150/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44C-A
13 September 2007
(150/H – 133/H)

P.T.

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 13 September 2007

André RWAMAKUBA

v.

THE PROSECUTOR

Case No. ICTR-98-44C-A

ICTR Appeals Chamber
Date: 13 September 2007
Action: P.T.
Copied To: Concerned Judges, Parties, SLOs, LOs, ALOs, Archives

Decision on Appeal against Decision on Appropriate Remedy

Counsel for André Rwamakuba:

Mr. David Hooper
Mr. Andreas O'Shea

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Patrice Tchidimbo
SIGNATURE: [signature] DATE: 13/09/07

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of an appeal filed by Mr. André Rwamakuba[1] against a decision taken by Trial Chamber III ("Trial Chamber").[2] In its decision of 18 April 2007, the Appeals Chamber dismissed the Prosecution's appeal against the Impugned Decision,[3] but allowed the Registrar to make submissions pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") on all aspects of it.[4] The Registrar and Mr. Rwamakuba filed their initial briefs on 2 May 2007[5] and their response briefs on 14 and 17 May 2007,[6] respectively. No replies have been filed.

I. BACKGROUND

2. In its Judgement of 20 September 2006, the Trial Chamber acquitted Mr. Rwamakuba of all charges against him and ordered his immediate release.[7] At that point, Mr. Rwamakuba had been detained by the Tribunal for nearly eight years.[8] The Trial Judgement also invited submissions from the parties and the Registrar concerning a potential violation of Mr. Rwamakuba's right to legal assistance, which resulted in a delay in his initial appearance, occurring shortly after his arrest and transfer to the Tribunal.[9] Pursuant to the Trial Judgement, Mr. Rwamakuba requested a remedy for this violation.[10] In addition, he sought a separate remedy for the "grave and manifest injustice" he

[1] Defence Notice of Appeal of Decision dated 31 January 2007, 12 February 2007 ("Rwamakuba Notice of Appeal").
[2] *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007 ("Impugned Decision").
[3] Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, paras. 6, 9 ("Scheduling Order").
[4] Scheduling Order, paras. 7, 9 ("As for the Registrar's Notice, the Appeals Chamber notes that the Impugned Decision is directed at the Registrar, who participated in the proceedings below on this matter upon invitation from the Trial Chamber to do so. Accordingly, the Appeals Chamber finds it appropriate and within the scope of Rule 33(B) of the Rules in the present circumstances to allow the Registrar to make submissions on all aspects of the Impugned Decision, including the award of compensation for the violation of Mr. Rwamakuba's right to legal counsel.").
[5] Registrar's Submissions in Respect of the Trial Chamber III Decision on Appropriate Remedy of 31 January 2007 Pursuant to Rule 33(B) of the Rules of Procedure and Evidence, 2 May 2007 ("Registrar's Submissions"); Defence Brief on Appeal Concerning Appropriate Remedy, 2 May 2007 ("Rwamakuba Appeal Brief").
[6] Registrar's Submissions in Response to Defence Brief on Appeal Concerning Appropriate Remedy, Pursuant to Rule 33(B) of the Rules of Procedure and Evidence, 14 May 2007 ("Registrar's Response Brief"); Appellant's Response to Registrar's Submissions on Appeal Concerning Appropriate Remedy, 17 May 2007 ("Rwamakuba Response Brief"). The Appeals Chamber granted Mr. Rwamakuba a brief extension of time to file his response brief. *See* Decision on Request for Extension of Time to File a Response, 10 May 2007, para. 5.
[7] *The Prosecutor v. André Rwamakuba*, Case No. ICTR 98-44C-T, 20 September 2006, Chapter IV ("Trial Judgement").
[8] Trial Judgement, para. 5 (noting that Mr. Rwamakuba was arrested on 21 October 1998 and transferred to the Tribunal the following day). The Namibian authorities first arrested and detained Mr. Rwamakuba, apparently on their own initiative, from 2 August 1995 until 8 February 1996. During this period, the Prosecution informed the Namibian authorities on 22 December 1995 that it was determining whether it was interested in prosecuting Mr. Rwamakuba. However, on 18 January 1996, the Prosecution informed the Namibian authorities that it had no evidence against him. *See* Trial Judgement, para. 4.
[9] Trial Judgement, Chapter IV.
[10] Impugned Decision, paras. 5, 14.

suffered as a result of his lengthy detention and prosecution on allegedly false and manipulative evidence.[11] The Registrar opposed both applications, and the Prosecution filed no submissions.[12]

3. On 31 January 2007, the Trial Chamber awarded Mr. Rwamakuba two thousand United States dollars upon finding that there had been a violation of his right to legal assistance and, as a further reparation for this violation, ordered the Registrar to provide an apology to Mr. Rwamakuba, and to use his good offices in resettling him with his family and in ensuring his children's continued education.[13] The Trial Chamber, however, denied Mr. Rwamakuba's separate claim for compensation arising from the alleged "grave and manifest injustice" related to his lengthy detention and allegedly tainted prosecution.[14] Mr. Rwamakuba now appeals the dismissal of this latter claim and requests the Appeals Chamber to find that the Trial Chamber had the authority to award compensation on that claim as well.[15] In his submissions, the Registrar objects to the Trial Chamber's award of financial compensation to Mr. Rwamakuba for the violation of his right to legal assistance.[16]

4. The Appeals Chamber will first address Mr. Rwamakuba's appeal concerning compensation for the lengthy detention and allegedly tainted prosecution. It will then turn to the Registrar's objection to the award of financial compensation to Mr. Rwamakuba for the violation of his right to legal assistance.

II. ALLEGED ERROR RELATING TO THE TRIAL CHAMBER'S DECISION NOT TO PROVIDE COMPENSATION IN VIEW OF THE ACQUITTAL

A. Background

5. In his application before the Trial Chamber, Mr. Rwamakuba claimed that he was indicted and prosecuted on false and manipulative evidence, which, coupled with his lengthy pre-trial and trial detention, resulted in "a grave and manifest miscarriage of justice".[17] As a legal basis for this

[11] Impugned Decision, paras. 5, 14, 19.
[12] Impugned Decision, para. 6.
[13] Impugned Decision, pp. 23-24 (disposition).
[14] Impugned Decision, paras. 19-31.
[15] Rwamakuba Notice of Appeal, paras. 5, 6; Rwamakuba Appeal Brief, paras. 7, 13. In his Notice of Appeal, Mr. Rwamakuba asks the Appeals Chamber to award appropriate compensation and, in the alternative, to remit the matter to the Trial Chamber. However, in his Appeal Brief, Mr. Rwamakuba requests only that his claim be remanded for further consideration.
[16] Registrar's Submissions, paras. 22, 23, 36-39, 40-72. In addition, the Registrar's Submissions also address the question of whether compensation is available for an acquittal as well as the Trial Chamber's construction of Rule 5 of the Rules. *See* Registrar's Submissions, paras. 6-21, 24-39. The Appeals Chamber has considered the Registrar's submission on the issue of compensation to an acquitted person in the context of Mr. Rwamakuba's appeal. The Appeals Chamber however does not need to address his submissions on the Trial Chamber's construction of Rule 5 of the Rules, as the Trial Chamber expressly stated that this rule was inapplicable to its findings. *See* Impugned Decision, para. 39.
[17] Impugned Decision, para. 19.

claim, Mr. Rwamakuba pointed primarily to Article 85(3) of the Statute of the International Criminal Court ("ICC Statute"), which envisions the possibility of compensation to an acquitted person in such circumstances.[18]

6. The Trial Chamber, however, was not satisfied that it had the power to provide such a remedy.[19] First, it noted that neither the Statute nor the Rules of the Tribunal provides for compensation to an acquitted person.[20] Second, it observed that, in the context of the existing international courts, only the ICC Statute provides for the possibility of compensation in the event of an acquittal[21] and even then, only in exceptional circumstances.[22] Finally, given the lack of uniform practice at national and international levels, the Trial Chamber concluded that a right to compensation for an acquitted person does not exist in customary international law.[23]

B. Submissions

7. Mr. Rwamakuba asserts that the Trial Chamber erred in law in finding that it lacked authority to award compensation in the event of an acquittal involving "a grave and manifest miscarriage of justice".[24] In this respect, he submits that both customary international law and the Trial Chamber's inherent authority provide a basis to award him compensation.[25] In particular, he points to the Trial Chamber's extensive discussion of the right to compensation as a remedy for violations of fair trial rights both in customary international law and in the exercise of its inherent authority.[26] Accordingly, Mr. Rwamakuba presents his claim to the Appeals Chamber as a violation of his fair trial and human rights.[27]

8. In particular, Mr. Rwamakuba submits that he suffered a "grave and manifest injustice" because he was indicted and prosecuted on evidence that was "false and manipulative", "palpably dishonest", and "inherently unsatisfactory and tainted".[28] Mr. Rwamakuba claims that the

[18] Impugned Decision, para. 20.
[19] Impugned Decision, paras. 21, 31.
[20] Impugned Decision, para. 21.
[21] Impugned Decision, paras. 21-25. The Trial Chamber observed that the Special Panel for Serious Crimes in East Timor provides for a right to compensation for unjust convictions and unlawful arrests and detentions. *See* Trial Judgement, para. 23, fn. 36.
[22] Impugned Decision, para. 28.
[23] Impugned Decision, paras. 27, 31.
[24] Rwamakuba Notice of Appeal, para. 5; Rwamakuba Appeal Brief, paras. 32-53
[25] Rwamakuba Appeal Brief, paras. 32-53.
[26] Rwamakuba Appeal Brief, para. 32.
[27] Rwamakuba Appeal Brief, para. 32 ("The Trial Chamber held that there was not sufficient evidence of State practice and *opinion (sic) juris* to support a customary right to compensation for grave and manifest miscarriage of justice. In our respectful submission, the Chamber has posed the question in the wrong way. The Trial Chamber accepts that there *is* a right to an effective remedy under customary international law when addressing the other claim. This, it is suggested, is well established in international law. The real question in our submission is whether the right to *an* effective remedy under customary law could be applied to the accused in these circumstances.").
[28] Rwamakuba Appeal Brief, paras. 12, 20, 22.

Prosecution failed to take adequate measures against the use and presentation of false evidence.[29] In addition, Mr. Rwamakuba points to his lengthy pre-trial and trial detention, resulting from the alleged failings in the collection and presentation of evidence against him, and argues that he was denied the right to an expeditious trial.[30] In particular, he notes that he made an early unsuccessful request for the severance of his case.[31] Ultimately, Mr. Rwamakuba requests the Appeals Chamber to find that the Trial Chamber has the authority to award financial compensation in such circumstances and to remand his case for further consideration of the merits of his claim.[32]

9. The Registrar opposes Mr. Rwamakuba's appeal.[33] The Registrar argues that the Tribunal has no authority to award compensation in circumstances where an accused has been acquitted after trial or for alleged unfairness in the proceedings.[34] In any event, the Registrar submits that Mr. Rwamakuba has failed to substantiate both factually and legally his claim of a grave and manifest miscarriage of justice.[35] The Registrar concludes by noting that "[w]hen the Tribunal acquits an Accused because the evidence fails to establish the crime beyond reasonable doubt, then the rights of an Accused to be judged fairly upon the evidence are vindicated."[36]

C. Discussion

10. The Appeals Chamber can identify no error on the part of the Trial Chamber in finding that it lacked authority to award compensation to Mr. Rwamakuba for having been prosecuted and acquitted. As the Trial Chamber observed, the Statute and Rules of the Tribunal do not provide a basis for compensation in such circumstances.[37] Nor is any found in the jurisprudence of this Tribunal or of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In the past, the Presidents of this Tribunal and the ICTY requested the Security Council to amend the Statutes of the two Tribunals to provide for such authority.[38] These efforts were unsuccessful and underscore the inability of the Tribunal to provide such a remedy in either its express or implied powers.[39] As

[29] Rwamakuba Appeal Brief, paras. 22, 43, 46.
[30] Rwamakuba Appeal Brief, paras. 17, 18, 23, 46, 47.
[31] Rwamakuba Appeal Brief, para. 16.
[32] Rwamakuba Appeal Brief, para. 13.
[33] Registrar's Response Brief, para. 2.
[34] Registrar's Submissions, paras. 18-21; Registrar's Response Brief, paras. 21-26.
[35] Registrar's Response Brief, paras. 4-29.
[36] Registrar's Response Brief, para. 29.
[37] Impugned Decision, para. 21.
[38] *See* Letter dated 28 September 2000 from the Secretary General Addressed to the President of the Security Council, U.N. Doc. S/2000/925* (6 October 2000)(annexing letter from President Pillay of the Tribunal)("ICTR Submission"). *See also* Letter dated 26 September 2000 from the Secretary General Addressed to the President of the Security Council, U.N. Doc. S/2000/904 (26 September 2000)(annexing letter from President Jorda of the ICTY)("ICTY Submission"); Letter dated 18 March 2002 from the Secretary General Addressed to the President of the Security Council, U.N. Doc. S/2002/304 (18 March 2002)(annexing letter from President Jorda of the ICTY). These letters specifically annexed a copy of Article 85 of the ICC Statute.
[39] *Cf. The Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11*bis* Appeal, 1 September 2005, paras. 14-17 (holding that the Security Council's endorsement of the ICTY's Completion Strategy,

the Trial Chamber observed, the practice of providing compensation for an acquittal varies at both national and international levels.[40] In this respect, the International Covenant on Civil and Political Rights ("ICCPR") refers to a right of compensation only where an individual already convicted by a final decision has been exonerated by newly discovered facts.[41] A person in such circumstances who has been convicted and has suffered punishment as a result of the conviction may receive compensation.[42] Mr. Rwamakuba, however, was not convicted and punished; he was acquitted in the first instance.

11. Furthermore, the Appeals Chamber finds no merit in Mr. Rwamakuba's submission that he is entitled to financial compensation for his acquittal on the basis that the proceedings against him violated certain rights resulting in a grave and manifest injustice to him. First, he presents no evidence or convincing argument to substantiate his assertion that the Prosecution presented false or tainted evidence against him in order to arrest and try him. His argument consists primarily of reiterating reasons why the Prosecution witnesses presented at his trial lacked credibility and reliability.[43]

12. In that respect, the Appeals Chamber notes that prior to commencement of trial, the Trial Chamber reviewed the evidence supporting the amended indictment against Mr. Rwamakuba after his case was severed from the *Karemera et al.* case and found that a *prima facie* case was established by the Prosecution.[44] In addition, in dismissing Mr. Rwamakuba's motion for judgment of acquittal at the end of the Prosecution case, the Trial Chamber rejected his principal contention that the Prosecution evidence was inherently unreliable.[45] Mr. Rwamakuba's submission that the Prosecution evidence was palpably false relies principally on the strength of his alibi, of which Mr.

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which included the referral of cases to national jurisdictions, reflected that the Tribunal was authorized to do so under the Statute)("*Stanković* Appeal Decision").

[40] Impugned Decision, paras. 25, 27.

[41] Article 14(6) of the ICCPR provides: "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 wholly or partly attributable to him."

[42] *Id.*

[43] Rwamakuba Appeal Brief, paras. 25-27.

[44] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment, 14 February 2005, para. 48 ("Considering the evidence presented by the Prosecution in support of its Motion, the Chamber finds that a *prima facie* case has been established with respect to the counts contained in the proposed Amended Indictment against Rwamakuba and grants leave to file it subject to further amendments detailed in the order.")("*Karemera et al.* Severance Decision"). The Trial Chamber observed that his case changed "substantially" from his initial indictment to his trial, removing allegations of joint criminal enterprise and focusing on his alleged direct role. *See Karemera et al.* Severance Decision, paras. 28, 37.

[45] *See The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Judgement of Acquittal, 28 October 2005, para. 13 ("The Chamber has very cautiously reviewed all the arguments of both parties as well as the transcripts in the current proceedings. The contradictions raised by the Defence with respect to the witnesses' testimony are not so irreconcilable that the Prosecution case should be considered as having completely broken down.").

Rwamakuba gave notice only on the eve of his separate trial on 8 June 2005.[46] While the Trial Judgement reflects that the Trial Chamber eventually found that the Prosecution evidence lacked credibility upon a final analysis of all the evidence as a whole, including the alibi,[47] this does not lead to the conclusion that the Prosecution evidence - which was initially considered to be sufficiently credible and reliable by the Trial Chamber to charge Mr. Rwamakuba and to deny his motion for judgement of acquittal - was therefore false or tainted.

13. Second, his assertion on appeal that he was denied the right to an expeditious trial is similarly unsupported and somewhat belied by his failure to develop this argument before the Trial Chamber.[48] He points only to the length of his proceedings and his early unsuccessful request for severance on 11 October 2000.[49] In this respect, he does not address the complexity or nature of the proceedings against him when his case formed part of a joint trial alleging a government-wide joint criminal enterprise.[50]

14. Finally, the Appeals Chamber sees no basis for remanding Mr. Rwamakuba's claim to the Trial Chamber in order for him to develop it further. Mr. Rwamakuba already had an opportunity to present these arguments to the Trial Chamber and, indeed, he expressly based his application below in part on the assertion that his rights were violated at one or more stages of the proceedings.[51] However, Mr. Rwamakuba took the position before the Trial Chamber that it was unnecessary for him to demonstrate that he was denied the right to an expeditious trial.[52] In addition, as to the alleged violation based on the nature of the Prosecution evidence presented in his case, Mr.

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[46] *The Prosecutor v. André Rwamakuba*, Case No. ICTR. 98-44C-PT, Decision on Prosecution Motion for Notice of Alibi and Reciprocal Inspection, 14 June 2005, para. 5.

[47] Trial Judgement, paras. 212, 214 ("The Chamber heard 49 Prosecution and Defence witnesses, [and] 94 Prosecution and 218 Defence exhibits were admitted into evidence over 78 trial days. [...] *After assessing the evidence as a whole*, the Chamber found all of the Prosecution witnesses not to be credible or reliable. Their testimonies were either inconsistent with the Indictment or contained other discrepancies which could not be satisfactorily explained. The absence of any credible or reliable identification of André Rwamakuba at the time and place of the alleged crimes, the lack of credibility or reliability of the Prosecution witnesses, the participation of the Accused in other activities during periods alleged in the Indictment and the Defence alibi evidence, *cumulatively* raise a reasonable doubt regarding the Prosecution's case.")(emphasis added).

[48] *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Application for Appropriate Remedy, 25 October 2006, para. 24 ("We submit it is not necessary to demonstrate a violation of the right to trial without undue delay for this to be weighed into the question of whether there has been a miscarriage of justice.")("*Rwamakuba* Trial Submissions").

[49] Rwamakuba Appeal Brief, para. 16. *See also The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on André Rwamakuba's Motion for Severance, 12 December 2000, para. 44.

[50] *See Karemera et al.* Severance Decision, para. 29 ("The proposed Amended Indictment against Rwamakuba incorporates only allegations that are unique and relevant to him. The charge of joint criminal enterprise, which formed the basis of the joinder and was one of the reasons why the Prosecution previously opposed the severance, has been removed. The Prosecution has indicated that the severance of Rwamakuba has allowed it to narrow the allegations of joint criminal enterprise from the large level of the government apparatus to the level of the MRND party, and to focus primarily on the control of *Interahamwe* militias.").

[51] *Rwamakuba* Trial Submissions, para. 7.

[52] *Rwamakuba* Trial Submissions, para. 24.

Rwamakuba raised similar issues at the delivery of his Trial Judgement[53] and cited the Prosecution's use of "false and manipulative" evidence in his submissions at trial.[54] The Trial Chamber expressly considered these submissions in the Impugned Decision, even though they exceeded the scope of its scheduling order.[55] These arguments were therefore before the Trial Chamber and were not accepted as a basis for compensation.

D. Conclusion

15. In sum, Mr. Rwamakuba has not demonstrated that the Trial Chamber erred in law in finding that it lacked authority to award him compensation for his acquittal. Furthermore, Mr. Rwamakuba fails to substantiate his claim that he suffered a grave and manifest injustice from the proceedings brought against him because he was indicted and prosecuted on false and manipulative evidence and because of his lengthy pre-trial detention. Accordingly, his appeal is dismissed.

III. ALLEGED ERROR RELATING TO THE TRIAL CHAMBER'S DECISION TO AWARD COMPENSATION

A. Background

16. The Registrar's submissions concern the Trial Chamber's decision to award Mr. Rwamakuba two thousand United States dollars as compensation for a violation of his right to legal assistance.[56] The history of the proceedings related to the violation of Mr. Rwamakuba's rights to legal assistance and to an initial appearance without delay is set forth in the Trial Judgment and in a number of decisions in this case.[57] It suffices to note here that the Namibian authorities arrested Mr. Rwamakuba on 21 October 1998 and transferred him to the Tribunal the following day.[58] The

[53] *See* T. 20 September 2005 pp. 11, 14 ("But for all that, it's our submission that there has been a deliberate attempt -- to use the phrase that's often been used -- to poison the waters of justice and to bring before you, the Judges, false allegations that have essentially resulted in André Rwamakuba being detained for seven years, totally separated from family -- and work, and opportunity and effectively having his life broken on those lies.").
[54] Impugned Decision, para. 19; *Rwamakuba* Trial Submissions, para. 24.
[55] Impugned Decision, paras. 12, 13.
[56] *Registrar's Submissions*, paras. 19-23, 36-72.
[57] Trial Judgement, paras. 217; Impugned Decision, paras. 2-4; *The Prosecutor v. André Rwamakuba et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, 12 December 2000, p. 2, paras. 35-44 ("*Rwamakuba* Arrest and Detention Decision"); *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-A, Decision (Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention), 11 June 2001, pp. 2-4 ("*Rwamakuba* Appeal Decision"). The Trial Chamber described the violation of Mr. Rwamakuba's rights as a violation of his "right to legal assistance", noting that it resulted in a delay in his initial appearance. Impugned Decision, paras. 14-18, 71. However, the Appeals Chamber has previously explained in a similar context that the right to legal assistance and the right to an initial appearance without delay are in fact two distinct rights. *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 242-253 ("*Kajelijeli* Appeal Judgement").
[58] Trial Judgement, para. 5; *Rwamakuba* Arrest and Detention Decision, p. 2, para. 35.

Tribunal did not assign him counsel under the Tribunal's legal aid system until 24 February 1999.[59] This delay was explained in part by Mr. Rwamakuba's delay in proposing an attorney to represent him.[60] However, during this four month period, the Tribunal did not offer Mr. Rwamakuba the assistance of a duty counsel as required under Rule 44*bis* of the Rules.[61] In addition, the Tribunal did not hold his initial appearance, in part due to his lack of representation, until 7 April 1999.[62]

17. On 18 April 2000, Mr. Rwamakuba requested Trial Chamber II, which was originally seized of this case, to dismiss the charges against him and to immediately release him, alleging violations of his fundamental rights during his arrest and detention.[63] Trial Chamber II determined that the Registrar's failure to assign duty counsel in accordance with Rule 44*bis* "resulted in an absence of any legal assistance for the Accused over an extended period of time in contradiction with, notably, Article 20(4)(c) of the Statute, and, further, in the delay in the Accused's initial appearance."[64] Trial Chamber II, however, concluded that the delay did not cause him "serious and irreparable prejudice" and denied the motion for immediate release.[65] On 11 June 2001, a Bench of the Appeals Chamber dismissed Mr. Rwamakuba's appeal of this decision, on the ground that the issues surrounding Mr. Rwamakuba's arrest and detention did not raise jurisdictional matters.[66] The Bench of the Appeals Chamber added, however, that "it is open to the Appellant 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]

18. Pursuant to the Trial Judgement, Mr. Rwamakuba filed an application for a remedy for the violation of his right to legal assistance.[68] In the Impugned Decision, the Trial Chamber granted this application and ordered the Registrar to issue a formal apology[69] and to pay him two thousand United States dollars in financial compensation for his "moral injury".[70] The Trial Chamber reasoned that it had authority to provide a remedy to Mr. Rwamakuba for this violation based on the

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[59] *Rwamakuba* Arrest and Detention Decision, para. 38. The Appeals Chamber notes that Trial Chamber II mistakenly referred to the year of the assignment of Mr. Rwamakuba's counsel as 2000, rather than the correct year of 1999. *See* Rwamakuba Appeal Brief, Annex A (indicating date of appointment as 24 February 1999).
[60] *Rwamakuba* Arrest and Detention Decision, paras. 38-40.
[61] *Rwamakuba* Arrest and Detention Decision, paras. 41-43. *See also* Trial Judgement, para. 217.
[62] *Rwamakuba* Arrest and Detention Decision, p. 2, paras. 35, 43. *See also* Impugned Decision, para. 2. The Tribunal scheduled his initial appearance for 10 March 1999, but adjourned it at the request of his assigned counsel until 7 April 1999.
[63] *Rwamakuba* Arrest and Detention Decision, p. 2, paras. 1-7.
[64] *Rwamakuba* Arrest and Detention Decision, para. 43.
[65] *Rwamakuba* Arrest and Detention Decision, para. 44.
[66] *Rwamakuba* Appeal Decision, p. 4.
[67] *Rwamakuba* Appeal Decision, p. 4.
[68] Impugned Decision, paras. 5, 14, 19.
[69] Impugned Decision, pp. 23-24 (Disposition). In addition, the Trial Chamber ordered the Registrar to use his good offices in resettling him with his family and in ensuring his children's continued education. The Trial Chamber noted that "[t]hese are obligations of means and not of result". Impugned Decision, para. 77. The Registrar does challenge this aspect of the decision.
[70] Impugned Decision, pp. 23-24 (Disposition).

right to a remedy for human rights violations, as reflected in numerous international instruments,[71] as well as the jurisprudence of the Appeals Chamber, notably the *Kajelijeli* Appeal Judgement and the *Barayagwiza* case.[72] More particularly, the Trial Chamber recalled that a Bench of the Appeals Chamber in this case indicated that Mr. Rwamakuba could seek reparation for this violation.[73] In addition, the Trial Chamber relied on its inherent authority.[74]

19. On the issue of financial compensation for the violation of Mr. Rwamakuba's right to legal assistance, the Trial Chamber acknowledged that no specific provision of the Statute or Rules expressly envisioned such a remedy.[75] However, the Trial Chamber reviewed various international instruments,[76] decisions of human rights bodies,[77] and the decisions of the Appeals Chamber in the *Barayagwiza* and *Semanza* cases,[78] all referring to compensation as part of an effective remedy. From this, the Trial Chamber concluded that it had inherent authority to award financial compensation.[79]

B. Submissions

20. The Registrar submits that the Trial Chamber erred in law in finding that it had the authority to award financial compensation as part of an effective remedy.[80] In this respect, he contends that the Tribunal's Statute and Rules do not provide for compensation as a remedy and submits that the right to compensation for human rights violations is simply an "emerging norm".[81] He describes the Appeals Chamber findings in the *Barayagwiza* and *Semanza* cases, which envisioned an award of financial compensation to the accused in those cases if they were acquitted, as "anticipatory" and

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[71] Impugned Decision, para. 40 (referring to Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the European Convention on Human Rights, the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights)(internal citations omitted).

[72] Impugned Decision, para. 41-43, citing *Kajelijeli* Appeal Judgement, paras. 255, 322; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 74 ("*Barayagwiza* Appeal Decision").

[73] Impugned Decision, para. 44, citing *Rwamakuba* Appeal Decision, p. 4.

[74] Impugned Decision, paras. 45-49.

[75] Impugned Decision, paras. 40, 58.

[76] Impugned Decision, paras. 54, 55 (referring to the International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights, and the Statutes of the Inter-American Court of Human Rights as well as the European Court of Human Rights).

[77] Impugned Decision, paras. 51, 52, 55 (discussing decisions or recommendations of the European Court of Human Rights, Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, The United Nations Human Rights Committee, Committee on the Elimination of all Forms of Racial Discrimination).

[78] Impugned Decision, para. 63, citing *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, paras. 579-582, *Barayagwiza* Appeal Decision, para. 75.

[79] Impugned Decision, para. 62.

[80] Registrar Submissions, paras. 19, 20, 40-61.

[81] Registrar Submissions, paras. 40-56.

"declaratory".[82] In particular, he notes that the Presidents of this Tribunal and of the ICTY unsuccessfully sought an amendment of the Statute from the Security Council to provide for financial compensation as a remedy for fair trial rights violations in the Statute, shortly after these decisions were taken.[83]

21. Finally, the Registrar takes issue with the merits of the decision. Pointing to the Trial Chamber's finding that the violation did not materially prejudice Mr. Rwamakuba's case, he submits that the award of financial compensation is unwarranted and that other forms of reparation awarded to Mr. Rwamakuba in the Impugned Decision, such as the formal apology, sufficed.[84] He adds that the Trial Chamber's award of damages for the "moral injury" has no basis in fact.[85]

22. Mr. Rwamakuba responds that the Statute was not meant to be an exhaustive document on the authority of the Tribunal but rather a basic jurisdictional framework.[86] He submits that an effective remedy therefore falls within the Tribunal's mandate to do justice and to foster reconciliation.[87] Furthermore, Mr. Rwamakuba contends that the award of moral damages was "a fair and humane demonstration of the Trial Chamber's capacity to understand the real hurt occasioned to an accused by such circumstances."[88]

C. Discussion

23. There is no question that, as the Trial Chamber recognized and held in the Impugned Decision, Mr. Rwamakuba is entitled to an effective remedy for the violation of his right to legal assistance as well as his right to an initial appearance without delay. Trial Chamber II recognized the existence of these violations,[89] and the Appeals Chamber indicated that Mr. Rwamakuba could "seek reparation" for them.[90] Moreover, the Appeals Chamber, after considering nearly identical violations in the *Kajelijeli* Appeal Judgement, reached the same conclusion and, accordingly, reduced the sentence imposed in that case.[91] The two principal questions for the Appeals Chamber

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[82] Registrar Submissions, para. 41. He also quotes an opinion from the Office of Legal Affairs of the United Nations in support of this proposition. *Id.*, para. 20(iii).
[83] Registrar Submissions, paras. 20, 41.
[84] Registrar Submissions, paras. 36-39, 67-69.
[85] Registrar Submissions, paras. 62-66.
[86] Rwamakuba Response Brief, para. 15.
[87] Rwamakuba Response Brief, paras. 16, 17.
[88] Rwamakuba Response Brief, para. 23.
[89] *Rwamakuba* Arrest and Detention Decision, para. 43.
[90] *Rwamakuba* Appeal Decision, p. 4.
[91] *Kajelijeli* Appeal Judgement, paras. 237, 242-250, 253, 323, 324 (finding violations of the right to counsel, resulting from a failure to provide duty counsel in accord with Rule 44*bis* of the Rules, and the right to an initial appearance without delay). The Appeal Chamber noted that the accused was in the custody of the Tribunal for a total of 211 days prior to any initial appearance during which he was without assigned counsel for 147 days. *Kajelijeli* Appeal Judgement, para. 237. In the present case, Mr. Rwamakuba was detained in the Tribunal's detention facilities for a total of 167 days from the date of his transfer on 22 October 1998 until his initial appearance held on 7 April 1999, of which he spent 125 days without assigned counsel. *See supra* para. 16. It should also be noted, however, that the Appeals

are whether the Tribunal is empowered to award financial compensation as an effective remedy for a violation of the fundamental rights of the accused and, if so, whether it was appropriate to award Mr. Rwamakuba financial compensation as an effective remedy in the present case.

24. The Appeals Chamber has previously held that "any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy."[92] It follows very plainly from the Appeals Chamber's decisions in the *Barayagwiza* and *Semanza* cases that a remedy for a violation of the rights of the accused may include an award of financial compensation, as both decisions envisioned financial compensation being fixed at the time of judgement, if the accused were acquitted.[93] In this respect, the Appeals Chamber is not persuaded by the Registrar's submissions that the absence of an explicit provision providing for financial compensation in the Statute for violations of the rights of the accused as well as the Security Council's decision not to amend the Statute to expressly include such a remedy indicate that it is not available.

25. First, while there is no right to compensation for an acquittal *per se*, there is a right in international law to an effective remedy for violations of the rights of the accused, as reflected in Article 2(3)(a) of the ICCPR.[94] In this respect, the ICCPR specifically envisions compensation as an appropriate remedy in certain circumstances, such as the case of unlawful arrest or detention.[95] The Appeals Chamber has previously held that the ICCPR is a persuasive authority in determining the Tribunal's powers under international law.[96]

Chamber found additional violations in the *Kajelijeli* case. *See Kajelijeli* Appeal Judgement, para. 251, 252 (finding that the rights of the accused were violated based on his arbitrary provisional detention in Benin without charge for 85 days, and detention in Benin without appearance before a Judge for a total of 95 days, which was attributable to the Prosecution).

[92] *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 125 ("*Semanza* Appeal Decision").

[93] *Semanza* Appeal Decision, p. 34 ("[T]hat for the violation of his rights, the Appellant is entitled to a remedy which shall be given *when judgement is rendered by the Trial Chamber*, as follows:(a) If he is found not guilty, the Appellant shall be entitled to financial compensation [...]")(emphasis added); *Barayagwiza* Appeal Decision, para 75(iii)("DECIDES that for the violation of his rights the Appellant is entitled to a remedy, *to be fixed at the time of judgement at first instance*, as follows: a) If the Appellant is found not guilty, he shall receive financial compensation [...]")(emphasis added).

[94] Article 2(3) of the ICCPR states: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted." *See also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147 (16 December 2005).

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

[96] *See Kajelijeli* Appeal Judgement, para. 209. In addition, the Appeals Chamber has previously recognized that the rights of the accused in Article 20 of the Statute track the rights in the ICCPR. *See, e.g., Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 12, fn. 46 ("*Zigiranyirazo* Appeal Decision").

26. The authority in the Statute to provide an effective remedy flows from Article 19(1) of the Statute, which obliges the Trial Chambers to ensure a fair trial and full respect for the accused's rights. The existence of fair trial guarantees in the Statute necessarily presumes their proper enforcement.[97] In this respect, the Appeals Chamber observes that the Statute and Rules do not expressly provide for other forms of effective remedy, such as the reduction of sentences, yet such a remedy has been accorded on several occasions.[98] Moreover, the submissions of the Presidents of this Tribunal and of the ICTY seeking an amendment of the Statute from the Security Council to provide for financial compensation do not suggest that an effective remedy in the form of financial compensation cannot be ordered and paid in the absence of an express provision. At the time of making the submissions, the Appeals Chamber had already issued two decisions envisioning possible awards of compensation to remedy fair trial rights violations and the submissions themselves recognized the authority of the Tribunals to order financial compensation as an effective remedy in the form of an "exceptional ruling" or an "*ex gratia* payment".[99] The request for a statutory amendment merely expressed the preference of the Presidents for a specific statutory provision so that it would be beyond dispute that any award of compensation would be paid "according to law".[100] Against this backdrop, the Appeals Chamber will not assume that the Security Council's inaction was intended to interfere with the Tribunal's inherent authority to order compensation in appropriate circumstances. Accordingly, the Appeals Chamber can identify no error of law on the part of the Trial Chamber in finding that it had the authority in general to award an effective remedy for the violations of Mr. Rwamakuba's rights as an accused person, including financial compensation.

27. The question remains, however, whether it was appropriate for the Trial Chamber to award Mr. Rwamakuba financial compensation in the present case, as part of the remedy for the violations

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[97] *Cf. Stanković* Appeal Decision, para. 14 ("It is true, as the Appellant points out, that the Statute of the Tribunal does not contain an explicit legal basis for Rule *11bis*. But the explicit language of the Statute is neither an exclusive nor an exhaustive index of the Tribunal's powers. It is axiomatic under Article 9 of the Statute that it was never the intention of those who drafted the Statute that the Tribunal try all those accused of committing war crimes or crimes against humanity in the Region. The Tribunal was granted primary – but explicitly not exclusive – jurisdiction over such crimes. In this regard, it is clear that alternative national jurisdictions have consistently been contemplated for the 'transfer' of accused.")(internal citations omitted).

[98] *See generally Semanza* Appeal Decision, p. 34; *Barayagwiza*, Appeal Decision, para. 75; *Kajelijeli* Appeal Judgement, para. 324.

[99] ICTR Submission, p. 4 ("Such mechanisms include, inter alia, arbitration, ex gratia payment, resolutions of the General Assembly authorizing limited liability and amendment of the Statute"); ICTY Submission p. 4 ("These mechanisms include, among other things, arbitration, exceptional ruling, General Assembly resolutions recognizing limited responsibility and amendment of the Tribunal's Statute.").

[100] ICTR Submission, p. 4 ("In this connection, it is essential to note that the United Nations would not be able to comply with its international obligations simply by paying the individuals concerned an appropriate sum in compensation. The obligations which are codified within article 9, paragraph 5, and article 14, paragraph 6, of the International Covenant on Civil and political Rights are not simply to ensure that persons whose cases fall within the scope of these provisions are compensated *simpliciter*, but rather to guarantee that they are vested with žan enforceable right to compensation" (in the case of article 9(5)) and are compensated "according to the law" (in the case of article 14 (6)"); *See also* ICTY Submission p. 5.

of his right to legal assistance and to an initial appearance without delay. The jurisprudence of the Appeals Chamber reflects that the nature and form of the effective remedy should be proportional to the gravity of harm that is suffered.[101] In practice, the effective remedy accorded by a Chamber for violations of an accused's fair trial rights will almost always take the form of equitable or declaratory relief.[102] In the past, the Appeals Chamber has envisioned financial compensation as a form of effective remedy only in situations where, amongst other violations, an accused was impermissibly detained without being informed of the charges against him.[103] This is in line with Article 9(5) of the ICCPR which provides for an enforceable right to compensation in the event of an unlawful arrest or detention.[104]

28. Bearing this in mind, the Appeals Chamber recalls that Mr. Rwamakuba was detained in the Tribunal's detention facilities for a total of 167 days from the date of his transfer on 22 October 1998 until his initial appearance held on 7 April 1999, of which he spent 125 days without assigned counsel.[105] As the Appeals Chamber in the *Kajelijeli* case already pointed out in relation to the rights of a suspect,[106] a judge is called upon to make an accused familiar with the charges, to verify an accused's identity, to examine any obvious challenges to the case, to inquire into the medical condition of an accused, and to notify a person enjoying the confidence of the detainee[107] and consular officers.[108] The Appeals Chamber further stressed that:

> Rule 62 is unequivocal that an initial appearance is to be scheduled without delay. There are purposes for an initial appearance apart from entering a plea including: reading out the official charges against the accused, ascertaining the identity of the detainee, allowing the Trial Chamber or Judge to ensure that the rights of the accused while in detention are being respected, giving an opportunity for the accused to voice any complaints, and scheduling a trial date or date for a sentencing hearing, in the case of a guilty plea, without delay.[109]

The Appeals Chamber considers the violations of Mr. Rwamakuba's rights attributable to the Tribunal and financial compensation to be an effective remedy. The nature of the violations

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[101] *Semanza* Appeal Decision, para. 125.
[102] *See, e.g., Zigiranyirazo* Appeal Decision, para. 24 (excluding testimony taken in violation of an accused's right to be present during his trial); *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, paras. 164, 165 (setting aside a guilty verdict where accused's right to notice of charges against him was violated); *Kajelijeli* Appeal Judgement, para. 324 (reduction of sentence for period of unlawful arrest and detention in Benin and right to legal assistance and initial appearance at Tribunal); *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 37 (recognition of violation and warning of possible future sanctions for the Prosecution's violation of Rule 68 of the Rules).
[103] *Semanza* Appeal Decision, paras. 87, 90; *Barayagwiza* Appeal Decision, paras. 54, 55.
[104] ICCPR, article 9(5)("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.").
[105] *See supra* paragraph 16.
[106] *Kajelijeli* Appeal Judgement, para. 221.
[107] *See* Standard Minimum Rules for the Treatment of Prisoners, approved by ECOSOC Res. 663(C) (XXIV) of 31 July 1957 and Res. 2076 (LXII) of 13 May 1997 (UN Doc. E/5988 (1977)); *Kajelijeli* Appeal Judgement, fn. 451.
[108] Vienna Convention on Consular Relations, Article 36(B).
[109] *Kajelijeli* Appeal Judgement, para. 250 (internal citations omitted).

suffered by Mr. Rwamakuba is no less significant than in other cases where such compensation was envisioned to be fixed at the time of judgement if the accused were found not guilty (as opposed to a reduction in sentence in case the accused were found guilty).[110] Accordingly, the Appeals Chamber can identify no error on the part of the Trial Chamber in finding that financial compensation is an appropriate form of an effective remedy to address the violations of Mr. Rwamakuba's rights.

29. Moreover, the Appeals Chamber is not persuaded by the Registrar's submission that the award of two thousand United States dollars has no basis in fact. It is not disputed that Mr. Rwamakuba's suffered serious violations of his fundamental rights. In the *Kajelijeli* Appeal Judgement, the Appeals Chamber did not demand or cite additional proof of specific harm in according an appropriate remedy in that case, which involved a significant reduction in sentence.[111] Moreover, as noted above, the Appeals Chamber in the *Barayagwiza* and *Semanza* cases envisioned the award of compensation, in the event of an acquittal, to be fixed at the time of judgement.[112]

30. Finally, the Appeals Chamber also agrees with the Trial Chamber that internal institutional considerations related to the execution of an order, including budgetary matters, are separate considerations from the Tribunal's authority to award an effective remedy in the form of financial compensation in appropriate circumstances and in compliance with its international obligations.[113] Budgetary considerations cannot interfere with the Tribunal's authority to award financial compensation as an effective remedy for a human rights violation; similarly, at the domestic level, a State cannot advance the argument that there are no budgetary resources available to justify a refusal to award compensation. The Appeals Chamber has confirmed the Tribunal's general authority to award compensation in appropriate and limited circumstances. In addition, it has affirmed the reasonableness of the award in the present case.

D. Conclusion

31. Accordingly, the Appeals Chamber concludes that the Trial Chamber did not err in awarding Mr. Rwamakuba two thousand United States dollars as financial compensation as part of an effective remedy for the violations in the present case.

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[110] *See, e.g., Kajelijeli* Appeal Judgement, para. 323 (considering an accused's detention without being informed of the charges against him and his detention without an initial appearance as equally impermissible).
[111] *Kajelijeli* Appeal Judgement, paras. 253, 323, 324. The Appeals Chamber set aside the convicted person's two life-sentences and fifteen years' sentence imposed by the Trial Chamber and converted them into a single sentence consisting of a fixed term of imprisonment of 45 years.
[112] *Semanza* Appeal Decision, p. 34; *Barayagwiza* Appeal Decision, para 75(iii).
[113] *See* Impugned Decision, para. 60.

IV. DISPOSITION

32. For the foregoing reasons, the Appeals Chamber **DISMISSES** Mr. Rwamakuba's appeal, **AFFIRMS** the Trial Chamber's award of two thousand United States dollars in compensation to him and **ORDERS** the Registry to make appropriate arrangements for the payment of the award.

Done in English and French, the English version being authoritative.

Done this thirteenth day of September 2007,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN 134/H

1. I agree with the Appeals Chamber's dismissal of Mr. Rwamakuba's appeal relating to the Trial Chamber's decision not to provide compensation in view of his acquittal. My hesitation is over paragraph 32 of the decision of the Appeals Chamber, in which the Appeals Chamber "ORDERS the Registry to make appropriate arrangements for the payment of the award" in respect of related matters. As the Registry is headed by the Registrar, the flexibility of this formula does not conceal the fact that it is directed to him and that it assumes that he has the capacity to make payment. That gives me difficulty.

2. I accept that the Tribunal may declare that the appellant's human rights have been violated. It may also award compensation for such a violation, provided that the particular methods of award are within its competence, as has been the case in some instances. But it seems to me that the Tribunal has no competence to order the Registrar to make appropriate arrangements for financial payment. It is not merely a question of the lack of budgetary provision, but also a question of the lack of authority under the Statute.

3. The Appeals Chamber suggests that it is granting 'an effective remedy'. What therefore has to be seen is whether the remedy granted will prove effective. In my view, it will not prove effective, for the reason that the Registrar will lack the means of compliance. As indicated by the Appeals Chamber itself, the Presidents of this Tribunal and of the ICTY sought an appropriate amendment of the Statute from the Security Council to allow for financial compensation to be paid by the Tribunal in such a situation, but their quest was unsuccessful; that was in September 2000.[1] By its long silence, the Security Council may be taken to have affirmed that the Tribunals have no competence to order payment of financial compensation.

4. The practical implications of the Appeals Chamber's order must also be considered. If the order stands and the Registrar (including anyone from the Registry) does not make the payment, his obligation can be enforced, at the instance of Mr. Rwamakuba, by a contempt order. The Registrar's probable defence in contempt proceedings will be that he is unable to make the payment because of the lack of budgetary provision and the impossibility of such provision being made in view of the lack of statutory authority. If the Tribunal accepts this defence, it will merely have postponed the decision that the Trial Chamber lacked authority to order the Registrar to pay financial compensation to Mr. Rwamakuba. If the Registrar's defence is dismissed, the Registrar

[1] *See* Letter dated 28 September 2000 from the Secretary General Addressed to the President of the Security Council (U.N. Doc. S/2000/925)(annexing a letter from President Pillay of the ICTR). *See also* Letter dated 26 September 2000 from the Secretary General Addressed to the President of the Security Council, U.N. Doc. S/2000/904 (26 September 2000)(annexing a letter from President Jorda of the ICTY).

may have to go to prison. That prospect looks unlikely. If the Registrar succeeds at that stage, Mr Rwamakuba would have to content himself with an illusion in place of an effective remedy.

5. The international legal system, if it may be called a system, is not perfect. In this respect, it is unlike the national legal systems addressed by the various human rights instruments. The question is not how a function given to the Tribunal is to be exercised by it, but whether the function has in the first place been given to it. In this case, it is not possible to fill the imperfections in the Tribunal's system by recourse to the idea of inherent authority. Both Tribunals have in several cases properly relied on the concept of inherent authority, and I recognize that the competence which the concept gives is not confined to trivial matters. However, it seems to me that it is available only for the better discharge of a function which was given to the Tribunals, at least in essence, by the Statute; it is not available to justify the acquisition of a wholly new function, more particularly one which involves the expenditure of monies provided by United Nations member states.

6. *South West Africa* has been justly criticized. However, the criticisms do not affect the validity of the International Court of Justice's pronouncement that in 'the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception ...'.[2] As Immanuel Kant saw in 1784, 'The greatest problem for the human species is that of attaining a civil society which can administer universal justice'.[3] That is true of the administration of international justice to states; it is equally true of the administration of international justice to individuals.

7. The problem in this case is a real one; some of the dicta in past decisions may have led to it. However, it is not possible to supply the deficit in the manner indicated by the Appeals Chamber.

Done in English and French, the English text being authoritative.

Dated 13 September 2007
At The Hague
The Netherlands

Mohamed Shahabuddeen

[Seal of the Tribunal]

[2] *I.C.J. Reports 1966*, 6, 46, para. 86.
[3] Cited in J.L. Gaddis, *The Cold War. A New History* (New York, 2005), 158.

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