

Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522

Application 024/2019, *Jean de Dieu Ndajigimana v United Republic of Tanzania*

Order, 26 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant was detained at the United Nations Detention Facility in the Respondent State on suspicion of having interfered with the administration of justice in relation to the appeal process of a Rwandan national before the International Residual Mechanism for Criminal Tribunals in Arusha. The Applicant claimed that his detention was arbitrary and requested the Court to issue provisional measures for his release onto the territory of the Respondent State. The Court dismissed the request for provisional measures as it had become moot following the Applicant's release to Rwanda.

Jurisdiction (*prima facie*, 13-17)

Provisional measures (moot, 25)

I. The Parties

1. The Applicant, Jean de Dieu Ndajigimana, is a national of Rwanda who at the time of filing the Application was detained at the United Nations Detention Facility (hereinafter referred to as "the UNDF") in Arusha, United Republic of Tanzania. His detention follows from his indictment for knowingly and wilfully interfering with the administration of justice with intent to secure Augustin Ndirabatware's acquittal during the appeal proceedings before the International Residual Mechanism for Criminal Tribunals (hereinafter referred to as "the IRMCT").
2. The Respondent State is the United Republic of Tanzania which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. This request for provisional measures is included in the Application filed on 15 July 2019 wherein the Applicant alleges that the Respondent State prevented his release onto its territory, thereby creating a situation of arbitrary detention and a violation of his right to liberty as guaranteed under various instruments. In his Application, the Applicant states that the Respondent State's action is contrary to the Charter, the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR"), the Agreement between the United Nations and the United Republic of Tanzania, concerning the Headquarters of the IRMCT (hereinafter referred to as "the Host Agreement"), the Treaty for the Establishment of the East African Community (hereinafter referred to as "the EAC Treaty") and the Protocol on the Establishment of the East African Community Common Market (hereinafter referred to as "the EAC Protocol").
4. It emerges from the Application that following the conviction by the IRMCT of a Rwandan national named Augustin Ndirabatware for genocide, the Applicant and four other individuals (hereinafter referred to as "the co-accused") were suspected of interfering with witnesses allegedly with intent to secure Augustin Ndirabatware's acquittal during the appeal proceedings before the IRMCT. On 24 August 2018, a judge of the IRMCT confirmed an indictment against the Applicant and his co-accused charging them with contempt of the IRMCT and/or incitement to commit contempt.
5. As a result of the indictment, on 3 September 2018, the Applicant and his co-accused were arrested in the Republic of Rwanda and on 11 September 2018, were transferred to the UNDF in Arusha.
6. On 25 February 2019, the Applicant filed a confidential motion before a judge of the IRMCT for his provisional release to Rwanda or, alternatively, to an IRMCT safe house in the Respondent State pending determination of the charges against him.
7. On 29 March 2019, a judge of the IRMCT granted the Applicant's request for provisional release to Rwanda but dismissed the alternative request for release to an IRMCT safe house within the Respondent State.¹ The IRMCT Office of the Prosecutor (hereinafter referred to as "the IRMCT-OTP") appealed against this decision in so far as it relates to the provisional release in the Republic of Rwanda but did not oppose the Applicant's request for release within the Respondent State. The IRMCT-OTP, nevertheless, solicited submissions from the Government of the Respondent State about the feasibility of the Applicant's release

onto its territory.

8. By a *Note Verbale* dated 9 April 2019, the Government of the Respondent State, in response to a communication by one of the Applicant's co-accused, Anselme Nzabonimpa, who had also been granted provisional release, communicated its refusal to permit provisional release onto its territory and conveyed the position that accused persons under the custody of the IRMCT should remain within the UNDF. As a result of this communication, a judge of the IRMCT held that he neither has the authority to provisionally release Anselme Nzabonimpa into an IRMCT safe house in the Respondent State nor to modify his conditions of detention.²
9. The Applicant believes that these findings have equal application to him since his case is similar to Anselme Nzabonimpa and he has been jointly charged with him.

III. Summary of the procedure before the Court

10. The Application was filed on 15 July 2019 and served on the Respondent State by a notice dated 24 July 2019, which notice also requested the Respondent State to submit its observations on the Applicant's request for provisional measures within fifteen (15) days of receipt thereof.
11. On 14 August 2019, the Respondent State filed its observations in response to the Applicant's request for provisional measures and also its List of Representatives which was transmitted to the Applicant through a notice dated 16 August 2019.

IV. Jurisdiction

12. In dealing with any Application filed before it, the Court must conduct a preliminary examination of its jurisdiction pursuant to Articles 3 and 5 of the Protocol.
13. However, in considering whether or not to order provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply that it has *prima facie*

2 IRMCT, *The Prosecutor v Maximilien Turinabo, Anselme Nzabonimpa, Jean de Dieu Ndagijimana, Marie Rose Fatuma, Dick Prudence Munyeshuli*, Decision on Anselme Nzabonimpa's Second Motion for Provisional Release, 19 June 2019.

jurisdiction over the case.³

14. Article 3(1) of the Protocol provides that ‘the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned’.
15. The Court notes that the Respondent State is party to both the Charter and the Protocol and that it has also accepted the competence of the Court to receive cases from individuals and Non-Governmental Organisations under Article 34(6) of the Protocol, read together with Article 5(3) thereof.
16. The Court also notes that the violations alleged by the Applicant relate to rights protected in instruments to which the Respondent State is a party. Specifically, the Applicant has pleaded the following: Articles 1, 6, 7(1)(b) and 12(1) of the Charter; Articles 9(1), 9(3), 12(1) and 14(2) of the ICCPR;⁴ Article 38(2) of the Host Agreement; Articles 2 and 104 of the EAC Treaty;⁵ and Articles 7(1), (2)(a)-(c) and 9 of the EAC Protocol.⁶ The Applicant has also pleaded a violation of Articles 3, 9, 11(1) and 13(1) of the UDHR.⁷ The Court, therefore, concludes that it has jurisdiction *ratione materiae* to hear the Application.
17. In the light of the above, the Court is satisfied that it has *prima facie* jurisdiction to examine the Application.

V. Provisional measures requested

18. In his application for provisional measures, the Applicant prays the Court to:
 - a. Provide him with an award of provisional measures pursuant to Article 27(2) of the Protocol and Rule 51(1) of its Rules ordering his

3 See, Application 001/2018, Order of 11 February 2019 (Order for Provisional Measures) *Tembo Hussein v United Republic of Tanzania*, para 8; *African Commission on Human and Peoples’ Rights v Libya (Provisional Measures)* (2011) 1 AfCLR 17 para 15; and *African Commission on Human and Peoples’ Rights v Kenya (Provisional Measures)* (2013) 1 AfCLR 193 para 16.

4 Tanzania acceded to the ICCPR on 11 June 1976.

5 Tanzania ratified the EAC Treaty on 7 July 2000.

6 Tanzania ratified the EAC Protocol on 1 July 2010.

7 In Application 012/2015. Judgment of 23 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* para 76 the Court held that while the UDHR is not a human rights instrument subject to ratification by States, it has been recognised as forming part of customary law and for this reason the Court is enjoined to interpret and apply it. The Court is also mindful that Article 9(f) of the Respondent State’s Constitution refers to the UDHR as a directive principle of national policy.

liberty. The measures requested by the Applicant include:

- i. An order to the State of Tanzania to consent to and facilitate the provisional release of the Applicant on its territory;
 - ii. An order to the State of Tanzania to allow the Applicant free movement in Tanzania subject to complying with any conditions that may be imposed by the IRMCT for the duration of provisional release; and
 - iii. To give a report, within 15 days of receipt of the order, of the measures it has taken to ensure the Applicant is provisionally released in its territory.”
- 19.** The Applicant argues for the order of provisional measures “due to the imminent threat of irreparable harm ... were he to remain in pre-trial detention.” According to the Applicant, “the implementation of urgent provisional measures will prevent [his] continued arbitrary detention caused by Tanzania’s failure to respect its international and regional obligations.”
- 20.** The Respondent State opposes the request for provisional measures on three grounds. First, it submits that the IRMCT took over the role of the International Criminal Tribunal for Rwanda (hereinafter referred to as “the ICTR”) with jurisdiction to deal with crimes committed during the Rwandan Genocide of 1994. According to the Respondent State, the jurisdiction of the IRMCT is distinct from that of the Court and, specifically, “Article 3(1) of the Protocol to the Court, does not confer it with International Humanitarian Jurisdiction over crimes committed in the period between January 1994 and 31 December 1994 on Rwandese Citizens under the ICTR in which the Court can grant the release of the Applicant as one of the provisional measures available in that mechanism.” Second, the Respondent State also submits that the Applicant’s case is still pending before the IRMCT and, therefore, is not admissible before the Court under Article 56(7) of the Charter. Third, the Respondent State submits that the Applicant has failed to demonstrate that he is faced with a situation of extreme gravity and urgency, where he could possibly suffer irreparable harm. In support of this submission, the Respondent State has highlighted the fact that the Applicant is lawfully detained by the IRMCT.
- 21.** The Court acknowledges that under Article 27(2) of the Protocol and Rule 51(1) of the Rules, it is empowered to order provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons”, and “which it deems necessary to adopt in the interest of the parties or of justice.”
- 22.** It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided

for by the aforementioned provisions.⁸ Nevertheless, the Court must always be satisfied of the existence of a situation of extreme gravity and urgency before it orders provisional measures.

23. The Court observes that in his request for provisional measures, the Applicant has requested the Court to order the Respondent State to consent to and facilitate his provisional release onto its territory and to allow his free movement subject to his compliance with the conditions for his provisional release.
24. The Court notes that on 4 September 2019, the Registry wrote the Applicant's legal representative inquiring as to the current status of the Applicant. Specifically, the Applicant's legal representative was asked to indicate whether the Applicant was still in detention at the UNDF, or in an IRMCT safe house or if he had been released to the Republic of Rwanda. In response to this inquiry, the Applicant's legal representative informed the Court that the Applicant was released to the Republic of Rwanda on 21 August 2019 and that he arrived at his home on 22 August 2019. Attached to the communication by the Applicant's legal representative was a copy of a decision by a single judge of the IRMCT which confirms that the Applicant has indeed been released after the Government of the Republic of Rwanda agreed to implement the order for provisional release.
25. In respect of the Applicant's request for provisional measures, the Court notes that the Applicant prayed the Court for an order directing his release from the UNDF to the Respondent State. The Court also notes that before the IRMCT, the Applicant had prayed for provisional release to either the Respondent State or the Republic of Rwanda. Given that the Applicant, as confirmed by his own legal representative, has already been released to the Republic of Rwanda, the Court finds that his prayer for release has become moot. With regard to the Applicant's prayer for an order to allow him to move freely within the Respondent State, the Court notes that this prayer is also reflected in the reliefs that the Applicant is seeking in his substantive action before the Court. In order not to risk prejudging the substantive issues that the Applicant has raised, the Court refrains from commenting on this prayer at this juncture. In light of the preceding, the Applicant's prayer that the Respondent state must report on measures taken to implement the provisional measures within fifteen (15) days does not arise. The Court accordingly dismisses this application

8 *Armand Guehi v United Republic of Tanzania (Provisional Measures)* (2016) 1 AfCLR 587 para 17.

for provisional measures.

26. Having dismissed the application for provisional measures, the Court does not consider it necessary to pronounce itself on the requirements in Article 27(2) of the Protocol or any of the conditions in Article 56 of the Charter so far as they relate to this matter.
27. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

VI. Operative Part

28. For these reasons,
The Court,
Unanimously,

- i. *Dismisses* the Applicant's request for provisional measures.