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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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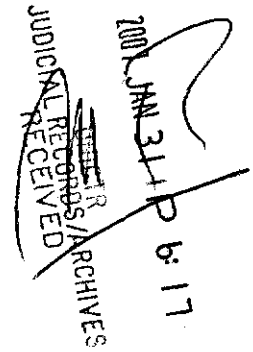
TRIAL CHAMBER III



Before Judges:	*Dennis C. M. Byron, Presiding* Karin Hökborg Gberdao Gustave Kam
Registrar:	Adama Dieng
Date:	31 January 2007

THE PROSECUTOR

v.

André RWAMAKUBA

Case No. ICTR-98-44C-T

DECISION ON APPROPRIATE REMEDY

Office of the Prosecutor:
Dior Fall
Iain Morley
Adama Niane

Defence Counsel:
David Hooper
Andreas O'Shea

INTRODUCTION

1. On 20 September 2006, the Chamber rendered its Judgement in the present case, acquitting André Rwamakuba of all charges and consequently ordering his immediate release.[1]

2. In a decision dated 12 December 2000,[2] Trial Chamber II found that the Registrar had failed to appoint Duty Counsel for André Rwamakuba during the initial months of his detention at the United Nations Detention Facilities ("UNDF"), from 22 October 1998 until 10 March 1999, in breach of Rule 44 *bis* of the Rules of Evidence and Procedure.[3] It further held that this was a violation of Rwamakuba's right to legal assistance and that the delay in assigning him duty Counsel had caused a delay in his initial appearance.[4] Trial Chamber II did not consider that the said delays in providing Rwamakuba with legal representation and in his initial appearance had caused him a serious and irreparable prejudice.[5] Concluding that there was no accumulation of violations of André Rwamakuba's rights, Trial Chamber II dismissed the Defence motion for his immediate and unconditional release.[6]

3. On 11 June 2001, the Appeals Chamber dismissed the appeal filed by André Rwamakuba against Trial Chamber II's Decision. It found that the notice of appeal did not meet the requirements for an interlocutory appeal challenging the Indictment. The Appeals Chamber, however, considered that "it [was] open to [Rwamakuba] to invoke the issue of the alleged violation of his fundamental human rights by the Tribunal in order to seek reparation as the case may be, at the appropriate time."[7]

4. In its Judgement of 20 September 2006, the Chamber held that in light of the previous finding of a violation of André Rwamakuba's right to legal assistance, he was at liberty to file an application seeking an appropriate remedy for the violation of his right to legal assistance between 22 October 1998 and 10 March 1999.[8] The Chamber further invited the Prosecution and the Registrar to file any submission on this issue.

5. On 25 October 2006, the Defence filed an "Application for Appropriate Remedy,"[9] by which it claims an appropriate remedy not only for the violation of André Rwamakuba's right to legal assistance, but also for the alleged grave and manifest injustice occasioned, inter alia, by the manipulation of evidence against him during his case. In its submission, the Defence requests that the Chamber order that the Registrar: (i) provide Rwamakuba with an apology; (ii) seek the good offices of the State where Rwamakuba's family is present to facilitate some temporary status for him in that State; (iii) seek the good offices of that State to ensure the uninterrupted schooling of Rwamakuba's children; and (iv) provide financial compensation

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[1] *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Judgement (TC), 20 September 2006.
[2] *Rwamakuba*, Decision on the Defence Motion concerning the Illegal Arrest and Illegal Detention of the Accused (TC), 12 December 2000 ("Decision on Illegal Arrest and Detention").
[3] Rule 44 *bis* (d) reads: "If an accused, or suspect transferred under Rule 40 *bis*, is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused or suspect until counsel is engaged by the accused or suspect, or assigned under Rule 45."
[4] *Rwamakuba*, Decision on Illegal Arrest and Detention (TC), 12 December 2000, at para. 43.
[5] *Ibid.*, at para. 45.
[6] *Ibid.*
[7] *Rwamakuba*, Decision on Appeal against Dismissal of Motion Concerning Illegal Arrest and Detention (AC), 11 June 2001.
[8] *Ibid.*, at paras. 217-220 and Order III.
[9] Defence for André Rwamakuba, Application for Appropriate Remedy, 25 October 2006 ("Defence Application").

to Rwamakuba.[10] With respect to the violation of Rwamakuba's right to legal assistance, it specifically seeks compensation covering a minimum of 2,000 US dollars (USD) per month for loss of earnings and 10,000 USD for emotional stress.[11]

6. On 2 November 2006, the Registrar filed his response, in accordance with an extension of time granted by the Chamber,[12] in which he opposes the Defence application on various grounds.[13] On 9 November 2006, the Defence filed a Reply to the Registrar's Submissions.[14] The Registrar filed additional submissions on 24 November 2006 and 7 December 2006.[15] The Prosecutor did not file any submissions on this issue.

DELIBERATIONS

7. Before ruling on the merits, the Chamber will first address two preliminary matters relating to the timeliness and scope of the submissions filed by the Defence and the Registrar. The Chamber will then determine if any violation of André Rwamakuba's rights entitles him to an appropriate remedy, and what, in the circumstances of the case, constitutes an appropriate remedy.

1. Preliminary Matters

1.1 Timeliness of the Submissions filed by the Defence and the Registrar

8. The Defence Application is dated 23 October 2006, but was filed on 25 October 2006, two days after the deadline for submissions set out in Order III of the Judgement.[16] The Chamber considers however that it is in the interests of justice to accept this late submission.

9. In addition to the submissions filed in accordance with the Chamber's Order, the Registrar filed two additional submissions on 24 November and 7 December 2006, respectively[17] The Defence has not responded to any of these additional submissions.

10. In the filing of 24 November 2006, the Registrar contends that the Defence misunderstands a number of his arguments and therefore requests the right to present some clarifications.[18] In its submissions of 2 November 2006, the Registrar undertook to seek the

[10] *Ibid.*, pp. 10-11.
[11] *Ibid.*, p. 10.
[12] See *Rwamakuba*, Decision Granting Extension of Time to File Submissions (TC), 31 October 2006.
[13] The Registrar, "The Registrar's Submissions Regarding André Rwamakuba's Request for an Appropriate Remedy," 2 November 2006 ("Registrar's Submissions").
[14] Defence for André Rwamakuba, "Reply to the Registrar's Submissions Regarding André Rwamakuba's Request for an Appropriate Remedy," 9 November 2006 ("Defence Reply").
[15] The Registrar, "The Registrar's Additional Submissions in regard to the Defence Application for Remedy," 24 November 2006 ("Registrar's Additional Submissions of 24 November 2006"); The Registrar, "The Registrar's Additional Submissions in regard to the Defence Application for Remedy," 7 December 2006 ("Registrar's Additional Submissions of 7 December 2006").
[16] *Rwamakuba*, Judgement (TC), 20 September 2006, Order III: "The Defence is at liberty to file any application seeking appropriate remedy to the violation of his right to legal assistance between 22 October 1998 and 10 March 1999 no later than 23 October 2006."
[17] These submissions were filed pursuant to Rule 33(B) of the Rules, whereby the Registrar may make a submission to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of his functions.
[18] The Registrar clarifies that he questions the appropriateness of making a claim for compensation for unwarranted proceedings and prolonged detention before the Chamber. In that respect, the Registrar refers to letters from Presidents of this Tribunal or of the International Criminal Tribunal for Former Yugoslavia

legal advice of the Office of Legal Affairs ("OLA") of the UN Secretary-General on the Defence Application. The additional submission filed by the Registrar on 7 December 2006 relays the substance of the OLA's legal advice on the Defence Application.

11. According to Order III of the Chamber's Judgement, the Registrar was supposed to file only one submission. Nevertheless, the Chamber decides to take into consideration the Registrar's Additional Submissions of 24 November 2006 since the arguments developed therein with respect to the powers of the Chamber and the prior positions expressed by the Presidents of the ICTR and ICTY were already contained in his two initial submissions and since the Additional Submissions of 24 November 2006 only amount to providing the Chamber and the parties with documents which were either publicly available or were previously communicated to the Defence. With respect to the Additional Submissions of 7 December 2006, the Chamber also decides to consider the arguments developed in this submission, reproducing the OLA's advice, as they do not in substance constitute new arguments on the issues under consideration and because they were not previously available.

1.2 Scope of the Defence's Application and Orders of the Judgement

12. The Registrar submits that the Defence Application exceeds Order III of the Judgement in that the Defence also seeks an appropriate remedy for the grave and serious miscarriage of justice due to the time André Rwamakuba spent in the custody of the Tribunal prior to his acquittal and alleged manipulation of evidence.[19]

13. While this Defence request exceeds the Order III of the Judgement, the Chamber finds that it is in the interests of justice to discuss it since it could pertain to the fundamental rights of a former accused of the Tribunal.

2. Violation of the Rights of André Rwamakuba Entitling Him to an Effective Remedy

14. The Defence claims an appropriate remedy for the violation of André Rwamakuba's right to legal assistance as well as for the alleged grave and manifest miscarriage of justice occasioned in his case. The Chamber will separately address these two issues hereinafter.

2.1 Violation of André Rwamakuba's Right to Legal Assistance

15. The Registrar submits that, in its Decision of December 2000, Trial Chamber II did not find that André Rwamakuba suffered serious or irreparable prejudice as a result of the Registrar's failure to appoint a Duty Counsel as soon as practicable. The Registrar also emphasizes the particular circumstances of the case at that time. The Registrar explains first, that the duty to appoint a Duty Counsel had not been enshrined in the Rules until just over four months before Rwamakuba arrived in Arusha; second, the initial appearance would have taken place in a reasonable time had Rwamakuba advised the Registrar in due time of his

("ICTY") indicating that the Tribunals do not have the mandate, under their respective Statutes, to provide compensation to persons wrongly accused and then acquitted by the Tribunal. The Registrar contends that the United Nations Secretary-General, through his Legal Counsel, might be in a better position to direct the concerned party to the organ or party which could effectuate payment in compensation to André Rwamakuba, should such relief be considered appropriate. The Registrar also attached an Inter-Office Memorandum by the Court Management Section, dated 16 February 2000, concerning the issue of the assignment of Duty Counsel to André Rwamakuba at that time "to assist this Chamber in its deliberations on this issue." (Registrar's Additional Submissions of 24 November 2006, at para. 8).

[19] Registrar's Submissions, at para. 7.

wish to have Defence Counsel assigned to him, based on a claim of indigence; third, as the Registrar was taking diligent steps to implement the new practice imposed by the new Rule, there was a limited number of counsel practising in Arusha who qualified as Duty Counsel for the Tribunal; and fourth, a statement of the rights possessed by an accused had already been served on Rwamakuba, who is an intelligent, educated man who has held senior ministerial office in his government.[20] The Registrar further submits that the delay in Rwamakuba's initial appearance was partly attributable to the difficulty in assigning Defence Counsel to the co-accused.[21] To support its submission, the Registrar provides copy of an Inter-Office Memorandum by the Court Management Section, dated 16 February 2000, which was made available to the parties and Trial Chamber II at the time of its deliberations on the Defence Motion concerning the illegal arrest and detention of Rwamakuba.[22]

16. The Chamber is not persuaded by the Registrar's arguments regarding the seriousness of the breach of André Rwamakuba's right to legal assistance as set forth in Rule 44 *bis* of the Rules. Even if the specific circumstances of this case could explain the reason why Rwamakuba's right was violated – as claimed by the Registrar – and even if the prejudice was not as serious and irreparable as to justify his immediate release, Trial Chamber II clearly established the existence of the violation of one of Rwamakuba's fundamental rights while he was an accused before this Tribunal.[23] Moreover, it is a fundamental principle of international human rights law, as recalled by the Appeals Chamber, that any violation of a human right entails the provision of an effective remedy.[24]

17. Furthermore, Rule 44 *bis* gives effect to one of the most important fair trial rights of an accused, the right to legal assistance.[25] While it is true that this rule was included in the Rules on 8 June 1998, just over four months before the breach started to take place, it is nonetheless clearly established under international human rights law that the right to counsel attaches at the investigative and pre-trial stages.[26] What is more, an infringement of Rule 44 *bis* would generally be considered as a violation of the right to legal assistance as enshrined in international human rights law. Indeed, it is in the interests of justice that legal assistance be provided to the accused in international criminal law from the earliest stages of the proceedings as it involves complex cases, concerns serious offences and entails significant potential sentences.[27]

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[20] Registrar's Submissions, at paras. 11-17.
[21] Registrar's Additional Submissions of 24 November, at para. 10.
[22] Registrar's Additional Submissions of 24 November, at para. 8.
[23] *Rwamakuba*, Decision on Illegal Arrest and Detention (TC), 12 December 2000, at para. 43.
[24] See, below, at paras. 40-44.
[25] See *Pham Hoang v. France*, Judgement of 25 September 1992, Series A no. 243, p. 23, at para. 39; *Prosecutor v. Slobodan Milošević*,, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (TC), 1 November 2004, at paras. 11 & 13 (on the fundamental importance of the right to counsel).
[26] See Concluding Observations of the Human Rights Committee: Georgia, 1 April 1997 P 27, U.N. Doc. CCPR/C/79/Add.74 (1997); *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (1991) at para. 5.10 ("*Kelly v. Jamaica*"); *S v. Switzerland*, 12629/87; 13965/88 (1991) ECHR 54 (28 November 1991); *Brennan v. the United Kingdom*, 39846/98 (2001) ECHR 596 (16 October 2001); Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85, rev. February 11, 1994, at 5.
[27] Under both the International Covenant on Civil and Political Rights and the European Convention on Human Rights, whether the right to legal assistance has been violated in a given case will depend on the circumstances of that case: whether the accused or suspect lacks sufficient means to pay for legal assistance and whether it is consequently required in the interests of justice to provide him with free legal assistance. The complexity of the case (*Pham Hoang v. France*, 13191/87 (1992) ECHR 61 (25 September 1992) ("*Pham Hoang v. France*")) as well as the seriousness of the offence with which the accused is charged and the potential sentence involved

18. As decided in its Judgement,[28] this Chamber must therefore address the issue of the effective and appropriate remedy concerning the violation of André Rwamakuba's rights.

2.2 Alleged Grave and Manifest Injustice

19. The Defence also claims a remedy on the basis of a grave and manifest miscarriage of justice.[29] It submits that André Rwamakuba was indicted and prosecuted on false and manipulative evidence. In the Defence's view, this circumstance, combined with the length of his pre-trial and trial detention which amounts to a total of nine years, constitutes a miscarriage of justice.[30]

20. In support of its application, the Defence relies upon Article 85(3) of the Statute of the International Criminal Court ("ICC") which provides for compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice.[31] In the Defence's view, irregularities in the detention of an accused, long detention before trial and evidence of foul play in the bringing of a prosecution are factors which might be considered by Judges in determining whether a grave and manifest miscarriage of justice has taken place in a given case.[32]

21. Neither the Statute nor the Rules of Procedure and Evidence of this Tribunal provide for the power to accord compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice. Nor is there any decision from this Tribunal applying such a principle. Likewise, the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for Former Yugoslavia ("ICTY"), which was established by the United Nations Security Council in similar circumstances as this Tribunal a year before the ICTR, do not include such a provision.

22. The Chamber must therefore determine whether the ground of compensation provided for in Article 85(3) could be applied by this Tribunal as a rule established under customary international law.[33] According to the jurisprudence of the International Court of Justice, the existence of a customary international law requires the demonstration of two elements: (i) an extensive and virtually uniform State practice (material element of custom) and (ii) the

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(*Kelly v. Jamaica*, at para. 5.10; *Boner v. UK*, 18711/91 (1994) ECHR 36 (28 October 1994)) are relevant factors in the assessment of whether it is in the interests of justice to provide the right to legal assistance to an accused.

[28] *Rwamakuba*, Judgement (TC), 20 September 2006, at para. 220.

[29] Defence Application, at para. 7.

[30] *Ibid.*, at para. 24.

[31] *Ibid.*, at paras. 18-19 & 22 (referring to the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, entered into force July 1, 2002, Article 85(3) of which reads as follows: "In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.")

[32] *Ibid.*, at para. 19.

[33] The Appeals Chamber has recalled on several occasions that the sources of law of this Tribunal encompass customary international law, see *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (AC), 3 November 1999, at para. 40; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A, Judgement (AC), 23 May 2005, at, para. 209. See also Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, U.N. Doc. S/25704, at paras. 33-34 ("Secretary-General's Report on the Establishment of the ICTY"); Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955, presented 13 Febuary 1995, U.N. Doc. S/1995/134, at paras. 11-12 ("Secretary-General's Report on the Establishment of the ICTR").

acceptance by States of this practice as law (subjective element of custom).[34] To this end, the Chamber will therefore have regard to the practice and positions of States as expressed in international criminal law and international human rights law.

23. The ICC Statute is the only constitutive instrument of an International Criminal Tribunal to include a provision for compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice.[35] In the only other Statute which expressly provides for compensation to an accused person, the Statute of the Special Panel for Serious Crimes in East Timor ("SPSCET"), a provision for this ground of compensation was not included.[36]

24. As well, international human rights law does not provide for this ground of compensation, only providing a right to compensation in circumstances involving either an unlawful arrest or detention[37] or an unjust conviction.[38] Since the adoption of the ICC Statute, these instruments have not been amended to include a ground for compensation to an acquitted person for a miscarriage of justice.

25. As such, other than the ICC Statute, no instrument in international criminal law or international human rights law includes a provision for compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice while some of them do provide for compensation under other circumstances.

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[34] See *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), Judgment of 20 Feb. 1969, (1969) ICJ Rep. 3, at para. 74; *Continental Shelf Case* (Lybian Arab Jamahiriya/Malta), *Judgement* of 3 June 1985, (1985) ICJ Rep. 13 at para. 27; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, (1996) ICJ Rep. 226 at para. 64.

[35] The International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone, the Special Panel for Serious Crimes in East Timor and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of the Crimes Committed during the Period of Democratic Kampuchea do not provide for this ground of compensation.

[36] Article 52 of the SPSCET provides a right to compensation in regard to unjust convictions and unlawful arrests or detentions (Statute of the SPSCET, Regulation 2000/30, September 25, 2000, as amended by regulation 2001/25, September 14, 2001, s. 52).

[37] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 9(5) ("ICCPR"). Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols No 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, art. 5(5) ("ECHR"). An arrest or detention will be considered unlawful if there has been a violation of the provisions relating to the right to liberty and security (articles 9(1) to (4) of the ICCPR, articles 5(1) to 5(4) of the ECHR) or a relevant provision of domestic law.

[38] ICCPR, Art. 14(6): "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is whole or partly attributable to him."; ECHR, Protocol no 7, art. 3: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is whole or partly attributable to him."; ACHR, Art. 10: "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgement through a miscarriage of justice." This right to compensation is therefore limited to cases where an accused person was convicted through a miscarriage of justice, specifically with respect to the ICCPR and ECHR where this miscarriage of justice has been conclusively shown to exist on the basis of a new or newly discovered fact.

26. What is more, the inclusion of Article 85(3) was not without controversy during negotiations of the ICC Statute. The Report of the Working Group on Procedural Matters at the Rome Conference includes the following comment: "There are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Other delegations considered this text to be too restrictive."[39]

27. On the basis of the above, the Chamber considers that there is insufficient evidence of State practice or of the recognition by States of this practice as law to establish that customary international law provides for compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice.

28. Moreover, even if Article 85(3) of the ICC Statute had achieved customary status, the Chamber observes that it remains a narrowly drafted provision. It firstly does not as such provide a right to compensation, but rather provides that the Court *may in its discretion* make an award for financial compensation. It secondly provides that such an award will be appropriate in *exceptional circumstances* where *conclusive facts* establish that there has been a grave and manifest miscarriage of justice.[40]

29. This being said, the Chamber finds it, however, necessary to emphasize the importance and the relevance of the principle set forth in Article 85(3) of the ICC Statute in light of the long and complex trials in this Tribunal. The significance of this principle must be understood with reference to the right of any individual to freedom, including the corresponding principle that detention should remain exceptional or, at least, limited to what is reasonable and necessary.[41]

30. In that respect, it is notable that under the Tribunal's Rules, an accused person who is sentenced is given credit for the period during which he was detained in custody pending his or her surrender to the Tribunal or pending trial or appeal.[42] By analogy, the Chamber is of the view that the possibility to grant some sort of remedy or compensation would be fair in circumstances where, although the arrest or detention of an acquitted person was not unlawful, he or she was subject to a lengthy detention during the pre-trial and trial stages. Such an award of compensation would be exercised in light of the circumstances of the case, and could not be applied, for instance, where an accused had intentionally caused his or her arrest or where it would be unreasonable to award compensation. In the Chamber's view, such a provision would offer an acceptable balance between the fundamental right to freedom of any individual and the realities of the investigation and prosecution of international crimes.

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[39] Report of the Working Group on Procedural Matters at the Rome Conference, Document A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998), art. 85.

[40] See however Salvatore Zappalà, "Compensation to a n Arrested or Convicted Person" in Antonio Cassese, Paola Gaeta and John R.W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 1577 at 1583 (arguing that a grave and manifest injustice should be considered ipso facto as an exceptional circumstance.)

[41] ICCPR, Art. 9(1), 9(3) & 9(4); ECHR, Art. 5(1), 5(3) & 5(4); ACHR, 7(2), 7(5) & 7(6).

[42] Rule 101(D) reads as follows: "Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal."

The Chamber notes that a number of States provide for the award of compensation in such circumstances subject to a number of conditions or exceptions.[43]

31. For the above reasons, while the Chamber acknowledges the importance of the principle provided for in Article 85(3) of the ICC Statute, it does not find that at present customary international law provides for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice. In the absence of a provision in its Statute and Rules or any other applicable source of law in this regard, the Chamber therefore denies the Defence's claim for compensation on this basis. The Chamber considers that the Security Council would have to amend the Statute of the Tribunal, or take any other action, as the case may be, for such a claim or any other claim for compensation to be admissible in the context discussed.

3. Effective Remedy

32. The Chamber will first determine whether it has the power to provide for an effective remedy in case of violation of the rights of a person while he or she was an accused before this Tribunal. In particular, it will determine whether it has the power to order a financial compensation as an effective remedy. Finally, it will address the question of the effective remedy in view of the specific circumstances of the case.

3.1 The Chamber's Power to Provide an Effective Remedy in Case of Violation of the Rights of an Accused Person

33. The Defence submits that the Chamber possesses the power to grant an effective remedy to André Rwamakuba under Rule 5, Rule 54 or an implied power.[44]

34. The Chamber cannot accept the Defence argument regarding Rule 54.[45] This Rule provides that a Chamber may issue any such orders as may be necessary for the preparation or conduct of the trial. The Chamber is of the opinion that an award for compensation in respect of a former accused's rights, following the end of his trial, cannot be considered as being necessary for the preparation or conduct of his trial.

35. Concerning the Defence's argument relying upon Rule 5, the Registrar submits that according to the French version of this provision, a remedy can only be awarded against a party to the case[46] and that the Registrar is not a party to this case within the meaning of the Rule.[47]

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[43] See, e.g, Austria: Compensation (Criminal Proceedings) Act 1969, Sect. 2(1)(b) and 6; Iceland: Act No. 36/1999, Section 175; Italy: Code of Criminal Procedure, Article 314; Latvia : Law on Indemnification against Loss Resulting from Unlawful or Unsubstantiated Actions of the Investigation Entity, Prosecution Office or Court; Sweden: SFS 1974:515, as amended by SFS 1998:714; The Netherlands: Dutch Code of Criminal Procedure, Articles 89 and 591a; Norway: Code of Criminal Procedure, Articles 444-446; United Kingdom: The UK has a policy of making ex-gratia payments to acquitted persons for wrongful conviction or charge or in exceptional circumstances (Policy Statement of the Home Secretary Douglas Hurd, 29 November 1985, H.C. Deb., cols 691-692, quoted in *Regina v. Secretary of State for the Home Department (Appellant) ex parte Mullen (Respondent)*, [2004] UKHL 18, at para. 28).

[44] Defence Reply, at para. 5.

[45] Rule 54 reads: "At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas and warrants as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

[46] Rule 2(A) provides that only the Prosecution and the Accused are parties to a given case.

[47] Registrar's Submissions, at para. 21.

36. Rule 5 of the Rules provides that "[w]here an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party." The Chamber notes that the French version of this provision differs from the English version in that it seems to limit its scope to non-compliance with the Rules or Regulations by a party only.[48]

37. Under Rule 7, in case of discrepancy between the two versions of a Rule, "the version which is more consonant with the spirit of the Statute and the Rules shall prevail."[49] In this regard, the Chamber finds the Registrar's interpretation of Rule 5 unsustainable as it goes against the ordinary meaning and spirit of the Rule. First of all, neither the English nor French texts specify what kind of relief may be ordered by the Chamber if it finds that the non-compliance has caused material prejudice to the claiming party. In some instances, a Trial Chamber may consider that the provision of relief will require action by a person to whom the non-compliance is not attributable. This could therefore cover situations where the Registrar is ordered to take the necessary measures while not being responsible for the non-compliance. Second of all, the violations for which relief could be ordered under Rule 5 cannot be limited to violations by "parties" to the proceedings as this would defeat the purpose of the Rule which seeks to provide relief for non-compliance with the Tribunal's Rules and Regulations. The Chamber cannot accept that the Tribunal could escape liability for non-compliance with the Rules or Regulations because the non-compliance was by an organ or a person or authority who was not a "party" to the proceedings. Consequently, the Chamber finds that Rule 5 must grant protection against any breach of the rules and regulations and that the party against whom relief may be ordered includes the Tribunal itself.

38. In the present case, it was found that the Registrar failed to act pursuant to Rule 44 *bis* of the Rules so as to appoint a Duty Counsel for André Rwamakuba pending assignment of his Counsel and that this omission resulted, notably, in the absence of legal assistance for Rwamakuba, while he was an accused, over an extended period of time in contradiction with his fundamental right enshrined in Article 20 (4) (c) of the Statute.[50] According to Rule 5 of the Rules, the Chamber must now establish whether the Registrar's non-compliance with Rule 44 *bis* caused material prejudice to Rwamakuba. In light of Trial Chamber II's finding that this breach had not caused Rwamakuba a serious and irreparable prejudice,[51] the Chamber finds that he did not suffer a material prejudice within the meaning of Rule 5. As such, the Chamber deems it unnecessary to consider whether the relief contemplated in Rule 5 would confer upon the Chamber the power to make orders for financial compensation.

39. Having determined that Rule 5 is not applicable on the facts to the present case, in the absence of the showing that André Rwamakuba suffered material prejudice, the Chamber will now consider whether the violation of his right to legal assistance may be redressed on the basis of any other applicable law.

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[48] The French version of Rule 5 (A) reads: "Toute exception d'une partie à l'égard d'un acte d'une autre partie, fondée sur une violation du Règlement ou des règlements internes, doit être soulevée dès que possible; la Chambre de première instance accorde réparation si la preuve de la violation présumée est rapportée et si celle-ci a effectivement fait subir un préjudice substantiel à cette partie."

[49] See also Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 331, art. 33(4) (when a comparison of a text authenticated in two or more languages discloses a difference of meaning, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.")

[50] *Rwamakuba,* Decision on Illegal Arrest and Detention (TC), 12 December 2000, at para. 43.

[51] *Ibid.*, at para. 45.

40. The Chamber agrees with the parties that neither the Statute, nor the Rules of this Tribunal provide for a right to an effective remedy for violations of human rights. However, this right undoubtedly forms part of customary international law and is expressly provided for in the following instruments: the Universal Declaration of Human Rights,[52] the ICCPR,[53] the Convention on the Elimination of All Forms of Racial Discrimination,[54] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,[55] the Convention Concerning Indigenous and Tribal Peoples in Independent Countries,[56] the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[57] the ECHR,[58] the American Declaration of the Rights and Duties of Man[59] and the American Convention of Human Rights.[60]

41. Relying upon international human rights instruments, and particularly the International Covenant on Civil and Political Rights, the Appeals Chamber of this Tribunal has recognized on several occasions that an Accused has a right to an effective remedy.[61]

42. In the *Kajelijeli* case, the Appeals Chamber relied upon the various sources of law applicable to the Tribunal, including the Statute, the Rules and customary international law as reflected in the ICCPR as well as referred to the provisions of regional human rights treaties as persuasive authority and evidence of international custom.[62] It set out, on the basis of existing standards in international human rights law, that "any violation of the accused's

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[52] G.A. Res. 217A (III), U.N. Doc. A/810 (1948) art. 8 (providing that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted hum by the constitution or law).

[53] ICCPR, art. 2(3)(a) (obliging State Parties to ensure that any person whose rights have been violated shall have a effective remedy). See also articles 9(5) and 14(6) which provide that a enforceable right to compensation according to law for unlawful arrests or detentions and unjust convictions.

[54] 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, art. 6 (obliging State Parties to assure effective protection and remedies against any acts of racial discrimination as well as the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination).

[55] 10 December 1984, entered into force 26 June 1987, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39\51, 197, art. 14 (obliging State Parties to ensure that a victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation)

[56] *I.L.O. No. 169, 27 June 1989, entered into force* 5 September 1991, (1989) 28 I.L.M. 1382. The Convention refers to "fair compensation for damages" at Art. 15(2), "compensation in money" at Art. 16(4) and full compensation for "any loss or injury" at Art. 16(5).

[57] G.A. Res. 40/34 of 29 November 1985, at para. 4 (stating that victims are entitled to access to the mechanisms of justice and prompt redress for the harm they have suffered) and at para. 8 (providing that where appropriate restitution should be made to victims, their families or dependants by offenders or third parties responsible for their behaviour).

[58] ECHR, Art. 13 (stating that victims are entitled to an effective remedy before a national authority). See also article 41 (formerly article 50) which provides, upon a finding of a violation and the absence of total reparation in domestic law, that the European Court of Human Rights shall afford just satisfaction to the injured party.

[59] 2 May 1948, O.A.S. Res. XXX, adopted by the Ninth International conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser.L/V/II.92, doc.31 rev. 3 at 17 (1996), Art. XVII (guaranteeing the right to resort to the courts to ensure respect for legal rights and to obtain protection from acts of authority which violate fundamental constitutional rights).

[60] O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Art. 25 (entitling everyone to effective recourse against acts that violate the fundamental rights recognized by the constitution, laws of the state or the Convention), ("ACHR"). See also Articles 1(1), 8, 10 & 63(1).

[61] See *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, at paras. 74-75; *Kajelijeli*, Judgement (AC), 23 May 2005, at paras. 255 and 322; *Prosecutor v. Semanza*, Case No.ICTR-97-20, Decision (AC), 31 May 2000, at para. 125.

[62] *Kajelijeli*, Judgement (AC), 23 May 2005, at para. 209.

rights entails the provision of an effective remedy pursuant to Article 2(3) (a) of the ICCPR."[63] In that case, the Appeals Chamber ordered a reduction in sentence as the appropriate remedy with respect to the violations of the Appellant's rights.[64]

43. In the *Barayagwiza* case, the Appeals Chamber also affirmed that all violations of rights demand a remedy.[65] In his Separate Declaration, Judge Rafael Nieto-Navia shed further light on the Appeals Chamber decision by stating as follows:

> 28. Human rights treaties provide that when a state violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party.
> 29. Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights. As it is impossible to turn back the clock, I think that the remedy decided by the Appeals Chamber fulfills the international requirements.[66]

44. In the present case, the Appeals Chamber has stated that "it [was] open to [Rwamakuba] to invoke the issue of the alleged violation of his fundamental human rights by the Tribunal in order to seek reparation as the case may be, at the appropriate time."[67]

45. On the basis of the above Appeals Chamber decisions, the Chamber holds the view that its power to provide an accused or former accused with an effective remedy for violations of human rights arises out of the combined effect of the Tribunal's inherent powers and its obligation to respect generally accepted international human rights norms.

46. 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.[68] The Appeals Chamber has previously recognized the existence of certain inherent powers accruing to a Trial Chamber by virtue of its nature as a judicial body. In the *Tadic* case, the Appeals Chamber explained that the Tribunal was not simply a subsidiary organ of the Security Council, but was a judicial body:

> To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security

[63] *Ibid.*, at para. 255. See also at para. 322.
[64] *Ibid.*, at para. 324.
[65] *Barayagwiza*, Decision (AC), 31 March 2000, at para. 74. In his Separate Opinion, Judge Shahabuddeen did not address the issue of financial compensation as such, arguing on the basis of rule 40 *bis*, that the accused's release was the only possible remedy (*Barayagwiza*, Separate Opinion of Judge Mohamed Shahabuddeen on Prosecutor's Request for Review or Reconsideration (AC), 31 March 2000, at para. 42).
[66] *Barayagwiza*, Declaration of Judge Rafael Nieto-Naviam on Prosecutor's Request for Review or Reconsideration (AC), 31 March 2000, at paras. 28 & 29. In his Declaration, Judge Lal Chand Vohrah indicated that he approved of Judge Nieto-Naviam' statement as it related to human rights principles (*Barayagwiza*, Declaration of Judge Lal Chand Vohrah on Prosecutor's Request for Review or Reconsideration (AC), 31 March 2000, at para. 3).
[67] *Rwamakuba*, Decision on Illegal Arrest and Detention (AC), 11 June 2001.
[68] See, e.g., *Nuclear Tests Case* (Australia. v. France; New Zeland v. France), Judgement of 20 Dec. 1974, (1974) I.C.J. Rep. 253 at 259-260; *Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp.*, (1981) 1 All E.R. 289, 295 (H.L.).

> Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.[69]

47. In the Chamber's view, the power to give effect to the right to an effective remedy for violations of the rights of an accused or former accused accrues to the Chamber because this power is essential for the carrying out of judicial functions, including the fair and proper administration of justice. This is all the more true in the present case as the right at issue, the right to legal assistance, is one of the core fair trial rights held by an accused in criminal proceedings.[70]

48. Moreover, 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. Indeed, the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights.[71] This result is in keeping with the United Nations' stated purposes as well as its internal practices. According to its constitutional instrument, one of the purposes of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all.[72] In many instances, the U.N. Security Council has recalled

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[69] *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC), 2 October 1995, at para. 15. See also *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, at para. 33; *Tadic*, Judgement (AC), 15 July 1999, at para. 322.

[70] See *Prosecutor v. Slobodan Miloševic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (TC), 1 November 2004, at paras. 11 & 13 (on the fundamental importance of the right to counsel); *Pham Hoang v. France*, at para. 39 (noting that the "right of a person charged with a criminal offence to free legal assistance is one element, amongst others, of the concept of a fair trial in criminal proceedings").

[71] This is implicit in two of the International Court of Justice's advisory opinions: *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 Dec. 1980, (1980) ICJ Rep. 73 at 89-90 ("International organizations are subjects of international law and, as such, are bound by obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."); *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, (1949) ICJ Rep. 174 at 179 (holding that an international organization is "a subject of international law and capable of possessing international rights and duties."). See also CESCR, General Comment 8, The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, 12/12/97, E/C.12/1997/8 at para. 11 ("The second set of obligations relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States. In this respect, the Committee considers that there are three conclusions which follow logically from the recognition of economic, social and cultural human rights.) ("General Comment no 8"). At the EU level, see *Nold v. Commission*, Case 4/73, 1974 E.C.R. 491 (holding that fundamental rights were applicable to the EU on the basis of the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories (including the European Convention of Human Rights)).

[72] See *Charter of the United Nations*, 26 June 1945, entered into force 24 Oct. 1945, 1 U.N.T.S. xvi, Art. 1(3). Article 1(3) has most notably been invoked by the General Assembly with respect to the improvement within of the effective enjoyment of human rights (see, e.g., G.A. Res. 34/46, 23 Nov. 1979; 36/133, 14 Dec, 1981; 38/124, 16 Dec. 1983; 339/145, 14 Dec. 1984; 40/124, 13 Dec. 1985). See also the Preamble and Art. 55 (c), the latter of which states that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." It is notable that according to the *travaux préparatoires*, the inclusion of the term "observance" was considered to strengthen this provision (United Nations Conference on International Organization, at 324). The French version of Article 55(c) even refers to the "respect effectif" (effective observance) of human rights obligations. Article 55(c) thus

this purpose by adopting resolutions aiming to promote and protect human rights.[73] The Security Council and the Secretary-General have also recalled that the members of peace-keeping missions as well as transitional authorities for the administration of territory must observe fundamental human rights.[74] In particular, when reporting to the Security Council on the establishment of the ICTY, the U.N. Secretary General underlined that: "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings."[75] This result is furthermore in keeping with the principle that States cannot evade their obligations under international legal obligations by creating an international organization that would not be bound by the legal limits imposed upon them. As the Member States of the United Nations are bound to respect their international human rights obligations when prosecuting international crimes within their domestic national legal systems, they cannot establish an International Criminal Tribunal which would not be bound to respect the same human rights obligations.[76]

49. In light of the above-mentioned principles and as there is no explicit provision of the Statute or the Rules providing for an organ of this Tribunal to grant an effective remedy, the Chamber finds that it has the inherent power to provide an accused or former accused with an effective remedy for violations of his or her human rights while being prosecuted or tried before this Tribunal. Such power necessarily accrues to the Chamber as it is essential both for the carrying out of its judicial functions and for complying with its obligation to respect generally accepted international human rights norms.

3.2 The Chamber's Power to Order Financial Compensation as an Effective Remedy

50. The Chamber will now consider whether its power to give effect to an accused's or former accused's right to an effective remedy includes the power to grant financial compensation as claimed by the Defence.

51. Under international human rights law, the right to an effective remedy endows an individual who has been the victim of a human rights violation with the right to seek a

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forms the basis for the activities of the United Nations in respect of human rights. It was for instance invoked, along with Article 56, in the Preamble to the Universal Declaration of Human Rights, UN GA Res. 217 A(III), 10 Dec. 1948, UN Doc. A/810 at 71 (1948).

[73] See, e.g., SC. Res. 1244, 22 U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999) para. 11(j) (specifying that the responsibilities of the international administrations in Kosovo and Timor include "protecting and promoting human rights.").

[74] UNTAET, Reg. No. 1999/1 On the Authority of the Transitional Administration in East Timor, UNTAET/REG/1991/1, 27 Nov. 1999 and UNMIK, Reg. No. 1999/1 On the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1, 25 July 1999 (both providing that "[i]n exercising their functions, all persons undertaking public duties or holding public office [in the respective territories] shall observe internationally recognized human rights standards."); UN Secretary-General's Bulletin on the Observance by UN Forces of International Humanitarian Law, 6 August 1999, U.N. Doc. ST/SGB/1999/13 (1999) at para. 1.1.

[75] Secretary-General's Report on the Establishment of the ICTY, at para. 106.

[76] The Committee of the International Law Association on the Accountability of International Organisations has stated as follows: "States cannot evade their obligations under customary law and general principles of law by creating an international organization that would not be bound by the legal limits imposed upon its Member States." (ILA Final Report 2004, at 18). See General Comment no 8 at para. 8 (emphasizing the treaty obligations of the members of the Security Council), *Waite and Kennedy v. Germany*, 26083/94 [1999] ECHR 13 (18 February 1999), at para. 67 and *Matthews v. UK*, 24833/94 [1999] ECHR 12 (18 February 1999), at para. 32 (holding that the responsibilities of Member States under the ECHR continue even after the transfer of competences to international organisations).

remedy before a competent tribunal and to obtain financial compensation as a remedy if appropriate. To begin with, the Human Rights Committee has stated the following view on the obligations entailed by the right to an effective remedy under Article 2(3) of the ICCPR:

> Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[77]

52. Moreover, according to the European Court of Human Rights, an effective remedy entails that "where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress."[78] Finally, the Inter-American Commission of Human Rights has interpreted the right to an effective remedy as "the right of every individual to go to a tribunal when any of his rights have been violated [...], to obtain a judicial investigation conducted by a competent, impartial, and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation."[79] Under the American Convention of Human Rights, an effective remedy must therefore be both adequate and efficacious:

> The American Convention requires the States to offer effective recourses to human rights violations victims. The formal existence of such recourses is not sufficient to demonstrate their effectiveness; to be effective, a recourse must be adequate and efficacious. Adequate means that the function of the recourse in a State's domestic legal system must be appropriate for protecting the juridical situation affected. A recourse is efficacious when it is capable of producing the result for which it was designed.[80]

53. In the present case, the Registrar disputes the Chamber's power to grant financial compensation to André Rwamakuba for the violation of his right to legal assistance. It submits that orders to financially compensate those whose rights have been violated are only under development within the general principles of law as understood in Article 38 of the ICJ Statute and have not yet been enshrined in UN Charter principles, treaty law, or customary law.[81]

54. The Chamber is not persuaded by the Registrar's argument. To begin with, five international human rights instruments expressly refer to a right to compensation or

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[77] Human Rights Committee, General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at para. 16.
[78] *Silver v. UK*, 5947/72; 6205/73; 7052/75;... [1983] ECHR 11 (24 October 1983), at para. 113.
[79] *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 (1996) 157 at 190-191. See also *Carranza v. Argentina*, Case 10.087, Report No. 30/97, Inter-Am.C.H.R., OEA/Ser.L/V/II.98, Doc. 7 rev. (1998) 254 at 266-267.
[80] *Raquel Martí de Mejía v. Perú*, at 193. See also *Velásquez Rodríguez Case*, Judgement of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), at paras. 63, 64 & 66.
[81] Registrar's Submissions, at para. 18.

restitution.[82] In particular, the International Covenant on Civil and Political Rights, which was adopted under the auspices of the United Nations, provides for a right to financial compensation in circumstances involving either an unlawful arrest or detention[83] or an unjust conviction.[84] Other regional instruments on human rights also provide for a right to financial compensation under these circumstances.[85] With respect to violations of the right to life, the *Special Rapporteur*, in a 1994 report to the UN Human Rights Commission, characterized the duty to provide compensation to victims of such violations as an international obligation: "The recognition of the duty to compensate victims of human rights violations, and the actual granting of compensation to them, presupposes the recognition by the Government of its obligation to ensure effective protection against human rights abuses on the basis of the respect for the fundamental rights and freedoms of every person."[86]

55. In addition, the Inter-American Court of Human Rights and the European Court of Human Rights are empowered to make awards for financial compensation to victims of human rights violations.[87] Consequently, financial compensation has been awarded to victims of human rights violations on numerous occasions by the Inter-American Court of Human Rights[88] and the European Court of Human Rights.[89] The former stated as follows in *Velazquez-Rodriguez* in regard to the concept of reparations: "Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio integrum*) which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification and patrimonial and non-patrimonial

[82] The Convention on the Elimination of All Forms of Racial Discrimination, art. 6; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, art. 14; the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 15(2), 16(4) & 16(5); and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, at para. 4.

[83] ICCPR, art. 9(5): "Anyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation." ECHR, art. 5(5): "Everyone who has been the victim of arrest or detention in contravention with the provisions of this Article shall have an enforceable right to compensation."

[84] ICCPR, art. 14(6): "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is whole or partly attributable to him."

[85] ECHR, Protocol no 7, art. 3: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is whole or partly attributable to him."; ACHR, art. 10: "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgement through a miscarriage of justice."

[86] E/CN.4/1993/46, at para. 79(g). See also at para. 11.

[87] ECHR, art. 41: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."; ACHR, art. 63(1): "1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[88] See, e.g., *Velasquez Rodriguez v. Honduras*, Judgement of 29 July 1988, (1988) Inter-Am.Ct.H.R. (ser. C) no. 4; *Suarez Rosero v. Ecuador (Reparations)*, Judgement of 20 January 1999, (1999) 44 Inter-Am.Ct.H.R. (ser. C); *Aloeboetoe et al. v. Surinam (Reparations)*, Judgement of 10 September 1993, (1994) Inter-Am.Ct.H.R. (Ser. C) No. 15.

[89] See below footnote 121.

damages, including emotional harm."[90] The latter has held that while just satisfaction cannot be claimed as a right under the ECHR, the Court has the discretion to grant just satisfaction the basis of equity, though not of its own motion.[91] Bodies without express provisions allowing for the award of financial compensation have also accepted in principle the need for an award of compensation and have made recommendations to that effect. The African Commission on Human and Peoples' Rights,[92] the UN Human Rights Committee[93] and the Committee on the Elimination of all Forms of Racial Discrimination[94] have all recommended paying compensation as an appropriate remedy for a human rights violation. Moreover, two International Criminal Tribunals now include express provisions granting a right to financial compensation for violations of the rights of an accused.[95]

56. As a result, the Chamber holds the view that it cannot be said that orders to financially compensate those whose rights have been violated are only under development in international law.

57. The Registrar further disputes the Chamber's power to grant financial compensation to André Rwamakuba for the violation of his right to legal assistance because there is no provision in the Statute that allows the Tribunal or Chambers to grant financial compensation to individuals it has allegedly wronged.[96] In support of its submission, it relies upon letters written by Judge Claude Jorda, former President of the ICTY, Judge Navanethem Pillay, former President of the ICTR, Judge Theodore Meron, former president of the ICTY and Judge Erik Møse, President of the ICTR, in which they take the position that the Security Council would have to amend the Statutes of the Tribunals for a Chamber to be able to make an order for compensation.[97] The Registrar also points out that the Tribunal does not have budgetary provisions allowing payment to individuals in compensation for the Tribunal's actions and that financial compensation could not be effected from present budget lines without breaching the financial rules of the Tribunal.[98] It argues that a claim for compensation would be more appropriately lodged with the U.N. Secretary-General, through his Legal Counsel,[99] and that pursuant to Section 2 of the Convention on the Privileges and Immunities of the United Nations 1946,[100] the Registrar should be able to request that the Secretary-General of the United Nations waive the immunity of the Tribunal, or to seek

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[90] *Velasquez Rodriguez v. Honduras*, Judgement of 29 July 1988, (1988) Inter-Am.Ct.H.R. (ser. C) no. 4, at para. 26.

[91] *Sunday Times v. UK (No.1)*, 6538/74 (1980) ECHR 6 (6 November 1980); *Francesco Lombardo v. Italy*, 11519/85 (1992) ECHR 72 (26 November 1992).

[92] *Embga Mekongo Louis v. Cameroon*, 8th Annual Report of the ACHPR 1994-1995, ACHPR/8TH/ACT/RPT/XVII, Annex IX.

[93] See, e.g, *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No. 30/1978, U.N. Doc. CCPR/C/OP/1 at 109 (1985); *Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato v. Uruguay*, Communication No. 84/1981, U.N. Doc. Supp. No. 40 (A/38/40) at 124 (1983); *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979), U.N. Doc. Supp. No. 40 (A/37/40) at 137 (1982).

[94] *LO. Karim v. the Netherlands*, Communication No. 4/1991, U.N. Doc. CERD/C/42/D/4/1991.

[95] Article 52 of the SPSCET; Article 85 of the ICC Statute.

[96] Registrar's Submissions, at para. 23.

[97] Registrar's Additional Submissions of 24 November 2006, at paras. 4-5; Registrar's Additional Submissions of 7 December 2006, at paras. 6-9.

[98] Registrar's Submissions, at para. 29.

[99] Registrar's Additional Submissions of 24 November 2006, at para. 6.

[100] 1 U.N.T.S. 15, 13 February 1946, II, sec. 2: "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

clarification from the Secretary-General that the waiver is unnecessary, before any Chamber's finding on this issue.[101]

58. In light of the above-mentioned instruments on human rights and their applications by human rights bodies, the Chamber concludes that its inherent power to give effect to an accused's or former accused's right to an effective remedy encompasses the power to grant financial compensation where, in the specific circumstances of a case, it constitutes the appropriate remedy to redress a violation of the human right in question. Should the Chamber not have this power, it would lead to the untenable conclusion that it could not give effect to the right to an effective remedy in circumstances where financial compensation formed the only effective for a human rights violation. As such, the fact that this power is not explicitly provided for in the Tribunal's Statute or Rules is immaterial.

59. In the letters written by the former and current Presidents of the ICTR and ICTY to the U.N. Secretary-General, referred by the Registrar in support its submissions, the Presidents did not discuss the possibility that the Chamber possessed an inherent power to grant financial compensation, nor did they comment on the right to an effective remedy as they were not acting as a judicial body as this Chamber is in the present case. They only indicated their interest "in having the International Criminal Tribunal for Rwanda placed in a position to fully respect internationally recognized obligations"[102] – an objective shared by this Chamber. Similarly to the present Decision, the Presidents recalled that acts of the Tribunals, as subsidiary organs of the Security Council, were imputable to the United Nations[103] and further observed that the United Nations, considering itself bound by generally accepted norms of human rights law such as articles 9(5) and 14(6) of the ICCPR relating to unlawful detentions and unjust convictions, would be under an obligation to ensure that compensation was paid to a person whose rights, enshrined in these articles, had been violated.[104] In this regard, the Chamber holds the view that the Security Council cannot have intended that the Tribunal would be in breach of generally accepted international human rights norms and as such must have accorded it the powers necessary to comply with such norms and thus carry out its functions as a judicial body. The lack of an appropriate mechanism to provide redress to an accused or former accused of this Tribunal, including the award of financial compensation when appropriate, when he or she is the victim of a human rights violation in fact justifies the Chamber's decision to entertain Rwamakuba's claim.

60. In the Chamber's view, since Article 16(1) of the Statute provides that the Registrar "shall be responsible for the administration and servicing of the International Criminal Tribunal for Rwanda",[105] the Registrar forms the entity with the necessary powers and

[101] Registrar's Submissions, at para. 25.
[102] Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General annexed to Letter dated 28 September 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/925, at 3 [Letter from the President of the ICTR of 26 September 2000].. See also Letter dated 19 September 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the Secretary-General annexed to Letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/904, at 3 [Letter from the President of the ICTY of 18 September 2000].
[103] Letter from the President of the ICTY of 18 September 2000, at 3; Letter from the President of the ICTR of 18 September 2000, at 3.
[104] Letter from the President of the ICTY of 18 September 2000, at 3-5; Letter from the President of the ICTR of 18 September 2000, at 3-4.
[105] See also Secretary-General's Report on the Establishment of the ICTR, at para. 20: "Article 30 of the Statute provides that the expenses of the Tribunal shall be the expenses of the Organization in accordance with Article 17 of the Charter. In clearly distinguishing between the competence of the Security Council to establish the

responsibilities to give effect to financial compensation that could be ordered as an effective remedy for the violation by the Tribunal of the rights of an accused person. However, questions relating to the mechanisms for giving effect to an order for compensation, such as budgetary matters or the appropriate body for lodging a claim, constitute extra-legal considerations which cannot constitute bars to the provision of financial compensation when it appears to be the effective remedy for a human rights violation. In addition, the Chamber considers that the internal rules of the United Nations may not be invoked as justification for its failure to comply with an international obligation, in the present case, the obligation to respect André Rwamakuba's right to an effective remedy.[106]

61. Furthermore, the Chamber also finds that the Convention on the Privileges and Immunities of the United Nations cannot apply to an order by the Chamber to the Registrar, both of which are part of a special kind of subsidiary organ of the U.N. Security Council as the immunities recognized to the United Nations are primarily applicable to its relations with States.[107]

62. The Chamber concludes therefore that in accordance with its obligation to give full effect to an accused's or former accused's right to an effective remedy, it must have the inherent power to make an award of financial compensation. Were the provision of financial compensation never available, then an individual's right to an effective remedy would be unjustifiably restricted in cases where such compensation was necessary to adequately and efficaciously address the prior human rights violation.

63. This finding conforms to the jurisprudence of the Appeals Chamber. In the *Semanza* and *Barayagwiza* cases, the Appeals Chamber found that the accused's rights had been violated, and ordered as a remedy that when judgement was rendered by the Trial Chamber, if the accused was found not guilty, he would be entitled to financial compensation from the Tribunal.[108] However, since in both cases the accused were found guilty, no financial compensation has been ordered so far.[109]

International Tribunal and the budgetary authority of the General Assembly to decide on its financing, the Security Council did not pronounce itself on the mode of financing, i.e., regular budget or a special account."

[106] See, by analogy, Article 27(2) of the Vienna Convention on the Law of Treaties between States and international organizations or between international organizations, 21 March 1986, not yet in force, Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II (Vienna: United Nations, 1986).: "An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty."

[107] According to the Preamble to the UN Convention on Privileges and Immunities, this Convention is primarily meant to apply to the relations between the UN and Member States:

> "Whereas Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes and
> Whereas Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Member such privileges and immunities as are necessary for the fulfillment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

[108] *Barayagwiza*, Decision (AC), 31 March 2000, at para. 75.

[109] *Semanza*, Judgement (TC), 15 May 2003, at paras. 579-582; *Media Case*, Judgement (TC), 3 December 2003, at para. 1106.

64. Contrary to the Registrar's assertions,[110] the orders made by the Appeals Chamber in those cases cannot be considered as purely declaratory statements about the remedy to which an accused is in principle entitled. By including an order either for a reduction in sentence or for financial compensation in its disposition, the Appeals Chamber must have intended that its order be complied with depending on the outcome. And indeed, the Trial Chambers complied with the Appeals Chamber's orders when at the conclusion of these two trials, they decided to reduce the sentences against the accused in accordance with the Appeals Chamber decisions.[111]

65. The Registrar also considers that this Chamber cannot rely upon the Appeals Chamber's decision in the *Barayagwiza* case because it did not specify the legal basis for compensation and the Registrar was not invited to address submissions to the Appeals Chamber on this issue. The Registrar moreover asserts that the Appeals Chamber's decision in *Semanza* merely alluded to the Tribunal's mandate to protect international public order and relied on Rule 5, a rule which the Registrar argues does not in fact provide the Chamber with the power to make awards for financial compensation to individuals whose rights it has infringed.[112]

66. The Chamber is of the opinion that the Registrar misreads the Appeals Chamber Decisions. Both Decisions relied upon the principle that all violations of rights of an accused person demand a remedy.[113] In any event, as this Chamber has already explained above, it has the inherent power to grant an appropriate remedy to redress any violation of the rights of an accused. Such a remedy may include, depending on the circumstances of the case, a financial compensation. There is therefore no need to comment further on the Appeals Chamber's prior Decisions and if the Registrar seeks to dispute these Decisions and be heard by the Appeals Chamber, his application lies with the Appeals Chamber.

3.3 The Effective Remedy in this Case

67. The Defence requests for the violation of André Rwamakuba's right to legal assistance during the initial months of his detention at the Tribunal's detention facilities, that the Chamber order that the Registrar: (i) provide Rwamakuba with an apology; (ii) seek the good offices of the State where Rwamakuba's family is present to facilitate some temporary status for him in that State; (iii) seek the good offices of that State to ensure the uninterrupted schooling of Rwamakuba's children; and (iv) provide financial compensation to Rwamakuba.[114] It also seeks compensation covering a minimum of 2,000 USD per month for loss of earnings and 10,000 USD for emotional stress.[115]

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[110] Registrar's Additional Submissions of 7 December 2006, at para. 10.
[111] *Semanza*, Judgement (TC), 15 May 2003, at paras. 579-582; *Media Case*, Judgement (TC), 3 December 2003, at para. 1106.
[112] Registrar's Submissions, at para. 20.
[113] *Barayagwiza*, Decision (AC), 31 March 2000, at para. 74; *Semanza*, Decision (AC), 31 May 2000, at para. 125. With respect to the *Semanza* Decision, the Chamber observes that while the Appeals Chamber only discussed the appropriateness of ordering a remedy under Rule 5 of the Rules; on the facts before it, it dismissed the application of Rule 5 having found that the violation of the accused's right had not caused him a material prejudice (*Semanza*, Decision (AC), 31 May 2000, at para. 124.)
[114] Defence Application, pp. 10-11.
[115] *Ibid.*, p. 10.

68. According to jurisprudence on human rights, an effective remedy must be granted on a case-by-case basis, taking into account the subject matter as well as the nature of the right allegedly violated.[116]

69. Before international criminal proceedings, the only remedy thus far utilized by a Trial Chamber with respect to the violation of an accused's right to legal assistance has been the exclusion of evidence.[117] Under international human rights law, in *Kelly v. Jamaica*, the Human Rights Committee concluded that as a result of a violation of his right to legal assistance, the petitioner was entitled to a remedy entailing his release.[118] Neither remedy is of course applicable to the present case. There is also significant case-law regarding the appropriate remedy for a violation of the right to legal assistance under the ECHR.[119] The European Court of Human Rights has awarded non-pecuniary damages to applicants in circumstances where the outcome would have been different had the infringement of the right to legal assistance not taken place[120] or where it was satisfied that the applicant had suffered some injury from the infringement itself, such as distress, frustration, confusion or feelings of abandonment and isolation.[121] The Court has yet to award pecuniary damages to an applicant for a violation of his right to legal assistance. Indeed, the Court has concluded that it could not speculate as to the outcome of the proceedings had the applicant been provided with legal assistance and therefore that no causal link between the violation and the alleged pecuniary damage had been established.[122] In cases where it has found neither, the Court has held that a finding of a violation was sufficient satisfaction for the violation.[123]

70. Drawing on the persuasive jurisprudence of the European Court of Human Rights, the Chamber will therefore consider, with respect to both pecuniary and non-pecuniary damages, whether the outcome would have been different had André Rwamakuba's right to legal assistance not been infringed. In addition, the Chamber will also ascertain whether he suffered some injury from the infringement itself.

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[116] ECHR, *Hasan and Chaush v. Bulgaria*, 30985/96 (2000) ECHR 511 (26 October 2000), at para. 99. See also footnotes 77-80.

[117] *Prosecutor v. Delalic*, Case No. IT-96-21-I, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (TC), September 2, 1997. The Trial Chamber excluded a statement made by the accused to Austrian authorities because the accused had not been informed of his right to counsel or permitted counsel.

[118] *Kelly v. Jamaica*, at para. 7.

[119] The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have yet to consider communications alleging violations of the right to legal assistance.

[120] *Perks v. UK*, 25277/94; 25279/94; 25280/94;... (1999) ECHR 89 (12 October 1999). In respect of one of the applicants, the Court held it was unlikely that the magistrates would have made the order for the applicant's detention had he been represented at the hearing before them. It awarded the applicant GBP 5,500 (at paras. 80 & 81). In respect of all other applicants, the Court concluded that it was impossible for it to speculate as to whether the magistrates would have made the order for the applicants' detention had they been represented at the hearing before them. It held that the finding of a violation was sufficient satisfaction (at para. 82).

[121] See *Twalib v. Greece*, 24294/94 (1998) ECHR 54 (9 June 1998), at para. 66 ("*Twalib v. Greece*"); *R.D. v. Poland*, 29692/96;34612/97 (2001) ECHR 868 (18 December 2001), at para. 57; *Artico v. Italy*, 6694/74 (1980) ECHR 4 (13 May 1980), at para. 46; *Quaranta v. Switzerland*, 12744/87 (1991) ECHR 33 (24 May 1991), at para. 43; *Berlinski v. Poland*, 27715/95; 30209/96 (2002) ECHR 505 (20 June 2002), at para. 85; *Biba v. Greece*, 33170/96 (2000) ECHR 426 (26 September 2000), at para. 35; *Granger v. UK*, 11932/86 (1990) ECHR 6 (28 March 1990), at para. 52.

[122] See, e.g., *Twalib v. Greece*,), at para. 62; *Pham Hoang v. France*, at para. 44.

[123] See, e.g., *Pakelli v. Germany*, 8398/78 (1983) ECHR 6 (25 April 1983), at para. 46; *Benham v. UK*, 19380/92 (1996) ECHR 22 (10 June 1996), at para. 68; *Pham Hoang v. France*, at para. 45; *Maxwell v. UK*, 18949/91 (1994) ECHR 38 (28 October 1994), at para. 43.

71. With respect to the first question, the Chamber considers that the Defence has not established that the length of André Rwamakuba's detention would have been shorter had he been provided with legal assistance upon his arrival in Arusha. While Trial Chamber II established that the violation of Rwamakuba's right to legal assistance caused a delay in his initial appearance,[124] the Defence has not established that this delay lengthened the duration of his time in detention. The Chamber therefore concludes that there is no causal link between the violation found and his alleged loss in earnings, nor between the violation found and any non-pecuniary injury he may have suffered as a result of his detention.

72. With respect to the second question, the Chamber considers that Trial Chamber II's finding that the prejudice caused to André Rwamakuba's defence was not serious or irreparable[125] is not necessarily determinative of whether he suffered some moral injury as a result of this infringement. While this finding makes clear that the violation of Rwamakuba's right to legal assistance did not affect the overall fairness of the trial, it does not as such address the need for reparations arising out of any emotional harm which may have been caused by the infringement itself.

73. The Chamber finds that, in the specific circumstances of this case, André Rwamakuba must have suffered some moral damage as a result of the violation of his right to legal assistance which cannot be adequately compensated by the sole finding of a violation and the provision of an apology by the Registrar. Bearing in mind the complexity of international criminal proceedings, his unfamiliarity with the Tribunal's proceedings, the seriousness of the charges and the potential sentence involved,[126] in all probability, Rwamakuba suffered feelings of confusion, isolation, and distress as a result of the failure to provide him with duty counsel over a four and a half month period.

74. In addition to his claim for financial compensation, André Rwamakuba also moves the Chamber to order that the Registrar seek the good offices of the State where Rwamakuba's family is present to facilitate some temporary status for him in that State and to ensure the uninterrupted schooling of Rwamakuba's children.

75. The Registrar responds that he is unable to determine the success or failure of such efforts and that none of these requests are within the power of the Registry to effect.[127]

76. According to the Statute and Rules, the Registrar has the duty to give effect and implement any Chamber's Decision or Judgement.[128] In its Judgement of 20 September 2006, this Chamber also requested the Registrar to make all necessary arrangements in the implementation of the decision of acquittal of André Rwamakuba.

77. In the present case, contrary to the Registrar's assertions, the Defence only seeks that good efforts are used to facilitate the temporary residence of André Rwamakuba and schooling of his children in a certain State. These are obligations of means and not of result and they derive from the judgment of acquittal itself and form a necessary element of its

[124] *Rwamakuba*, Decision on Illegal Arrest and Detention (TC), 12 December 2000, at para. 43.
[125] *Ibid.*, at para. 45.
[126] The European Court of Human Rights has inferred that applicants must have suffered moral injury arising out of the violation of the right to legal assistance in circumstances involving complex proceedings or serious consequences for the applicant or where the applicant right to legal assistance was violated over a significant period of time. See above footnote 121.
[127] Registrar's Submissions, at para. 8.
[128] See Article 16 of the Statute and Rule 33 of the Rules.

implementation. Without interfering with the powers and responsibilities of the Registrar, the Chamber cannot see any obstacle for the Registrar to act as requested by the Defence. In the Chamber's view, these requests should be granted not as a result of Rwamakuba's violation of his right to legal assistance, but as a matter of course.

78. The Chamber further observes that on the basis of Article 28 of the Statute, States have to cooperate with the Tribunal in the "prosecution of persons accused of committing serious violations of international humanitarian law."[129] The term "prosecution" includes compliance not only with orders included in sentencing judgements, but also with orders in judgements of acquittal as either result forms the natural consequence of any prosecution.[130] In that respect, the Chamber holds the view that this meets one of the Tribunal's objectives of contributing to the process of national reconciliation in Rwanda, as decided by the Security Council acting under Chapter VII of the Charter.[131] As such, the Chamber has no doubt that States will cooperate with the Tribunal in facilitating the relocation of Rwamakuba and his family. The Chamber emphasizes that whoever has been found to be not guilty should be treated as such, without consideration as to whether elements of doubt persist.[132]

79. The Chamber notes that the present decision does not fall within the ambit of Rule 73 for the purposes of appeal.

FOR THE ABOVE REASONS, THE CHAMBER

I. DISMISSES the Defence's claim for financial compensation for a grave and manifest *miscarriage of justice;*

II. HOLDS that there has been a breach of André Rwamakuba's right to legal assistance, as provided for in Article 20 (4) (d) of the Statute, resulting from the Registrar's failure to appoint Duty Counsel for Rwamakuba during the initial months of his detention at the United Nations Detention Facilities, from 22 October 1998 until 10 March 1999;

III. Accordingly, **ORDERS** that the Registrar provide André Rwamakuba with an apology for the violation of his right to legal assistance;

IV. ORDERS that the Registrar provide André Rwamakuba with financial compensation in the amount of 2,000 (two thousand) US dollars for the moral injury sustained as a result of this violation;

V. ORDERS that the Registrar use all available means to seek the good offices of the State where André Rwamakuba's family is present to facilitate some temporary status for him

[129] Article 28(2) includes a non-exhaustive list of requests for assistance and orders issued by a Trial Chamber with which States shall comply.
[130] The French version of Article 28 is even clearer in this respect, referring to the "jugement" of such persons.
[131] UNSC Resolution 955, UN Doc. S/RES/955 (1994), 8 November 1994. Article 39 of the UN Charter reads as follows: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."
[132] The European Court of Human Rights has held numerous times that following an acquittal, the voicing of suspicions of guilt constitutes a violation the presumption of innocence set out in Article 6(2) of the ECHR. See, e.g., *Asan Rushiti v. Austria*, 28389/95 [2000] ECHR 106 (21 March 2000), at paras. 24-32 (in the context of proceedings for compensation on acquittal).

in that State and to seek the good offices of that State to ensure the uninterrupted schooling of his children.

Arusha, 31 January 2007, done in English.

Dennis C. M. Byron	Karin Hökborg	Gberdao Gustave Kam
Presiding Judge	Judge	Judge

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