MECHANISM FOR INTERNATIONALCRIMINAL TRIBUNALS (MICT)

Judge: Justice Theodor Meron, Presiding

Registrar: Mr. John Hocking

Date Filed: 18 February 2015

THE PROSECUTOR

v.

F.X. NZUWONEMEYE
Case No. ICTR-00-56-A

MOTION FOR COMPENSATION AND DAMAGES FOR VIOLATIONS OF THE FUNDAMENTAL RIGHTS OF F.X. NZUWONEMEYE, PURSUANT TO SECURITY COUNCIL RESOLUTION 1966 (2010)
PUBLIC FILING

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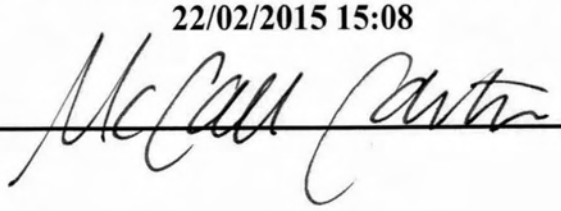

APPLICATION FOR COMPENSATION AND DAMAGES FOR VIOLATIONS OF THE FUNDAMENTAL RIGHTS OF F.X. NZUWONEMEYE, PURSUANT TO SECURITY COUNCIL RESOLUTION 1966 (2010)

I. Introduction

1. On 11 February 2014, the Applicant, Major F.X. Nzuwonemeye was acquitted by the ICTR Appeals Chamber of his two convictions, for crime against humanity and violations of common Article 3.

2. On the date of his acquittal, he was released to a "safe house" in Arusha, Tanzania, where he remains under the care and custody of the U.N.

3. When Nzuwonemeye was released to the safe-house, he had spent fourteen years in detention. He had already served almost three quarters of the twenty year sentence imposed by the Trial Chamber.

4. Nzuwonemeye stands before this Tribunal as a legally "free" man, who has been acquitted of the crimes for which he was convicted by the Trial Chamber.

5. Yet, Nzuwonemeye also stands before this Tribunal as a man who has already served time in detention and endured his punishment for the crimes for which he was acquitted.[1]

6. The contradiction posed is inescapable: Nzuwonemeye has served his punishment although he was acquitted.

7. Moreover, Nzuwonemeye served time in detention for convictions which did not meet the legal standard of proof beyond a reasonable doubt, and which were based on fundamental violations of his rights under the ICTR Statute, Article 20, the ICCPR, Article 14 and other international legal instruments.

[1] Nzuwonemeye was eligible for provisional release, based on the fact that he had served more than two-thirds of his sentence at the time of the Appeal Judgment.

8. The fourteen years in detention which were illegally taken out of Nzuwonemeye's life cannot be "given back to him" and he can never be "made whole." But, through this motion, Nzuwonemeye is seeking financial compensation and damages for his illegal detention from his arrest through the present; for loss of income, for the deprivation of his liberty, and right to family life for these fourteen+ years.

9. The basis of his claim is that Nzuwonemeye's fundamental rights, guaranteed under the ICCPR and the ICTR Statute, were violated. These include a) the right to be notified of the charges against him; and b) the right to undue delay in the proceedings against him.

II. Jurisdiction and Competence

1. This Application is made before the MICT, pursuant to Resolution 1966 (2010), paragraphs 1 and 4. The MICT at Arusha commenced on 1 July 2012. As of the end of December 2014, the ICTR completed its work, but for one case. Hence, this Motion cannot be brought before Trial Chamber II because it no longer is in existence.

2. The subject matter of this Motion - financial compensation for violations of fundamental rights - has been entertained previously by the Trial Chambers of the ICTR, in the *Baglishema*, *Rwamakuba*, *Semanza* and *Zigiranyirazo* cases.

3. Nzuwonemeye, therefore, brings this motion before the MICT, which has the power to address issues previously addressed by the ICTR Trial Chambers.

III. Facts

1. On 2 February 2000, Judge Kama issued a Warrant of Arrest and Order for Transfer and Detention against François-Xavier Nzuwonemeye.[2]

2. On 15 February 2000, François-Xavier Nzuwonemeye was arrested in France where he sought refuge with his family and transferred to the UNDF in Arusha, Tanzania on 23 May 2000.[3] He made his initial appearance on 25 May 2000 before Judge Pavel Dolenc and entered a plea of not guilty.

3. On 20 September 2004, the *Ndindiliyimana* et al ("Military II") trial commenced before Trial Chamber II. The proceedings lasted for 395 trial days. The Chamber heard a total of 216 witnesses, 72 for the Prosecution and 144 for the Defence and admitted 965 exhibits. Closing arguments took place during the last week of June 2009.

4. On 17 May 2011, almost two years since the close of trial, the Trial Chamber rendered its oral judgment in the case *Ndindiliyimana et al*. On 17 June 2011, the Trial Chamber filed its written judgment. Nzuwonemeye was found guilty of crime against humanity (murder) (count 4) and violation of Article 3 common to the Geneva Conventions and Additional Protocol II (murder) (count 7). The Appellant was acquitted of conspiracy to commit genocide (count 1), crime against humanity (rape) (count 6) and violation of Article 3 common to the Geneva Conventions and Additional Protocol II (rape, humiliation and degrading treatment) (count 8).

5. The Applicant was found guilty under the ICTR Statute ("Statute") Article 6(1) for ordering, and aiding and abetting and Article 6(3) for superior responsibility for the crime of murder of Prime Minister Agathe Uwilingiyimana ("Prime Minister") on 7 April 1994; the Trial Chamber entered a judgment of conviction under 6(1). Appellant was found

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[2] *Ndindiliyimana* Warrant of Arrest for Nzuwonemeye; *Ndindiliyimana* Trial Judgment, 17 May 2011, p. 517.

[3] ICTR Detainees—Status on 16 August 2005.

guilty under 6(3) for the crime of murder of the Belgian UNAMIR soldiers. He was sentenced to twenty years imprisonment.

6. In June 2010 – in the middle of the judgment writing phase - the President of the ICTR, Judge Byron, in his biennial report to the Security Council cited the "Military" case as the basis for requesting more time.[4] He cited the number of court days (395), admitted exhibits (965) and witnesses (216) in the military case, as well as the loss of the Judgment Coordinator as key reasons for his request.

7. The Appeal arguments were heard during the week of 6 May 2013.

8. The Appeals Chamber rendered its judgment on 11 February 2014. The Appeals Chamber reversed the Trial Chamber's conviction for crime against humanity for the murder of the Prime Minister under 6(1) [for aiding and abetting] based on an uncured pleading defect in the indictment (AJ: 254); for 6(1) [for ordering] based on insufficiency of the Chamber's findings which included its failure to provide a reasoned opinion and make express findings on *mens rea* and *actus reus* liability for ordering (AJ: 292-293), and on multiple evidentiary errors (AJ: 292-312).

In respect to 6(3) liability for the Prime Minister's murder, the Appeals Chamber held that the Trial Chamber erred in finding that RECCE soldiers "participated in the attack on and killing of" the Prime Minister, and reversed the finding of 6(3) liability for both Nzuwonemeye and Sagahutu (AJ: 320-321).

For the Belgians, the Appeals Chamber reversed the Trial Chamber's conviction under 6(3) based on lack of notice. The Appeals Chamber held that the indictment was defective and uncured, because it failed to plead any specific conduct to support the 2nd and 3rd elements of 6(3), i.e. knowledge and failure to punish (AJ: 237-241, 254) and that since Nzuwonemeye was not adequately informed of the allegations against him, it "was not open to the Trial Chamber to convict him pursuant to 6(3)." (AJ: 240).

The Appeals Chamber reversed the conviction for violation of common Article 3, consistent with the underlying murder conviction reversals.

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[4] Report of President Dennis Byron to Security Council, 18 June 2010, S/PV.6342, p. 7.

9. Upon his acquittal, Nzuwonemye was released from incarceration at UNDF and placed in "safe house" in Arusha, under the care and custody of the ICTR. At the time of this filing, he has remained in this safe house for 12+ months, although he is acquitted and legally a "free" person.

IV. The ICTR Appeals Chamber has upheld the right to financial compensation for violations under the ICCPR

1. Any violation of the rights of a person accused before the Tribunal requires a proportionate remedy.[5] The Judges of the ICTR and ICTY considered the right to compensation of accused and acquitted persons who were victims of egregious tribunal administrative and trial violations, significant enough to warrant strong representations to the Secretary General of the UN and the Security Council on the matter.[6] The Appeal Chamber's decisions in the *Barayagwiza* and *Semanza* cases confirm that a remedy for a violation of the rights of the accused may include an award of financial compensation.[7] The absence of an explicit provision providing for financial compensation in the Statute for violations of the rights of the accused as well as the Security Council's decision not to amend the Statute to expressly include such a remedy does not mean that remedies are not available.[8]

2. In the past, the Appeals Chamber has envisioned financial compensation as a form of effective remedy only in situations where, amongst other violations, an accused was impermissibly detained without being informed of the charges against him.[9] This is in

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[5] *André Rwamakuba vs The Prosecutor*, Case No: ICTR-98-44C-A, Decision on Appeal on Appropriate Remedy, para. 24 ("Rwamakuba Appeal Decision on Remedy"); *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 125 ("Semanza Appeal Decision").

[6] UN letters attached and marked Exhibits A) UN Document No. **S/2000/925** signed by K. Annan; B) Letter dated 26 September 2000 from the President of the ICTR addressed to the Secretary General (Annex); C) Article 85 of the Rome Statute (Appendix); D) Security Council Document No. **S/2000/904**, letter dated 26 September 2000 from the Secretary General addressed to the President of the Security Council; E) Letter dated 19 September 2000 from the President of the ICTY addressed to the Security Council (Annex); F) Article 85 of the Rome Statute (Appendix).

[7] *Semanza* Appeal Decision, p. 34 (acquitted defendant entitled to financial compensation for violations of rights); *see also*, *Barayagwiza* Appeal Decision, para. 75 (iii)

[8] *Rwamakuba* Appeal Decision on Remedy, para. 24.

[9] *Semanza* Appeal Decision, paras. 87, 90; *Barayagwiza* Appeal Decision, paras. 54, 55.

line with Article 9(5) of the ICCPR which provides for an enforceable right to compensation in the event of an unlawful arrest or detention.[10]

3. However, compensation in international courts and tribunals is envisioned beyond violations of unlawful arrest or detention, as evidenced by the inclusion of Article 85(3) in the Rome Statute. This section provides for the Court, in its discretion, to award compensation for a "grave and manifest miscarriage of justice," following an acquittal, in addition to the rights of victims of unlawful arrest or detention, as specified in Article 85(1).

4. In Nzuwonemeye's case, he suffered two violations: a) he was in detention for fourteen years and convicted on a defective indictment, rendering the detention unlawful; and b) denied his right to an trial without undue delay.

V. The fundamental violations of Nzuwonemeye's right to notice of the charges against him and right to undue delay meet the legal criteria for financial compensation

(a) Nzuwonemeye's right to notice was violated and should be compensated

1. In its final judgment, the Appeals Chamber's acquittal of Nzuwonemeye for crime against humanity for the murders of the Prime Minister and the Belgians confirmed that his right to notice – a fundamental right under the ICCPR and ICTR Statute, Article 20 - had been violated.

2. The Appeals Chamber held that violations of notice, in respect to 6(3) conviction for the Belgians, and the 6(1) for the aiding and abetting conviction for the Prime Minister, were grounds for reversal.[11]

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[10] ICCPR, Article 9(5)("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation").

[11] *Ndindiliyimana* et al Appeal Judgment, 11 February 2004, para. 254.

3. Nzuwonemeye's fundamental right to notice of the charges against him was violated from the inception of the arrest warrant in February 2000 through the Appeals Chamber's reversal in February 2014.

4. As a result, Nzuonemeye was denied his right to liberty, as guaranteed in the Universal Declaration of Human Rights.[12] During this fourteen year period, Nzuwonemeye was incarcerated on a defective indictment, and subsequently tried and found guilty by the Trial Chamber based on a defective indictment.

5. Nzuwonemeye was deprived of his liberty from his arrest through his acquittal, and the deprivation of liberty continues after his acquittal: he has been living in a "safe house" in Arusha under UN care and custody.

6. In sum, his fundamental right to notice has resulted in a loss of liberty during the pendency of the proceedings against him, and after, since his acquittal.

7. For this reason, Nzuwonemeye is requesting financial compensation for the fourteen year and continuing period for loss of liberty, based on violation of his fundamental right to notice.

(b) Nzuwonemeye's fundamental right to be tried without undue delay was violated and should be compensated

1. The right to be tried without undue delay is uniformly articulated as a fair trial right by international courts and tribunals, and its violation is recognized as prejudicial to the fair trial rights of an accused.[13]

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[12] UDHR (1948), Section 3 reads: Everyone has the right to life, libetrty and security of person.

[13] ICTR Statute, Article 20(4) (c). *See* European Convention on Human Rights, Article 6(1); International Covenant on Civil and Political Rights, Articles 9(3), 14(3) (c); *Reinhardt and Slimane-Kaid v. France*; *Zimmerman and Steiner v. Switzerland* ; *Harold Elahie v. Trinidad and Tobago*, Communications No. 533/1993 (20 February 1992).

2. Article 14(3)(c) of the ICCPR (and mirrored in the ICTR Statute, Article 20 (4)(c)) states that a person accused of a crime has the right "To be tried without undue delay."

3. The purpose of this right is found in the Human Rights Committee, General Comment No. 32, on Article 14: Right to equality before courts and tribunals and to a fair trial.[14]

4. The Comment emphasizes that the right to be tried without undue delay serves the interest of justice. It states:

> The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, *but also to serve the interests of justice*.... [*italics* added]

5. The Comment considers that the conduct of administrative and judicial authorities is a factor in the determination of what is reasonable in respect to delay.

> What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and *the manner in which the matter was dealt with by the administrative and judicial authorities*...[*italics* added]

6. The Comment emphasizes that expeditious proceedings are particularly important where there is no bail granted, and apply to all stages of the proceedings

> *In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.* This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. *All stages, whether in first instance or on appeal must take place "without undue delay."* [*italics* added]

[14] U.N. Doc. CCPR/C/GC/32 (2007).

(c) The undue delay in Nzuwonemeye's proceeding contravened the purposes which the right was designed to protect

6a. Nzuwonemeye was denied his liberty throughout the proceedings in his case, and did not have the legal option of release on bail. He was incarcerated in prison from his arrest throughout the proceedings, including up to the appeal judgment of acquittal. Since his acquittal, he has remained under the care and custody of the UN in a "safe house" and does not have the liberty to travel, or to work or to reside with his family (who reside in France).

7. Although he has been acquitted, Nzuwonemeye has already served approximately three-quarters of his twenty-year sentence imposed by the Trial Chamber in its May 2009 judgment -- for crimes for which he was acquitted, including based on the violation of his fundamental right to notice of the charges against him.

8. The obvious question is: does the fact that the lengthy incarceration (amounting to three-quarters of his sentence) of a person charged and convicted on a defective indictment who is ultimately acquitted serve the interests of justice? The answer can only be "No."

(d) The unreasonableness of the delay in Nzuwonemeye's situation satisfies the "measuring sticks" for undue delay

1. Nzuwonemeye was arrested in February 2000 and the judgment and sentence were rendered on 17 May 2011. The length of time of time from arrest to judgment and sentence is approximately 11.25 years.

2. Nzuwonemeye's length of time from arrest to judgment and sentence exceeds what is reasonable. For example, the Human Rights Committee ("HRC"), in *Harold Elahie v. Trinidad and Tobago*, held that a period of *7 years and 8 months (from arrest to sentence)* violated the defendant's rights under ICCPR Article 9(3) and Article 14 (3c).[15] (*italics* added).

[15] *Harold Elahie v. Trinidad and Tobago*, Communications No. 533/1993 (20 February 1992).

3. In addition, the European Court of Human Rights (ECHR), in the case of *Reinhardt and Slimane-Kaid v. France*, where the proceedings against each defendant lasted eight years and one month, and eight years and five months, respectively,[16] has held that unreasonable delay occurred because of the authorities' behavior, and this violated the defendants' fair trial rights.

4. Nzuwonemeye's 11 years in detention (arrest to trial judgment) also exceeds the *Seselj* case. At the December 2011 Security Council meeting, Mr. Churkin, representing the Russian Federation, remarked:

> "Particular attention should be paid to the notorious case of *Seselj*. *He has been in detention for nine years now.* Moreover, there has still not been a first instance judgment."[17] (*italics* added).

5. The undue delay in Nzuwonemeye's case was based on the conduct of administrative and judicial authorities – one of the HRC criterion for determining reasonableness.

6. From the end of the case on 26 June 2009 through the rendering of the Trial Chamber Judgment on 17 May 2011, approximately twenty three (23) months or two years elapsed.

7. The onus for this delay during the deliberations and judgment drafting stage falls squarely on the conduct of the Tribunal as the relevant authority. The delay was caused by the Tribunal's allocation of resources during this period, and staffing and organizational decisions that were completely within its control.

• During this period, two of the Trial Chamber II "Military II" judges, J. Hikmet and J. Park, also sat on the *Kanyarukiga* bench and rendered a judgment in that case on 1 November 2010.

• In fact, in December 2009, Judge Byron reported to the Security Council that in three cases (which included "Military II"), the "progress [in judgment drafting] is

[16] *See also Zimmerman and Steiner v. Switzerland* (three and one half years for a proceeding exceeded "reasonable" time).

[17] S/PV.6678.

continuously challenged by parallel assignments of the judges and their legal staff to support other cases. . . the scheduling of complex deliberations in the multi-accused cases is difficult and risks delays."[18]

• In June 2010, President of the ICTR, Judge Byron, cited that the loss of the Judgment Co-ordinator for the "Military II" judgment as one of the key reasons for requesting an extension of time, under the Completion Strategy.[19]

8. In sum, the workload assignments and shortage of resources are not sufficient justifications for delay in a trial,[20] and these conditions impact on and prejudice the Applicant's fair trial right to be tried with no undue delay.

(e) The undue delay prejudiced Nzuwonemeye and caused him irreparable harm

1. The HRC explicitly stated in its Comment that "an important aspect of fairness of the hearing is its expeditiousness."

2. Here, if Nzuwonemeye's trial had been without undue delay, it is logical that the outcome of the proceedings would have been known sooner.

3. Assuming the same judicial outcomes, i.e., conviction and sentence by the Trial Chamber and acquittal by the Appeals Chamber, it would have been less than 14 years of incarceration before Nzuwonemeye was acquitted.

4. Even today, a year+ since the acquittal, Nzuwonemeye is not a free man. He cannot travel, he cannot leave Arusha, he is not accepted in any country where he would be safe, and he still lives under UN security.

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[18] *Ibid.*, 3 December 2009, S/PV.6228, p. 6.

[19] Report of President Dennis Byron to Security Council, 18 June 2010, S/PV.6342, p. 7.

[20] *See Mugiraneza* Decision, 23 June 2010, Partially Dissenting Opinion of Judge Emile Francis Short, paras. 3-5. Mugiraneza had been in custody for 11 years at the time of this decision.

VI. Violations of Nzuwonemeye's rights must be compensated under law.

1. It is a fundamental principle of international human rights law that any violation of a human right entails the provision of an effective remedy.[21]

2. The right to an effective remedy for violation of fundamental human rights is provided in customary international law and is part of the inherent powers possessed by the Trial Chamber.[22]

3. The power to provide an effective remedy to an accused who has suffered a violation of his or her fundamental human rights includes the power to award financial compensation.[23]

4. The Appeals Chamber has previously held that "any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy." [24]

5. The proportionate remedy in the case at bar is financial compensation of one million USD for violations of fundamental rights, or, in the alternative, a sum which the Appeals Chamber deems as commensurate with the violations.

6. Nzuwonemeye has been prejudiced and suffered harm due to the length of his incarceration which amounted to a "time served" sentence for crimes for which he was

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[21] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007), para. 16; *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007), para. 24.

[22] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007), paras. 45,49.

[23] *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007), para. 26; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007), paras. 58,62.

[24] *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, 31 May 2000, para 125 ("Semanza Appeal Decision); *Andre Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, 13 September 2007, para. 24.

ultimately acquitted, for the loss of income to his family, for loss of liberty and family life.

7. Nzuwonemeye harbors no illusions that his acquittal can erase the stain of having been charged with crimes, nor does he expect that the Appeals Chamber can "make him whole" for what he and his family have endured the last fourteen+ years. Loss of his family life, his freedoms, ability to work and support himself and his family, his reputation are all human rights to which it is difficult to attach a price tag.

8. The presumption of guilt attaches to any person charged with an international crime related to the events in Rwanda in 1994, and it unfortunately continues even after a final judicial decision of acquittal. The difficulties in re-locating acquitted persons, and those who have served their sentences is an example of this.

9. Judicial institutions, however, are able to provide some compensation to those who have endured a grave injustice and violations of their rights within its system. This is evidenced by the compensation laws in many national jurisdictions,[25] and decisions in regional courts in respect to UN Member States.[26]

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[25] *See*, for example, in Italy, Chapter VIII of the Italian Code of Criminal Procedure, entitled "Repair for Wrongful Imprisonment," contains Article 314, which states that those individuals acquitted by final judgment "because the crime did not occur, because the person did not commit the crime, [or] because the offense had not been completed or is not a crime under law" are entitled to "fair compensation for detention suffered." Italian Code of Criminal Procedure, Chapter VIII, art. 314(1) at http://www.altalex.com/index.php?idnot=36788.

In Norway, under Articles 444-446 of Straffeprosessloven, or the Norwegian Code of Criminal Procedure, it states that a defendant is entitled to compensation for any *financial* loss if acquitted, if the prosecution is discontinued, or if the defendant is detained contrary to Article 5 of the European Convention of Human Rights or Article 9 of the International Covenant on Civil and Political Rights ("ICCPR").. Straffeprosessloven[Norwegian Code of Criminal Procedure], art. 444(a)-(c) at http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf.

Uniquely, even if these conditions are not fulfilled, a defendant can still be remunerated "if [compensation] appears to be reasonable" due to the defendant suffering financial loss "resulting from special or disproportionate damage that the prosecution has caused him." Thus, under Norwegian law and contrary to other state laws analyzed, a defendant need not even be acquitted, but need only suffer financial loss due to "special or disproportionate damage" at the hands of the prosecution to be eligible for compensation.

In Latvia, areas of compensation are quite broad, under the Law on Indemnification against Loss Resulting from Unlawful or Unsubstantiated Actions of the Investigation Entity, Prosecution Office or Court (the "Compensation Law"). *See*, http://www.tm.gov.lv/en/useful-information/indemnification-of-acquitted-

VII. Remedy requested

1. The dispositive issue for the MICT is the issue of fairness, and whether it has the legal will to fashion a remedy for the violations of Nzuwonemeye's fundamental rights.

2. As Justice Jackson cautioned at Nuremburg,

> ". . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice." [27]

The Applicant, Major F.X. Nzuwonemeye, respectfully requests

(a) One million USD, or, in the alternative, a sum which the Appeals Chamber deems is commensurate with the fundamental violations suffered by the Applicant, for the 15 year+ period of detention, from his arrest through his final judgment of acquittal, and through the current period, in the "safe house."

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persons. The Compensation Law specifics nine "categories of loss" for which compensation may be awarded. These include: remuneration for lost wages and employment opportunities; any allowance or scholarships not received; compensation for the full value of any property seized during the proceedings, or of damages caused to the property by the state; legal costs; and any monies such as fines and any other amounts collected in the enforcement of a court judgment, associated with lost profits from business, or property rights.

[26] For example, in 2014, the European Court of Human Rights ordered France to pay between EUR 5000-2000 (USD6100-2500) to each pirate for "moral damages," based on violation of the delay from the detention between their arrest and their arrival in France in two cases; Denmark was ordered to pay compensation to a group of Somali pirates held for 13 days before being brought before a judge, in violation of Danish law which states that a person must be brought before a judge within 24 hours.

[27] Justice Robert H. Jackson, Chief of Counsel for the United States, in his Opening Statement before the International Military Tribunal at Nuremburg, 21 November 1945.

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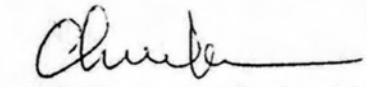
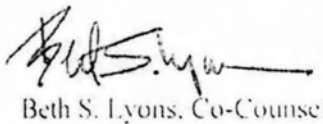
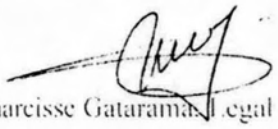
Respectfully submitted.



Chief Charles A. Taku, Lead Counsel



Beth S. Lyons, Co-Counsel



Tharcisse Gataraman, Legal Assistant

APPENDIX EXHIBIT A

United Nations S/2000/925*

Security Council

Distr.: General
6 October 2000
English
Original: French

Letter dated 28 September 2000 from the Secretary-General addressed to the President of the Security Council

I am transmitting to you herewith for consideration, and for consideration by the members of the Security Council, a letter dated 26 September 2000 addressed to me by Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda.

In her letter, Judge Pillay indicates that, according to the Judges of the International Criminal Tribunal for Rwanda, the Tribunal should be able, in certain situations, to compensate persons who may have been wrongfully detained, prosecuted or convicted by the Tribunal.

You will remember that, in my letter dated 26 September 2000 (S/2000/904), I drew to your attention and to the attention of the members of the Security Council, a letter dated 19 September 2000 from Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia, concerning the same proposal.

Judge Pillay notes that, according to the Judges, there are three situations in which the Tribunal should be able to award such compensation.

The first situation arises when a person has suffered punishment as a result of a final decision of the International Tribunal and that decision is subsequently reversed by the Tribunal, or a pardon is granted, because a new or newly discovered fact proves that there has been a miscarriage of justice.

The second situation arises when a person who has been detained under the Tribunal's authority is subsequently acquitted by a final decision of the Tribunal or is subsequently released following a decision to terminate the proceedings against him/her in circumstances which show conclusively that there has been a grave and manifest miscarriage of justice.

The third situation in which, according to the Judges, the Tribunal should be able to award compensation arises when a person is arrested or detained under the Tribunal's authority in a manner or in circumstances which constitute a violation of the right to liberty and security of person and when the conduct which gave rise to the violation is legally imputed to the Tribunal and thus to the United Nations.

* Reissued for technical reasons.

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Judge Pillay observes that, in the first and third situations, the United Nations is required, under generally accepted human rights norms, to compensate the individual who has been unlawfully convicted, arrested or detained.

Judge Pillay also observes that in neither of these two situations could the United Nations fulfil its legal obligations simply by paying a sum of money as compensation to the individual concerned. Legal provisions must be enacted which would give the individual a specific right to compensation, determine how the compensation to be paid must be calculated and establish a procedure for this purpose which meets the essential requirements of legality and respect for law.

Judge Pillay observes that, in the second situation described in his letter, the United Nations could not be held bound under existing international law to compensate an individual who may have been unlawfully detained or prosecuted as described. She states that the Judges nevertheless believe that, given the particular circumstances in which the Tribunal operates, it is desirable that the Tribunal should be able to award compensation in such situations.

Judge Pillay notes that, for the Tribunal to be able to award compensation in each of the three situations described in his letter, the Security Council would have to amend the Statute of the International Criminal Tribunal for Rwanda to empower it to deal with questions of compensation.

Should the Security Council adopt such amendments, the General Assembly would subsequently have to approve the necessary appropriation to the Tribunal's budget.

I should be grateful if you would bring the text of this letter and its annexes to the attention of the members of the Security Council.

(*Signed*) Kofi A. **Annan**

EXHIBIT B

Annex

[Original: English]

Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General

The Judges of the International Criminal Tribunal for Rwanda have requested me to address this letter to you explaining that they consider it desirable that the Statute of the Tribunal be amended to provide for compensation to persons wrongly prosecuted or convicted.

Neither the Statute nor the Rules of Procedure and Evidence of the Tribunal provide remedies for deprivation of liberty, consequent upon wrongful arrest, prosecution or conviction or unlawful violations of rights. The right to such remedy is embodied in various international human rights instruments. The Judges are interested in having the International Criminal Tribunal for Rwanda placed in a position to fully respect internationally recognized obligations.

During the past five years, three instances of deprivation of liberty occurred in the International Criminal Tribunal for Rwanda which caused concern for the Registrar: a wrongful arrest upon mistaken identity; the withdrawal of a prosecution against an individual who had voluntarily surrendered to the Tribunal and whose status is still being determined by the host country; and an order by the Appeal Chamber in case ICTR-97-AR72 that, on the grounds of violation of his rights during arrest and pre-trial detention, the appellant in the case was entitled to a remedy in the form of financial compensation, if he is found not guilty, and a reduced sentence, if he is convicted.

Awarding compensation to wrongly convicted persons

The right of wrongly convicted persons to receive compensation is set forth in various international human rights instruments, including article 14, paragraph 6, of the International Covenant on Civil and Political Rights. An almost identical provision to article 14, paragraph 6, is also found in article 85 of the Statute of the International Criminal Court, adopted at Rome on 17 July 1998.

Acts of the International Criminal Tribunal for Rwanda, a subsidiary organ of the Security Council, are imputable to the United Nations. Consequently, since it considers itself bound by generally accepted norms of human rights law such as article 14, paragraph 6, of the International Covenant on Civil and Political Rights, the United Nations would be under an obligation to ensure that compensation is paid to a person whose conviction by the International Criminal Tribunal for Rwanda has later been reversed.

Awarding compensation to wrongly prosecuted persons

Although article 85, paragraph 3, of the Rome Statute will enable the future International Criminal Court to award compensation in exceptional circumstances to accused who are acquitted or have the proceedings against them terminated on account of a grave and manifest miscarriage of justice, equivalent provisions do not appear in the International Covenant on Civil and Political Rights or in any other

international human rights instrument. It cannot, therefore, be said that a right of this type currently forms part of customary international law. Accordingly, the United Nations cannot be said to be under an unambiguous legal obligation to pay compensation to a victim of a miscarriage of justice in such circumstances.

Nevertheless, provisions for the compensation of an accused who has in some way been wrongly prosecuted do exist in some national systems.

In view of the circumstances under which the International Criminal Tribunal for Rwanda operates — in particular, the fact that accused persons are held in pre-trial detention for long periods — it would therefore be in the interest of the Tribunal, and of the United Nations in general, that compensation be awarded, at the discretion of the Tribunal, to accused persons who are acquitted or have the proceedings against them discontinued. It should be noted, however, that such discretion should only be exercised in exceptional circumstances where there has been a "grave and manifest" miscarriage of justice.

Awarding compensation to unlawfully detained persons

International human rights treaties guarantee to persons who may be deprived of their liberty in circumstances or in a manner that involves a violation of their rights, the right to receive compensation; see for instance article 9, paragraph 5, of the International Covenant on Civil and Political Rights. Consequently, should a person be arrested or detained on the authority of the International Criminal Tribunal for Rwanda in a manner or in circumstances that are in violation of the rights recognized in paragraphs 1 to 4 of article 9 of the Covenant and should the conduct which gave rise to that violation be such as to be deemed in law to be that of the International Criminal Tribunal for Rwanda, and so be imputable to the United Nations, the Organization would be under an international obligation to ensure that the victim of that violation was compensated.

Please note that, since the Statute does not contain any provisions conferring on the International Criminal Tribunal for Rwanda the authority to take the necessary steps to ensure the discharge of the aforementioned obligations, various possible mechanisms have been examined, in consultation with the Office of Legal Affairs, which would nonetheless enable such persons to obtain compensation. Such mechanisms include, inter alia, arbitration, ex gratia payment, resolutions of the General Assembly authorizing limited liability and amendment of the Statute of the International Criminal Tribunal for Rwanda.

In this connection, it is essential to note that the United Nations would not be able to comply with its international obligations simply by paying the individuals concerned an appropriate sum in compensation. The obligations which are codified within article 9, paragraph 5, and article 14, paragraph 6, of the International Covenant on Civil and Political Rights are not simply to ensure that persons whose cases fall within the scope of these provisions are compensated *simpliciter*, but rather to guarantee that they are vested with "an enforceable right to compensation" (in the case of article 9 (5)) and are compensated "according to the law" (in the case of article 14 (6)). It is therefore necessary, in order to discharge this obligation, that there exist rules of law, satisfying the basic requirements of legality and due process, that confer on persons wrongly prosecuted or convicted by the International Criminal Tribunal for Rwanda, as well as those who were unlawfully arrested or detained under its authority, a specific legal right to be paid compensation.

Accordingly, since the International Criminal Tribunal for Rwanda and, in particular, the Chambers, are in the best position to determine whether wrongly prosecuted or convicted persons as well as those who are unlawfully arrested or detained should receive compensation, the Judges are of the view that the Security Council should consider widening the scope of the jurisdiction of the International Criminal Tribunal for Rwanda through a statutory amendment, conferring upon it competence to deal with cases of compensation.

Given that any steps taken in this regard should closely reflect recent developments of international human rights law, it is suggested that a new article should be inserted into the Statute of the International Criminal Tribunal for Rwanda modelled on the precedent afforded by article 85 of the Rome Statute of the International Criminal Court, the text of which is attached for ease of reference (see appendix).

Finally, with a view to seeking the most appropriate amendment to the Statute of the International Criminal Tribunal for Rwanda, I would kindly ask you to transmit this letter to the President of the Security Council for his consideration and that of the members of the Council.

Since it is axiomatic that the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia take similar approaches to this issue, I have discussed the issue of compensation with Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia, who has informed me that the Judges of that Tribunal also envisage proceeding in this manner with a view to securing the amendment to the Statute of that Tribunal and that a separate letter to this effect has been addressed to you.

Should you have any questions regarding this request, or wish to obtain further information on the right wrongly prosecuted or convicted persons as well as that of unlawfully arrested or detained persons to receive compensation, please do not hesitate to contact me.

(*Signed*) Navanethem **Pillay**
President

EXHIBIT C

Appendix

Article 85 of the Rome Statute of the International Criminal Court

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

EXHIBIT D

United Nations S/2000/904

Security Council

Distr.: General
26 September 2000
English
Original: French

Letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council

I am transmitting to you herewith for consideration, and for consideration by the members of the Security Council, a letter dated 19 September 2000 addressed to me by Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia.

In his letter, Judge Jorda indicates that, according to the Judges of the International Tribunal for the Former Yugoslavia, the Tribunal should be able, in certain situations, to compensate persons who may have been wrongfully detained, prosecuted or convicted by the Tribunal.

Judge Jorda notes that, according to the Judges, there are three situations in which the Tribunal should be able to award such compensation.

The first situation arises when a person has suffered punishment as a result of a final decision of the International Tribunal and that decision is subsequently reversed by the Tribunal or a pardon is granted, because a new or newly discovered fact proves that there has been a miscarriage of justice.

The second situation arises when a person who has been detained under the Tribunal's authority is subsequently acquitted by a final decision of the Tribunal or is subsequently released following a decision to terminate the proceedings against him/her in circumstances which show conclusively that there has been a grave and manifest miscarriage of justice.

The third situation in which, according to the Judges, the Tribunal should be able to award compensation arises when a person is arrested or detained under the Tribunal's authority in a manner or in circumstances which constitute a violation of the right to liberty and security of person and when the conduct which gave rise to the violation is legally imputed to the Tribunal and thus to the United Nations.

Judge Jorda observes that, in the first and third situations, the United Nations is required, under generally accepted human rights norms, to compensate the individual who has been unlawfully convicted, arrested or detained.

Judge Jorda also observes that in neither of these two situations could the United Nations fulfil its legal obligations simply by paying a sum of money as compensation to the individual concerned. Legal provisions must be enacted which would give the individual a specific right to compensation, determine how the

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compensation to be paid must be calculated and establish a procedure for this purpose which meets the essential requirements of legality and respect for law.

Judge Jorda observes that, in the second situation described in his letter, the United Nations could not be held bound under existing international law to compensate an individual who may have been unlawfully detained or prosecuted as described. He states that the Judges nevertheless believe that, given the particular circumstances in which the Tribunal operates, it is desirable that the Tribunal should be able to award compensation in such situations.

Judge Jorda notes that, for the Tribunal to be able to award compensation in each of the three situations described in his letter, the Security Council would have to amend the Statute of the International Tribunal for the Former Yugoslavia to empower it to deal with questions of compensation.

Should the Security Council adopt such amendments, the General Assembly would subsequently have to approve the necessary appropriation to the Tribunal's budget.

I should be grateful if you would bring the text of this letter and its annexes to the attention of the members of the Security Council.

(*Signed*) Kofi A. **Annan**

EXHIBIT E

Annex

Letter dated 19 September 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General

I am writing to you today to request your assistance on a matter of very great importance to the International Criminal Tribunal for the Former Yugoslavia, namely, compensation for persons who have been wrongfully prosecuted or convicted.

During recent months, the Judges have expressed concern at the plight of individuals who, after having been prosecuted and tried according to the applicable rules, have been acquitted by the Tribunal. Although the best way of clearing an accused person is to acquit him or her, under the legislation of a number of countries, anyone who has been wrongfully convicted or prosecuted can be compensated for the deprivation of liberty suffered and for the economic losses sustained due to the proceedings instituted against him or her. Persons who have been unjustly arrested or detained can also receive compensation. Such compensation — which is also codified in various international human rights instruments — is not provided for in the Statute of the International Tribunal for the Former Yugoslavia, nor in its Rules of Procedure and Evidence.

Since the International Tribunal for the Former Yugoslavia wishes, by definition, to abide fully by the internationally recognized norms relating to the rights of suspects and accused persons, the absence of any provision which would allow for awarding compensation in such situations is a cause for concern. Moreover, during the first six years of its existence, a number of people have been deprived of their liberty by the Tribunal only to be later acquitted or to have the proceedings against them terminated. It is possible that these people may file a complaint against the Tribunal on the grounds that they were deprived of their liberty and sustained direct economic losses as a result of these proceedings.

Accordingly, the issue of compensation needs to be addressed as soon as possible.

As mentioned above, the issue of compensation arises in three situations. When an individual is wrongfully convicted, when an individual is unjustly prosecuted and when an individual is unlawfully arrested or detained. These situations are dealt with below in detail.

Compensation for wrongfully convicted persons

The right to compensation of wrongfully convicted persons is provided for in several international human rights instruments, including, in particular, article 14, paragraph 6, of the International Covenant on Civil and Political Rights. Article 85, paragraph 2, of the Statute of the International Criminal Court, adopted in Rome on 17 July 1998, contains a provision that is virtually identical.

Since it is a subsidiary body of the Security Council, the actions of the International Tribunal for the Former Yugoslavia can be imputed to the United Nations. Consequently, since it considers itself bound by generally accepted human rights norms such as article 14, paragraph 6, of the International Covenant on Civil

and Political Rights, the United Nations will be legally bound to compensate persons whose conviction by the Tribunal is subsequently overturned.

Compensation for unjustly prosecuted persons

Although article 85, paragraph 3, of the Statute of the International Criminal Court gives the latter the power, in exceptional circumstances, to award compensation to persons who have been accused and subsequently acquitted, following the termination of proceedings due to a grave and manifest miscarriage of justice, there is no equivalent provision in the International Covenant on Civil and Political Rights nor in any other international human rights instrument. It cannot, therefore, be said that a right of this nature is currently part of international customary law. Accordingly, the United Nations could not be held legally bound to compensate the victims of grave and manifest miscarriages of justice in such circumstances.

However, some national systems do provide for the compensation of wrongfully prosecuted persons.

Because of the particular circumstances in which the Tribunal operates, including the fact that the accused are detained for long periods pending trial, it is in the interest of the Tribunal, and of the United Nations in general, to award compensation, at the discretion of the Tribunal, to accused persons who are acquitted or against whom proceedings are terminated. It should, however, be noted that this discretion should be exercised only in exceptional circumstances, following a "grave and manifest" miscarriage of justice.

Compensation for unlawfully detained persons

International human rights instruments guarantee the right to compensation of persons who have been deprived of their liberty in circumstances involving a violation of their rights, as may be seen in article 9, paragraph 5, of the International Covenant on Civil and Political Rights. Thus, if a person is arrested or detained under the authority of the Tribunal in circumstances that constitute a violation of the rights recognized in article 9, paragraphs 1 to 4, of the International Covenant on Civil and Political Rights and if the conduct giving rise to this violation is legally imputed to the Tribunal and thus to the United Nations, the latter would be legally bound to award compensation to the victim of this violation.

Since the Statute contains no provision conferring on the Judges the power to take the necessary measures to fulfil the above-mentioned obligations, several possible mechanisms have been studied, in consultation with the Office of Legal Affairs, that would offer the possibility of compensation to the persons concerned. These mechanisms include, among other things, arbitration, exceptional ruling, General Assembly resolutions recognizing limited responsibility and amendment of the Tribunal's Statute.

In this context, it must be noted that the United Nations may not evade its international obligations simply by paying a sum of money as compensation to the persons concerned. The obligations set forth in article 9, paragraph 5, and article 14, paragraph 6, of the International Covenant on Civil and Political Rights are not designed solely to provide for summary compensation to persons who are protected by these provisions, but rather to ensure that these persons have a "right to

compensation" (in the case of article 9, paragraph 5) and compensation "according to law" (in the case of article 14, paragraph 6). It is therefore necessary, in order to fulfil this obligation, to enact legal provisions that meet the essential requirements of legality and respect for law, conferring on persons wrongfully prosecuted or convicted by the Tribunal, and on those who have been unlawfully arrested or detained, a specific right to compensation.

Consequently, since the Tribunal and, in particular, the Chambers are in the best position to determine whether persons who have been wrongfully prosecuted or convicted and those who have been unlawfully arrested or detained should be compensated, the Judges consider that the Security Council should study the possibility of widening the jurisdiction of the Tribunal by amending its Statute to empower it to deal with questions of compensation.

Since any step taken in this respect must closely reflect recent developments in international human rights law, we suggest that a new article should be added to the International Tribunal's Statute, inspired by the precedent contained in article 85 of the Statute of the International Criminal Court, the text of which is also attached herewith.

Lastly, in order to adopt the best possible amendment to the International Tribunal's Statute, I should be grateful if you would draw this letter to the attention of the President and members of the Security Council for their consideration.

In addition, since the International Tribunal and the International Criminal Tribunal for Rwanda (ICTR) ought to take a similar approach to this issue, I have discussed it with Judge Navanethem Pillay, President of ICTR. She told me that the ICTR judges also envisaged using the same approach to seeking an amendment to the Statute of that Tribunal, and that a separate letter prepared with that intention would shortly be addressed to you.

Of course, the envisaged amendments will have administrative and budgetary implications for the United Nations. In this context, the Tribunal has already requested the opinion of Mr. Joseph Connor, Under-Secretary-General for Management, and expects to receive his reply soon.

If you have any other questions regarding this request, or if you wish to obtain additional information on the right to compensation of persons who have been wrongfully prosecuted or convicted or persons who have been unlawfully arrested or detained, I remain at your disposal to discuss them.

In that regard, I should like to draw to your attention a detailed document prepared by the Registry on the question of compensation, which is attached to the letter addressed to Mr. Connor.

(*Signed*) **Claude Jorda**
President

EXHIBIT F

Enclosure

Article 85 of the Statute of the International Criminal Court

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.