

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-22-124

Date: 27 May 2022

Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Seon Ki Park
Judge Margaret M. deGuzman

Registrar: Mr. Abubacarr Tambadou

Decision of: 27 May 2022

IN THE MATTER OF

**FRANÇOIS-XAVIER NZUWONEMEYE
PROSPER MUGIRANEZA
PROTAIS ZIGIRANYIRAZO
ANATOLE NSENGIYUMVA
ALPHONSE NTEZIRYAYO
ANDRÉ NTAGERURA
THARCISSE MUVUNYI
INNOCENT SAGAHUTU**

PUBLIC

**DECISION ON MOTIONS TO APPEAL DECISION DENYING
ASSIGNMENT OF COUNSEL**

Counsel for the Relocated Persons:

Mr. Peter Robinson for Mr. François-Xavier Nzuwonemeye
Ms. Kate Gibson for Mr. Prosper Mugiraneza
Mr. John Philpot for Mr. Protais Zigiranyirazo
Ms. Allison Turner for Mr. Anatole Nsengiyumva
Mr. Iain Edwards for Mr. Alphonse Nteziryayo
Ms. Barbara van Straaten for Mr. André Ntagerura
Ms. Abbe Jolles for Mr. Tharcisse Muvunyi
Mr. Jean Flamme for Mr. Innocent Sagahutu

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively);¹

NOTING that, on 5 December 2021, Mr. Anatole Nsengiyumva (“Nsengiyumva”) and Mr. Innocent Sagahutu (“Sagahutu”) (collectively, “Applicants”), each having served his sentence imposed by the International Criminal Tribunal for Rwanda (“ICTR”),² were relocated, with their consent, to the Republic of Niger (“Niger”) pursuant to an agreement between the United Nations and Niger;³

NOTING that, on 27 December 2021, the authorities of Niger issued an order requiring the Applicants, *inter alios*, to leave the territory of Niger for diplomatic reasons (“Expulsion Order”), confiscated their identification documents, and restricted their freedom of movement;⁴

NOTING that, on 31 December 2021 and 14 January 2022, the Duty Judge for the Arusha branch of the Mechanism (“Duty Judge”) ordered Niger to stay the Expulsion Order and to ensure that the Applicants had their documents returned and enjoyed freedom of movement on the territory of Niger, pending the final adjudication of the matter;⁵

NOTING that, on 7 February 2022, the Duty Judge issued a decision, describing the situation before him as a “crisis” and ordering the Registrar of the Mechanism (“Registrar”) to make the appropriate arrangement for the return of the Applicants to the Arusha branch of the Mechanism on a temporary basis, until their transfer to another State;⁶

NOTING that, on 16 February 2022, the Duty Judge issued the Impugned Decision, wherein he dismissed the Applicants’ requests for assignment of counsel at the Mechanism’s expense in

¹ Order Assigning Judges to a Bench of the Appeals Chamber, 28 February 2022, p. 1.

² See *Augustin Ndingiyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Judgement, 27 February 2014, para. 449; *Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011, para. 742.

³ In addition to Nsengiyumva and Sagahutu, Mr. François-Xavier Nzuwonemeye, Mr. Prosper Mugiraneza, Mr. Protais Zigiranyirazo, Mr. Alphonse Nteziryayo, Mr. André Ntagerura, and Mr. Tharcisse Muvunyi were also relocated to Niger. See *In the Matter of François-Xavier Nzuwonemeye et al.*, Case Nos. MICT-13-43, MICT-14-75, MICT-12-27, MICT-12-26, MICT-15-90 & MICT-19-119, Order to the Republic of Niger to Stay the Expulsion Order of Relocated Persons and Order for Submissions, 31 December 2021 (“Order of 31 December 2021”), p. 1; Agreement Between the Government of the Republic of Niger and the United Nations on the Relocation of Persons Released or Acquitted by the International Criminal Tribunal for Rwanda or the International Residual Mechanism for Criminal Tribunals, 15 November 2021 (“Relocation Agreement”).

⁴ See Order of 31 December 2021, p. 1; Further Order to the Republic of Niger and to the Registrar, 14 January 2022 (“Further Order of 14 January 2022”), para. 15. The Appeals Chamber notes that all other persons, who were either acquitted or had finished serving their sentences and were relocated together with the Applicants to Niger were also subject to the Expulsion Order.

⁵ Order of 31 December 2021, p. 3; Further Order of 14 January 2022, paras. 8, 22.

⁶ Decision on Motions Regarding the Relocation Agreement with Niger and Order for Transfer of the Relocated Persons to the Arusha Branch, 7 February 2022 (“Decision of 7 February 2022”), paras. 20, 29-30.

relation to the Applicants' relocation to Niger on the basis that: (i) the case before him concerned the enforcement of the Relocation Agreement with regard to Applicants who were no longer accused before the Mechanism, "and for which legal assistance [was] therefore not applicable";⁷ (ii) the Applicants' requests for evacuation and cooperation in relation to their expulsion from Niger had been adjudicated;⁸ and (iii) the Applicants had failed to demonstrate the existence of exceptional circumstances warranting the assignment of counsel at the Mechanism's expense;⁹

BEING SEISED OF motions filed on 22 and 24 February 2022, in which the Applicants seek to appeal the Impugned Decision;¹⁰

NOTING Sagahutu's submissions that, in the Impugned Decision, the Duty Judge erred in law and fact on the basis that: (i) the policy on counsel remuneration does not contain a reference to exceptional circumstances, and requiring demonstration of such circumstances violates the principles of equality of arms and fairness in criminal proceedings;¹¹ (ii) if demonstration of exceptional circumstances is considered to be required, this standard has been met in view of the Duty Judge's reference to the situation before him being a "crisis" and the restrictions imposed by Niger on Sagahutu's freedom of movement;¹² and (iii) interpreting "*pro bono*" legal assistance as

⁷ Decision on Innocent Sagahutu's and Anatole Nsengiyumva's Requests for Assignment of Legal Aid Counsel, 16 February 2022 ("Impugned Decision"), pp. 2-3. *See also* Request for Assignment of Legal Aid Counsel, 6 February 2022 (original filed in French; English translation filed on 10 February 2022); Motion for Assignment of Counsel, 14 February 2022.

⁸ Impugned Decision, pp. 1, 3. *See also* Extremely Urgent Motion for Emergency Protocol for Next 48 Hours and After, 1 February 2022; Urgent Motion for Non-Refoulement Order to Niger, 1 February 2022; Extremely Urgent Motion for Emergency Evacuation and Relocation, 29 January 2022 (public with Annexes B and C and strictly confidential and *ex parte* Annex A); Request for Immediate and Urgent Evacuation, 28 January 2022 (original filed in French; English translation filed on 7 February 2022); *In the Matter of Anatole Nsengiyumva*, Case No. MICT-22-123, Urgent Motion to Order the Cooperation of the Governments of the Members of the United Nations Security Council and to Direct the IRMCT President to Request Security Council Assistance, 4 January 2022; *In the Matter of Innocent Sagahutu*, Case No. MICT-13-43, Request for Immediate and Urgent Evacuation, 1 January 2022 (original filed in French; English translation filed on 7 January 2022).

⁹ Impugned Decision, p. 3.

¹⁰ Appeal on Behalf of Mr Innocent Sagahutu, 22 February 2022 (original filed in French; English translation filed on 3 March 2022) ("Sagahutu Appeal"), paras. 1-2, 15-25, p. 14; Appeal of Decision on Assignment of Counsel, 24 February 2022 ("Nsengiyumva Appeal"), paras. 17-33. *See also* Submission on Filing of Appeal of Decision on Assignment of Counsel, 24 February 2022. The Appeals Chamber notes that Sagahutu subsequently filed an "appeal brief" in which he refers to the Sagahutu Appeal as a "notice of appeal" that was filed, according to him, under Rule 133 of the Rules of Procedure and Evidence of the Mechanism ("Rules"). *See* Appeal on Behalf of Mr. Innocent Sagahutu, 7 April 2022 (originally filed in French; English translation filed on 21 April 2022) ("Submission of 7 April 2022"), para. 1. The Appeals Chamber notes that the present proceedings do not concern an appeal from judgement and that, therefore, neither Rule 133 of the Rules, governing the filing of a notice of appeal, nor Rule 138 of the Rules, governing the filing of an appeal brief in such proceedings, is applicable. The Appeals Chamber will, therefore, not consider the Submission of 7 April 2022 as validly filed.

¹¹ Sagahutu Appeal, paras. 2, 19-21, 24-25. *See* Remuneration Policy for Persons Representing Indigent Convicted Persons in Post-Conviction Proceedings, Upon Issuance of a Judicial Order Granting Assignment of Counsel at the Expense of the International Residual Mechanism for Criminal Tribunals, adopted on 28 September 2017 and revised on 4 January 2019 and 12 April 2021 ("Remuneration Policy").

¹² Sagahutu Appeal, paras. 15-17.

“free of charge” is contrary to Article 19 of the Statute of the Mechanism (“Statute”) and other international legal instruments concerning workers’ right to be remunerated;¹³

NOTING Nsengiyumva’s submissions that, in the Impugned Decision, the Duty Judge committed discernible errors in: (i) incorrectly interpreting Article 19(4) of the Statute;¹⁴ (ii) reaching a patently incorrect conclusion of fact that no exceptional circumstances existed warranting the assignment of counsel at the Mechanism’s expense despite, *inter alia*, the Expulsion Order, Nsengiyumva’s house arrest, and the risk that he may be sent to Rwanda against his will;¹⁵ and (iii) abusing his discretion “by placing the emphasis on a contract instead of [...] Nsengiyumva’s life”;¹⁶

OBSERVING that neither the Statute nor the Rules expressly provide for an appeal as of right from a decision of a duty judge denying a request for assignment of counsel to a convicted person following the issuance of a final judgement against him;

CONSIDERING, however, that the present appeals implicate the Mechanism’s duty to ensure the welfare of persons, who have been acquitted or released having served their sentences, in relation to their relocation;¹⁷

FINDING, therefore, that the matter concerns the proper functioning of the Mechanism and, thus, it is appropriate for the Appeals Chamber to exercise its discretion to consider the appeals;¹⁸

RECALLING that, to succeed on appeal, the Applicants must demonstrate that the Duty Judge committed a discernible error in the Impugned Decision because it was based on an incorrect

¹³ Sagahutu Appeal, paras. 22-24. The Appeals Chamber will not consider, on the merits, Sagahutu’s undeveloped submission alleging a violation of the *res judicata* principle. See Sagahutu Appeal, para. 18.

¹⁴ Nsengiyumva Appeal, paras. 18-22.

¹⁵ Nsengiyumva Appeal, paras. 23-29.

¹⁶ Nsengiyumva Appeal, paras. 30-31. Nsengiyumva further alleges that “[t]he interests of justice, the exceptional nature and circumstances of his house arrest in Niger, the complexity of the proceedings involving the relations between [S]tates and the United Nations, the fairness of these proceedings, and the public’s confidence in the international criminal justice system militate in favor” of him being assigned counsel at the Mechanism’s expense. See Nsengiyumva Appeal, para. 32.

¹⁷ See *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, para. 19.

¹⁸ See *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, para. 12. Cf. *Prosecutor v. François-Xavier Nzuwonemeye*, Case No. MICT-13-43, Decision on the Appeal of the Single Judge’s Decision of 22 October 2018, 17 April 2019, paras. 7, 19-26.

interpretation of the governing law, a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of discretion;¹⁹

NOTING that, pursuant to Article 19(4)(d) of the Statute, in the determination of any charge against him, an indigent accused is entitled to have legal assistance assigned to him without payment by him, in any case where the interests of justice so require;

CONSIDERING that, as correctly observed by the Duty Judge and contrary to Nsengiyumva’s submission, Article 19(4)(d) of the Statute is not applicable in the present case as there are no ongoing criminal proceedings against Nsengiyumva before the Mechanism;²⁰

RECALLING that it is well established in the jurisprudence that, as a matter of principle, a convicted person whose case has reached finality is not entitled to legal assistance at the Mechanism’s expense, and that legal aid may only be granted in exceptional circumstances and pursuant to a judicial order;²¹

CONSIDERING that the criminal proceedings against Sagahutu before the Mechanism reached finality and that, therefore, there is no merit to his argument that the requirement to demonstrate the existence of exceptional circumstances violates his fair trial rights;²²

CONSIDERING FURTHER that *pro bono* counsel representing a convicted person in post-conviction proceedings is, in principle, not remunerated by the Mechanism,²³ and that Sagahutu’s submissions erroneously rely on Article 19 of the Statute, which for the reasons explained above, is not applicable in the present circumstances;

FINDING, therefore, that the Applicants fail to demonstrate that the Impugned Decision is based on an incorrect interpretation of the governing law;

¹⁹ Decision on Motions to Appeal Decision of 8 March 2022, for Reconsideration of Decision of 15 March 2022, and to Appear as *Amicus Curiae*, 27 May 2022, para. 17.

²⁰ See Impugned Decision, pp. 2, 3. See also *supra* n. 2.

²¹ See Decision on Joint Request for Assignment of Counsel, Extension of Time to File an Appeal, and Scheduling a Status Conference, 15 March 2022, p. 3; *Prosecutor v. François-Xavier Nzuwonemeye*, Case No. MICT-13-43, Decision on a Motion for the Assignment of Counsel and for an Extension of Time, 13 December 2018, p. 2; *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R, Decision on a Request for Assignment of Counsel, 4 July 2018, para. 5; *Eliézer Niyitegeka v. Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka’s Request for Review and Assignment of Counsel, 13 July 2015, para. 8. See also Remuneration Policy, Article 1.

²² See *supra* n. 2.

²³ See, e.g., *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52A-R, Decision on Jean-Bosco Barayagwiza’s Motion of 6 March 2008, 11 April 2008, pp. 3-4 (wherein the ICTR Appeals Chamber found that the applicant had not shown that he should receive legal assistance at the ICTR’s expense with respect to a review following the final judgement in his case and noted that, in any event, the applicant may be assisted “at his own expense, at the expense of a third party, or on a *pro bono* basis [...]”).

CONSIDERING that the Duty Judge’s description of the situation before him as a “crisis” and the restrictions imposed on the Applicants by Niger do not demonstrate the existence of exceptional circumstances warranting the assignment of legal aid at the Mechanism’s expense, particularly given that, at the time of the issuance of the Impugned Decision, the Duty Judge had already ordered the Registrar to take all necessary measures for the Applicants to be returned to the Arusha branch of the Mechanism on a temporary basis, until their transfer to another relocation State;²⁴

FINDING, therefore, that the Applicants fail to show that, in the Impugned Decision, the Duty Judge committed a discernible error in finding that no exceptional circumstances warranted the assignment of counsel to the Applicants at the Mechanism’s expense;

FOR THE FOREGOING REASONS,

HEREBY DISMISSES the Sagahutu Appeal and the Nsengiyumva Appeal in their entirety.

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

Done this 27th day of May 2022,
At Arusha,
Tanzania



Judge Carmel Agius
Presiding Judge

[Seal of the Mechanism]

²⁴ Impugned Decision, p. 1, *referring, inter alia, to* Decision of 7 February 2022.



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