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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

Trial Chamber III

Before: Judge Florence Rita Arrey, Presidings
Judge Seon Ki Park
Judge Gberdao Gustave Kam

Registrar: Mr. Adama Dieng

Date Filed: 6 May 2012

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THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-01-73-A

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

(Rule 28 of the ICTR Statute and Rules 54 and 73 of the R.P.E.)

Counsel for the Prosecution

Hassan Bubacar Jallow

Counsel for Protais Zigiranyirazo

John Philpot
Charles Taku
Kyle Gervais

The Registrar

Pascal Besnier

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Introduction

1. Protais Zigiranyirazo, hereafter the Applicant, files this Reply to the Reponses of the Registry and the Prosecutor to his application for compensation and damages filed on 18 April 2012.

2. He requested compensation for his long detention; for the violations of the most basic and fundamental principles of justice by the Tribunal in convicting him on 18 December 2008; for the failure of the Tribunal to ensure that he could return to Belgium if acquitted; and the failure of the Tribunal to reunite with his family since his acquittal on 16 November 2009. He also requests moral damages for his lengthy and ongoing suffering as well as exemplary damages because of the carelessness of the Tribunal associated with his arrest, his conviction and the failure to return him to Belgium.

3. He also asked the Trial Chamber to request the cooperation of the Kingdom of Belgium and respectfully order the Kingdom of Belgium to accept Mr Zigiranyirazo's return to Belgium where he was arrested by the Tribunal in 2001.

Recent Procedural History

4. On 24 February 2012, Applicant filed his Motion.

5. On 20 March 2012, the Trial Chamber issued a Scheduling Order requiring the Prosecution and the Registry to file their submissions by 18 April 2012. On 2 April 2012, Applicant requested an additional Scheduling Order to file a reply to the Responses of the Registry and the Prosecutor. On 17 April 2012, the Chamber rendered a scheduling order requiring a Defense Reply by 11 May 2012. On 18 April 2012, the Prosecutor and Registry filed their respective responses to the Motion, hereafter referred to as Registry Response and the Prosecutor Response.

Introductory comments

6. The Applicant is cognizant that the Prosecutor's and Registrar's Responses were framed by this Trial Chamber's Scheduling Order of 20 March 2012. However, it should be noted that the Respondents appeared to make no substantive position on the Applicant's submission related to 1) Compensation Stemming from the Trial Chamber Judgement of 18 December 2008, 2) Moral damages, or 3) Exemplary Damages and only makes cursory remarks with respect to Quantum. Nor does the Registrar's Response object to the awarding of Costs to the Defense team as requested.

7. The Applicant will follow the sequencing of the Response of the Registrar for ease of consultation by the Chamber. Following this sequence, the Applicant will reply simultaneously to the Registrar and the Prosecutor.

Compensation

8. The underlying rule, in both domestic and international law, is that all violations of rights require compensation.[1] There is undoubtedly a General Principle in international law, found throughout Common, Continental and Islamic law, that the victim of a violation of rights has the right to compensation. This principle extends to the State.[2]

9. Contrary to the Registrar's submissions that "awarding financial compensation to the Mr. Zigiranyirazo would not produce an effective remedy[...],"[3] financial compensation is often the only available form of remedy. With due respect to the Registrar, unless he can turn back time to return Mr Zigiranyirazo to Belgium in 2001, financial compensation, however imperfect, is the best available mechanism to an effective remedy.

10. The Applicant stresses his arguments that the simple act of an acquittal is decidedly not sufficient compensation, as suggested by the Prosecutor.[4]

Compensation for Detention

11. The Prosecution's and Registry's arguments regarding compensation for the Applicant's 8.5 years of detention must all fail. Initially, the Prosecutor improperly frames the Applicant's submissions regarding detention. The Applicant, in his motion, explicitly accepts that pre-trial detention generally is legitimate, and never argues that it was 'unlawful.'[5]

12. The main crux of the Prosecution and Registrar's submissions on this point appears to be that as long as procedural due process guarantees are in place, the violations to the right to liberty disappear. For the Respondents, the legitimacy of the detention not only trumps the violation of the right to liberty, but also means that the violation never occurred.

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[1] *Andre Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C, *Decision on Appeal on Appropriate Remedy*, para 24.
[2] Subject in certain instances to the *State Immunity* doctrine, but which isn't relevant in the case at bar.
[3] Registrar Response para. 3
[4] Prosecutor Response para 63.
[5] Prosecutor Response, para 1.

13. The Applicant disagrees. Detention, but its very nature, is a violation of the right to liberty. The violation of the right to liberty, and the correlated harm, exists even if the violation resulted from a legitimate use of the use of force by an authority.

14. By analogy, the Applicant notes that in a domestic setting, if a house is expropriated and demolished (violation of the right to property and the correlated harm) in order to construct a vital new freeway (a government act for the public good), the legitimate nature of the action does not somehow eliminate the obvious nature of the harm. Society, through adequate compensation, indemnifies the individual for their loss of a house. This right to compensation exists even where due process rights are respected.

15. Finally, the Applicant notes that the Prosecutor implicitly acknowledges that the Applicant's right to liberty was violated. The Prosecutor notes "an acquittal is an ordinary part of any justice system and is a full and adequate remedy."[6] If the acquittal is supposedly a remedy--it is a remedy to what? This acknowledges that there is an underlying violation.

Seriousness

16. While the Prosecutor highlights the seriousness of other violations of the rights of the accused at the hands of the Tribunal, it in no way mitigates the seriousness of the violations against the accused. Whatever threshold the Prosecutor wishes to apply, whether "serious", "egregious" or "grave and manifest",[7] the violations committed against the Applicant are of the highest order. Importantly, the Prosecutor makes no arguments which actually compare the Applicant's harm with the other cases, and simply relies on recounting the jurisprudence to make his point.

17. At the very minimum, a man who was incarcerated for 8.5 years, whose detention and trial were both unconscionably long, who suffered through the stress and uncertainty of a terribly flawed judgement, whose reputation will forever be tainted and who remains confined to a small town in East Africa is at least comparable to the situations enumerated by the Prosecutor.

18. The Prosecutor equally appears to attempt a listing the types of violations which are compensated by the Tribunal, limiting it to "i) an accused was detained without being

[6] Prosecutor Response para 63.
[7] See generally; Prosecutor Response paras 24-30.

apprised of the charges against him or ii) the accused's initial appearance was delayed"[8] However, this list cannot be exhaustive.

19. Deprivation of freedom for long periods constitutes harm much greater that the temporary deprivation of the right to counsel or a delay in arraignment.

Strict Liability

20. The Prosecutor[9] and Registry's[10] arguments against *Strict Liability* must all necessarily fail as well.

21. Firstly, it is not a defence against compensation to highlight that the Applicant's due process rights were respected.[11] Notably, when the Statute compensates convicted individuals for their pre-trial detention, the Trial Chamber is not required to analyse whether the pre-trial detained's due process rights were respected. Rather, on a basis of *Strict Liability*, and without an analysis of *Fault*, the convicted are compensated.

22. This underscores the one of the main justifications of a imposing a *Strict Liability* regime in similar situations. The purpose of such regimes is to compel the entity which undertakes dangerous activities to institute all reasonable precautions against causing harm. However, in the inevitable event that the dangerous activity causes the predictable harm, the entity cannot use its precautionary measures as a defence.

23. The Applicant however agrees with the Prosecutor that *Strict Liability* regimes are imposed in response to inherently dangerous activities.[12] The detention of individuals who are presumed innocent prior to a determination of their guilt is an inherently risky activity. As noted by the prosecution, "acquittal is a normal part of any justice system."[13] It follows therefore that, in a system which accepts pre-trial detention, innocent people will be detained and have their rights to liberty violated. This is an inherently dangerous activity with very serious consequences.

24. A *Strict Liability* standard has consistently been 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 compensated in the form of a sentence reduction. Importantly, in *Rwamakuba*, the Tribunal correctly bridged the artificial distinction between

[8] Prosecutor Response, para 60.
[9] See Prosecutor Response, para 58-64.
[10] Registry Response para 6.
[11] See Prosecutor Response para 60-61.
[12] Prosecutor Response para 64.
[13] Prosecutor para 63.

financial compensation and compensation through a reduction in sentence. Therefore, the Applicant reiterates his position that *Strict Liability* is the appropriate standard for liability with respect to compensation for detention.

Right to a Trial Without Undue Delay

Waiver

25. The Prosecutor's arguments[14] with respect to a supposed waiver to the right to a trial without undue delay are misplaced.

26. Firstly, according to former ICTR President, Judge Erik Mose, an Accused during his proceedings, is "not required to co-operate actively in expediting the proceedings which may lead to his conviction."[15] Additionally, in domestic courts, it has equally held that "there is no obligation on any accused to progress matters towards trial, or to protest about delay; the obligation is on the prosecution to ensure trial without undue delay"[16] and "The accused should not be required to assert the explicitly protected individual right to trial within a reasonable time."[17]

27. Secondly, following the extensive jurisprudence on right to a speedy trial arising from the Government II case, the accused can only base a violation of his right to a trial without undue delay on the time elapsed up to that date.[18] The accused cannot base a motion anticipating the total length of detention. Therefore, it is only at the subsequent to the conclusion of the final Appeal judgement that the Applicant was in a position to make a claim regarding the totality of the violation of his rights.

Undue Delay

28. Within the context of ongoing criminal proceedings, the Prosecutor is correct in his application of the 5 factors. However, the Applicant respectfully suggests that the existing factors are context specific particularly when dealing with ongoing criminal proceedings, and a post-facto analysis of the violation to trial without undue delay may require the Trial Chamber differentiate from the existing jurisprudence.

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[14] Prosecutor Response, para 22.
[15] See Judge Mose, *Man's Inhumanity to Man Essay on International Law in Honor of Antonio Cassese*, eds. Vohrah et al. Kluwer Law International 2003 pg 543.
[16] New Zealand Supreme Court *Williams v R* [2009] NZSC 41. Para 12.
[17] Supreme Court of Canada R. *v.* Askov, [1990] 2 S.C.R. 1199
[18] *Bizimungu et al.*, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, 14 June 2007, para. 14.

29. Notably, the jurisprudence conflates the right to a fair trial and the right to a trial without undue delay. The Appeals Chamber has decided that "[t]he right to an expeditious trial is an inseparable and constituent element of the right to a fair trial."[19] With respect, the right to a fair trial and the right to a trial without undue delay are distinct rights but they can overlap. There may be undue delay, requiring a remedy, even though the delay did not affect trial fairness. The prejudice suffered by the Applicant due to his excessively long trial (and related detention) is far more holistic than simply a consideration of his fair trial rights.

30. The conflating of distinctive rights is appropriate in the context of a trial, but is poorly suited in the present context. Firstly, in the previous cases, the Chamber was typically being seized with a request to stay the case, which is not applicable here. Secondly, with respect to the prejudice to the accused, the Chamber appears most concerned with the fair trial rights. However, once the Accused is acquitted, the analysis of what constitutes prejudice should change.

Length of Delay:

31. The length of the delay is an important element in deciding whether there has been undue delay. It is the first factor to be considered and it is clear that the longer the delay, the more difficult it should be for a court to excuse it.

32. The Applicant's position is clear – all pretrial detention of an accused individual is a violation of the right to liberty, albeit legitimate. The Applicant does not contend, as suggested by the Prosecutor[20] that the simple act of detention is 'de facto' unreasonable. It is the specific length of the Applicant's detention was 'grossly excessive'[21] and he should therefore be compensated.

33. The Applicant additionally draws the Chamber's attention to Nahimana Appeal Judgement cited by the Prosecutor.[22] In it, the Appeal Chamber notes:

> ... In this regard, the Appeals Chamber notes in particular that the case cited to support the Appellant's argument relates to criminal proceedings before a domestic court and not before an international tribunal. However, because of the Tribunal's mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts. There is no doubt that the present case is particularly complex, due *inter alia* to the multiplicity of counts, the number of accused, witnesses and exhibits, and the complexity of the facts and the law, and that the proceedings could be expected to extend over an extended period.

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[19] *Prosecutor v. Kvocka*, Decision on Interlocutory Appeal by the Accused Zoron Zigic against the Decision of the Trial Chamber dated 5 December 2000, 25 May 200, para 20.
[20] Prosecutor Response para 33
[21] Applicant Motion para 28.
[22] Cited by the Prosecution, Response Brief, Para 34, fn 66, Nahimana Appeal Judgement para 1076.

34. It is clear that the Appeals Chamber in the cited case fails to draw comparisons between domestic and international cases because of their inherent differences. However, the cases which the Applicant cites have been heard at the same Tribunal, regarding similar indictments, similar fact patterns in terms of geographic and temporal scope and calling at times even more witnesses.

35. The only substantial difference between the proceedings in the Applicant's case and the most recent ICTR cases is that the Applicant's proceedings was over 300% longer. It is difficult to imagine how a comparison with these ICTR cases is "not relevant."[23]

36. Finally, the Applicant notes that, with the exception of the proceedings against Kajelijeli, who had his trial substantially delayed after the untimely death of Judge Kama, the Applicant suffered the through the longest trial.[24] The next longest single accused trial, which was 162 days shorter than the Applicant's, was also delayed due to the death of Judge Kama.[25] For a case that has no tragic or unforeseen events, it is clear from the track record of the Tribunal that the Applicant's case was an outlier in length.

The Complexity of the Proceedings

37. As noted above the Applicant suffered through a longer trial than any other single accused.

38. The Zigiranyirazo trial was very much fact based concerning the determination of guilt. The legal issues were relatively simple in the closing brief. It is wrong to blame legal issues for the length of the trial.[26]

39. This argument is rather weak when the Nizeyimana and Zigiranyirazo trials are compared. Both involve a serious alibi and complicated allegations of Command Responsibility of an informal nature. In the Applicant's case the Prosecutor called 25 witnesses while the Applicant called 41 witnesses. In the Nizeyimana case, each party called 42 witnesses. The Nizeyimana case will have been resolved in considerably less than three years whereas the time from arrest to Trial judgement for the Applicant was seven years and five months.

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[23] Prosecution Response para 36.

[24] As a function solely of Trial Length, measured as "Total of Days Between Trial and Judgement". The Applicant endured 1172 days of trial. The Applicant has not independently verified this numbers, however they are sourced from a Tribunal Symposium at; International Criminal Tribunal for Rwanda, "Symposium on the Legacy of International Criminal Courts and Tribunals in Africa", February 2010 pg 27, available at http://www.brandeis.edu/ethics/pdfs/internationaljustice/Legacy_of_ICTR_in_Africa_ICEJPL.pdf

[25] See *Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T,* 22 January 2004 para 24, 25.

40. In Ndahimana, there was equally lengthy discussion of the Accused's de facto power, which was the subject of a number of defence and prosecution witnesses.

The Conduct of the Parties;

41. The Applicant was not dilatory in the presentation of his case.

42. It is a fundamental precept of a criminal justice system that it is the responsibility of the Prosecutor to bring the accused to trial. Further, the right to be tried within a reasonable time is one that belongs to the accused. It follows that any inquiry into the conduct of the accused should in no way absolve the Prosecution from its responsibility to bring the accused to trial. An inquiry into the actions of the accused should be restricted to discovering those situations where the accused's acts either directly caused the delay, or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. These direct acts on the part of the accused, such as seeking an adjournment to retain new counsel, must of course be distinguished from those situations where the delay was caused by factors beyond the control of the accused.[27]

43. However, the Prosecutor at paragraphs 43, 45, 47, and 48 appears to suggest that somehow the Applicant was responsible for delays simply for exercising his rights, particularly his right to Preparation of a Defence. The actions of Applicant were simply an exercise of rights as an accused. It is not necessary that the accused cooperates in a manner to expedite the trial or renounce some of his rights. He is entitled to assert all of his procedural rights.

44. Moreover, the Applicant notes from the Prosecutor's Response, that there was an application to amend filed on 20 March 2003. A new amended indictment was filed on 31 August 2004. The Prosecutor's case had almost completely changed: he had moved the goal posts requiring serious new investigations in many countries whence Defence request for time to investigate.

Conduct of the Relevant Authorities;

45. The Prosecutor attempts place the blame for some of the delays at the feet of the Rwandan authorities.[28]

46. Firstly, the Applicant does not base his claim on the delays attributed to the Rwandan authorities.

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[27] Supreme Court of Canada, R. *v.* Askov, [1990] 2 S.C.R. 1199.
[28] See Prosecution Response Para 53, 54.

47. Secondly, the Rwandan authorities are an inherent part of the system of justice at the ICTR. If the Rwandan authorities are slow or obstructionist, it is part of the systemic failure of the Tribunal justice system and is therefore imputable to the Prosecutor. The Prosecutor attempts to parse the various reasons as to why the Applicant's process was excessively long. However these reasons all demonstrate the systemic delays endemic at the Tribunal, particularly in the early 2000's.

Prejudice to the Accused

48. Finally, the Prosecutor's understanding of prejudice is too restrictive. The Right to a Trial without Undue Delay is underpinned by a number of concerns of the Accused. Firstly, the Right is closely aligned with the Right to a Fair Trial. Namely, there are concerns that as proceedings are prolonged, memories fade and evidence disappears. Secondly, the Right is concerned with the stress and uncertainty caused by the delay. Having criminal proceedings hanging over the head of the accused is an inherently stressful situation. Thirdly, and most importantly, in the situation of the Applicant, he was incarcerated during this entire period. Regardless of our position the all pre-trial detention is a violation of the right to liberty, the fact is that the longer the case took, the longer an innocent person spent in jail.

49. Of the 5 factors, Prejudice to the Applicant is the most striking.

Alleged Waiver due to failure to Apply for Judicial Interim Release

50. At paragraphs 5 and 11 of the Registry Response, the Registry alleges waiver by the Applicant: he is barred from asking for damages since he did not apply for judicial interim release at trial or on appeal. This bar to action is wrong since the Applicant did not waive any right and could not have obtained judicial interim release in any case as described hereafter.

51. Judicial interim release is not a right as such and cannot be waived. It is not provided for in Article 20 of the Statute such as the Right to Counsel, to be Tried without Undue Delay, the Right to Call Witnesses or the Right to be Present at his Trial.[29] It is hard to conceive of the waiver of a non-right.

52. In some cases, an accused can waive a right such as the Right to be Present at his Trial or the Right to Counsel. Even in this case, any waiver of a fundamental right must be explicit and unequivocal. Waiver by an accused of his right to be present at trial must be free and unequivocal (though it can be express or tacit) and done with full knowledge. The

[29] See article 20 of the Statute for a full description of these rights.

accused must have had prior notification as to the place and date of the trial, as well as of the charges against him or her. The accused must also be informed of his/her right to be present at trial and be informed that his or her presence is required at trial. Where an accused who is in the custody of the Tribunal decides voluntarily not to be present at trial, it is in the interests of justice to assign him or her counsel.[30]

53. Any waiver, such as the right to counsel, must be shown "convincingly and beyond reasonable doubt". It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken.[31]

54. In the instant case, the applicant did not waive any right and never consented to being detained at trial or on appeal. He was detained by court order which was never vacated. There is no indication of any waiver which is convincing and beyond reasonable doubt or express and unequivocal.

55. Furthermore, at no time during his pre-judgment detention did the Applicant consider that he could provide the serious guarantees required by the Tribunal to grant judicial interim release.

56. On appeal, after conviction, the access to judicial interim release is raised in principle since the Accused no longer benefits from the presumption of innocence. At no time during his appeal proceedings did the Applicant consider he could provide any serious guarantees justifying interim release on appeal. He had no special compelling specific circumstances such as illness and he knew of no state that could guarantee that he would return to face trial.

57. Furthermore, the access to judicial interim release at the ICTR is rather academic since the Chambers have never granted judicial interim release.[32]

58. The argument of alleged waiver is wrong should be set aside.

Detention on Appeal

59. In paragraphs 8-11 of his Response, the Registrar makes serious errors concerning Applicant's claim for damages suffered as a result of his detention on appeal.

60. In paragraphs 9 and 10 of his Response, the Registrar explains that the Applicant's reliance on the egregious nature of the Trial Chamber's error is a mistake since it had no

[30] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para.
[31] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 18
[32] To the knowledge of the Applicant and his counsel

determinative effect on his detention. Furthermore, according to the Registrar, there is no legal difference between pre-judgement and post judgment detention. These are fundamental errors.

61. The "egregious" errors by the Trial Chamber were the direct cause of the post judgment detention. The Applicant would have been acquitted and a free man on 18 December 2008 had the Trial Chamber not :

- committed three serious errors and failed to appreciate that Zigiranyirazo only needed to establish reasonable doubt,[33]
- expressly misapplied the burden of proof and made a clear legal error on the application of the burden of proof,[34]
- failed to address the issue of the distance, time, and feasibility of travel to Kesho from Kanombe in the light of considerable evidence placing Zigiranyirazo at Kanombe at various times on 8 April 1994,[35]
- failed to provide a reasoned opinion on the feasibility of the Applicant's travel between Kanombe and Kesho Hill on 8 April 1994,[36] and
- committed serious errors since the crimes Zigiranyirazo was accused of were very grave, meriting the most careful of analyses, misstating the principles of law governing the distribution of the burden of proof with regards to alibi and seriously erring in its handling of the evidence, and erred in such a manner as to convict the applicant and the most basic and fundamental principles of justice. [37]

62. The causal link between the egregious errors and the post-conviction damages is clearly established: the errors caused his detention from December 18, 2008 to 16 November 2009. Damages suffered as a result of these violations of his fundamental rights should be compensated.

63. The Registry sees no legal difference between detention before and after conviction as stated in his Response at paragraph 10. This is wrong: there is a clear distinction between pre-conviction and post-conviction detention. At trial, an Accused is presumed innocent. After conviction and during appeal, the convicted man is deprived of the presumption of

[33] Trial judgment paras. 39 and 41
[34] Trial judgment paras 41, and 43
[35] Trial judgment para para 45.
[36] Trial judgment para 46
[37] Trial judgment para 75

innocence, therefore reversing the burden of proof. The convicted man must prove his innocence on appeal whereas prior to conviction, the burden is on the Prosecutor to prove guilt beyond a reasonable doubt.

64. For an innocent man such as the Applicant, stricken by an egregious and unfair judgement, post-conviction detention is even worse and more stressful than the terrible experience of detention up to judgement. With his conviction and the brutal end of the presumption of innocence, any hope for release is seriously undermined. The future is black like a bottomless pit. The Applicant faced life and probable death in prison. He suffered a stigma for himself and his family. No trial conviction at the ICTR trial had been completely overturned and the prisoner released. What hope was there? The Trial Chamber had sent him to "hell" by its terrible violation of his fundamental rights to a fair trial.

65. Notably, the Applicant's damages suffered during this period of detention on appeal were far greater, resulting from moral and psychological harm owing to the deeply flawed *Trial Chamber* judgement. This is similar in nature, but far greater in length and degree to the "confusion, isolation and distress" for which *Rwamakuba* was compensated. [38]

66. Post-conviction detention was caused by the egregious errors of the Trial Chamber and damages are increased as described in the Motion.[39]

67. For this reason, the Registry arguments concerning post-conviction detention should be rejected and Applicant's claim with respect to the period 18 December 2008 to 16 November 2008 should be granted independently of all other claims.

Confinement to Arusha and Relocation

68. In paragraphs 12-16 and 17-25 of the Registry Response, the Registry argues against Applicants claims concerning confinement to Arusha and Relocation.

69. In paragraph 13, the Registrar argues that the Applicant is a free man living in comfort in Arusha. This belies the fact that the Applicant is prevented from living with family members, cannot work, has no travel document and is "standing still" in his life with no perspective for change after spending more than eight years in prison for crimes he did not commit.

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[38] *Rwamakuba Trial Decision on Remedy*. para. 73, Decision approved on appeal *Decision on Appeal against Decision on Appropriate Remedy*, 13 September 2007

[39] See the entire Motion, in particular, paras. 124. ss. 135, 139, 140.

70. The Tribunal publicly uses the term "locked" to describe the situation of acquitted persons. It is right to recognize the deprivation of liberty to the world community. ICTR spokesperson and Senior Legal Counsel for the Tribunal, Mr Roland Amoussouga, to CBC Radio on 18 April 2012 spoke in detail about the plight of the acquitted and referred to them as being "locked in a same place and not to be able to travel ... .".[40] The Applicant asks the court to accept this term invoked by Tribunal spokesperson, Mr Roland Amoussouga.

Right to Counsel in Belgium

71. In his section "Confinement to Arusha", the Registry makes a serious error concerning its obligations with respect to the Accused in Belgium.

72. He argues at paragraph 16 that when the Applicant was in Belgium in 2001 that he had no jurisdiction to assign counsel to the Applicant since he was in the custody of Belgian authorities and not detained under the authority of the Tribunal.

73. This is wrong. The Applicant was detained under the authority of the Tribunal. The Tribunal ordered that Belgium detain him for transfer to Arusha. Any suggestion that he was not detained under the authority of the Tribunal does not make sense.

74. The jurisprudence of the Appeal Chamber is clear: once a detention and transfer order has been applied a detainee, he is under the constructive custody of the Tribunal in the country he is being held, in the instant case, Belgium.[41]

75. Any person detained under the authority of the Tribunal must be assigned counsel according to Rule 45 *bis*. And indeed this makes sense. One can imagine a case where the international warrant arrests the wrong person. Counsel could prevent a disastrous situation of transferring the wrong person to Arusha. The same would apply if the Warrant of Arrest was not signed by the Presiding Judge or if the documents served on the Accused did not respect the form required by law. Similarly, if the Arrest and transfer order does not provide the right of the Accused to be returned to the country of arrest upon acquittal. Assigned counsel could have applied to a Chamber of the ICTR to obtain the appropriate remedy.

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[40] Canadian CBC 18 April 2012, "Unwanted Acquitted Rwandans", beginning at minute 5min 40 seconds; http://www.cbc.ca/thecurrent/popupaudio.html?clipIds=2224235225

[41] Decision of 3 November 1999, JEAN-BOSCO BARAYAGWIZA v.THE PROSECUTOR, DECISION, *Case No: ICTR-97-19-AR72* para. 61.. The Prosecutor's argument that the rights of the prisoner under the Rule were only created after reaching Arusha. This argument was rejected. This decision was reversed in part concerning the remedy in *Arrêt (Demande du Procureur en Révision ou Réexamen),* Jean-Bosco Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, 31 March 2000. The findings about detention by Cameroun for the Tribunal was undisturbed.

76. An Accused has the right to counsel if it is in the interests of justice. Upon arrest, the Accused, in this case in Belgium, is informed of his right to counsel under Article 20 of the Statute where the interests of justice so require.[42] Surely the interests of justice would have been served with assignment of counsel in Belgium. Many of the damages suffered by the Applicant from 16 November 2009 would have been mitigated.

77. And even if the argument on Right to be Assigned Counsel during the period in Belgium fails, the Registry made a serious error when the Accused was arrested in Belgium. He failed to insist on the right to return if the Accused were acquitted, namely the *statu quo ante* argument raised in the Motion at paragraph 101. The Trial Chamber and the Prosecutor did not address is issue of the right to return in spite of its importance.

78. The Registrar admits that the *statu quo ante* argument is valid in paragraph 22 of his Response. He asked Belgium to take back the Applicant on 14 January 2010 based on *statu quo ante*. He should have invoked in in 2001 or by a Rule 28 application. He is some 9-12 years late.

79. It appears from the Registrar's Response that he has done nothing specific to try to relocate Mr Zigiranyirazo for more than two years. The last intervention by the Registry was on 14 January 2010.[43] Why was there no recourse to the powers of the Court under Rule 28?

80. The Registrar is mistaken at paragraph 23 of his Response when he says he has gone beyond a Rule 28 Order from the Trial Chamber. General requests for support for the acquitted Accused are of course necessary. He explains that the President has made repeated claims to the Security Council in favour of acquitted persons and refers to Security Council Resolution 2029(2011). These general broad requests are required but do not address the the specific issues of the Applicant with respect to his right to return to Belgium.

81. Contrary his argument at paragraph 23 of his Response, the Registrar has not gone beyond the scope of a Rule 28 application. A Rule 28 order will address the specific concern of the Applicant to which Belgium will be required to respond. If Belgium does not respect the Rule 28 Order, the Applicant can move the President to report Belgium to the Security Council. This is a useful, available procedure which can right some of the wrongs suffered by the Applicant. The Registry should have been proactive with the Court to right the wrongs suffered by the Applicant.

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[42] Motion para. 92.
[43] Registry Response para 22.

82. A Rule 28 order is essential to make up for the lost time.

83. The Applicant notes the judicial admission in paragraph 25 of the Registry Response that the Applicant has been wronged and is in a "difficult situation" and that solutions are "sorely lacking."

Quantum

84. The Respondents make limited argument with respect to Quantum, ignoring the Applicant's position with respect to Pecuniary, Moral and Exemplary damages. Additionally, there are no representations with respect to Costs. Rather, and without serious analysis, the Respondents base their arguments on "Proportionality."

"Proportionality"

85. The Applicant reiterates his arguments in his *Motion* and believes that the Prosecutor's arguments with respect Proportionality[44] are out of touch with reality. It must be understood that the Applicant's harm is exponentially more serious than any of the cases cited by the Prosecutor.

86. Nor is the Applicant's claim for compensation is far from "staggering."[45] The Applicant's claims are entirely reasonable, proportional to previous compensation claims (both financial and sentence reductions), and fully justified in his motion.

Financial Liability of Registrar for Damages

87. In the Registry Response at paragraph 25, the Registry explains that the Tribunal budget does not provide for the indemnities sought by the Applicant.

88. This is an error: the Appeals Chamber has held:

> .... Budgetary considerations cannot interfere with the Tribunal's authority to award financial compensation as an effective remedy for a human rights violation; similarly, at the domestic level, a State cannot advance the argument that there are no budgetary resources available to justify a refusal to award compensation.[46]

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[44] See Prosecutor Response para 65-67; See also Prosecutor Response Para 26-29
[45] Prosecutor Response Para 67
[46] *André Rwamakuba vs The Prosecutor*, Case No: ICTR-98-44C-, *Decision on Appeal on Appropriate Remedy*, para. 24 (Rwamakuba Appeal Decision on Remedy) at para 30.

Additional Comments

89. The Respondents regularly compare the Tribunal to a normally functioning domestic legal system. However, any comparison between this Tribunal and domestic criminal systems demonstrates its exceptional nature.

90. In domestic jurisdictions which limit the right to compensation for the acquitted, there is an implicit social contract which mitigates the risks of a citizen being wrongfully detained. This social contract, which manifests itself through a sense of community, charity, civil society, progressive taxation, representative democracy and state run social services, is what is being protected when an innocent individual is detained. These 'society' benefits are enjoyed by the pre-trial detained prior and subsequent to his detention, and mitigates the harm to the accused and his family during his pre-trial detention.

91. However, in the international context, the only society which arguably exists is the association of Nations.[47] The level at which this functions as a society is debatable. Regardless, the benefits of this 'society' accrue to states, and not directly to citizens. In any event, the Applicant is virtually a stateless person, who, through the coercive use of force by the international community, enjoys no state protection. The Applicant has borne unimaginable costs to benefit a 'society' from which he does not draw any direct benefit. The philosophical arguments which underpin the legitimacy of pre-trial detention domestically simply do not extend into the international realm.

92. The Applicant suffered immeasurable harm as a result of the coercive use of force by the international "community." Worse, once detained, that community failed to provide the required resources necessary to ensure the most efficient resolution possible of cases. It isn't the Tribunal which necessarily owes the Applicant compensation, but rather the international community which is responsible for the violation of his rights as stated by the Appeals Chamber.

93. He suffered and is still suffering terrible harm due to the failure of the Tribunal to guarantee his return to Belgium when the presumption of innocence became reality on 16 November 2009 with his acquittal on all charges.

[47] Borrowing from the language of Woodrow Wilson's 14 Points for Peace which led to the formation of the League of Nations. "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."

Conclusion

94. The Application reiterates his claim substantiated by the Reply to the different arguments in the Responses of the Prosecutor and the Registrar.

95. He asks the Chamber to render a speedy decision to permit his return to Belgium in the near future.

Respectfully submitted,

John Philpot,
Counsel

Charles Taku

Kyle Gervais,
Legal Assistant

United Nations
Nations Unies

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Case Name:	The Prosecutor vs. **Protais Zigiranyirazo**	**Case Number:**	ICTR-01-73-A
Dates:	Transmitted: **6 May 2012**	Document's date: **6 May 2012**	
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Title of Document:	**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 (Rule 28 of the ICTR Statute and Rules 54 and 73 of the R.P.E.)**		

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