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MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS (MICT)

Judge: Justice Vagn Joensen, Single Judge

Registrar: Mr. John Hocking

Date Filed: 18 June 2015

THE PROSECUTOR

v.

F.X. NZUWONEMEYE
Case No. MICT-13-43

**SUBMISSION RE CLAIM FOR COMPENSATION AND DAMAGES, AS
REQUESTED IN DECISION, DATED 19 MAY 2015, PARAGRAPH 23**

PUBLIC FILING

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Introduction

1. This submission addresses the issue of whether specific authorization by a Trial Chamber or Appeals Chamber is required to raise a claim for compensation and damages where the Statute and Rules are silent on this point, and the criminal proceedings have been completed.

2. The Applicant F.X. Nzuwonemeye (“Applicant”) submits that the answer is “no” – specific authorization is not required - based on a) the inherent powers of the Tribunal; b) its obligation under international human rights law to provide an effective remedy for fair trial violations; and c) past practices of the Tribunal.

3. Applicant’s situation, on its face, is a legal oxymoron which violates the principles of justice and fundamental fairness. When the Applicant was acquitted by the Appeals Chamber in February 2014, he had already served the penalty imposed by the Trial Chamber for these same crimes.¹ Hence, the Applicant was punished for crimes for which he was ultimately acquitted.

4. Applicant seeks an effective remedy from the MICT² for the fair trial violations he has suffered and by which he has been prejudiced.

5. Applicant has suffered two fundamental international human rights violations:

(a) Violation of the right to notice (ICTR Statute, Article 20 and ICCPR, Article 14), which resulted in unlawful detention, in violation of ICCPR, Article 9,³ and which triggers an enforceable right to compensation under ICCPR, Article 9(5), and

¹ The Trial Chamber sentenced Applicant to 20 years imprisonment. In February 2014, he had completed 2/3 of his sentence, which would entitle him to early release (for example, in the US (New York State); and also in Belgium, Denmark, Sweden, Italy or Norway; *see*, Hola and van Wijk, “Life after Conviction at International Criminal Tribunals,” *Journal of International Criminal Justice* 12 (2014), 109-132 at p. 122).

² References are made herein to MICT and ICTR as the same entity, pursuant to IRMCT Statute, Article 1 (1).

(b) Violation of the right to be tried without undue delay (ICTR Statute, Article 20 and ICCPR, Article 9)

6. If the Single Judge does not find that he is authorized to deliberate on the Applicant's Motion for Compensation and Damages ("Motion"), then the Applicant requests, in the alternative, that the Single Judge refer the Motion to the Appeals Chamber, which acquitted the Applicant, to determine whether the requested compensation and damages are an appropriate remedy for fair trial violations.

A. The ICTR, as a subsidiary organ of the Security Council has jurisdiction over its judicial functions,⁴ which include the implied power to address matters which are not explicit in the ICTR Statute or Rules

1. Appellate jurisprudence holds that the Tribunal is a "special kind" of "subsidiary organ" of the Security Council, where the Security Council did not intend to create an organ "totally in its power and at its mercy."⁵

2. Thus, a Trial Chamber has inherent authority to take certain measures which may not be expressly provided for in the Statute or Rules.⁶

³ The Appeals Chamber found a violation of right to notice in respect to Applicant's conviction for 6(3) for the Belgians, and for 6(1) conviction for aiding and abetting for the Prime Minister, and reversed the convictions for CAH and Violations of CA3 (*Nindiliyimana et al* Appeal Judgment, 11 February 2014, para. 254). As we pointed out in the Motion, the fundamental right to notice was violated from the inception of the arrest in 2000 through the Appeals Chamber's reversal of Applicant's convictions in 2014. During this period of 14 years, Applicant's detention was unlawful because he was incarcerated, tried and found guilty by the Trial Chamber based on a defective indictment.

⁴ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (ICTY empowered to decide Appellant's interlocutory appeal, challenging the legality of establishment of tribunal).

⁵ *Ibid.*, para. 15.

⁶ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Ntabakuze Petition for a Writ of *Mandamus* and Related Defence Requests, 18 April 2007, para. 5.

3. The doctrine of inherent powers provides that a court should be recognized as having been implicitly conferred the powers which prove necessary to the exercise of its mandate.⁷

4. The parameters of these powers are defined by the objectives and purposes of the ICTR Statute. The Appeals Chamber has held that “the ICTR may apply what is not specifically prohibited by the Rules only where this would be consistent with objects and purposes of the Statute.”⁸

5. Thus, the implied or inherent powers are not “blanket” powers. In the *Bagosora* case, the Appeals Chamber rejected the Prosecution’s argument that “what is not specifically prevented by the rules may be applied by the Court,”⁹ and held that the Prosecution had no right to appeal the Confirming Judge’s decision to dismiss the indictment against Bagosora and 28 others. The Appeals Chamber asked: was the dismissal of the indictment an obstacle to achievement of the ICTR mandate? The answer was, “No.”

6. Applicant submits that the granting of compensation is within the inherent power of the Tribunal, and that this is consistent with the objectives of the ICTR Statute.

B. SILENCE IN THE RULES OR STATUTE DOES NOT PROHIBIT THE EXERCISE OF JUDICIAL AUTHORITY OVER MATTERS CONSISTENT WITH THE OBJECTIVES OF THE STATUTE, INCLUDING INTERNATIONAL HUMAN RIGHTS LAW AND CUSTOMARY INTERNATIONAL LAW

1. The legal reality is that the Tribunals have exercised judicial authority over issues which are not included in the Statute or Rules, but consistent with the objectives of the ICTR Statute.

⁷ *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, para. 46 (“*Rwamakuba* Decision”)

⁸ *Prosecutor v. Bagosora et al*, Case No. ICTR-98-37-A, Decision on the Admissibility of the Prosecutor’s Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, Appeals Chamber, 8 June 1998, para. 45.

⁹ *Bagosora*, paras. 44-45.

2. One example is “joint criminal enterprise” (JCE). Although JCE does not appear in the Statutes of either the ICTR or ICTY, JCE has been held to be a form of committing under 6(1) and 7(1). The Appeals Chamber has held that the reference to JCE does not have to be explicit in the Statute for JCE to come within its jurisdiction since it is part of customary international law.¹⁰

3. A second example is in respect to Additional Protocol I, which is not mentioned in Article 3, ICTY Statute. Here, the Appeals Chamber held that the Trial Chamber’s approach to Article 3, ICTY Statute – to cover violations based in customary international law and those based on treaties (such as Additional Protocol I) - was correct because it was consistent with Article I of the Statute.¹¹

4. But most pertinent to Applicant’s case is that the Appeals Chamber has held that where a fundamental, international human right is concerned, a Chamber must address it, even if the Statute or Rules do not specifically include it.¹²

5. In *Semanza*, the Appeals Chamber held that a writ of *habeas corpus* must be heard because it involved a fundamental right found in international human rights law:

“neither the Statute nor the Rules of the Tribunal specifically address writs of *habeas corpus*. . . [t]his is a fundamental right and is enshrined in international human rights law, which also provides that the right of an individual to challenge the lawfulness of his detention implies that a ‘a writ of *habeas corpus* must be heard.’” [footnotes omitted] [underlining added]¹³

6. The Appeals Chamber found that Applicant *Semanza*’s right to be informed promptly of the nature of the charges against him had been violated,¹⁴ and his right to challenge the

¹⁰ *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, Appeals Chamber, 21 May 2003.

¹¹ *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2A, Appeal Judgment, 17 December 2004.

¹² *Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, Appeals Chamber, 31 May 2000.

¹³ *Ibid.*, para. 112.

¹⁴ *Ibid.*, para. 127.

lawfulness of his detention was violated by the failure of the Trial Chamber to hear the motion.¹⁵ For these violations of international human rights, the Appeals Chamber decided that if the Appellant were found not guilty, he was entitled to financial compensation or if found guilty, he was entitled to a reduction of his sentence pursuant to ICTR Statute, Article 23.

7. In the *Ntabakuze* case, the Trial Chamber held that it had the inherent authority to take certain measures which may not be expressly provided for in the Statute or the Rules.¹⁶ It rejected the Prosecution's arguments that a) the Tribunal was not authorized to issue an order for *mandamus* by Security Council Resolutions, the Statute or the Rules and b) any attempt to confer such power on itself would be *ultra vires*.

8. Thus, the argument that the exercise of judicial authority over matters which are not in the Rules or Statute is *ultra vires* should be rejected. The appellate jurisprudence is clear that when there is a violation of a fundamental right, enshrined in international human rights law, the Tribunal has the authority and obligation to exercise its authority, regardless as to whether it is written in the Rules or Statute.

9. This power accrues to the Chamber because the Tribunal, as a special kind of subsidiary organ of the U.N. Security Council, is bound to respect and ensure respect for generally accepted human rights norms.¹⁷

C. IMPLEMENTING EFFECTIVE REMEDIES FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

1. There is no legal dispute that the ICTR is bound to follow international norms, especially in relation to human rights and fair trial. Appellate jurisprudence

¹⁵ *Ibid.*, para. 128.

¹⁶ *The Prosecutor v. Bagosora et al.*, Decision on Ntabakuze Petition for a Writ of *Mandamus* and Related Defence Requests, 18 April 2007, para. 5.

¹⁷ *Rwamakuba* Decision, 31 January 2007, para. 48.

is clear that it relies on customary international law as a source of law, as reflected *inter alia* in the ICCPR.¹⁸

2. But the 19 May 2015 Decision appears concerned that the failure of the Appeals Chamber to expressly provide for compensation for the Applicant means that the Single Judge has no power to grant compensation.¹⁹

3. The 19 May 2015 Decision notes that in the *Rwamakuba* Trial Judgment, the Chamber made a specific request to defence counsel to file a motion on appropriate remedy for the fair trial violation.²⁰

4. It is true that no such order or request exists in the Appeals Chamber Judgment in the Applicant's case.

5. But, it makes no legal sense to conclude that the absence of a request from the Appeals Chamber to the Applicant for an appropriate remedy for fair trial violations was intended to prohibit the MICT from providing an effective remedy for human rights violations.

6. Such a conclusion would risk violating an international norm – the right to an effective remedy for human rights violations – which has consistently been upheld by the Appeals Chamber's jurisprudence.

7. But the question remains: how can the MICT satisfy its obligations – in practice?

Follow *Rwamakuba*'s Holdings, Based on Appellate Jurisprudence

¹⁸ *Kajelijeli* Appeals Judgment, 23 May 2005, para. 209.

¹⁹ See 19 May Decision, para. 22, quoting *Zigiranyirazo* Decision.

²⁰ Order III. "the Defence is at liberty to file any application seeking appropriate remedy to the violation of his right to legal assistance. . ."

8. *Rwamakuba* stands for the principle that the Chamber has inherent power to provide an effective remedy for human rights violations in criminal proceedings, based on its judicial functions and compliance with international human rights norms²¹ even where there is no explicit provision in the Statute or Rules to grant an effective remedy.

9. Thus, *Rwamakuba* holds that the Tribunal's obligation under human rights law to provide an effective remedy for human rights violations takes precedence over whether the right to an effective remedy is explicit or written in the Statute or Rules.

10. *Rwamakuba's* conclusions, moreover, are based on an analysis of prior Appellate Chamber holdings and obligations under customary international law, particularly human rights jurisprudence and instruments.²² While one Trial Chamber is not bound to follow the decision of other Trial Chambers, even if comprised of the same judges,²³ there is also no prohibition in respect to adopting arguments used by other Trial Chambers.

11. The *Rwamakuba* Trial Chamber granted financial compensation for the violation of the fair trial right to legal assistance.

Follow *Zigiranyirazo's* interest of justice jurisdiction

12. The significance of the *Zigiranyirazo* Decision is that the Trial Chamber found "interests of justice" jurisdiction to review *Zigiranyirazo's* Motion,²⁴ in spite of the fact that there was no finding as to whether he had raised his claims below. This jurisdictional finding specifically refuted the Registrar's argument that the right to expeditious proceedings and compensation was waived by failing to address these issues at trial.²⁵

²¹ *Rwamakuba*, para. 49.

²² *Rwamakuba* Decision, paras. 40-49.

²³ *Rutaganda v. Prosecutor*, No. ICTR-96-3-A, Judgment, 26 May 2003, para. 188.

²⁴ *Decision on Protais Zigiranyirazo's Motion for Damages*, Case No. ICTR-2001-01-073, 18 June 2012, paras. 15 and 35 ("*Zigiranyirazo* Decision")

²⁵ *Ibid.*, paras. 13-15.

13. The *Zigiranyirazo* Decision rejected appellate jurisprudence in respect to waiver and exceptional circumstances, and proceeded to deliberate on the substance of the various compensation claims.²⁶

14. Unfortunately, we note that the reference to *Zigiranyirazo*, para. 15 in the 19 May Decision at para. 21 is incomplete: it omits the conclusion that “. . . Although the Claimant has referred to no exceptional circumstances warranting a departure from this [waiver] rule, the Chamber will nonetheless consider the merits of his application in the interests of justice.”²⁷

15. This incompleteness leads to a misleading interpretation of *Zigiranyirazo*, para. 15: that the *Zigiranyirazo* Motion was dismissed based on waiver. This is not true. In fact, the Trial Chamber discussed the merits of the arguments raised and reached its conclusions based generally on substantive grounds.²⁸

16. Applicant notes that, in his case, waiver - in contrast to the *Zigiranyirazo* case²⁹ - is not an issue. The grounds for compensation have been previously raised in Applicant's case. First, the Appeals Chamber made a finding on the violation of notice, which was litigated below by Applicant, in its Judgment.³⁰ Second, the issue of undue delay was raised in Applicant's Appellant's Brief, but was not addressed in the Appeal Judgment in respect to Applicant.³¹

²⁶ *Ibid.*, para. 15.

²⁷ *Ibid.*, para. 15.

²⁸ See *Zigiranyirazo* Decision, at paras. 19-22, 26-28, 33-42, 55-57 for discussions explaining the reasons for the Trial Chamber's denial of the Motion.

²⁹ *Ibid.*, paras. 13-14.

³⁰ *Ndindiliyimana et al* Appeal Judgment, 11 February 2014, para. 254.

³¹ Undue delay was addressed by the Appeals Chamber only in respect to *Ndindiliyimana*'s arguments, as Applicant points out in Reply to the Prosecution's Response, 9 March 2015, paras. 9-11.

17. Lastly, it is useful to consider the reasoning of Judge Park, in his Partially Dissenting Opinion in the *Zigiranyirazo* Decision, where he emphasizes that procedural issues (referring, in this case, to time limits) should not prevent the Trial Chamber from exercising its power to redress violations of rights and the harm incurred from these violations.

18. In the *Zigiranyirazo* Decision, Judge Park differed with the Majority in its denial of compensation as a remedy for the harm suffered as a result of the conviction which was reversed by the Appeals Chamber.³² In fact, he considered that the violations of the Claimant's rights were "far more serious than the violation found by the Trial Chamber, and endorsed by the Appeals Chamber, in *Rwamakuba*."³³ Judge Park pointed out that the Majority reasoned that the claim should not succeed because it was submitted two years after acquittal. Judge Park argued that "time limits cannot impede the Chamber from invoking this power in order to address a violation of rights and harm suffered consequent upon such violation."³⁴

REMEDY REQUESTED

1. Acquittal alone does not provide an effective remedy for the violations of Applicant's rights, including the rights to notice, to be tried without undue delay and to be free from illegal detention, during this 14 year period.

2. It is now more than 16 months since his acquittal, and Applicant is still not "at liberty." He still must live in a safe house in Arusha and is not free to exercise his rights.

³² *Ibid.*, Partially Dissenting Opinion of Judge Park, para. 1.

³³ *Ibid.*, para. 4.

³⁴ *Ibid.*, para. 6.

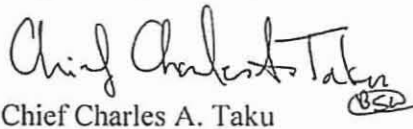
3. The gravity of this situation is undeniable, and an appropriate remedy – proportionate to the harm and prejudice – must be found in order for the Tribunal to fulfill its obligation to implement human rights norms.

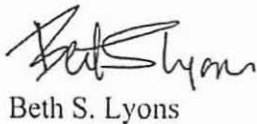
4. Applicant respectfully submits that the Single Judge is authorized, for the reasons stated above, to hear and decide Applicant's Motion for Compensation and Damages, and requests that the Motion be granted; or,


In the alternative, if the Single Judge holds that he is not authorized to deliberate on the Motion, the Applicant requests that the Single Judge refer the Motion to the Appeals Chamber, which acquitted Applicant, for decision.

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Respectfully submitted,


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