the Trial Chamber, p. 3.

¹³ Motion of André Ntagerura 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, 13 June 2008.

¹⁴ Decision on Motion for Leave to Appeal the President’s Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para. 14.

¹⁵ Motion, para. 13.

¹⁶ Motion, para. 15.

¹⁷ Motion, para. 17.

¹⁸ Motion, para. 16.

¹⁹ Motion, para. 19.

²⁰ Motion, para. 20.

Statute of the Tribunal ("Statute"), and the Decision of the Trial Chamber held that this provision could not be invoked to seek relocation to Canada.²¹

6. The Appellant contends that since he is unable to return to Rwanda, the Tribunal must relocate him to a country of his choice.²² He submits that the Tribunal does not have the discretion to decide where acquitted persons should spend the rest of their lives, but has merely the obligation to effect their acquittals.²³ The Appellant argues that an acquitted person's residence cannot be limited to the criteria applied by the Trial Chamber in relation to its finding that there is no obligation on Canada to cooperate as it is not the State of the Appellant's nationality nor the State in which he was arrested, particularly where return to the State of nationality is not feasible for fear of torture and persecution.²⁴ He asserts that if the choice of his resettlement is restricted to the State in which he was arrested, the Trial Chamber ought to have sought Cameroon's views on the matter, which at this stage are unknown.²⁵ He asserts that there is no municipal or international law that would compel Cameroon to accept him.²⁶

7. The Appellant claims that there were two requests for cooperation made to Canada in relation to his settlement in that country,²⁷ but that the Decision of the President questioned the unequivocal fact that these requests had been made.²⁸ He argues that in effect the Decision of the President "shattered" the Registrar's efforts in enforcing the Trial and Appeals Chambers' orders to effect his acquittal, as it would now be hypothetically possible for Canada to argue that no requests for cooperation were made.²⁹ The Appellant contends that the Decision of the President and the Decision of the Trial Chamber were wrong in maintaining that the Registrar had not sought Canada's cooperation in effecting his acquittal.

8. The Appellant argues that when requesting Canada's cooperation, the Registrar was acting in the lawful exercise of his functions.³⁰ He asserts that the two requests for cooperation sent to Canada have never been withdrawn or annulled and they continue to remain in force.³¹ The

²¹ Motion, paras. 10, 12, 20.

²² Motion, para. 21.

²³ Motion, para. 21.

²⁴ Motion, para. 22.

²⁵ Motion, para. 24.

²⁶ Motion, para. 24.

²⁷ Motion, paras. 28, 29.

²⁸ Motion, para. 33.

²⁹ Motion, para. 34.

³⁰ Motion, para. 41.

³¹ Motion, para. 38.

Appellant argues that Canada's failure to comply with these requests is a breach of its obligations under international law.³²

9. The Registrar responds that the contention that the Appellant is in "*ultra vires de facto* detention" does not reflect his living conditions.³³ He submits that the Appellant's living conditions are more comparable to those of a staff member of the Tribunal than those of a detainee. The Appellant is accommodated in a house in an "upper-class" neighbourhood and benefits from services which include cooking, cleaning, laundry, information technology facilities, and satellite television.³⁴ The Registrar states that this house is guarded by two civilian guards, an arrangement similar to that of staff members, and that an official Tribunal vehicle and a driver attend to his transportation needs in and around Arusha.³⁵ According to the Registrar, the Appellant avails himself of the medical services offered by the Tribunal's clinic, as well as the reading materials and internet service offered by the Tribunal's library.³⁶ He states that the Appellant's family may visit him as frequently and for as long as they wish, subject to the host State's visa obligations.³⁷ The Registrar asserts that he understands the frustration that any person in the Appellant's circumstances must experience, and that he has always responded positively to requests for extra facilities and equipment, subject to the overriding concerns of the host State in relation to the presence of aliens within its borders.³⁸ He also recalls that the host State presented two options to the Appellant, either to be transferred to a refugee camp or live in the Tribunal's safe house, and that the Appellant chose the latter.³⁹

10. The Registrar submits that the allegations relating to the Appellant's lack of involvement in his relocation process and the negligence of the Registry are not only false but also unfair.⁴⁰ He states that the Appellant submitted a list of countries to which he wished to be relocated and that France was his first choice.⁴¹ The Registrar recalls that in July 2008, after several years of formal and informal requests from the Tribunal, France advised that it was not in a position to admit the Appellant on its territory.⁴² According to the Registrar, the Appellant also indicated his willingness to be relocated to Canada, the United States, and the Netherlands.⁴³ He notes that the Registry made the required contact with these States at all levels and that the Appellant was kept informed at every

³² Motion, para. 38.

³³ Response, para. 4.

³⁴ Response, para. 4.

³⁵ Response, para. 5.

³⁶ Response, para. 4.

³⁷ Response, para. 5.

³⁸ Response, para. 6.

³⁹ Response, para. 7.

⁴⁰ Response, para. 8.

⁴¹ Response, para. 9.

⁴² Response, para. 9.

⁴³ Response, para. 9.

stage of this exercise.⁴⁴ The Registrar submits that he and the President consistently raised the issue of relocation of acquitted persons before the principal organs of the United Nations and constantly requested the assistance of Member States in this regard.⁴⁵

11. The Registrar contends that his diligence in seeking to relocate the Appellant has been limited by the Appellant's choice of countries.⁴⁶ He notes that the Appellant opposed moves to approach States willing to host him, especially those in Africa.⁴⁷ In response to the Appellant's claim that Cameroon's response to his request for relocation is not known, the Registrar recalls that the Appellant acknowledged the "general openness" of Cameroon to host him at a meeting with Cameroonian Government Minister, Ename Ename, and that the Appellant indicated that Cameroon had given him and his wife asylum after they left Rwanda.⁴⁸ The Registrar states that Cameroon confirmed this "general openness" to host the Appellant.⁴⁹ He submits that the Tribunal is obliged to do no more than to restore the Appellant to the situation in which he was before his arrest, which could be accomplished by relocating him to Cameroon.⁵⁰

12. The Registrar finally notes that in challenging the Decision of the President, the Appellant asserts that the Registrar was negligent in arranging his relocation,⁵¹ while in his challenge of the Decision of the Trial Chamber the Appellant asserts that the Registrar took the appropriate steps.⁵² He contends that the Appellant conflates an individual's freedom to move about or leave a State into an individual's right to become a resident of a desired State, without the acceptance of that State.⁵³ The Registrar submits that no such right exists in any international covenant and that there is no special privilege conferred on an acquitted person, such as the Appellant, by the Statute.⁵⁴

C. Discussion

13. The Appellant submits that the Decision of the President and the Decision of the Trial Chamber were "mutually contradictory" in relation to Article 28 of the Statute, which deals with the obligation of States to cooperate with the Tribunal. According to the Appellant, the President reasoned that relocation of acquitted persons fell within the ambit of this provision, while the Trial

⁴⁴ Response, para. 9.

⁴⁵ Response, para. 10.

⁴⁶ Response, para. 11.

⁴⁷ Response, para. 11.

⁴⁸ Response, para. 11.

⁴⁹ Response, para. 11.

⁵⁰ Response, para. 11.

⁵¹ Response, para. 12.

⁵² Response, para. 12.

⁵³ Response, para. 13.

⁵⁴ Response, para. 13.

Chamber found that this provision could not be invoked to seek relocation to Canada. The Decision of the President stated that

[t]he Applicant has failed to show that an obligation to cooperate in terms of the Statute had actually arisen. Article 28 requires that Member States of the United Nations cooperate with the Tribunal in its investigations and prosecutions. [...] 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. However, in order for the applicant to have the opportunity for the invocation of Article 28 it would be necessary for a Trial Chamber or a Judge to consider whether a request for the assistance of the Member State should be made.⁵⁵

The President then assigned a Trial Chamber to rule on the Motion of 24 October 2007.⁵⁶ The Trial Chamber held that

the obligation to cooperate does not in any way imply that Canada which is neither the state of origin nor the country of residence at the time of the arrest, should grant residence status or extend preferential treatment in processing such a request.⁵⁷

While stating that States are under a duty to cooperate with the Tribunal at all stages of the procedure under Article 28 of the Statute, the Trial Chamber considered that in the present case, the Registrar had a specific authority to request a State's cooperation based on his mandate to execute the Tribunal's decision,⁵⁸ and that it could "not conclude that an order requesting the cooperation of Canada is necessary, [finding] on the contrary, that the Canadian Government ha[d] complied with its obligations, in its relations with the Registrar".⁵⁹ The Appeals Chamber thus finds no contradiction in the Decision of the President and the Decision of the Trial Chamber in respect of Article 28 of the Statute.

14. The Appeals Chamber recalls that in the Disposition of its Appeal Judgement, it directed the Registrar to take the necessary measures to effect the Appellant's acquittal.⁶⁰ Where a person has been acquitted and all proceedings against him have been finalized, the Tribunal is obliged to release him from its detention facility. The Registrar's responsibility in this respect is limited to making the necessary diplomatic, logistical, and physical arrangements for such release, taking into consideration, to the extent possible and as appropriate, the requests of the acquitted person.

15. In the present case, the Appellant provided the Registrar with a list of States to which he would prefer to be relocated. The Registrar undertook diplomatic initiatives and conveyed the Appellant's request to the States concerned. The Appeals Chamber finds that the diplomatic initiatives of the Registrar in relation to relocation do not fall within the ambit of the obligation of

⁵⁵ Decision of the President, paras. 6, 7.

⁵⁶ Decision of the President, p. 3.

⁵⁷ Decision of the Trial Chamber, para. 4.

⁵⁸ Decision of the Trial Chamber, para. 4.

⁵⁹ Decision of the Trial Chamber, para. 5.

⁶⁰ Disposition, p. 2.

States to cooperate with the Tribunal under Article 28 of the Statute. Such an obligation pertains solely to the "investigation and prosecution of *persons accused* of committing serious violations of international humanitarian law",⁶¹ and hence does not extend to the relocation of acquitted persons. The Appeals Chamber thus finds that, contrary to the President's Decision and the Trial Chamber's Decision which both considered requests for cooperation – by a Trial Chamber in the former case and the Registrar in the latter case – with regard to the question whether relocation of acquitted persons fall within the scope of Article 28 of the Statute, there is no legal duty under Article 28 of the Statute for States to cooperate in the relocation of acquitted persons.

16. The Appellant submits that the Decision of the President questioned the unequivocal fact that requests for his relocation to Canada had been made and "shattered" the Registrar's efforts in enforcing his acquittal.⁶² In view of the finding above, the Appeals Chamber finds that the Appellant's argument is misplaced. This conclusion is in line with the Appeals Chamber's reasoning articulated above, and does not undermine the enforcement of his acquittal.

17. The Appellant contends that his due process rights were infringed because the Decision of the President and the Decision of the Trial Chamber took into consideration information outside the record of his case, without disclosing this information to him. However, the Appellant provides no indication as to what this information might be, how it affected the Decision of the President and the Decision of the Trial Chamber, and why it should have been disclosed to him. The Appeals Chamber notes that it is not clear from a reading of the Decision of the President and the Decision of the Trial Chamber that any information outside the record was considered.

18. As regards the Appellant's claim that his rights to liberty and to freedom of movement are violated, the Appeals Chamber notes that the Appellant has refused to be relocated to an African country.⁶³ In the absence of any other state willing to accept him on its territory, placement in a safe house is, to this day, the best option to secure and legalise his stay in Tanzania. The Appellant is subject neither to arrest nor detention; in fact, he has consented to the regime of the safe house. Additionally, the Appeals Chamber notes that the Registrar's submission that the living conditions

⁶¹ Emphasis added. The limited context of States' obligation to cooperate under Article 28 of the Statute is also made clear in paragraph 2, which lists a number of specific matters which could form the basis of a request for assistance by Trial Chamber, such as (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; and (e) the surrender or the transfer of the accused to the International Tribunal for Rwanda. See also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, finding in relation to Article 29 of the ICTY Statute, which mirrors Article 28 of the ICTR Statute, para. 26, that: "the International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal ... The *exceptional legal basis of Article 29* accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States...". Emphasis added.

⁶² Motion, para. 34.

in the safe house are more akin to those of a staff member than a detainee, considering especially the facilities and equipment made available to the Appellant,⁶⁴ his access to the medical services offered by the Tribunal's clinic and to reading materials and internet services of the Tribunal's library, his access to an official Tribunal vehicle and a driver to attend to his transportation needs in and around Arusha, and the possibility for his relatives to visit him as frequently and as long as they wish, subject to overriding concerns of Tanzania.⁶⁵ In light of the above, and even though the Appellant's situation may not be ideal, the Appeal Chamber finds that his rights to liberty and freedom of movement are not violated.

19. The Appellant contends that the Tribunal is obliged to settle him in a country of his choice, since he is unable to return to Rwanda, for fear of intimidation and torture.⁶⁶ He also alleges that he will be exposed to certain risks if he is relocated to any country in Africa.⁶⁷ While the Tribunal does not have the ability to direct any State to accept the Appellant on its territory or to fully investigate whether the Appellant's life or liberty would be at risk should he be returned to Rwanda or to another African country, it has nonetheless a duty to ensure the welfare of the acquitted person, and to that extent, to enquire whether the Appellant's life or liberty would be at risk upon relocation to a given country. In this regard, the Appeals Chamber notes that, notwithstanding the limitations on the capacity of the Tribunal to secure relocation for the Appellant, the Registrar is continuing his efforts to find a solution to the present situation.⁶⁸ As part of such efforts, the Appeals Chamber requests the Registrar to make enquiries with the Office of the United Nations High Commissioner for Refugees and solicit its assistance in relocating the Appellant.

⁶³ Reply, para. 17.

⁶⁴ Response, paras. 4, 5.

⁶⁵ Response, para. 5.

⁶⁶ Motion, paras. 22, 24.

⁶⁷ Reply, para. 17.

⁶⁸ Response, para. 15.

D. Disposition

20. For the aforementioned reasons, the Appeals Chamber:

DISMISSES the Motion in its entirety;

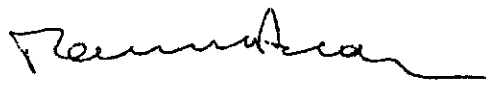
REQUESTS the Registrar to direct the Appellant's concerns in relation to his relocation to the United Nations High Commissioner for Refugees.

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

Dated this the 18th day of November 2008,

at The Hague,

The Netherlands.



Judge Fausto Pocar,

Presiding





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