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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

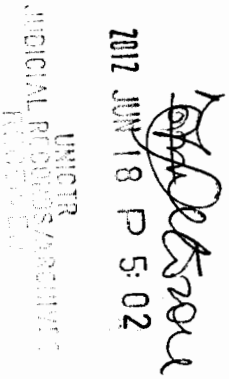
OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Seon Ki Park
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 18 June 2012



PROTAIS ZIGIRANYIRAZO
v.
THE PROSECUTOR

Case No. ICTR-2001-01-073

DECISION ON PROTAIS ZIGIRANYIRAZO'S MOTION FOR DAMAGES

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PROCEDURAL HISTORY

1. Protais Zigiranyirazo ("the Claimant") was arrested in Belgium on 26 July 2001 by Belgian Authorities, and transferred to the Detention Facility of the Tribunal in Arusha on 3 October 2001. His trial commenced on 3 October 2005 and closed on 25 May 2009.[1] On 18 December 2008, the Trial Chamber convicted the Claimant of genocide and extermination.[2] On 16 November 2009, the Appeals Chamber overturned the Trial Chamber judgement and acquitted the Claimant.[3]
2. On 24 February 2012, Mr. Zigiranyirazo filed a motion requesting compensation for the period he spent in detention until his acquittal and for violations of his fair trial rights.[4] Specifically, he seeks 1, 006,550 USD in compensation, and relocation to Belgium.[5]
3. On 20 March 2012, the Chamber directed the Prosecution and Registry to make submissions on the Motion.[6]
4. On 18 April, both the Prosecution and Registry filed submissions opposing the Claimant's Motion.[7]
5. On 6 May 2012, the Claimant filed a Reply.[8]

INTRODUCTION

6. In his motion, Mr. Zigiranyirazo requests compensation for: i) his "long detention", ii) for "the violations of the most basic and fundamental principles of justice by the [Trial Chamber] in convicting him on 18 December 2008"; iii) for the failure to assign counsel to him while he was detained in Belgium; and iv) for "the failure of the Tribunal to ensure that he could return to Belgium" and reunite with his family following his acquittal. He bases his

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[1] *Prosecutor v. Protais Zigiranyirazo*, ICTR-01-73-T, Judgement ("Trial Judgement"), 18 December 2008. Annex 1, Procedural History.
[2] Trial Judgement.
[3] *Protais Zigiranyirazo v. Prosecutor*,ICTR-01-7-A, Judgement ("Appeals Judgement"), 16 November 2009.
[4] *Protais Zigiranyirazo v. Prosecutor,* Motion for Damages for Violations of the Fundamental Rights of Protais Zigiranyirazo and Motion for Judicial Cooperation with the Kingdom of Belgium ("Motion"), 24 February 2012.
[5] Motion, Disposition.
[6] *Protais Zigiranyirazo v. Prosecutor*, ICTR-2001-01-73, Scheduling Order, 20 March 2012.
[7] *Protais Zigiranyirazo v. Prosecutor*, Prosecutor's Response to Motion for Damages for Violations of the Fundamental Rights of Protais Zigiranyirazo and Motion for Judicial Cooperation with the Kingdom of Belgium ("Response"), 18 April 2012; *Protais Zigiranyirazo v. Prosecutor*, Registrar's Submissions in Response to the Trial Chamber's Order of 20 March 2012 (Registrar's Submissions"),18 April 2012.
[8] *Protais Zigiranyirazo v. Prosecutor,* Reply to the Responses of the Registry and the Prosecutor to the Motion for Damages for Violations of the Fundamental Rights of Protais Zigiranyirazo and Motion for Judicial Cooperation with the Kingdom of Belgium ("Reply"), 6 May 2012.

argument that he is entitled to such compensation primarily, but not exclusively, on the theory of strict liability.[9]

7. Mr. Zigiranyirazo points to recent cases against single accused that have proceeded more expeditiously than the case against him, and argues that these cases demonstrate the unreasonableness of his lengthy detention. He adds that he cannot be expected to bear the cost of any failure of the international community to provide adequate resources to the Tribunal during these earlier cases.[10] He requests that the compensation include moral and exemplary damages, arguing that as a matter of public policy awarding punitive damages will have a deterrent effect and "improve international criminal law."[11]
8. The Registrar recognizes that the jurisprudence of the tribunal has established that an accused who has suffered a violation of his or her rights before the tribunal is entitled to an effective remedy which may include financial compensation, but opposes the request for compensation in the instant case.[12]
9. The Prosecution also opposes the Motion, rejects the Claimant's argument that there is a basis for his claim under a theory of strict liability, and observes that Mr. Zigiranyirazo failed to prove that any delays in his case were "undue".[13]
10. In his Reply, Mr. Zigiranyirazo reiterates his view that the underlying rule, in both domestic and international law, is that all violations of rights require compensation, adding that "it is not a defence against compensation to highlight that the Applicant's due process rights were respected."[14]
11. In response to submissions of the Prosecution and the Registrar, that his rights were respected, Mr. Zigiranyirazo argues that detention, by its nature is a violation of the right to liberty, and the harm exists "even if the violation resulted from the legitimate use of force by an authority."[15] As an example, he argues, that deprivation of freedom for long periods

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[9] Motion, paras. 2, 48-53.
[10] Motion, paras. 42-47.
[11] Motion, para. 121.
[12] Registrar's Submissions, para. 3.
[13] Response, paras. 2. b-c.
[14] *Zigiranyirazo v. Prosecutor*, Reply to the Responses of the Registry and the Prosecutor to the Motion for Damages for Violations of the Fundamental Rights of Protais Zigiranyirazo and Motion for Judicial Cooperation with the Kingdom of Belgium, 6 May 2012 ("Reply"), paras. 8 and 21.
[15] Reply, para. 14.

constitutes harm much greater than the temporary deprivation of the right to counsel or a delay in arraignment.[16]

DELIBERATIONS

Preliminary Matter

12. At the outset, the Chamber notes that in his motion, Mr. Zigiranyirazo raises arguments that have been the subject of extensive litigation in the past without referencing the jurisprudence, arguing that the jurisprudence was erroneous, or distinguishing earlier cases on the facts or law from the one at bar. Where this is the case, the Chamber will not reiterate the reasoning of prior chambers in any detail.

Failure to object during pre-trial, trial, and appellate proceedings

Submissions

13. The Prosecution observes that at no point during the eight years of his proceedings, did Mr. Zigiranyirazo allege any violation of his right to an expeditious trial or challenge his detention.[17] The Registrar does not address Mr. Zigiranyirazo's specific claims with respect to the length of his detention, but notes that he never filed a motion for provisional release. It is his view that this failure to seek a remedy at trial should bar him from receiving damages now.[18]
14. The Claimant disputes the Registrar's contention that he waived his right to expeditious proceedings and compensation by failing to address the issue at trial.[19]

Discussion

15. The Appeals Chamber has held that "[i]f a party raises no objection to a particular issue before the Trial Chamber (though all things considered it could reasonably have done so), in the absence of special circumstances the Appeals Chamber will find that the party has waived his right to adduce the issue as a valid ground [later]".[20] Although the Claimant has

[16] Reply, para. 19.
[17] Response, paras. 1, 2.a, 22.
[18] Registrar's Submissions, para. 5.
[19] Reply, paras. 25-27.
[20] *Prosecutor v. Akayesu*, Appeals Chamber Judgement, 1 June 2001, paras. 361. See also: *Prosecutor v. Zejnil Delalic*, IT-96-21-A, Appeals Chamber Judgement, 20 February 2001, para. 640.

referred to no exceptional circumstances warranting a departure from this rule, the Chamber will nonetheless consider the merits of his application in the interests of justice.

16. At the same time, it dismisses the Claimant's argument that it was already apparent in 2001 that international criminal cases were lengthy, that exhaustive investigations were required by both the Prosecution and the Defence, and that lengthy delays were endemic,[21] and thus that the Trial Chamber should either have stayed the proceedings or released him on bail *proprio motu.*[22] The Chamber considers that if in 2001 the Trial Chamber was aware, or should have been aware, that the proceedings would be lengthy, the Defence would have known the same. Yet, Counsel, who continues to represent the Claimant to this day, made no submissions on this issue to the Chamber at the time. The Chamber finds no support in the Statute, Rules or Jurisprudence, for the Claimant's claim that the Trial Chamber was under an obligation to act on its own initiative.

Compensation for Violations Stemming from Errors in the TC Judgement of 18 December 2008

Submissions

17. The Claimant submits that the Trial Chamber violated his fair trial rights by delivering a judgement that was replete with errors, and asserts that his claim for damages on this ground "is already the subject to a judicial determination."[23] Specifically, he cites the Appeals Chamber finding in its Judgement that the Trial Chamber committed three serious errors in assessing his alibi, and its conclusion that parts of the Trial Chamber Judgement "violated the most basic and fundamental principles of justice."[24]

18. Neither the Prosecution nor the Registrar made submissions on this issue.

Discussion

19. This Chamber is of the view that Article 85 (3) of the Statute of the International Criminal Court reflects the current state of customary law with respect to compensation for acquitted persons. It observes that the language of the Article is permissive rather than compulsory. Specifically, it states that "[i]n exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its

[21] Motion, paras. 30-31.
[22] Motion, paras. 29-41.
[23] Motion, paras. 74 and 75 (cited).
[24] Motion, paras. 73-82.

discretion award compensation..." to a person who has been acquitted. This Chamber also bears in mind that time lines for claims for compensation at the ICC are strictly regulated. Rule 173 of the ICC Rules of Procedure and Evidence stipulates that a request for compensation must be submitted no later than six months from the date of the relevant decision.

20. The Chamber recalls that in its Judgement reversing Mr. Zigiranyirazo's conviction for genocide, the Appeals Chamber held that the Trial Chamber had committed grave errors of fact and law.[25] However, as General Comment 32 on Article 14 of the ICCPR relating to the administration of justice sets out: "Article 14 guarantees procedural equality and fairness only, and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal."[26] The Appeals Chamber made no finding that the Trial Chamber committed these errors because it was not competent, impartial or independent, or that its conclusions were otherwise motivated by inappropriate considerations. It did not find that the prosecution of the Claimant was malicious. Nor has the Claimant contested the presumption that the Trial Chamber was competent, impartial and independent, or that the Prosecution acted with integrity in pursuing the case against him. Courts of first instance regularly make mistakes of fact and/or law. It is for this reason that Article 14 (5) of the ICCPR requires that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

21. The Chamber recognizes that the Appeals Chamber found that the Trial Chamber's errors constituted a "miscarriage of justice"[27] and that the Claimant's conviction "violated the most basic and fundamental principles of justice."[28] It further deems it self-evident that the Claimant suffered prejudice as a result of the year of detention between his conviction by the Trial Chamber and his subsequent acquittal by the Appeals Chamber. However, the Chamber, Judge Park dissenting, also takes into consideration that the Claimant did not submit his request for compensation until over two years after his acquittal by the Appeals Chamber. Further, he did not allege that the Prosecution was malicious or that the Trial Chamber was improperly constituted or motivated. It is clear that the framers of Article 85

[25] Appeals Judgement, see for example, paras. 39, 41, 43, 45-46, 63, 67-68, 73, 75.
[26] General Comment 32 relating to Article 14 of the International Covenant on Civil and Political Rights
[27] Appeals Judgement, para. 73.
[28] Appeals Judgement, para. 75.

(3) of the ICC Statute did not intend the mandatory provision of compensation to all individuals acquitted. The Chamber recalls that the Appeals Chamber will only reverse a trial chamber decision or judgement when it finds that the trial chamber has made "an error of law which [has] the potential to invalidate [its] decision or an error of fact which [has] occasioned a miscarriage of justice."[29] Thus, in those cases when the Appeals Chamber overturns a Trial Chamber conviction it is often because there was a miscarriage of justice. Yet, the Claimant has failed to propose a formula for distinguishing between "a grave and manifest miscarriage of justice" permitting compensation pursuant to Article 85 (3) of the ICC Statute, and a more standard error which might also result in an acquittal but no compensation. As Article 85 (3) of the ICC Statute is permissive, the framers do not appear to have intended the provision of compensation for each acquittal occasioned by a miscarriage of justice. The Chamber, Judge Park dissenting, is of the view that such compensation remains most appropriate where there has been a clear violation of a Claimant's fundamental rights as set out in Article 20 (4) of the Statute. It also bears in mind that to award compensation in the circumstances of this case might open the floodgates to an unmanageable host of compensation claims.

22. Taking these factors together, the Trial Chamber, Judge Park dissenting, chooses not to exercise its discretion to compensate the Claimant in this case for the period between his conviction by the Trial Chamber and his subsequent conviction by the Appeals Chamber.

Delay in providing legal assistance

Submissions

23. The Claimant submits that the Registrar was obliged to assign counsel to the Accused from the moment of his arrest by the Tribunal.[30] He notes that he was arrested in Belgium in late July 2001 and was not transferred to the Tribunal until early October of the same year. During this period "there was no attempt to provide for his return to Belgium, in the eventuality that he was acquitted."[31] The Claimant believes that this problem was compounded by the Registry's failure to assign counsel to him while he was in detention in

[29] Appellate Standard of Review. See for example, *Kanyarukiga v. Prosecutor*, ICTR-02-78-A, Judgement, 8 May 2012, para. 7.
[30] Motion, para. 90.
[31] Motion, paras. 87-89.

Belgium, because had he been granted legal assistance, his attorney would have "applied for and obtained from the Trial Chamber the appropriate guarantees to return to Belgium if acquitted."[32] Thus, he concludes that the Registry failed "in its duty to provide [the] accused with the means to protect his interests and fundamental rights."[33] In support of his position, he cites Article 20 (4)(d) of the Statute and Rules 42 and 45*bis*.[34]

24. In response to Mr. Zigiranyirazo's assertion that the Registrar should have assigned counsel to him immediately after his detention on the basis of an ICTR warrant, the Registrar notes that Rules 42 and 55[sic] apply when a suspect or accused is questioned by the Prosecutor of the ICTR, and that Mr. Zigiranyirazo does not allege that he was questioned by the Prosecutor of the ICTR while he was detained in Belgium.[35]

25. In his Reply, Mr. Zigiranyirazo notes that the Appeals Chamber in *Barayagwiza* held that once an accused has been arrested pursuant to an ICTR arrest warrant s/he is in the constructive custody of the Tribunal whether he or not s/he has been transferred to the seat of the Tribunal. On this basis, he disputes the Registrar's contention that he was not required to provide counsel to the Claimant until the Claimant was transferred to the custody of the ICTY.[36]

Discussion

26. The Appeals Chamber in *Rwamakuba* upheld the Trial Chamber's position in that case that the failure to provide legal assistance over an extended period of time could constitute a violation of the fundamental human rights of the accused.[37] At issue here is whether the Tribunal erred in failing to provide counsel to Mr. Zigiranyirazo during his nearly two month detention in Belgium before his transfer to the seat of the Tribunal.

27. Article 20 (4)(d) of the Statute is silent with respect to deadlines for the assignment of counsel. The Appeals Chamber in *Barayagwiza* held that the accused in that case was in the "constructive custody" of the Tribunal from the moment of his arrest and detention in response to a lawful request from the Tribunal to arrest and transfer the accused.[38] As for the

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[32] Motion, para. 95 (cited) and paras. 89-96.
[33] Motion, para. 90.
[34] Motion, paras. 91-94.
[35] Registrar's Submissions, paras. 14-16.
[36] Reply, para. 74.
[37] *Rwamakuba v. Prosecutor*, ICTR-98-44C-A, Decision on Appeal again Decision on Appropriate Remedy ("Rwamakuba Apppeals Decision"), 13 September 2007, paras. 27-28.
[38] *Barayagwiza v. Prosecutor*, [Appeals Chamber] Decision, 3 November 1999, paras. 61, 100.

Rules, the Chamber is of the view that there is some ambiguity with regard to the right of an accused to be assisted by counsel prior to his or her transfer to the ICTR. Rule 40 *bis* (I) refers to the assistance of counsel to an accused "after his transfer to the seat of the Tribunal." Rule 44 *bis* (D) refers to an the assignment of duty counsel to "an accused...{who] is unrepresented *after being transferred to the Tribunal.*" Rule 42 refers only to the right of a suspect "who is to be questioned by the Prosecutor", and is therefore inapplicable in this context. At the same time, Rule 45 *bis* stipulates that Rules 44 and 45 pertaining to the assignment of counsel apply "to any person detained under the authority of the Tribunal" but does not establish a deadline for the assignment of such counsel. The Appeals Chamber in *Kajelijeli* held that "the wording of Rule 44*bis* (D) is sufficiently clear ("unrepresented at any time") to find that such a duty exists *from the very moment of transfer to the Tribunal.*"[39]

28. Thus, while the Chamber concludes that Mr. Zigiranyirazo was under the constructive custody of the Tribunal from 25 July 2001, when he was arrested in Belgium pursuant to a warrant of arrest issued by the Tribunal, it finds no clear support for his proposition that he was entitled to have counsel assigned to him before his transfer to the ICTR. As will be discussed in further detail below, given that the Claimant was originally arrested by the Belgian authorities on an immigration "issue", the Chamber considers highly speculative his argument that had he been assigned counsel, counsel would have been able to negotiate the Claimant's return to Belgium in the event of an acquittal. Thus, the Claimant has not established that he was prejudiced by his inability to obtain legal assistance during his detention in Belgium. That said, the Chamber would propose that the Judges of the Tribunal consider whether Rules 40*bis* (I) and 44*bis* (D) are consistent with Rule 45*bis* at the next opportunity.

Compensation for Violation of Right to an Expeditious Trial

Submissions

29. Mr. Zigiranyirazo asserts that "[i]t stretches all logical reasoning to believe that the framers of the [International Covenant on Civil and Political Rights] could anticipate that an 8.5 year

[39] *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, para.245 (emphasis added).

period of detention would be considered reasonable".[40] He contends that his case was no more complex than two cases that followed his which proceeded more expeditiously.[41]

30. With respect to specific delays which he considers to have been "undue", Mr. Zigiranyirazo asserts that the Prosecution was not prepared to proceed against him at the time of his arrest. Indeed, "the Prosecution acquired almost all the evidence it used in court after [his] arrest in Belgium", and thus, the Indictment was amended three times after the arrest, resulting in numerous delays.[42] In turn, the Defence required additional time to address the new amendments and evidence.[43]

31. The Prosecution counters that while the Claimant has pointed to delays in his case, he has not argued that they were "undue".[44] It submits that in assessing the reasonableness of any delays, a Chamber must consider i) the complexity of the case, ii) the conduct of the parties and relevant authorities; and ii) the prejudice to the accused. Upon analysis of these criteria, the Prosecution concludes that any delays in Mr. Zigiranyirazo's case were not "undue."[45]

32. The Prosecution contends that the Claimant's reference to the overall duration of the proceedings is misguided. It is also of the view that Mr. Zigiranyirazo's comparison of recent cases with his is too superficial to be of assistance.[46] The Prosecution further observes that during a status conference held in May 2005, the Claimant asked for a continuance precisely because his case was so complex. The Prosecution concurs with the view expressed by the Claimant at the time that the case was complex.[47] It denies the Defence allegation that it was responsible for any undue delays or that it was dilatory in pursuing the case against the accused.[48] With respect to the amendments to the Indictment, the Prosecution establishes that on 20 March 2003, it filed a Motion seeking leave to amend the Indictment. On 15 October 2003, the Trial Chamber granted the Prosecution motion based on new and additional information available to the Prosecution.[49] On 2 March 2005,

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[40] Motion, para. 40.
[41] Motion, para. 44
[42] Motion, para. 35-36.
[43] Motion, paras. 35-38.
[44] Response, paras. 29-31.
[45] Response, paras. 31-64.
[46] Response, paras. 33-36.
[47] Response, paras. 37-42, 47.
[48] Response, paras. 43-49.
[49] Response, para. 9.

the Trial Chamber issued a decision granting the Prosecution leave to amend the indictment again. In that decision, the Trial Chamber allowed the Prosecution to add a new allegation.[50]

Discussion

33. The Appeals Chamber has held that in determining whether there has been a violation of the right to be tried without undue delay, a Chamber should consider the following factors:

(1) The length of the delay;
(2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
(3) The conduct of the parties;
(4) The conduct of the relevant authorities; and
(5) The prejudice to the accused, if any.[51]

34. Although the European Court of Human Rights ("ECHR") covers only a limited geographical area and therefore its jurisprudence alone cannot be described as constituting customary international law, it has addressed issues relating to reasonable lengths of detention and proceedings "without undue delay" in numerous criminal cases across a wide variety of states and legal systems within its jurisdiction, and thus this Chamber considers its jurisprudence to be persuasive. It has established that the issue of whether a period of detention is reasonable cannot be assessed in the abstract, and has adopted the same criteria as the ICTR Appeals Chamber for review.[52] It has also held that where an accused is detained, the ECHR "must also ascertain whether the competent ... authorities displayed special diligence in the conduct of the proceedings", and has established that it is incumbent on the authorities to explain any periods of inactivity or inertia.[53]

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[50] Response, paras. 14-15.
[51] *Prosecutor v. Mugiraneza*, ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and Appropriate Relief, 27 February 2004.
[52] *Mitev v. Bulgaria*, ECHR, Judgement, 22 December 2004, para. 104.

[53] *Labita v. Italy*, 6 April 2000, para. 153. See also, *Stogmuller v. Austria*, 10 November 1969, para. 5: Article 5 (3) [of the European Convention on Human Rights], for its part, refers only to persons charged and detained. It implies that there must be special diligence in the conduct of the prosecution of the cases concerning such persons. Already in this respect the reasonable time mentioned in this provision may be distinguished from that provided for in Article 6 [of the Convention]; *Mitev v. Bulgaria*, 22 December 2004, para. 104; *Crowther v. UK*, 1 February 2005, para.28; *Schacolas v. Cyprus*, 4 May 2006, para.123; *Gečas v. Lithuania*, 17 July 2007, para. 28.

35. The Chamber is again of the view that the Claimant's formulation of this particular issue is so imprecise as to warrant dismissal. Nevertheless, the Chamber has reviewed the evidence on the factors set out by the Appeals Chamber in the interests of justice.
36. With respect to the length of the proceedings, the Chamber agrees with the Complainant that the overall proceedings were lengthy particularly bearing in mind that he was in detention throughout. Any lengthy detention is prejudicial to an accused whether the detention is warranted or not. Nevertheless, the burden is on the Claimant to set out the particular delays he considers to have been undue.
37. As the Claimant has performed only the most perfunctory analysis in comparing his case with more recent cases which proceeded more expeditiously,[54] the Chamber cannot credit his assertion that any and all delays in his case were plainly unreasonable. Similarly, the Chamber finds that the Claimant has not established that the "relevant authorities", in this case, the Chambers or the Registry, were at any point inactive resulting in undue delays in the proceedings.
38. Turning to the conduct of the parties, the Chamber observes that according to the Claimant the ICTR issued a warrant for the Claimant's arrest after he was detained on an immigration issue by the Belgian authorities. It is not clear from the submissions whether the Claimant was ever afforded the opportunity to surrender to the Tribunal voluntarily. However, there is no evidence that the Claimant ever applied for provisional release, pursuant to Rule 65, and in this sense he can be said to have contributed to his own continued pre-trial detention.
39. With respect to the conduct of the Prosecution, this Chamber finds that there is merit to the Complainant's implicit claim that the Prosecution did not pursue its case against him with special diligence. In particular it observes that the Trial Chamber granted leave to the Prosecution to amend the indictment three times after the Claimant's arrest and detention.[55] Especially notable are its decisions in October 2003, and again in March 2005, to grant leave to the Prosecution to amend the Indictment "based on new and additional information available to the Prosecution after the confirmation of the initial indictment" over two years and three and a half years respectively after the arrest and detention of the Claimant.[56]

[54] Motion, paras. 42-47.
[55] Trial Judgement, Annex 1, paras. 1-8.
[56] Trial Judgement, TC Judgement, Annex 1, paras.3, 7.

40. This Chamber observes that in response to the Prosecution's 2003 Motion to amend the Indictment, the Claimant argued at length that granting the motion would "add undue delay to a time period that is already too long and unfair."[57] In its Decision on that motion, the Trial Chamber noted that the Prosecution was seeking to add new counts and facts to the Indictment but nevertheless granted the Prosecution leave to do so.[58] It is not for this Chamber to determine whether the Trial Chamber properly exercised its discretion in that decision. Rather, what is critical is that there is no evidence that the Claimant sought leave to appeal that decision. He cannot remedy this failure though this Chamber now.[59]
41. In objecting to the subsequent 2004 Prosecution Motion to amend the Indictment to include yet another new allegation, the Claimant did not raise the issue of undue delay and fair trial rights,[60] and again there is no evidence that he sought leave to appeal the Chamber's Decision granting the latter Prosecution request.
42. In his Closing Brief at trial, Mr. Zigiranyirazo alleged that the Prosecution had only begun the investigations against him after his arrest, but only to argue that evidence obtained so long after the events at issue could not be reliable, not to claim that the delay in collecting evidence had prejudiced his right to be tried without undue delay pursuant to Article 20 (4) (c) of the Statute. This despite the fact that the brief ran to 306 pages.[61] On appeal, the Claimant raised Prosecution's investigations after his arrest but again only to argue that the Trial Chamber had not considered his argument at trial that evidence obtained so late could not be credible.[62] Thus, the Chamber concludes that the Claimant repeatedly failed to assert his right to a trial without undue delay using the remedies available to him at trial and on appeal. It therefore denies the Motion on this ground.

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[57] *Prosecutor v. Zigiranyirazo,* Defence Response to Prosecutor's Motion to Amend the Indictment, 24 August 2003, paras. 28 (cited) and 29-49.
[58] *Prosecutor v. Zigiranyirazo,* Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003, paras. 20-22
[59] *Prosecutor v. Zigiranyirazo,* Prosecutor's Conditional Motion for Leave to Amend Indictment, 31 August 2004.
[60] *Prosecutor v. Zigiranyirazo,* Response to Prosecutor's Conditional Motion to Amend the Indictment, 9 September 2004.
[61] *Prosecutor v. Zigiranyirazo*, Defence Closing Brief, 24 April 2008, paras. 6-40.
[62] *Zigiranyirazo v. Prosecutor*, Claimant's Brief, 19 May 2009, paras. 401-408.

Compensation-Theory of Strict Liability

Submissions

43. Citing Articles 14 and 19 of the Statute, Rule 101 (C) of the Rules of Procedure and Evidence ("the Rules"), and Article 2 (3) (a) of the International Covenant on Civil and Political Rights (ICCPR), Mr. Zigiranyirazo submits that "international law provides for compensation of the acquitted detained as an effective remedy based on the principle of strict liability."[63] He argues that all pre-trial detention is a violation of the rights of the accused, and that both the ICTY and ICTR compensate convicted persons by giving them credit for time served in custody. He is of the view "that it is an incongruous and absurd interpretation of the Rules to compensate the convicted accused but not the acquitted accused."[64] He adds that common and continental legal systems both provide "numerous justifications" for the imposition of strict liability in "similar situations."[65] Under this principle, the Claimant is merely required to demonstrate damage and causation but need not show wrongful or malicious prosecution.[66] The request for compensation under this form of liability distinguishes Mr. Zigiranyirazo's claim from previous applications for compensation by acquitted persons.[67]
44. With respect to the Appeals Chamber decision on compensation in *Rwamakuba*, it is Mr. Zigiranyirazo's view that the Appeals Chamber did not settle the law with regard to compensation for acquitted persons.[68] Mr. Zigiranyirazo further argues that the *Rwamakuba* Trial Chamber erred in looking to state practice and customary international law for a "right to compensation." He contends that all pre-trial detentions involve a violation of the rights of the accused in the name of the public good and therefore that the right to seek compensation for these detentions is absolute in the event of acquittal.[69]
45. Mr. Zigiranyirazo recalls that in *Barayagwiza* and *Semanza*, the Appeals Chamber confirmed that a remedy for a violation of the rights of the accused could include an award of financial compensation,[70] and concludes that given the 8.5 years that he spent in

[63] Motion, para. 48.
[64] Motion, paras. 49,55.
[65] Motion, para. 53.
[66] Motion, para. 48.
[67] Motion, para. 27.
[68] Motion, para. 57.
[69] Motion, paras. 60-66.
[70] Motion, para. 19.

detention, it is "undeniable" that his rights were violated "regardless of the legitimacy of those actions by the Tribunal."[71]

46. The Prosecution accepts that there is a right under international law to compensation, but argues that it only exists with respect to serious violations of the fundamental rights of the accused, as reflected in Article 2 (3) (a) of the ICCPR.[72] In support of this argument, it reviews the specific circumstances in *Rwamakuba*, *Semanza* and *Barayagwiza* resulting in determinations by the Appeals Chamber that remedies were required in those cases.[73] The Prosecution concludes that the violation at issue must be "egregious" or manifestly "grave" to merit compensation, but is of the view that Mr. Zigiranyirazo has made no such claim with respect to his case.[74]

47. The Registrar submits that Mr. Zigiranyirazo's theory of strict liability finds virtually no support in either domestic or international law, and notes that no major human rights treaty includes a provision for compensation in the event of acquittal as opposed to a violation of a fundamental right.[75]

48. In response to the submissions of the Prosecution and Registry that no right to compensation under a theory of strict liability exists in international law, Mr. Zigiranyirazo argues that a strict liability standard has been consistently applied at the Tribunal when reducing the sentences of convicted individuals. Those who are convicted are not required to demonstrate fault in order to be compensation in the form of a sentence reduction.[76]

Discussion

49. Although it is central to his argument, Mr. Zigiranyirazo does not substantiate his claim that international law provides for compensation of an acquitted accused based on the principle of strict liability. The Chamber finds no support for this proposition in Articles 14 or 19 of the Statute, Rule 101 (C) or Article 2 (3) (a) of the ICCPR as cited by the Claimant, and notes that he has cited no jurisprudence. Further, it is of the view that the Claimant's assertion that the issue of strict liability has not been addressed in prior decisions by this Tribunal on compensation is erroneous. On the contrary, although it did not use the term

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[71] Motion, paras. 4, 20.
[72] Response, para. 25.
[73] Response, paras. 26-28.
[74] Response, paras. 29-31.
[75] Registrar's Submissions, paras. 6-7.
[76] Reply, para. 24.

"strict liability", the Appeals Chamber in *Rwamakuba* upheld the Trial Chamber finding that it "lacked authority to award compensation to Mr. Rwamakuba for having been prosecuted and acquitted," citing discussions with the Security Council and a review of the ICCPR.[77] In addition, as Mr. Zigiranyirazo has provided absolutely no support for his contention that "both common law and continental legal systems provide numerous justifications for the imposition of a strict liability regime" when an individual is acquitted following a lengthy detention,[78] this Chamber finds persuasive the analysis of the *Rwamakuba* Trial Chamber which concluded, on the contrary, that "there is insufficient evidence of State practice or of the recognition by States of this practice to establish that customary international law provides for compensation to an acquitted person..."[79]

50. The Chamber also notes that in response to the submissions of the Prosecution and Registry that a right to compensation under a theory of strict liability does not exist in international law, Mr. Zigiranyirazo argues that a strict liability standard has been consistently applied at the Tribunal when reducing the sentences of convicted individuals, and that those who are convicted are not required to demonstrate fault in order to obtain compensation in the form of a sentence reduction.[80] The Chamber observes that the Claimant cites no cases in support of his position on this matter. The Chamber itself finds that, on the contrary, sentences at the Tribunal have only been reduced following a finding that a specific right of the accused was gravely violated by an organ of the Tribunal.[81]
51. Thus, the Chamber dismisses Mr. Zigiranyirazo's claim that the principle of strict liability is applicable with respect to claims for compensation by acquitted persons.

Compensation for failure to return the Claimant to Belgium

Submissions

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[77] *Rwamakuba* AC Decision, para. 10. See also para. 25:"...there is no right to compensation for an acquittal *per se*..."
[78] Motion, para. 53.
[79] Rwamakuba TC Decision, para. 27.
[80] Reply, para. 24.
[81] See, *Rwamakuba v. Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, paras. 29-30; *Semanza v. Prosecutor*, ICTR-97-20-A, Judgement, 20 May 2005, paras.324-325; *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, paras.250, 323-324; *Barayagwiza v. Prosecutor*, ICTR-97-19, Decision, 3 November 1999, paras. 100-110.

52. Mr. Zigiranyirazo seeks compensation for damages suffered since his acquittal resulting from the failure of the Tribunal to "return him to Belgium" where he was arrested on 2001.[82] He argues that the Registry, Prosecution and President were negligent in 2001 in failing to ensure his return to Belgium in the event of an acquittal in his case,[83] and claims that as a result he has been "confined to" a safe house in Arusha, Tanzania since his acquittal by the Appeals Chamber in 2009.[84] He further requests "an order under Rule [sic] 28" requiring that Belgium cooperate in permitting him to reside there, arguing that while he may not have been a "full-fledged resident" of Belgium at the time of his arrest, he is nevertheless a legitimate refugee from Rwanda.[85]
53. The Registrar notes that while Mr. Zigiranyirazo asserts a duty on the part of the tribunal to relocate him to Belgium following his acquittal, he provides no legal support for this view relying instead on the argument that "[c]ommon fairness requires that the Tribunal guarantee his return to Belgium if acquitted."[86] Further, he objects to the Claimant's description of his current circumstances as "a form of limited detention", stressing the difference between the conditions under which the Claimant is currently accommodated and those of others veritably in detention.[87]
54. Nonetheless, the Registrar accepts that the Claimant may not wish to return to Rwanda and submits that he has undertaken numerous efforts to find a suitable alternative country for his relocation, Belgium and France in particular.[88] The Registrar further recalls that the problems relating to the Claimant are common to other individuals who have been acquitted by the Tribunal, and that he raised this with the Security Council, resulting in Security Council Resolution 2029(2011) calling on states to further cooperate with the Tribunal on this issue.[89] Finally, the Registrar notes that in a letter dated 28 March 2012, Mr. Zigiranyirazo indicated his willingness to be relocated to a country other than Belgium or

[82]Motion, para. 83-107.
[83]Motion, paras.95, 97-98.
[84]Motion, para. 13.
[85]Motion, paras. 142-146.
[86] Registrar's Submissions, paras. 14-15
[87] Registrar's Submissions, paras. 12-13.
[88] Registrar's Submissions, paras. 19-22.
[89] Registrar's Submissions, para. 23.

France. Had he indicated this earlier, his relocation might have proceeded more expeditiously.[90]

Discussion

55. In his motion, Mr. Zigiranyirazo notes that he was arrested in Belgium in late May 2001 "on an immigration issue", and that this detention eventually resulted in his transfer to the ICTR.[91] While he submits that he travelled to Belgium to apply for refugee status, there is no evidence that he was granted refugee status or citizenship by Belgium. Thus, his reference to his "right to return" to Belgium is inapposite. The ICTR is an international criminal court. Nothing in Article 28 or any other section of the ICTR statute or rules suggests that the Tribunal has jurisdiction to review refugee claims, confer refugee status on individuals, or interfere with the immigration policies, practices or decisions of sovereign states. Thus, the Chamber rejects the Claimant's argument that "the Registrar should have invoked Rule [sic] 28, on his own, to return the Applicant to Belgium."[92]

56. Moreover, the Appeals Chamber has previously held that

> Where a person has been acquitted and all proceedings against him have been finalized, the Tribunal is obliged to release him from its detention facility. The Registrar's responsibility in this respect is limited to making the necessary diplomatic, logistical, and physical arrangements for such release, taking into consideration, to the extent possible and as appropriate, the requests of the acquitted person.
>
> ... The Appeals Chamber finds that the diplomatic initiatives of the Registrar in relation to relocation do not fall within the ambit of the obligation of States to cooperate with the Tribunal under Article 28 of the Statute. Such an obligation pertains solely to the "investigation and prosecution of *persons accused* of committing serious violations of international humanitarian law", and hence does not extend to the relocation of acquitted persons.... there is no legal duty under Article 28 of the Statute for States to cooperate in the relocation of acquitted persons.[93]

57. The Chamber thus dismisses the applicant's application on this point, and further finds that this aspect of the Claimant's Motion is frivolous.

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[90] Registrar's Submissions, para. 24.
[91] Motion, paras. 4-8.
[92] Motion, para. 102.
[93] *In Re: Andre Ntagerura*, ICTR-99-46-A28, Decision on Motion to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008, 18 November 2008, paras. 14-15.

FOR THESE REASONS, THE DESIGNATED CHAMBER

DENIES the Motion in its Entirety.

Arusha, 18 June 2012, done in English.

Florence Rita Arrey	Seon Ki Park	Gberdao Gustave Kam
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

Partially Dissenting Opinion- Judge Park

1. While I concur with many of the Majority's conclusions regarding the claims for compensation raised by the Claimant, I differ with the Majority's decision to deny compensation as a remedy for the harm suffered by the Claimant as a result of his conviction by the Trial Chamber which was later reversed by the Appeals Chamber.
2. I am satisfied that the claim for compensation would not succeed under Article 14 (6) of the ICCPR, but agree that Article 85 (3) of the Rome Statute does allow for such compensation. In addition, I recall that that the Trial Chamber in *Rwamakuba* held that it was vested with the inherent power to provide an effective remedy to individuals who suffered a violation of their rights and that the right to an effective remedy is recognized by customary international law. Such power necessarily accrues to the Chamber as it is essential both for carrying out of its judicial functions and for complying with its obligation to respect general accepted international human rights norms. The Chamber further held that the absence of explicit provision providing for financial compensation in the Statute for violations of the rights of the Accused should not preclude a Chamber from awarding such a remedy to a claimant whose rights were violated.[94] Further in *Semanza* it held that "any violation, even if it entails a relative degree of prejudice, requires a proportional remedy".[95]
3. The *Rwamakuba* decision therefore left open the possibility of compensating individuals who have suffered damage as a result of violations of their rights. Bearing these factors in mind, I am of the view that the Chamber should have sought to determine whether the Claimant's impugned conviction violated his rights and whether he suffered any harm as a result.
4. In its Judgement in the instant case, the Appeals Chamber expressed, in words that do not invite ambiguity, that it considered the Trial Chamber to have violated the Claimant's most basic and fundamental rights. This violation stemmed from the Trial Chamber's reversal of the burden of proof in a manner that was detrimental to the Claimant's right to a fair trial. I am therefore constrained to conclude that the Claimant's detention

[94] *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, paras 45-49. See also Appeals Chamber decision upholding the Trial Chamber on this issue: *Rwamakuba v. Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Appropriate Remedy, 13 September 2007, para. 26

[95] *Semanza v. Prosecutor*, ICTR-97-20-A, Decision,

following his conviction by the Trial Chamber was entirely unjustified and that it violated his most basic and fundamental rights. This violation warrants redress, and it is my view, that in the circumstances the only effective remedy to the damage suffered by the claimant that was available to the Chamber is monetary compensation. Indeed, it is my view that the violations of the Claimant's rights in this case are far more serious than the violation found by the Trial Chamber, and endorsed by the Appeals Chamber, in *Rwamakuba*.

5. In assessing the Appeals Chamber's findings that the Claimant's conviction violated his basic and fundamental rights, the majority veered between two positions. On the one hand, the majority acknowledged that the Appeals Chamber found that the Claimant's conviction was fraught with error but held that these errors were not of sufficient gravity to have impaired the Claimant's rights to a fair trial, and are therefore unworthy of compensation. The majority refers to General Comment 32 on Article 14 of the ICCPR relating to the administration of justice, which sets out that: "article 14 guarantees procedural equality and fairness only, and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal." My view is that a reasonable construal of this comment suggests that the occurrence of errors in the process of administering justice is not in itself sufficient to hold an otherwise competent Tribunal responsible for the violation of the rights accorded to individuals by this instrument, but that implicit in this comment is the distinction between errors that impinge on the rights of the accused and those that do not affect the rights of the accused as enshrined in the ICCPR. Failure to distinguish between these two types of errors leads to the untenable situation where all errors are considered to be of the same gravity irrespective of their impact on the rights of the accused.
6. On the other hand, the Majority reasoned that notwithstanding the seriousness of the violations of the Claimant's rights, the claim for compensation should not succeed because his request was submitted over two years after his acquittal by the Appeals Chamber. Since my stance is that the Chamber is vested with inherent power to redress violations of rights, 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.

Arusha, 18 June 2012, done in English.

Seon Ki Park

Judge

[Seal of the Tribunal]