UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Original: English

TRIAL CHAMBER II

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

13/13

Registry: Antoine Mindua
John Kiyeyeu

Decision of: 12 December 2000

THE PROSECUTOR
v.
ANDRÉ RWAMAKUBA *et alia*
Case No. ICTR-98-44-T

DECISION ON THE DEFENCE MOTION CONCERNING THE ILLEGAL ARREST AND ILLEGAL DETENTION OF THE ACCUSED

The Office of the Prosecutor:
Kenneth C. Fleming
Ifeoma Ojemeni
Melinda Y. Pollard

Counsel for the Defence:
David Hooper

12.12.2000

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (hereinafter referred to as "the Tribunal"),

SITTING as Trial Chamber II, composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Mehmet Güney;

CONSIDERING that the Accused was arrested and detained from 2 August 1995 to 7 February 2000 by the Namibian authorities ; that, on 22 December 1995, the Office of the Prosecutor ("the OTP") contacted the Namibian authorities for the Accused to be kept in custody pending further information by their services; that, on 18 January 1996, the OTP notified the Namibian authorities that they had no evidence against the Accused with regard to his having committed any crimes within the jurisdiction of the Tribunal; that the Accused was subsequently released by the Namibian authorities on 8 February 1996 ;

CONSIDERING FURTHER that the Accused's Indictment was confirmed on 29 August 1998 and that an Order for Arrest and Transfer pursuant to Rule 55 of the Rules was issued against him on 8 October 1998; that the Accused was subsequently arrested on 21 October 1998 in Namibia and transferred to the Tribunal on 22 October 1998; that his Counsel was appointed on 24 February 2000 and, finally, that the Accused's Initial Appearance together with his co-Accsued, adjourned on 10 March 1999, took place on 7 April 1999;

BEING SEIZED of a *Motion Concerning the Illegal Arrest and Illegal Detention of the Accused* filed by the Defence on 18 April 2000; of a subsequent *Response of the Prosecutor to Defense Notice of Motion concerning the Arrest and Illegal Detention of the Accused* filed on 2 August 2000 and of a *Supplemental Response of the Prosecutor to Defense Notice of Motion concerning the Arrest and Illegal Detention of the Accused* filed on 3 August 2000;

CONSIDERING the following documents thereafter submitted by the Parties: Letter by the Defence dated 18 September 2000 (enclosing an *Affidavit* by the Accused and one by his Counsel David Hooper and a *Reply to Prosecution Response*) filed on 19 September 2000; *Surreply of the Prosecutor to Defense Reply dated 16 September 2000 Re : Notice of Motion Concerning the Arrest and Illegal Detention of the Accused* filed on 25 September 2000; 51-page set of documents submitted by the Defence at the hearing of 26 September 2000 (providing a chronology of events, a summary of the arguments and replies of the Parties, and a copy of the documents submitted to that date); Letter by the Defence dated 3 October 2000 (enclosing a *fac simile* letter from the Namibian Ministry of Foreign Affairs, Information and Broadcasting, dated 22 September 2000, regarding the absence of communication with the United Nations Secretary General during the Accused's detention from August 1995 to February 1996, and copy of the Defence reply thereof, dated 3 October 2000); Letters dated 9 and 10 October 2000 by, respectively, the Accused and his Counsel (enclosing three newspaper extracts); *Defence Reply to Prosecutor's Response to 'New Information'* filed on 2 November 2000; Letter by the

Defence dated 5 November 2000 (enclosing letters by the Accused to the Registry, regarding appointment of a Counsel);

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute"), specifically Article 19, 20 of the Statute; the Rules of Procedure and Evidence ("the Rules"), in particular Rules 40, 40 *bis,* 44, 44 *bis*, 62, 72, 73 of the Rules;

HAVING HEARD THE PARTIES at a hearing on 26 September 2000;

NOW CONSIDERS the Motion.

ARGUMENTS OF THE PARTIES:

The Defence submits, *inter alia*, that:

1. Their Motion, which pertains to the possible loss of jurisdiction *ratione personae* of the Tribunal, is of a preliminary nature: the violations alleged of the Accused's fundamental rights during two periods of detention (one in Namibia, from 2 August 1995 to 7 February 1996, the other at the UNDF in Arusha, in 1998) *per se* raise the issue of the possible loss of jurisdiction of the Tribunal over the Accused. They rely on the Barayagwiza Appeals Chamber Decision of 3 November 1999, at par. 71, wherein similar allegations were reviewed, according to which: "*the issues raised by the Appellant certainly fall within the ambit of Rule 72*". Alternately, they would bring their Motion under Rule 73 of the Rules.
2. The Accused's arrest of 2 August 1995, by the Namibian authorities, was carried out pursuant to a formal request made by the Prosecutor pursuant to Rule 40 of the Rules, in the form a list of suspects, on which the Accused's name figured, the Prosecutor had previously transmitted to, among others, the State of Namibia. Any irregularities pertaining to both the arrest and the subsequent detention of the Accused in Namibia from 2 August 1995 to 7 February 1996 are therefore attributable to the Tribunal.
3. The Accused's arrest of 1995 was illegal in the absence of any proof against the Accused to consider him a suspect, let alone ask for his arrest, as indicated by a *fac simile* letter dated 18 January 1996 signed by Richard Goldstone and addressed to the Namibian Ministry of Foreign Affairs, in which the then Prosecutor "*confirm[s] (...) that at this moment we do not possess evidence which would entitle us to request the Namibian authorities to detain Dr André Rwamakuba*".
4. During the Accused's 6 months of detention in Namibia from 2 August 1995 to 7 February 1996, several of his individual rights were violated: he was not granted assistance of a Counsel, neither did he appear before a Judge, nor was an indictment issued against him, in contradiction with his rights under the Statute and the Rules of the Tribunal as well as under International Law.
5. Furthermore, after his release in February 1996 for lack of evidence against him, the Accused was arrested for a second time in 1998, which accounts for a lack of diligence in the Prosecutor's handling of this case, resulting, notably, in the violation of his right to a speedy trial.

6. Following his second arrest on 21 October 1998 and his transfer to the Tribunal on 22 October 1998, the Accused, while in the custody of the Tribunal his Initial Appearance only took place on 7 April 1999 (a 135 day delay). He therefore suffered a breach of his rights under Articles 19 and 20 of the Statute, Rule 62 of the Rules and international human rights standards. Further, the Accused was not provided in due time with a Counsel. These two delays are substantial enough in themselves to warrant the loss of jurisdiction of the Tribunal over the Accused and, consequently, his release and the dismissal of all charges against him.

7. The cumulation of all these violations of the individual rights of the Accused are calling, as a remedy, for the immediate and unconditional release of the Accused and for the dismissal of the charges against him.

The Prosecutor replies, *inter alia*, as to the merits of the Defence Motion, that:

8. The Prosecutor did not direct or otherwise cause the August 1995 arrest of the Accused by the Namibian authorities and never circulated or otherwise made public a list of suspects to States prior to the Accused's arrest in 1995. When former Prosecutor Goldstone learnt of the Accused's arrest, four months after the latter, through the Ambassador for Rwanda to South Africa, he sent a letter on 22 December 2000 to the Namibian authorities, asking them to continue detaining the Accused pending further information under the regime of their municipal laws rather than on behalf of the Tribunal. Therefore, the Accused was not detained at the behest of the Tribunal in 1995/1996, which has no jurisdiction over alleged irregularities in this respect.

9. According to an Internal Memorandum of the Court Management Section of the Tribunal dated 16 February 2000, the delay in the Accused's initial appearance is attributable to the judicial recess, and to the Accused having delayed appointment of his Counsel. the Accused can therefore not claim for responsibility of the Tribunal with respect to a delay for which he is partly responsible.

10. The Defence Motion should therefore be dismissed.

HAVING DELIBERATED:

Admissibility of the Defence Motion

11. The Trial Chamber notes that the Appeals Chamber held that issues pertaining to due process and challenges of an individual's arrest at the request of the Tribunal and/or detention at the behest of the Tribunal were to be reviewed as preliminary motions based on lack of its jurisdiction *ratione personae* (*See* Barayagwiza Decision of 3 November 1999 at par. 71, Barayagwiza Scheduling Order of 5 February 1999 and Semanza Decision of 31 May 2000 at par. 70, which runs thus: "*l'Appelant a, en contestant la légalité de sa détention, effectivement soulevé la question de la compétence ratione personae du Tribunal et donc fait appel d'une décision qui a rejeté une exception d'incompétence au sens de l'article 72 du Règlement*" (our unofficial translation : "*the Appellant, while challenging the legality of his detention,*

has indeed raised the issue of the competence ratione personae of the Tribunal and thus lodged an appeal against a decision rejecting a pre-trial motion based on lack of jurisdiction within the meaning of Rule 72 of the Rules").

12. However, the Trial Chamber notes that the Appeals Chamber drew this conclusion, in all these cases, while applying Rule 72 of the Rules as in force prior to its amendment on 21 February 2000, when a Rule 72(G) was added to the effect of restricting any objections based on lack of jurisdiction under Rule 72(B)(i) to *"motion[s] challenging an indictment (...)"*. The present Defence Motion, however, was filed on 18 April 2000, that is, after Rule 72(G) entered in force. As the issues raised by the Defence are not related to the Accused's Indictment, the Trial Chamber shall not review it under Rule 72 of the Rules.

13. The Trial Chamber nevertheless notes that the Defence Motion raises serious allegations pertaining to the fundamental rights of individuals before the Tribunal as well as to the obligations of the different organs of the Tribunal in this respect. The Trial Chamber shall bear these considerations in mind while reviewing these submissions.

14. As alternately submitted by the Defence, the Trial Chamber will review the Defence Motion on the basis of a Motion pursuant to Rule 73(A).

The Accused's first period of detention in Namibia (2 August 1995 - 7 February 1996)

15. The Defence is contesting the legality of both the arrest of the Accused by the Namibian authorities on 2 August 1995, and his subsequent first period of detention in Namibia, from the date of his arrest to 7 February 1996.

On the Alleged Illegality of the Accused's Arrest in 1995 and misconduct of the Prosecutor in handling the case against him

16. On the basis of the allegation that the Namibian authorities arrested the Accused on 2 August 1995 pursuant to a Request of the Prosecutor, the Defence is challenging the legality of the said arrest, in the absence of sufficient evidence against the Accused for the Prosecutor to consider him a suspect and have him arrested, as indicated by the letter dated 18 January 1996 from former Prosecutor Goldstone to the Namibian Ministry of Foreign Affairs, in which the former "*confirm[s] (...) that at this moment we do not possess evidence which would entitle us to request the Namibian authorities to detain Dr André Rwamakuba*".

17. As a principle, the Trial Chamber would like to observe that, whatever the case may be, the Prosecutor, *"[who] shall initiate investigations ex-officio"* (Article 15(2) of the Statute), is independent in devising his own prosecution policy and has a discretionary power in deciding, upon assessment of the information collected, "*whether there is sufficient basis to proceed*", that is, to pursue who, in his opinion, may have committed crimes within the jurisdiction of the Tribunal. The Prosecutor

may very well consider someone a suspect and ask for his arrest under Rule 40 of the Rules, as might have been the case for the Accused, even in the absence of supporting evidence amounting to a *prima facie* case, that is, meeting the standard of proof applied by a Judge when reviewing an indictment and confirming it, as the case may be, pursuant to Rule 47 of the Rules. In this respect, the letter of 18 January 2000 can not substantiate allegations that the Prosecutor, if he ever acted upon Rule 40 of the Rules to have the Accused arrested in 1995, did so without having gathered, at least "*a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction*" (Rule 40 *bis of the Rules*), a body of material that may however not be sufficient to ask for confirmation of an indictment, which would account for the content of the Prosecutor's notification of 18 January 2000.

18. On the other hand, the Defence is challenging the Prosecutor's lack of diligence in handling his case against the Accused in the light of the latter's first arrest and detention from 2 August 1995 to 7 February 1996, his release after a period of six months for lack of evidence, followed thereafter by a second arrest in 1998.

19. In this respect, the Trial Chamber notes that, after having initially concluded a matter on the basis of lack of evidence to substantiate any charges against a suspect, the Prosecutor may very well come across additional information previously lacking to its file and pursue again the same suspect, without encroaching upon his rights.

20. Accordingly, even if the Accused's first arrest and detention on 2 August 1995 took place upon a request of the Prosecutor, which remains to be determined, the said arrest and subsequent detention could not be considered illegal as such, nor could it be considered a misconduct *per se* of the Prosecutor, for the sole reasons that, (1) he was subsequently released for lack of evidence against him (as indicated by the *fac simile* letter from former Prosecutor Goldstone to the Namibian Ministry of Foreign Affairs dated 18 January 1996) and that, (2) he was thereafter arrested on 21 October 1998 and thereafter detained for a second time both in Namibia and at the UNDF.

21. The Trial Chamber will now consider, whether the Tribunal has jurisdiction over the conditions of the Accused's detention in 1995 and 1996 in Namibia. If so, the Trial Chamber will then assess whether any violations of his individual rights have taken place at the time for which the Tribunal bears any responsibility.

On the Alleged Illegality of the Accused's First Period of Detention in Namibia: Does the Tribunal have jurisdiction over the conditions of detention of the Accused in 1995 and 1996 in Namibia?

22. As to the first issue laid out above, both parties agree that the Accused was arrested and detained by the Namibian authorities. The Trial Chamber accordingly recalls that, as a rule, the Tribunal has consistently held that it had no jurisdiction over the conditions of any arrest, detention or other measures carried out by a sovereign State

at the request of the Tribunal (*See* Ngirumpatse and Karemera Decisions of 10 December 1999, Kajelijeli Decision of 8 May 2000, Nzirorera Decision of 7 September 2000 and Nyiramasuhuko Decision of 12 October 2000).

23. As far as detention in a State is concerned however, these holdings have to be read in the light of the Baryagwiza Decision of 3 November 1999 – a Decision referred to by the Defence - where the Appeals Chamber, seized of allegations of illegality of the Appellant's detention in the State of Cameroon, held that "*under the facts of this case, Cameroon was holding [him] in the "constructive custody*" of the Tribunal by virtue of the Tribunal's lawful process or authority". Although the notion of one's "*constructive custody*" was not explicitly referred to in its subsequent Semanza Decision of 31 May 2000, which addressed in essence the same issues, the Appeals Chamber applied some of the consequences drawn from the notion of constructive custody in its Barayagwiza Decision of 3 November 1999 in the Semanza Decision as well. Among these consequences are the responsibility of the Tribunal for some aspects of the detention of such an individual detained at its behest, while specific timeframes under the Rules run with respect to the "constructive detainee" of the Tribunal, prior to his transfer to the UNDF, notably with respect to his right to be promptly informed of the nature of the charges against him.

24. In the instant case, the Defence alleges that the Accused was arrested by the Namibian authorities, at the request of the Prosecutor, on the basis of a list circulated by the latter, on which the Accused's name figured. The Trial Chamber concedes that such a list, if its existence had been proven, could constitute a Request by the Prosecutor under Rule 40 of the Rules to arrest and detain the individuals named therein, depending on its content and formulation.

25. During the hearing of 26 September 2000, the Prosecutor *"raise[d] an objection to the evidence offered by the Defence [with regard to the existence of such a list of suspects] in that the Defence has offered in support of its entire preposition nothing more than hearsay upon hearsay upon hearsay"*. The issue of the admissibility of hearsay evidence thus raised, The Trial Chamber emphasises that, pursuant to Rule 89(C), *"[a] Chamber may admit any relevant evidence which it deems to have probative value"* (our emphasis). In this respect, the Trial Chamber concurs with the ICTY Trial Chamber seized of the Blaskic Case, in a Decision of 21 January 1998, in that *"the admissibility of hearsay evidence may not be subject to any prohibition in principle since the proceedings are conducted before professional Judges who possess the necessary ability (...) to evaluate it, so that they make a ruling as to its relevance and probative value"*. The Trial Chamber further recalls that essentially the same position was held in the Akayesu Judgement of 2 September 1998, at par. 136, according to which: *"(...) in accordance with Rule 89 (...) hearsay evidence is not inadmissible per se"*.

26. Among the extensive material submitted by the Defense in support of the existence of the said list of suspects allegedly circulated by the OTP prior to the Accused's arrest of 1995 (a material inluding, among other documents, affidavits by the Accused and

his Counsel, newspaper extracts, correspondence from and to the Namibian authorities), the Trial Chamber devoted a special attention to the content of a letter dated 7 February 1996 sent by the Namibian Permanent Secretary for Home Affairs to the Accused, informing him of his unconditional release, according to which the latter had been « *detained as per requirements of Resolution 978 of February 1995 which requires that persons implicated in the Rwandan genocide should appear before the International Tribunal for Rwanda*". The Trial Chamber notes that this document establishes that the Accused may have been arrested by the Namibian authorities out of their wish to comply with what they thought was their general duty under Security Council Resolution 978, with the intention of surrendering him, should the Tribunal have wished to exercise its jurisdiction over the Accused.

27. The Trial Chamber however finds that no such evidence was brought by the Defence that the Namibian authorities so acted to abide, more specifically, by a formal request from the Prosecutor pursuant to Rule 40 of the Rules, in the form of a list of suspects including the Accused's name, notified to the State of Namibia by the Prosecutor, and requesting States to arrest and detain the suspects in question. The Trial Chamber notes in this regard that the Prosecutor contends that "*[the OTP] did not direct or otherwise cause the August 1995 arrest of the accused by the Namibian authorities*" (Response of the Prosecutor, par. 15) and, further, strongly denies the existence and circulation of such a list; *See* Transcripts of the hearing of 26 September 1999, at page 66 ("(...) *the Prosecutor's Office at no time circulated such a list*"). Being thus satisfied, in view of the arguments and the material submitted by both Parties, that the Namibian Authorities did not act on the basis of a list of suspects circulated by the Prosecutor prior to the Accused's arrest of 1995, the Trial Chamber does not find it necessary to request, pursuant to Article 28 of the Statute, the said authorities for further clarifications on the circumstances of the arrest and detention of the Accused in 1995 and 1996, as asked by the Defence.

28. The second issue raised by the allegations of the Defence relates to the moment when the Office of the Prosecutor or the Tribunal in any of its organs was informed of the Accused's detention in 1995 in Namibia. The Defence allege that the Prosecutor must have been notified of the Accused's arrest and detention prior to 21 November 1995, the date on which, according to the Prosecutor, Justice Goldstone was eventually informed of the Accused's detention, that is, more than 3 months after his arrest. They submit in support of these allegations a newspaper extract of The Namibian dated 21 August 1997, in which, more than two years after the Accused's first arrest in 1995, Ben Amathila, the Namibian Minister of Information and Broadcasting, supposedly told the journalist that "*the Government of Namibia had alerted the then Prosecutor of the International Tribunal for Rwanda, Justice Richard Goldstone, of the suspect's "presence arrest and detention" in Namibia*", in 1995.

29. The Prosecutor however submits in support of his reply a letter to the Namibian Attorney-General, dated 22 December 1995 and signed by former Prosecutor Goldstone, which clarifies, in the view of the Trial Chamber, that the Prosecutor indeed came to be notified of the Accused's arrest only on 21 December 1995,

through the Ambassador of Rwanda to South Africa, Dr E.B. Karenzi. The Trial Chamber further took into account, in this respect, a *fac simile* letter dated 22 September 2000 from the Namibian Ministry of Foreign Affairs, Information and Broadcasting to Mr Hooper, Counsel for the Accused, in which it is clearly stated that this Ministry – which was the one in charge in this respect - "*[made] no communication (...) to the UN Secretary-General when Dr Rwamakuba was first arrested and detained, i.e. from 2 August 1995 to 7 February 1996*".

30. For all the above reasons, the Trial Chamber is therefore not satisfied that, (1) the Namibian authorities arrested the Accused on 2 August 1995 and detained him until 22 December 1995 at the request of the Tribunal, and that, (2) the Prosecutor was notified of the Accused's arrest prior to 21 December 1995. The Trial Chamber does therefore not consider that, from 2 August 1995 until 22 December 1995, when the Prosecutor notified the Namibian authorities of their knowing that the Accused was in their custody, the Tribunal was responsible for the Accused's detention. The Tribunal having no jurisdiction over the conditions of that period of detention, any challenges in this respect are to be brought before the Namibian jurisdictions.

31. The Trial Chamber now turns to the issue whether the Accused was detained at the behest of the Tribunal, from 22 December 1995 when the Prosecutor contacted the Namibian Attorney-General with respect to the Accused upon learning of his detention, until 18 January 1996 when he subsequently notified the Namibian Ministry of Foreign Affairs, via a *fac simile* letter, that "*at this moment, we do not possess evidence which would entitle us to request the Namibian authorities to detain Dr Andre Rwamakuba*».

32. In his *fac simile* letter dated 22 December 1995, Prosecutor Goldstone informed the Namibian Attorney-General that "*[he had] instructed [his] Office in Kigali to take urgent steps to ascertain whether we are interested in a possible prosecution of Dr Rwamakuba on charges which fall within the jurisdiction of the International Tribunal*". He further "*hope[d] to be in a position to make a decision in this regard by the middle of January, 1996*" and further noted: "*I would be grateful if your laws permit this, that Dr Rwamakuba be kept in detention until that time*".

33. The Trial Chamber considers that the content of this letter does not amount to a request under Rule 40 to detain the Accused on behalf of the Tribunal. Indeed, the words used by the Prosecutor do not suggest that, upon being notified of the Accused's detention in Namibia, he considered him a suspect before the Tribunal. On the contrary, the letter suggests that the Prosecutor did not even know whether the Accused could be considered a suspect. Besides, the Trial Chamber notes that the Prosecutor, in this letter, did not ask for the continued detention of the Accused on behalf of the Tribunal, but rather envisaged such possibility under the regime of the Namibian laws, "*if [these] laws permit this*". For these reasons, the Trial Chamber does not consider that the Tribunal is responsible for the Accused's detention in Namibia from 22 December 1995 to 18 January 1996. The Tribunal having no

jurisdiction over the conditions of that period of detention, any challenges in this respect are to be brought before the Namibian jurisdictions.

34. The Trial Chamber notes that, were it even to be considered that the letter of 22 December 1995 amounted to a Request pursuant to Rule 40 to detain the Accused on behalf of the Tribunal, the Prosecutor asked in the said letter for a period of approximately 24 days pending further information so as "*to ascertain whether [they were] interested in a possible prosecution of Dr Rwamakuba on charges which fall within the jurisdiction of the International Tribunal*", and subsequently notified the Namibian authorities of the lack of such evidence, at the time, against the Accused, approximately 27 days after the said letter, on 18 January 1996. In any event thus, the Trial Chamber considers that the Prosecutor did act with diligence in order to gather any evidence needed to either sustain or drop possible charges against the suspect, so as to limit the time spent by the suspect in custody.

On the Alleged Illegality of the Accused's first months of detention at the UNDF

35. The Trial Chamber notes that the Accused was transferred to the Tribunal on 22 October 1998, while his initial appearance took place on 7 April 1999. Before that date, a first initial appearance, scheduled on 10 March 1999, was adjourned at the request of the Accused's Counsel along with the Counsels of other co-Accused in this case (*See* English Transcripts, hearing of 10 March 1999, at page 17), until 7 April 1999. Any delay in setting up the initial appearance of the Accused should therefore be computed from the date of the transfer of the Accused to that of the first initial appearance of 10 March 1999.

36. Even so, it clearly appears that the Accused's initial appearance was not scheduled by Court Management Section, on 10 March 1999, "*without delay*", as required under Rule 62 of the Rules, as more than four months and a half had elapsed since his transfer. However, the Trial Chamber notes that this delay is mainly attributable to the difficulties in having a Counsel assigned to the Accused, as indicated by an Interoffice Memorandum sent by Court Management Section on 16 February 2000 (*See* Memorandum ICTR/JUD-11-6-102 at par. 6: *"The initial appearance took place on 7-8 April 1999 because of, inter alia, lack of counsel agreeable to the Accused and the Judicial Recess (from 15 December 1998 to 15 January 1999)"*). Indeed, the Trial Chamber notes that no initial appearance could have taken place in the absence of a Counsel for the Accused.

37. The Trial Chamber recalls that the right to legal assistance is a fundamental individual right as enshrined in Article 20(4)(b) and (d) of the Statute and embedded in international law; a right which entails duties for the Tribunal and, in particular, the Registrar, as governed by Articles 44 to 45 *bis* of the Rules. The Trial Chamber will therefore now consider whether these duties were met in the instant case.

38. In order to shed some light on this issue, the Trial Chamber requested Mr. Alessandro Calderone, Chief of the Lawyers and Detention Facility Management Section

(LDFMS), notably, "*to provide all available information pertaining to the assignment of a defence counsel to Mr. André Rwamakuba*" (Interoffice Memorandum ICTR/JUD/TCII-21 of 28 September 2000). In their reply (Interoffice Memorandum ICTR/JUD-11-5-2 of 29 September 2000), LDFMS submitted that their services had taken the required steps regarding assignment of Counsel by sending a letter to the Accused within 8 days following the latter's transfer to the Tribunal, on 30 October 2000, asking him whether he intended to bear the expenses of his legal representation or whether he would declare himself indigent, in which case he would have to file a request for assignment of counsel. the Accused in his reply then asked for a period of time of at least three weeks in order to consult with his family in a letter to LFDMS dated 12 November 1998 (Annexure 2 to Interoffice Memorandum ICTR/JUD-11-5-2 of 29 September 2000, our translation from the French: *"J'ai l'honneur de vous demander de bien vouloir m'accorder un délai d'au moins trois semaines en vue de mener à bien des consultations avec ma famille"*). The Accused eventually submitted his Request for Assignment of Counsel on 17 February 2000 only. This request once received, the Registrar assigned Mr. David Hooper, on 24 February 2000, as Counsel for the Accused.

39. Rule 45(C)(i) of the Rules states that the Registrar, to assign a counsel, shall act upon reception of *"[a] request for assignment of counsel"*. The Trial Chamber notes that, according to the above Memorandums from LDFMS, the Registrar duly invited the Accused, within 8 days following his transfer, to submit the said request, which the Accused did on 17 February 2000 only. This suggests that the Accused bears the responsibility for any delay in having his Counsel assigned. The Defence however submitted, in a letter dated 5 November 2000, copy of a Request for Assignment of Counsel signed on 8 December 1998 by the Accused, and copies of accompanying letters to LDFMS, requesting assignment of M[e] Roger Cote, a Member of the Bar of Quebec, as Counsel for the Accused. The Trial Chamber notes that these documents certainly prove the Accused's wish and efforts to have a Counsel assigned to him as early as 8 December 1998. However, the copy of these documents, as submitted by the Defence, do not suggest that they were transmitted by the Accused to LDFMS along with an official transmission form, which accounts for the fact that, as explained by M[e] Hooper in his cover letter, they were returned to the Accused by LDFMS. Thus, these documents did not constitute an official request for assignment of Counsel submitted prior to 17 February 2000. In any event, the Trial Chamber further notes in this regard that the Accused *"was thereafter told that he could not have that lawyer"* and that *"he accepted that decision"* (Letter from Counsel for the Accused dated 5 November 2000).

40. On the basis of the above submissions, the Trial Chamber is therefore satisfied that the Registrar took reasonable steps so as to have a Counsel assigned to the Accused in due time following his transfer to the Tribunal, in accordance with his general duty in this regard pursuant to Rule 45 of the Rules and accordingly holds that the Registrar is not responsible for the delay in the Accused's counsel assignment.

41. However, the Trial Chamber notes that, when the Accused was transferred to the Tribunal, Rule 44 *bis* already entered into force, which imposed the further duty of assigning a Duty Counsel to accused or suspects, pending nomination of Counsel under Rule 45 of the Rules. Under the former provision, sub-Rule 44 *bis* (D) states that:

> **Rule 44 *bis*: Duty Counsel**
>
> *(...)*
>
> *(D) 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.*

42. The Accused, in a Second Affidavit dated 23 September 2000 submitted by the Defence, stated that: *"[i]n respect of the delay between my transfer to Arusha and my initial appearance I wish to add that I was not provided with nor offered the services of duty Counsel (...)"* (par. 3 of the Affidavit). The Trial Chamber, further to its Memorandum of 28 September 2000, therefore asked LDFMS to *"indicate whether, prior to the assignment of Mr. Hooper, you offered to Mr. Rwamakuba to be represented by a duty counsel pursuant to Rule 44 bis (D)"* (Interoffice Memorandum of 10 October 2000, ref: ICTR/JUD/TCII-24). LDFMS then replied that *"a duty counsel was not summoned to represent the accused"* (Interoffice Memorandum ICTR/JUD-11-5-2-1316 of 12 October 2000).

43. The Trial Chamber therefore concludes to the Registrar's failure to act pursuant to Rule 44 *bis* so as to appoint a Duty Counsel for the Accused pending assignment of his Counsel pursuant to Rule 45 of the Rules. This omission resulted in the 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.

44. However, the Trial Chamber does not consider that the said delay in providing the Accused with legal representation and thus, in the Accused's initial appearance, has caused him a serious and irreparable prejudice.

On the Alleged cumulation of violations of the Accused's rights

45. As indicated above, the Trial Chamber did not find that it had jurisdiction to assess the legality of the Accused's first period of detention in Namibia from 2 August 1995 to 7 February 1996. The Trial Chamber only hold that the absence of assignment by the Registrar of a Duty-counsel pursuant to Rule 44 *bis* of the Rules did constitute a violation of one of the Accused's fundamental rights, and that this delay in assigning a duty Counsel to the Accused further caused the delay in his initial appearance. Accordingly, the Trial Chamber does not conclude to a cumulation of violations of the rights of the Accused in the instant case.

FOR ALL THE ABOVE REASONS,

THE TRIAL CHAMBER

I. **DISMISSES** the Defence Motion asking for the immediate and unconditional release of the Accused with regard to the arrest and detention of the Accused in 1995 and 1996 in Namibia;

II. **DISMISSES** the Defence Motion asking for the immediate and unconditional release of the Accused with regard to the conditions of the Accused's first months of detention at the UNDF;

III. **DISMISSES** the Defence Motion asking for the immediate and unconditional release of the Accused with regard to the overall cumulation of the violations of the rights of the Accused.

Arusha, 12 December 2000

Laïty Kama
Presiding Judge

William H. Sekule
Judge

Mehmet Güney
Judge

Seal of the Tribunal