



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-43
Date: 17 April 2019
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BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Alphons Orie
Judge Seymour Panton

Registrar: Mr. Olufemi Elias

Decision of: 17 April 2019

PROSECUTOR

v.

FRANÇOIS-XAVIER NZUWONEMEYE

PUBLIC

**DECISION ON THE APPEAL OF THE SINGLE JUDGE'S
DECISION OF 22 OCTOBER 2018**

Office of the Prosecutor:
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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively),¹ is seized of the “Appeal from Decision on Motion for Order to the Government of France”, filed on 17 December 2018 (“Appeal”).

I. BACKGROUND

2. On 17 May 2011, Trial Chamber II of the International Criminal Tribunal for Rwanda (“ICTR”) convicted François-Xavier Nzuwonemeye (“Nzuwonemeye”) pursuant to Articles 6(1) and 6(3) of the Statute of the ICTR of murder as a crime against humanity and as a violation of Article 3 of the Geneva Conventions and of Additional Protocol II thereto and sentenced him to 20 years’ imprisonment.² On 11 February 2014, the Appeals Chamber of the ICTR set aside Nzuwonemeye’s convictions and acquitted him.³ Since his acquittal, Nzuwonemeye has remained under the authority of the ICTR, and thereafter the Mechanism, in Arusha, United Republic of Tanzania (“Tanzania”), pending relocation to another country.⁴ Nzuwonemeye asserts that he should be returned to France, where he was arrested on 15 February 2000; however, France has refused to accept him.⁵

3. On 23 August 2018, Nzuwonemeye filed a motion before the Mechanism in which he claimed that Article 28 of the Statute (“Statute”) applies to acquitted persons and requested the Mechanism to order France to take him back on its territory so as to put him in the same position as he was in at the time of his transfer to the ICTR.⁶ On 22 October 2018, Judge Gberdao Gustave Kam (“Single Judge”) denied Nzuwonemeye’s request, finding that Article 28 of the Statute could not serve as a legal basis for such an order.⁷ In the same decision, the Single Judge declined Nzuwonemeye’s request for the assignment of counsel at the expense of the Mechanism, finding that he had failed to demonstrate “in what way the ground he has invoked has a likelihood of succeeding”.⁸

¹ Order Assigning Judges to a Case Before the Appeals Chamber, 9 January 2019, p. 1.

² *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Judgement and Sentence, 17 May 2011 (“Ndindiliyimana et al. Trial Judgement”), paras. 47, 49, 74, 75, 2092-2094, 2097, 2106, 2145, 2147, 2148, 2153, 2154, 2162, 2243, 2244, 2267.

³ *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-A, Judgement, 11 February 2014, paras. 190, 241, 254, 312, 313, 319, 321, 322, 418, 449.

⁴ Appeal, paras. 4, 5. See also Decision on Motion for an Order Pursuant to Article 28 of the Statute and Other Considerations, 25 October 2018 (original French version filed 22 October 2018) (“Impugned Decision”), para. 3.

⁵ Appeal, paras. 4, 5. See also Ndindiliyimana et al. Trial Judgement, para. 95.

⁶ Motion for Order to Government of France, 23 August 2018 (“Motion of 23 August 2018”), paras. 15, 22.

⁷ Impugned Decision, para. 13.

⁸ Impugned Decision, para. 13.

4. On 23 October 2018, Nzuwonemeye filed a motion requesting legal aid at the expense of the Mechanism to file an appeal against the Impugned Decision and an extension of time by which to do so.⁹ On 13 December 2018, the Appeals Chamber granted Nzuwonemeye's requests.¹⁰

5. In the Appeal, filed on 17 December 2018, Nzuwonemeye submits that the Single Judge committed discernible errors by incorrectly interpreting: (i) Article 28 of the Statute to not include the power to order a State to take back an acquitted person who was arrested on its territory; and (ii) governing law when denying his request for assignment of counsel.¹¹ Nzuwonemeye requests that the Appeals Chamber reverse the Impugned Decision and order that his counsel be remunerated at the expense of the Mechanism for his work in support of the Motion of 23 August 2018 submitted to the Single Judge.¹² No responses to the Appeal have been received.

II. DISCUSSION

A. Jurisdiction

6. Nzuwonemeye submits that, although not expressly provided for in the Statute and the Rules of Procedure and Evidence of the Mechanism ("Rules"), the Appeals Chamber should allow him to appeal the Impugned Decision pursuant to its inherent jurisdiction over the enforcement of its orders.¹³ In this regard, he highlights, *inter alia*, that an acquitted person before the ICTR was allowed to appeal a decision similar to the Impugned Decision.¹⁴

7. The Appeals Chamber notes that Nzuwonemeye correctly observes that neither the Statute nor the Rules provide an appeal as of right from a decision related to the proper interpretation of Article 28 of the Statute. However, the Appeals Chamber observes that Nzuwonemeye argues that the Single Judge erred in his interpretation of Article 28 of the Statute, which as a consequence, has interfered in the Mechanism's ability to give full effect to his acquittal, and by consequence, his

⁹ Motion for Assignment of Counsel and Extension of Time, 23 October 2018, paras. 1, 9-16.

¹⁰ Decision on a Motion for the Assignment of Counsel and for an Extension of Time, 13 December 2018 ("Decision of 13 December 2018"), p. 3.

¹¹ See Appeal, paras. 19, 20, referring to *Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016 ("Orić Decision of 17 February 2016"), para. 9 (setting forth the discernible error standard of review).

¹² Appeal, paras. 51, 52. Nzuwonemeye requests that, should the Appeals Chamber agree that the Single Judge erred in holding that the Mechanism did not have the power to grant the Motion of 23 August 2018, the Appeals Chamber should not remand the matter to the Single Judge but should itself seek submissions from the governments of France and Tanzania on whether this power should be exercised in Nzuwonemeye's case and hold an oral hearing to give the States and Nzuwonemeye a full opportunity to be heard. Appeal, paras. 42-46.

¹³ Appeal, paras. 15, 18.

¹⁴ Appeal, paras. 16, 18. See also Appeal, para. 17 (identifying other instances where acquitted and convicted persons have been allowed to appeal decisions of a single judge).

“human right to family life”.¹⁵ Accordingly, the Appeals Chamber finds that the Appeal raises questions as to the scope of the Mechanism’s power to order cooperation of States pursuant to Article 28 of the Statute and implicates a clearly defined right of Nzuwonemeye. These issues concern the proper functioning of the Mechanism, and as the Appeals Chamber may exercise jurisdiction over such issues, it will consider the Appeal.¹⁶

B. Alleged Error in Interpreting Article 28 of the Statute

8. As noted above, the Single Judge dismissed Nzuwonemeye’s Motion of 23 August 2018, finding that Article 28 of the Statute could not serve as a legal basis for an order requiring France to take Nzuwonemeye back on its territory.¹⁷ The Single Judge recalled the express language of Article 28 of the Statute and considered as unfounded Nzuwonemeye’s submissions that an order requiring a State to take him back on its territory forms part of the “investigation and prosecution” process referred to in Article 28 of the Statute.¹⁸

9. The Single Judge further considered the fact that Nzuwonemeye sought return to France – the country in which he was arrested – did not put him in a different situation from André Ntagerura (“Ntagerura”) – who, before the ICTR, sought relocation to a State in which he was not arrested – in terms of France’s legal obligations under Article 28 of the Statute.¹⁹ In this respect, the Single Judge recalled that the ICTR Appeals Chamber held in Ntagerura’s proceeding that “there is no legal duty under Article 28 of the [ICTR] Statute for States to cooperate in the relocation of acquitted persons”.²⁰ Finally, the Single Judge noted that there was “nothing in the present case to indicate that the functions of the Mechanism, which are by their nature residual, could extend beyond those of the [International Criminal Tribunal for the former Yugoslavia (“ICTY”)] and ICTR” and that a “narrow interpretation of the functions of the Mechanism” was “all the more justified when it comes to intervening in domestic jurisdictions”.²¹

10. Nzuwonemeye submits that the Single Judge erred in law in holding that the requirements of Article 28 of the Statute have not been met and that the Mechanism did not have the power to order

¹⁵ See, e.g., Appeal, paras. 20, 45.

¹⁶ *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Decision on Prosecution Appeal of the Acting President’s Decision of 13 September 2018, 4 December 2018, paras. 12, 15.

¹⁷ Impugned Decision, para. 13.

¹⁸ Impugned Decision, paras. 7-9.

¹⁹ Impugned Decision, para. 10.

²⁰ Impugned Decision, para. 10, quoting *In Re. André Ntagerura*, Case No. 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* Decision of 18 November 2008”), para. 15.

²¹ Impugned Decision, para. 11.

France to take him back on its territory.²² He argues that returning him to France – the State in which he was arrested – is part of the “prosecution” of his case as envisioned under Article 28 of the Statute and contends that the Single Judge erred in finding that the term “prosecution” only encompasses events leading up to the issuance of a final judgment.²³ Nzuwonemeye submits that, because the Mechanism has the power to order a State to return a convicted prisoner serving a sentence on its territory, it must also have the power to order a State to accept the return of an acquitted person transferred from it.²⁴ Nzuwonemeye further argues that the Single Judge erred in relying on the holding of the ICTR Appeals Chamber in *Ntagerura*’s proceedings, which concerned the “relocation of acquitted persons”, as Nzuwonemeye’s request instead concerned the “return of a person who had been transferred from a State”.²⁵

11. Finally, Nzuwonemeye submits that the Single Judge erred in concluding that there was nothing in the present case to indicate that the functions of the Mechanism could extend beyond those of the ICTY and the ICTR as he failed to consider that the United Nations Security Council, through the Statute, strengthened the Mechanism’s powers *vis-a-vis* States in areas that would allow it to more effectively wind up the Tribunals’ work.²⁶ He argues that the Impugned Decision frustrates the Mechanism’s ability to wind up the work of the ICTR by interfering with the return of acquitted persons to States that transferred them.²⁷

12. The Appeal challenges the Single Judge’s interpretation of Article 28 of the Statute, which concerns the scope of the Mechanism’s powers to order State cooperation. As the Appeal argues that the Single Judge erred in law, the relevant standard of review requires Nzuwonemeye to

²² Appeal, paras. 25-42, 45, 46.

²³ Appeal, paras. 26, 27. Nzuwonemeye relies on a first instance decision by the President of the ICTR stating that “[t]he 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”. Appeal, para. 25, quoting *The Prosecutor v. André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion of André Ntagerura for Cooperation with Canada and for Reporting to the Security Council, 31 March 2008 (“*Ntagerura* Decision of 31 March 2008”), para. 7. He further relies on other instances wherein Article 28 of the Statute and Article 29 of the ICTY Statute have been relied upon in relation to post conviction proceedings to suggest the relief he requests is part of the “prosecution” of his case under Article 28 of the Statute. Appeal, para. 27, referring to *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, para. 16; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Second Order on Payment of Fine Pursuant to Rule 77 Bis and Warrant of Arrest, 16 November 2011. Nzuwonemeye further contends that the Single Judge’s narrow definition of the “prosecution” defies reason and that he erred in relying on a single text in assessing it. Appeal, paras. 33, 34.

²⁴ Appeal, para. 26, referring to, *inter alia*, Article 25 of the Statute.

²⁵ Appeal, paras. 28, 32. Nzuwonemeye suggests that ordering his return to the State in which he was arrested is more closely related to the prosecution of the case than *Ntagerura*’s situation, who sought relocation to a third State. Appeal, paras. 29-31. In this respect, Nzuwonemeye cites the submissions of the ICTR Registrar as summarized in the *Ntagerura* Decision of 18 November 2008 that “the [ICTR] 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”. Appeal, para. 31, referring to *Ntagerura* Decision of 18 November 2008, para. 11.

²⁶ Appeal, paras. 35-37, 39-41, referring to, *inter alia*, Articles 1(3), 1(4), 27, and 29 of the Statute.

identify the alleged error, present arguments in support of his claim, and explain how the error invalidates the decision.²⁸

13. The Appeals Chamber finds that Nzuwonemeye fails to demonstrate that the Single Judge erred by finding that ordering his return to France was not part of the “investigation and prosecution” of his case and that the relief he sought did not fall within the powers afforded to the Mechanism under Article 28 of the Statute.²⁹ Nzuwonemeye’s suggestion that the Single Judge erred because he found that Article 28 of the Statute is only applicable to proceedings leading up to final judgement reflects a misreading of the Impugned Decision, which made no such finding and only determined as unfounded Nzuwonemeye’s claim that ordering France to receive him constitutes “investigation and prosecution” under Article 28 of the Statute.³⁰

14. The Appeals Chamber also finds unpersuasive the purported analogy that Nzuwonemeye seeks to draw from his assertion that, because the Mechanism has the power to order a State to return a convicted prisoner serving a sentence on its territory pursuant to Article 25 of the Statute, it must necessarily have the power pursuant to Article 28 of the Statute to order a State to accept the return of an acquitted person transferred from it.³¹ The Appeals Chamber observes that Article 25 of the Statute is concerned with the enforcement of the sentences of persons convicted by the ICTY, the ICTR, and the Mechanism and provides that convicted persons may serve their sentences in a State designated by the Mechanism from among those States who have entered into enforcement of sentence agreements with the United Nations,³² which, at the request of the Mechanism, can be terminated at any time thereby requiring that State to either transfer the convicted person to another State or back to the Mechanism.³³ Furthermore, Article 25 of the Statute provides that the

²⁷ Appeal, para. 40. *See also* Appeal, para. 41.

²⁸ *Prosecutor v. Vojislav Šešelj*, Case No. MICT-16-99-A, Judgement, 11 April 2018, para. 13.

²⁹ Nzuwonemeye relies on a first instance decision which found that the relocation of an acquitted person is part of the investigation and prosecution process under Article 28 of the ICTR Statute; however, this holding was expressly overturned by the ICTR Appeals Chamber. *Compare Ntagerura* Decision of 31 March 2008, para. 7 with *Ntagerura* Decision of 18 November 2008, para. 15.

³⁰ *See* Impugned Decision, paras. 9, 10. Nzuwonemeye fails to show how orders issued pursuant to Article 28 of the Statute or Article 29 of the ICTY Statute in instances where States refused to comply with orders issued in *post conviction* contexts demonstrate error in the Single Judge’s finding that there is no legal authority under Article 28 of the Statute to order France to receive Nzuwonemeye after his acquittal. Similarly, Nzuwonemeye’s references to other definitions of the term “prosecution” provide no further support for his claim and fail to demonstrate that the Single Judge erred in his interpretation of the term in the context of Article 28 of the Statute through his reliance on a “single text”. *See* Appeal, para. 34.

³¹ *See* Appeal, para. 26.

³² Article 25 of the Statute relies on voluntary cooperation in that it depends on a State’s readiness to accept a convicted person in the first place. *See, e.g.*, Rules 23(B) and 127(A) of the Rules; Practice Directions on the Procedure for Designation of the State in Which a Convicted Person is to Serve His or Her Sentence of Imprisonment, MICT/2 Rev.1, 24 April 2014, paras. 1, 2, 7, 8.

³³ *See, e.g., Accord entre le gouvernement de la République Française et l’Organisation des Nations Unies concernant l’exécution des peines prononcées par le Tribunal Pénal International pour le Rwanda*, 14 March 2014, article 9(2).

enforcement of a sentence “shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Mechanism”. The supervisory authority that the Mechanism retains over the enforcement of sentences is what provides the Mechanism the authority to issue orders with respect to the enforcement of such sentences, including orders for the transfer of a person whose sentence is being enforced in certain limited circumstances.³⁴ Accordingly, the Appeals Chamber finds Nzuwonemeye’s arguments in this respect fail to demonstrate any error in the Impugned Decision.

15. The Appeals Chamber turns to Nzuwonemeye’s contention that the Single Judge erred in relying on the decision of the ICTR Appeals Chamber in *Ntagerura*’s proceedings, which held that “there is no legal duty under Article 28 of the [ICTR] Statute for States to cooperate in the relocation of acquitted persons”. At the outset, the Appeals Chamber recalls that the Statute reflects normative continuity with the Statutes of the Tribunals and that the Appeals Chamber is bound to interpret its Statute in a manner consistent with the jurisprudence of its predecessor institutions.³⁵

16. In this regard, the Appeals Chamber is not persuaded by Nzuwonemeye’s contention that the Single Judge erred in finding that the holding of the ICTR Appeals Chamber applied to his case because that prior authority concerned the “relocation of acquitted persons” whereas Nzuwonemeye sought return to the State in which he was arrested. The decision of the ICTR Appeals Chamber, while concerning *Ntagerura*’s request to be transferred to a State other than the one in which he was arrested, turned on the proper interpretation of the scope of Article 28 of the Statute, and namely, whether it could be construed as granting the ICTR the authority to compel a State to accept an acquitted person on its territory.³⁶ As such, the ruling in that decision was not limited to the relocation of acquitted persons to States *other than the State of arrest*.³⁷ Rather, it concerned the authority of the ICTR Appeals Chamber to compel a State to accept an acquitted person in any circumstance,³⁸ a holding that the ICTR Appeals Chamber subsequently reaffirmed when denying another applicant’s leave to appeal a trial chamber’s refusal to order that he be returned to the State of his arrest pursuant to Article 28 of the ICTR Statute.³⁹ Further, Nzuwonemeye does not show

³⁴ See, e.g., *Prosecutor v. Radislav Krstić*, Case No. MICT-13-46-ES.1 / IT-98-33-ES, Order Designating the State in Which Radislav Krstić is to Serve the Remainder of His Sentence, 19 July 2013, pp. 1, 2.

³⁵ *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama’s Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, paras. 5, 6.

³⁶ *Ntagerura* Decision of 18 November 2008, para. 15.

³⁷ *Ntagerura* Decision of 18 November 2008, para. 15. See also *Ntagerura* Decision of 18 November 2008, para. 19 (noting that the “[ICTR] does not have the ability to direct any State to accept the Appellant on its territory”) (emphasis added).

³⁸ See *supra* n. 37.

³⁹ See *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Protais Zigiranyirazo’s Request to Appeal Trial Chamber III’s Decision of 18 June 2012, 26 February 2013, paras. 9-11 (wherein Protais Zigiranyirazo

how his request to be returned to France falls within the scope of “prosecution” under Article 28 of the Statute while Ntagerura’s request to be relocated to a third country is more tenuous. The Appeals Chamber further does not find Nzuwonemeye’s reliance on the submissions of the ICTR Registrar summarized in the *Ntagerura* Decision of 18 November 2008 persuasive as the relevant holding of the ICTR Appeals Chamber necessarily rejected these submissions.⁴⁰ As such, Nzuwonemeye fails to demonstrate that it was unreasonable for the Single Judge to rely on this jurisprudence in interpreting Article 28 of the Statute in the specific context of Nzuwonemeye’s request.

17. The Appeals Chamber further finds that Nzuwonemeye fails to demonstrate that the Single Judge erred in concluding that there was nothing in the present case to indicate that the functions of the Mechanism were more extensive than those of the ICTR and the ICTY. As early as 2008, the Appeals Chamber of the ICTR unequivocally determined that Article 28 of the ICTR Statute, as enacted by the United Nations Security Council, did not provide judicial authority to order States to accept the relocation of acquitted persons. Since that ruling, the United Nations Security Council was made aware of the persistent concerns pertaining to the relocation of persons acquitted or persons convicted by the ICTR but released on the territory of Tanzania following the completion of their sentences.⁴¹ In this context, Nzuwonemeye fails to establish or identify any changes in the Statute to support an intention on the part of the United Nations Security Council to empower the Mechanism through Article 28 of its Statute to compel States to accept the relocation of acquitted

sought leave to appeal a trial chamber decision dismissing his request to return him to the place of his arrest, which the ICTR Appeals Chamber denied on the basis that the Tribunal lacked the authority under Article 28 of the ICTR Statute to compel the cooperation of a State in the relocation of acquitted persons, irrespective of the particular circumstances of the case, and that allowing such an appeal “would serve no purpose in view of the clearly established limits on the Tribunal’s authority”).

⁴⁰ See *supra* n. 37.

⁴¹ See, e.g., Report of the International Criminal Tribunal for Rwanda, U.N. Doc. A/65/188-S/2010/408, 30 July 2010, para. 58 (“The Tribunal relocated one acquitted person, but three remain under the Tribunal’s protection, despite the Registrar’s strenuous efforts to secure a country of residence for them. That issue, as well as that of the relocation of convicted persons who will complete their sentence, is becoming increasingly crucial as the Tribunal moves towards the completion of its work.”); Address to the 70th United Nations General Assembly: Twentieth Annual Report of the International Criminal Tribunal for Rwanda by Judge Vagn Joensen, President, 13 October 2015 (“[...] I once again reiterate that the assistance of all Member States is essential to the Mechanism’s ability to relocate these acquitted and released persons, some of whom have remained in Arusha for over a decade.”); Address to the United Nations Security Council: Final Report on the Completion Strategy of the International Criminal Tribunal for Rwanda by Judge Vagn Joensen, President, 9 December 2015 (in which Judge Joensen, President of the ICTR, stated that the issue of relocating the acquitted and convicted persons still residing in Tanzania “remains a serious challenge to the credibility of international criminal justice” and wherein he reiterated the need “for the urgent assistance from the Security Council to find a sustainable solution to a problem that continues to see these acquitted and convicted released persons, some of whom have remained in a safe house in Arusha for over a decade, without a place to call home.”); Address to the United Nations General Assembly by Judge Theodor Meron, President, 9 November 2016 (“[...] The support and cooperation of individual Member States is [...] essential in resolving the situation faced by the Mechanism with regard to individuals indicted by the ICTR who were subsequently acquitted or released in Tanzania. The appropriate relocation of these individuals, as I have stated before, is a crucial challenge for international justice, and a humanitarian imperative.”).

persons or those that have completed their sentences and who are currently in Tanzania.⁴² To the contrary, the United Nations Security Council has continued to find it necessary, after the adoption of the Statute, to reiterate its call upon all States to voluntarily cooperate with and render all necessary assistance to the ICTR and the Mechanism in the relocation of, *inter alia*, acquitted persons and convicted persons who have completed their sentences and have been released on the territory of Tanzania.⁴³

18. In light of the above, the Appeals Chamber finds that Nzuwonemeye fails to demonstrate that the Single Judge erred in denying his request for an order to France pursuant to Article 28 of the Statute to receive him back on its territory.⁴⁴

C. Alleged Error in Refusing to Assign Counsel

19. Having found that Article 28 of the Statute could not serve as a legal basis for an order requiring France to take Nzuwonemeye back on its territory, the Single Judge considered that Nzuwonemeye's request for assignment of counsel at the Mechanism's expense, using the model of review proceedings, cannot be considered favorably since he had not demonstrated, as required in the context of review proceedings, "in what way the ground he has invoked has a likelihood of succeeding".⁴⁵

20. On appeal Nzuwonemeye submits that the Single Judge erred in denying his request for assignment of counsel as he failed to consider whether the test applied when considering requests for the assignment of counsel to acquitted accused of "exceptional circumstances" had been met.⁴⁶ He argues that a consideration of exceptional circumstances required the Single Judge to consider: (i) the "complexity of the Article 28 issue"; and (ii) whether the likelihood of success of the motion can be excluded.⁴⁷

⁴² In particular, Nzuwonemeye fails to demonstrate how innovations reflected in Articles 1(3) and 1(4) of the Statute, which demonstrate a clear preference for transferring certain cases from the Mechanism to States, as well as Articles 27 and 29 of the Statute, necessarily suggest that Article 28 of the Statute imposes greater obligations on States to cooperate in relocating acquitted persons than Article 28 of the ICTR Statute did.

⁴³ See, e.g., United Nations Security Council Resolution 2029, U.N. Doc. S/RES/2029, 21 December 2011, para. 5; United Nations Security Council Resolution 2054, U.N. Doc. S/RES/2054, 29 June 2012, para. 6; United Nations Security Council Resolution 2080, U.N. Doc. S/RES/2080, 12 December 2012, para. 4; United Nations Security Council Resolution 2194, U.N. Doc. S/RES/2194, 18 December 2014, para. 3; United Nations Security Council Resolution 2256, U.N. Doc. S/RES/2256, 22 December 2015, para. 12; United Nations Security Council Resolution 2422, U.N. Doc. S/RES/2422, 27 June 2018, para. 3.

⁴⁴ Based on the foregoing, the Appeals Chamber need not consider Nzuwonemeye's further requests for submissions from the governments of France and Tanzania.

⁴⁵ Impugned Decision, para. 13.

⁴⁶ Appeal, para. 48.

⁴⁷ Appeal, paras. 47-51.

21. The Appeals Chamber considers that a single judge's decision on whether to remunerate counsel at the expense of the Mechanism in circumstances which are not provided for in the Statute or the Rules falls within the discretion of the single judge. Therefore, to succeed on appeal, the appellant must demonstrate that the single judge committed a discernible error in his decision based on an incorrect interpretation of governing law, a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of discretion.⁴⁸

22. The Appeals Chamber recalls that to receive funding for counsel following a final conviction, the existence of exceptional circumstances must be established.⁴⁹ The Appeals Chamber considers that this standard applies equally to a person seeking funding for counsel following an acquittal.

23. The Appeals Chamber observes that Nzuwonemeye sought assignment of counsel before the Single Judge on the grounds that exceptional circumstances were satisfied in his case.⁵⁰ However, the Appeals Chamber is not satisfied that Nzuwonemeye has established that the Single Judge erred in denying his request. In considering this request, the Single Judge found that, regardless of Nzuwonemeye's arguments to the contrary, the jurisprudence with respect to the scope of the Mechanism's power pursuant to Article 28 of the Statute was abundantly clear. Accordingly, the Single Judge clearly considered the complexity, or lack thereof, of the issue being raised in denying the request for assignment of counsel at the Mechanism's expense.

24. Furthermore, and contrary to the claim of Nzuwonemeye, the Appeals Chamber is not satisfied that the Single Judge failed to consider whether the likelihood of the success of the motion could be excluded in denying the assignment of counsel. The Single Judge unreservedly found that there was no likelihood of success of the motion considering the previous interpretation of Article 28 of the ICTR Statute by the ICTR Appeals Chamber, a holding that he considered authoritative for the interpretation of Article 28 of the Statute, there being no indication to the contrary. Moreover, Nzuwonemeye and his counsel chose to file the Motion of 23 August 2018 without awaiting any decision on his prior request for remuneration and, as such, it was within the discretion of the Single Judge to actually evaluate the likelihood of the motion's success by reference to the specific arguments of Nzuwonemeye. Having done so, the Single Judge excluded the possibility of the Motion succeeding.

⁴⁸ *Orić* Decision of 17 February 2016, para. 9.

⁴⁹ *See* Decision of 13 December 2018, p. 2, n. 9.

⁵⁰ *See* Request for Assignment of Counsel, 20 July 2018, paras. 12-14.

25. In reaching the conclusions above, the Appeals Chamber is mindful that it previously found the existence of exceptional circumstances warranting the limited assignment of counsel at the expense of the Mechanism for the purposes of preparing the Appeal. However, this conclusion was based on circumstances – including whether the Appeal was receivable by the Appeals Chamber – which were not present in the first instance.⁵¹ In any event, the fact that the Appeals Chamber exercised its discretion to remunerate Nzuwonemeye’s counsel does not demonstrate that the Single Judge erred in the exercise of his discretion by refusing to do so.⁵²

26. Based on the foregoing, the Appeals Chamber finds that Nzuwonemeye fails to demonstrate that the Single Judge erred in dismissing his request for the assignment of counsel.

III. CONCLUSION

27. While the Appeals Chamber cannot grant the Appeal, as it does not have the power to compel France to accept an acquitted person on its territory, it nonetheless shares the concerns expressed by the Single Judge. The international community’s commitment to impunity should not end with rendering justice to those convicted of international crimes but must necessarily accommodate those who have completed their sentences or have been acquitted of such crimes.

28. In this respect, the Appeals Chamber echoes the sentiments of the Single Judge, who expressed his cognizance of the “precarious situation in which persons acquitted by the ICTR have found themselves for many years in the sense that they do not wish to return to Rwanda, their country of origin, and that the States requested by acquitted persons are reluctant to accept individuals who have been charged with international crimes”.⁵³ Like the Single Judge, the Appeals Chamber stresses the repeated requests of the United Nations Security Council for States to provide the Mechanism with “all necessary assistance [...] for increased efforts towards the relocation of [acquitted persons and convicted person who have completed serving their sentences]”.⁵⁴

29. The right of an acquitted person to be returned to the country where he was arrested involves issues which are beyond the scope of the jurisdiction of the Mechanism. Domestic jurisdictions or other international institutions tasked with adjudicating claims of violations of

⁵¹ Decision of 13 December 2018, p. 2.

⁵² Cf. *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović’s Interlocutory Appeal Against Trial Chamber’s Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007, para. 11 (noting that the question before the ICTY Appeals Chamber is not whether it agrees with the decision but whether the trial chamber has correctly exercised its discretion in reaching that decision).

⁵³ Impugned Decision, para. 16.

⁵⁴ Impugned Decision, para. 16. See also *supra* n. 43.

human rights must evaluate such claims in their full context and are better suited to address the issues raised by Nzuwonemeye, including alleged violations to his human right to family life.⁵⁵

30. In this context, the Appeals Chamber further encourages France to renew its consideration of Nzuwonemeye's request to be allowed in France under the same conditions in which he was arrested and be given the opportunity to, through the proper procedures, attempt to legalize his status in that country.

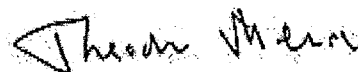
IV. DISPOSITION

31. For the foregoing reasons, the Appeals Chamber:

GRANTS Nzuwonemeye leave to appeal the Impugned Decision and **DISMISSES** the Appeal in its entirety.

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

Done this 17th day of April 2019
At The Hague,
The Netherlands



Judge Theodor Meron
Presiding Judge

[Seal of the Mechanism]



⁵⁵ See, e.g., Appeal, para. 45.



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