

The International Residual Mechanism for Criminal Tribunals and “residual” problems with former accused

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By: James Hendry

On February 7, 2022, Judge Joseph E. Chiondo Masanche ordered a number of persons formerly prosecuted before the International Criminal Tribunal for Rwanda to be returned to the Arusha, Tanzania branch of the International Residual Mechanism for Criminal Tribunals because they had been given seven days to leave Niger for reasons of public order (here). His job was a complex one because he was dealing with nine persons who had been acquitted by the Rwanda Tribunal or who had served their sentences and eight of whom had been moved to Niger as a cooperating state from Arusha under an Agreement with the Mechanism on November 15, 2021 (here). The Security Council had established the Mechanism to take over the functions of the Rwanda Tribunal as well as the International Criminal Tribunal for the Former Yugoslavia by Resolution 1966 (2020) which appends the Statute of the Mechanism as Annex 1 (here). Security Council Resolution 2529 (2020) article 4,

emphasised the importance of relocating persons who were acquitted or completed their sentences expeditiously and durably and called on states to cooperate and assist the Mechanism in doing so (here).

Niger agreed to accept François-Xavier Nzuwonemeye, Prosper Mugiraneza, Protais Zigiranyirazo, Anatole Nsengiyumva, Alphonse Nteziryayo, Tharcisse Muvunyi, André Ntagerura, and Innocent Sagahutu as Relocated Persons under the Agreement. On December 13, 2021, the President of the Mechanism praised the “exemplary cooperation” of Niger and the “major breakthrough” achieved in the Agreement to the Security Council in respect of eight of the nine Relocated Persons. Niger’s delegate was President of the Security Council at the time.

But Niger issued an Expulsion Order requiring the Relocated Persons to leave within seven days on December 27, 2021, reportedly taking their identity documents and placing them under house arrest.

The Relocated Persons commenced a series of motions variously seeking a stay of expulsion, immediate evacuation and relocation.

On December 31, 2021, Chambers Judge Masanche ordered Niger to stay the Expulsion Order, which might contravene the Agreement, and to allow the Relocated Persons to stay there according to the terms of the Agreement pending final adjudication of the matter and to provide an explanation of the Expulsion Order within 30 days (here). He found his jurisdiction in Article 28 of the Statute of the Mechanism that says states shall cooperate with the Mechanism in investigating and prosecuting persons charged under the Statute of the Mechanism and that states shall obey a Judge’s order or request for state assistance concerning these persons. He also referred to Rules 31(B) and 55 of the Rules of Procedure and Evidence of the Mechanism (here) that say the Registrar may make submissions about the discharge of duties to the President or Chambers in a case and that a Judge may issue orders necessary for trials.

The President of the Mechanism ordered the Registrar to ensure the rights of the Relocated Persons were not infringed and to work out a solution.

Niger suspended its execution of the Expulsion Order for 30 days on January 4, 2022 to allow the Mechanism to find another state to accept the Relocated Persons but did not say it would wait until the end of the proceedings as ordered.

On January 14, 2022, Judge Masanche ordered Niger to stay the Expulsion Order, to comply with the rule of law and to ensure the fundamental rights, welfare and safety of the Relocated Persons pursuant to the Agreement and to return their identity documents and allow them freedom of movement and that he would remain seized of the matter, all until final resolution of the matter (here). He reiterated his jurisdiction came from Article 28 of the Statute of the Mechanism requiring cooperation with the Mechanism and further, its duty to ensure the welfare of acquitted persons and enquire whether their life or liberty would be at risk on relocation, established in the Rwanda Tribunal’s jurisprudence (Appeals Chamber, *In re Ntagerura*, ICTR-99-46-A28, 18 November 2008, para. 19,

here). He also instructed the Registrar to ensure compliance with the Agreement and his Order but dismissed the motions of the Relocated persons for immediate evacuation and relocation as premature because of the stay of the Expulsion Order.

In a letter to the Security Council of January 19, 2022, the President of the Mechanism set out the facts and expressed his deep concern for the rights of the Relocated Persons and the rule of law more generally. He called on the Council to press Niger to comply with the Agreement and said that Niger's disregard of the Agreement should not be allowed to create a precedent (here).

When the matter came back before him, Judge Masanche ordered on February 7, 2022, that the Registrar arrange to move the Relocated Persons back to Arusha until their transfer to another state, that Niger assist with the relocation, that the Registrar tell the Judge of the steps taken and dismissed the various remaining motions as moot (para. 30, here). He noted that two of the Relocated persons had sought release from house arrest and the Expulsion Order from the Niger courts and that they felt they were in a situation of "grave and imminent danger" (para. 13).

Judge Masanche's reasons for his Order stated that the situation before him was a crisis, a possible human rights violation and that it had turned the rule of law and the norm that states would comply with treaties "on its head" (para. 20). He saw the main issue as the adherence by states to the treaties they enter (para. 21). He repeated the point he made from the *Ntagerura* case, that the Mechanism had a duty to ensure the welfare of acquitted or released persons pending relocating them and to enquire whether their life or liberty would be at risk while this was happening. He then said that, normally, the Mechanism's duty of care would end there. However, he said that the Relocated Persons had consented to their relocation based on the Agreement that provides that the Mechanism would support them for a year and would be consulted before any adverse action toward them was taken. This meant that the Mechanism's duty of care remained (para. 22). He noted the Agreement said that Niger had agreed not to take unilateral action, but that even where there was a violation of public order or harm, the Registrar would first be consulted. Thus, the Expulsion Order and the seizure of identity documents was in "flagrant violation" of the Agreement.

Judge Masanche considered his jurisdiction. The Agreement did not confer it. Rather it provides in Article 11 that disputes would be resolved by negotiation or by a mutually agreed method of settlement. He noted that in this case, where Niger was in breach of the Agreement and its obligation to consult or negotiate with the Mechanism before acting and where there were risks to persons to whom the Mechanism owes a duty of care, judicial intervention was required (para. 25). He noted that Article 28 of the Statute of the Mechanism was not exhaustive in the kinds of cooperation owed by states to the Mechanism or to comply with orders made by judges for assistance in respect of persons prosecuted under the Statute of the Mechanism. He went on to note that the Mechanism does not have supervisory power over those acquitted or released but only over the service of sentences by Articles 25(2), Rule 128 and under Article 40(2) of the "Headquarters Agreement" between the UN and Tanzania concerning the temporary transfers back to Mechanism detention facilities pending transfer to a new enforcement state (here) (para. 26). He found that the duty of care owed to acquitted and

released persons from the Rwanda Tribunal's jurisprudence allowed him to make the Order given the lack of authority to the contrary. He also noted that the "Headquarters Agreement" also provided rights to persons released from custody until their transfer to another state and that persons required to be in Tanzania by the Registrar were entitled to the right to movement there (para. 27). The submissions by Niger to him saying that his order staying the Expulsion Orders should be revoked did not suggest that Niger intended to abide by the Agreement. The ongoing diplomatic enquiries by the Registrar also showed that he was making attempts to transfer the Relocated Persons to another state. Though he noted that the Rwanda Tribunal and the Mechanism had found it hard to find such receiving states, the status quo could not be maintained. So he ordered the Registrar to arrange for the return of the Relocated Persons to Arusha pending their transfer to another state.

Conclusion

The President of the Mechanism's Letter to the Security Counsel clearly stated his concern that an Agreement for the receiving of released or acquitted persons could not be ignored by a state party. He was concerned about the rule of law and the precedent that it set. The Chambers Judge characterised the issue as the sanctity of treaties and the rule of law. He mentioned that one of the concerns of the Rwanda Tribunal and the Mechanism was finding states who would take these people. The Judge even hinted at the bad faith of Niger in entering into the Agreement, suggesting that it gave the impression of being a mere ruse to trick individuals into thinking they would have a life in a new country (para. 21).

The Mechanism needs to be able to deal with the problem presented by the Relocated Persons in this case either by including jurisdiction in the Agreements it reaches with states to take them or by amending the Statute of the Mechanism. The Appeals Chamber of the Rwanda Tribunal in the *Ntagerura* case said that the diplomatic work of the Registrar to find a state to relocate those acquitted did not fall within the duty of states to cooperate nor that there was any legal duty to cooperate this way under Article 28 which dealt only with investigations and prosecutions and did not extend to acquitted persons (para. 15). Judge Mesanche's almost wistful reference to the lack of cooperation from states in taking persons acquitted or released by the Mechanism suggests that even if such jurisdiction could be given to a criminal tribunal, it might deter more cooperation in the future.

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