ICTR-98-44C-A
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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN THE APPEALS CHAMBER

(ICTR 98 44C-A)

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

Registrar Mr Adama Dieng

DATED 1ST May 2007

THE PROSECUTOR

V

DR ANDRE RWAMAKUBA

DEFENCE BRIEF ON APPEAL CONCERNING APPROPRIATE REMEDY

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THE PROSECUTOR

V

DR ANDRE RWAMAKUBA

DEFENCE BRIEF ON APPEAL CONCERNING APPROPRIATE REMEDY

A. PROCEDURAL HISTORY

1. On 20th September 2006 the Trial Chamber rendered judgement in this case, acquitting Dr Andre Rwamakuba of all charges and ordering his immediate release[1]. The Chamber further held that Dr Rwamakuba was at liberty to file a motion for appropriate remedy in respect of a previous finding of the Chamber relating to a violation of his right to legal assistance following his arrest and transfer to Arusha in 1998.

2. The finding that Dr Rwamakuba's right to legal assistance was breached, and that there had been avoidable delay in his initial appearance, is set out in the decision of the Trial Chamber dated 12 December 2000[2]. That decision concerns the court's findings in respect of a more general assertion by the defence that there had been a cumulative violation of rights that amounted to an abuse of the process of the court and that Dr Rwamakuba should, as a consequence, have been unconditionally released. The Chamber's decision not to find such an extensive

[1] The Prosecutor v. Andre Rwamakuba, Case No ICTR-98-44C-T, Judgement, 20th Septmeber 2006 'Trial Judgement'.
[2] Rwamakuba, Decision on the Defence Motion concerning the illegal Arrest and Detention of the Accused Decision 12 December 2000.

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abuse, justifying release, was the subject of appeal. The Appeal Chamber dismissed that appeal on the ground that it did not meet the criteria for interlocutory appeal. However, it stated that it considered 'that it was open to Rwamakuba to invoke the issue of the alleged violation of his fundamental human rights by the Tribunal in order to seek reparation as the case may be, at the appropriate time'.

3. Following the Judgement, the Defence filed an ' Application for Appropriate Remedy' on 25 October 2006. By the application the defence sought appropriate remedy for the violation of rights identified by the Trial Chamber in its decision of 12 December 2000. The defence further requested appropriate remedy for 'the existence of grave and manifest injustice giving rise to his arrest and trial'.

4. The Trial Chamber gave its 'Decision on Appropriate remedy' dated 31 January 2007. In its decision, the Trial chamber, having considered the representations made by the Registrar against the awarding of financial compensation, ordered, inter alia, the Registrar to pay $2,000 compensation to Dr Rwamakuba for violation of his right to legal assistance in the six months delay between transfer to Arusha and initial appearance.

5. The Trial Chamber dismissed the defence claim for financial compensation for 'a grave and manifest injustice'. By Appeal dated 12 February 2007 the defence seek review of the dismissal of the claim for financial compensation for 'grave and manifest injustice'.

6. By the ' Decision on the Prosecution's Notice of Appeal and Scheduling', dated 18 April 2007, the Appeal Chamber dismissed the Prosecution's notice of appeal on the basis that the Prosecution had waived the right to appeal. The Appeal Chamber permitted the Registrar to make detailed submission on all aspects of the impugned decision and those submissions are awaited. The defence do not, at this stage, make any submissions in respect of the award of compensation for the

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violation of right to legal assistance and delay (a decision that they did not appeal) but reserve their right to respond to the Registrar's submissions. This includes consideration of the Chambers power to order financial compensation.

7. The Defence here address the matter of general compensation for ' grave and manifest injustice'.

B. THE GRAVE AND MANIFEST INJUSTICE

The Moral argument is compelling

(a) Dr Rwamakuba. – a brief biography.

8. Dr Andre Rwamakuba is 56. Born and educated in Rwanda he is a married man with three children. He qualified as a medical doctor after studies in Rwanda and Belgium. He later developed a high level of expertise in the area of public health. By 1994 he was Director of Medical Health for Greater Kigali. At his trial Belgian medical colleagues spoke very highly of him, his work and his abilities.

9. Following the war and genocide of 1994 Dr Rwamakuba left Rwanda together with his family. He obtained employment eventually as a medical doctor in Namibia. He was arrested and transferred to Arusha in October 1998. His initial

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appearance did not take place until April 1999. He remained in custody until his acquittal in September 2006. He is currently living in accommodation in Arusha provided by the ICTR and is unable to rejoin his family. His family left Namibia shortly after his arrest and currently live in Switzerland where he has a brother with Swiss nationality. His wife and children sought refugee status in Switzerland but that application has been refused. Their lives have been difficult and their future is very uncertain. Dr Rwamakuba has had no physical contact with his wife and children since arrest – accept for a brief visit paid to him by his wife and one daughter when they attended the trial as witnesses. (There is no scheme provided by the ICTR Registry to facilitate a visit by indigent spouses or family.) The family have been in dire financial straits. Mrs Rwamakuba is not permitted to work in Switzerland. The family have been compelled to live on modest welfare benefits. Dr Rwamakuba's three children, Marie-Ange, Alice and Claude, were aged respectively 17, 12 and 11 at the time of his arrest and, accept as referred to above, he has not seen them since.

10. During his time in custody, and separation from his family and life, Dr Rwamakuba experienced considerable mental anxiety and upset. His medical training and skills are much reduced as a consequence of his detention. The charges brought against him were particularly abhorrent, concerning as they did allegations of killing patients in a hospital, disembowelling pregnant women and other shocking and false allegations.

Even though acquitt the fact that such charges were brought against him will have a profound effect on his future status, on his professional life and on his ability to work and sustain a family life.

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(b) Significance to the appeal of the grounds for asserting 'Grave and manifest injustice'

11. This assertion is a significant part of the appeal in that it raises the moral imperative of the argument to provide compensation and renders it more compelling. This is not to detract from the principle that one should not go behind a verdict of acquittal. It serves to emphasise the wrong done to Dr Rwamakuba.

12. The defence submit that the proper forum to determine whether a grave and manifest injustice, through false and manipulative testimony, has been done in this case is the Trial Chamber itself. It would be a complex, impractical and time consuming exercise if done by the Appeal Chamber with no experience of the issues in the case and without the benefit of seeing the witnesses.

13. For that reason we respectfully submit that, unless directed to do so by the Appeal Chamber, we should not have to demonstrate '*grave and manifest injustice*' at this stage. If the Appeal Chamber allows our appeal to the extent that it finds that there is a power to order general compensation on acquittal then we anticipate that the case will be remitted to the Trial Chamber for consideration as to the merits and the assessment of compensation.

(c) The lack of any other appropriate forum to address the injustice

14. There is no other appropriate forum for the pursuit of justice in this case. No international body exists where Dr Rwamakuba could pursue his claim of injustice. Neither is there any domestic remedy realistically available to Dr Rwamakuba. He cannot sue the organs of the Tribunal before national courts, where it possesses full immunity. He cannot sue those who bore false witness against him, and even if he did, their circumstances are such that there would be no financial compensation and, instead, a loss through the expense of costs. All

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the witnesses live in Rwanda and the accused, even though innocent of the charges brought against him, is most unlikely to get any satisfaction there. There was some evidence to support the suspicion that the witnesses were in fact sponsored by some authority in Rwanda. The witnesses were, and remain, protected witnesses. In any event, issues of immunity, *forum non conveniens* and lack of power over instances abroad could provide a significant barrier to any domestic proceedings in relation to prejudice suffered by virtue of these proceedings whoever the defendant might be. Pursuit of judicial remedy in Rwanda is unrealistic, if not futile. The result is that the failure to address the matter in this Tribunal would result in a denial of justice.

(d) History of arrest, detention and trial and its relevance to 'grave and manifest injustice'.

15. The defence attach, at Annex A, a chronology of the history of arrest, detention and trial relating to Dr Andre Rwamakuba.

The chronology illustrates the protracted period of time in which Dr Rwamakuba was detained for trial.

The defence submit that the delay was caused, in part, by avoidable systemic deficiencies in the manner in which investigations and trial take place at the ICTR.

Throughout that period his rights to liberty, work and family life were greatly disrupted. The defence submit that Dr Rwamakuba could and should have been tried more expeditiously. The delays are not merely regrettable but were excessive, wrong and avoidable.

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16. It is to be noted, for example, that the defence made an early application for severance so that he could be tried more expeditiously. The severance application was successfully opposed by the Prosecution on the basis that the interests of justice were best served by a joint trial. Subsequently, after a period of mis-trial, the Prosecution applied for severance. The defence agreed and the severed trial took place. It is no fault of the Trial Chamber that it accepted the representations of the Prosecution in opposing severance. The Trial Chamber is often not in a position to have the over-view of a case to the same extent as the Prosecutor. The Chamber will legitimately take into account the fact that the Prosecution is opposing severance in recognition of the Prosecutorial discretion which was initially exercised in relation to the indictment. An unopposed application for severance has a greater chance of success. While the Prosecutor's exercise of discretion in opposing severance could not be questioned at that time, it may be questioned now by the Appeal Chamber in the context of the prejudice caused to Dr Rwamakuba by these proceedings. There is no compelling reason why such severance could not have taken place when first requested by the defence.

17. The United Nations bears a significant responsibility ins not providing a sufficient facility for expeditious trial – whatever the reason for that may be. The lack of provision of sufficient funding for Judges, courtrooms or alternative measures is not a matter that should be borne by the accused. While this may not usually be relevant to judicial decisions during trial, it becomes relevant now in considering how the accused has been prejudiced by the proceedings.

18. In the case of those convicted, who are subject normally to very lengthy sentences and usually to life sentences, such delay, though regrettable, is swallowed up by the length of sentence. Taking the length of pre-trial detention into account is an indication that it merits a remedy. In some cases delay can be reflected in a reduced sentence. The suspicion remains that the problem of acquitted persons was not given thought to because the prospect of acquittal was not sufficiently considered.

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19. The social obloquy of arrest and accusation for such serious offences is so great that acquittal alone is insufficient remedy. In the case of an acquitted person the protracted disruption to his or her life caused by such systemic delay is considerable and, in the eyes of the average, decent onlooker, cries out to be redressed.

(e) The core grounds for the assertion of 'Grave and manifest injustice'

20. This need for effective remedy and redress is even more compelling when acquittal follows a trial where the prosecution evidence was, as the defence maintain is the position here, palpably dishonest. In such a case, detention for such a considerable time is a clear and obvious injustice.

21. Fortunately, the Judges of the Chamber acquitted the accused. To that extent the Tribunal was effective in preventing the full potential harm of false testimony. Such a verdict may, in a way, be seen as a form of declaratory relief. It remains, in our submission, a wholly insufficient remedy to the extensive hurt and harm suffered by Dr Rwamakuba.

22. The reliance by the Prosecution on evidence that was so inherently unsatisfactory and tainted demonstrates a further failure to protect the rights of Dr Rwamakuba. Where the weakness of such evidence is obvious, then a systemic failure by an organ of the Tribunal to protect the rights of an accused is further cause to provide him an effective remedy. The defence mantain that there was a failure in the process of investigation, a failure in the process to review such investigation and a failure to review effectively the trial process by the prosecutor. That the Office of the Prosecutor is an organ of the Tribunal strengthens the argument that the Tribunal should compensate.

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23. However, even absent all fault on the part of the Tribunal, the fact that a person is arrested and detained for so long at its behest, on such scandalous charges, merits effective remedy if acquitted.

24. The defence refer to paragraphs 12 and 13 above but here refer the Appeal Chamber to the Judgment where there is support for our assertion that the evidence led by the prosecution was false, culminating in the finding at paragraph 214 of the judgement –

> *"214 After assessing the evidence as a whole the Chamber found that all of the Prosecution witnesses not to be credible or reliable..."*

Three brief examples may suffice at this stage to demonstrate the baleful quality of the evidence.

25. First, evidence was led that for the period of six months prior to April 1994 Rwamakuba was active in his home commune leading virulently anti-Tutsi demonstrations. This evidence was given by witnesses who could not have mistaken his identity as they knew him and his family. There was the clearest evidence from, amongst others, Belgian Professors and Doctors,that Dr Rwamakuba was in Belgium throughout this time.

26. Second, a number of witnesses gave evidence of his killing people at Butare hospital. The same witnesses were deeply compromised and contradicted by extensive evidence given by them in other cases in Rwanda. For example, one witness claimed she witnessed Rwamakuba kill her sister whereas she gave clear evidence in Rwanda that another named man had killed her several kilometres from the hospital.

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27. Third, two of the witnesses led by the Prosecution had given extensive evidence in another case heard earlier at the ICTR, when they made no mention of Rwamakuba, and had been found 'not credible' by the Chamber in that case. They were nonetheless produced as witnesses in the Rwamakuba case and similarly disbelieved.

C. THE DECISION IMPUTED

28. The Trial Chamber dealt with the defence claim for a remedy on the basis of a grave and manifest miscarriage of justice in paragraphs 19 to 31.

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

29. In sum, the Trial chamber considered that –

(a) Nothing in the Statute or Rules of procedure provided for a power to award compensation to an acquitted person, nor that of the ICTY, nor any precedent authority.

(b) Rule 85(3) of the Statute of the International Criminal Court provided such a power.

(c) The Chamber therefore directed itself to look to see if such a power existed in customary international law.

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(d) It found that no other international statute provided such a power and that international human rights law provided such a power relating to circumstances of unlawful arrest, detention and conviction but not to acquittal.

The Trial chamber concluded -

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

Adding, -

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

30 ..... the Chamber is of the view that the possibility to grant some sort of remedy or compensation would be fair in circumstances where although arrest and detention was not unlawful , he or she was subject to a lengthy detention during the pre-trial and trial stages. Such an award of compensation would be exercised in light of circumstances of the case and could not be applied, for instance, where.....it would be unreasonable to award compensation. In the Chamber's view such a provision would offer an acceptable balance between the fundamental right to freedom of any individual and the realities of the investigation and Prosecution of international crimes.

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30. In the absence of specific statutory power and in the absence of a customary rule the chamber concluded it had no power to order such a remedy and that it would require an amendment to the Statute by the Security Council.

D. DEFENCE APPEAL ARGUMENTS RELATING TO THE TRIAL CHAMBER'S FINDINGS

31. The Trial Chamber held that there was not sufficient evidence of State practice and *opinion 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.

32.

1. The Chamber was wrong in finding that there was no basis in customary law for a remedy?

Ubi jus ibi remedium. - For the violation of every right, there must be a remedy

Customary law

33. The Chamber felt it necessary to identify a specific customary norm on compensation for acquitted persons defined in some detailed manner, as exists in the International Criminal Court Statute. In our submission one does not need to identify a separate distinct right under customary law if an existing norm of a

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more general nature is applicable. A sufficient basis exists in customary law for providing a remedy to those who have been acquitted following a grave and manifest injustice. The International Criminal Court provisions provide guidance on how the existing general normative framework for remedies may be applied.

34. Customary international law offers three distinct but interrelated principles which are directly applicable to the situation. The first and basic principle is that states must not only respect but also ensure or secure respect for the rights of a person. Article 2 of the International Covenant on Civil and Political Rights of 1966 provides requires states to:

> Respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant...
>
> And
>
> ... to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative and other measures as may be necessary to give effect to the rights recognised in the present Covenant.

35. Similar provisions may be found in article 2(1) of the International Covenant on Economic, Social and Cultural Rights of 1966, articles 2 and 3 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, article 2(1) of the Convention on the Rights of the Child of 1989, article 1 of the European Convention on Human Rights and Fundamental Freedoms of 1950, article 1 of the American Convention on Human Rights of 1969 and article 1 of the African Charter on Human and Peoples' Rights of 1981. State practice and opinio juris derives from the almost universal acceptance of this principle through these instruments as well as outside these instruments through implementation and support for the principle. When states act jointly to create an international body to give effect to international human rights law, such a body

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assumes the collective obligation of states in this regard in its manner of operation.

36. The second principle is that against the denial of justice. This principle derives from general state practice and opinio juris. It is given concrete manifestation in a number of human rights treaty provisions, and domestic constitutions, in the form of the right to a fair and public hearing before an independent and impartial tribunal in the determination of one's rights. The concept of a right to effective access to justice is meaningless without some form of applicable reparation and is necessarily implied in the principle. The principle of access to justice is supported by, for instance, Article 14 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention on Human Rights and Fundamental Freedoms and Article 7 of the African Charter on Human and Peoples' Rights.

37. Finally, customary law specifically recognises the right to an effective remedy which is a necessary corollary of the former two principles. Article 2 (3) (a) of the International Covenant on Civil and Political Rights provides for an obligation:

> To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy.

This principle is also contained in Article 8 of the Universal Declaration on Human Rights, Article 13 of the European Convention on Human Rights and Fundamental Freedoms; Article 25 of the American Convention on Human Rights and Article 6 of the Declaration on the Elimination of All Forms of Racial Discrimination and Article 45 of the Charter of Fundamental Rights of the European Union.

38. While monetary compensation may not be specifically required it may be the appropriate relief for effective remedy. The customary norm for an effective remedy certainly provides a sufficient basis for a power to award compensation.

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International human rights jurisprudence further supports the right to a remedy usually in the form of compensation. In the case of *Velasquez Rodriguez*, the Inter-American Court of Human Rights held there to be a duty to 'ensure to victims adequate compensation'.[3] In *Eduardo Bleier v Uruguay*,[4] the state was urged by the Human Rights Committee to pay compensation. In *Silver and Others v UK, the European Court of Human Rights* described compensation as a specific part of the right to an effective remedy.[5] It may also constitute an effective deterrence against wrongdoing or to lax and inefficient systems. The defence have reserved their right to respond on this issue of monetary compensation until the Registrar's arguments have been submitted.

Application of customary law to grave and manifest injustice

39. In considering the applicability of the obligation to ensure respect for rights, the right of access to justice and the right to an effective remedy, it is submitted that it should be taken to be the intention of States that these customary norms have wide application because of the fundamental nature of the underlying principles that justice should not be denied and should be fairly administered. This stance is applicable to the interpretation of treaties when considering the intention of State parties. As noted by the European Court of Human Rights, in the case of *Delcourt v Belgium*,[6] in relation to article 6 of the European Convention on Human Rights and Fundamental Freedoms,

> *In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision.*

[3] (1989) 28 *International Legal Materials* 291, at 324
[4] Communication No R.7/30 (23 May 1978). U.N. Doc. Supp. No 40 (A/37/40) at 130 (1982), par 15, Human Rights Committee
[5] Judgment of 25 March 1983, par 113, European Court of Human Rights
[6] *Delcourt v Belgium*, ECHR, Judgment of 17 January 1970, Series A, No 11

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Similarly, in *Golder v United Kingdom* it was observed that:

> *The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.*

40. Article 85 (3) of the International Criminal Court Statute provides that:

> In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

This provision of the International Criminal Court Statute on providing compensation for a 'grave and manifest miscarriage justice' is merely an application of the existing customary norm of a right to an effective remedy. This is demonstrated by the fact that it is drafted in a manner which indicates that it simply deals with the circumstances when a discretion might be exercised, rather than purporting to create any new right as such. By agreeing to this formula of compensation where there has been a grave and manifest injustice, the states party to the Statute were in effect providing *opinio juris* supporting the right to an effective remedy and an opinion as to how it was applicable to those acquitted following a trial. In essence, rather than creating any new norm or custom these states gave meaning to an existing customary norm applied in a particular context. It is thereby accepted by the international community that a person who has been acquitted in the context of a grave and manifest miscarriage of justice may be

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considered a victim whose rights have been violated and therefore entitled to a remedy.

Human rights violated in the context of a grave and manifest injustice and entailing the right to a remedy

(a) The right to liberty

41. One right that is infringed by the manipulation of evidence leading to detention and trial, in the context of a 'grave and manifest injustice', is the right to liberty. An unlawful detention will entail a violation of the right to liberty especially where leading to a grave and manifest injustice. It is submitted that while a lawful detention and trial would not in itself infringe the right to liberty, it might when accompanied by a grave and manifest injustice, thereby justifying the application of the right to an effective remedy.

42. Where the international organs infringe the right in an international tribunal this may entail the right to a remedy. An arrest and detention only continues to be justified as long as the reasonable suspicion forming the basis of detention continues. It has been held by the European Court of Human Rights that 'it is clear that the persistence of such suspicions is a condition sine qua non for the validity of the continued detention of the person concerned'.[7] Thus, if the Prosecutor persists in a Prosecution, or reliance on a witness, even when the grounds for reasonable suspicion have been dissipated by a clear demonstration of false evidence, then this can constitute a grave and manifest injustice entailing a violation of the right to liberty justifying a remedy.

[7] *Stogmuller v Austria*, 10 November 1969, (ECHR) at par 4; *Kemmache v. France*, 27 November 1991 (ECHR) at par 45

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43. In our submission, a violation may also occur even if the international authorities have acted lawfully, but individuals or third states have deliberately and/or wrongly brought about the detention. Human rights must be protected from third parties as well as state authorities.[8] Such infringement can be caused by individuals deliberately falsifying evidence to instigate lawful processes. So a trial may be lawful in the sense that the authorities had reasonable grounds to proceed, but nonetheless lead to an infringement of the right to liberty by virtue of the actions of third parties, whether state or non-state entities. This would especially be so where the relevant international authority, in this case the Prosecution, failed to take adequate measures against the use and presentation of false evidence. In *Kurt v Turkey*, for instance, there was held to be responsibility to safeguard against the disappearance of detainees, even if otherwise lawfully detained and the disappearance was not shown to be executed by state authorities.

44. With regard to State authorities, in this case the Defence asserts that Dr Rwamakuba's initial detention in Namibia was illegal. The Tribunal found that it was not constructively responsible for the conditions of his first period of detention in Namibia, thereby retaining jurisdiction. This does not detract from the question of whether his right to liberty had been violated and whether the subsequent train of events, including the gathering of false evidence to secure his re-arrest, amount to a grave and manifest miscarriage of justice for the purpose of justifying a remedy.

45. That a person's human rights may be violated by non-State authorities, giving rise to a right to a remedy, is supported by the obligation on the part of States not only to respect but also to ensure respect for rights. If false evidence is gathered to set in train legal procedures this could constitute a violation of a person's right to liberty by those individuals participating in such a scheme, entailing a right to a remedy.

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[8] *Association X v United Kingdom* (7154/75) DR 14, 31; *Airey v Ireland* (6289/73) judgment: 2 ECHRR 305; *Marckx v Belgium* (6833/74) Judgment: 2 EHRR 330;

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(b) The right to a fair trial

46. Further, the right to a fair trial may be infringed by factors concerning the way in which the trial was instigated or conducted. A malicious prosecution, falsification, loss or manipulation of evidence, may be factors giving rise to a grave and manifest miscarriage of justice and therefore an unfair trial. The trial may be scrupulously fair from the perspective of the judge's conduct of the case, but may be unfair in terms of the way in which proceedings came about and the way in which evidence is presented. This may lead to unnecessary trial, grave prejudice to the accused by long incarceration, and onerous impact on life and family. This violation of his right to a fair trial justifies the application of an effective remedy.

(c) **The right to private and family life**

47. By virtue of the Universal Declaration of Human Rights, article 16(3)::

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State

This provision is essentially repeated in article 23 of the International Covenant on Civil and Political Rights. If a person is incarcerated for a long period, as a result of a grave and manifest miscarriage of justice, this may infringe the right to privacy and family life. The history of Dr Rwamakuba clearly demonstrates his rights were infringed and continue to be so.

(d) The right to work

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48. By virtue of article 6(1) of the International Covenant on Social, Economic and Cultural Rights:

> The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

A long period of incarceration stemming from false evidence might constitute a grave and manifest miscarriage of justice infringing a person's right to work. Dr Rwamakuba's history illustrates a clear infringement of his right to work and the economic and social effects of that infringement have been, and continue to be immense.

2. The Chamber was incorrect in its assertion that the exercise of its discretion depended on the existence of a customary right to a remedy

49. It is submitted that it was not necessary for the Chamber to enquire into the customary nature of the right. The Chamber possesses a discretion to provide a remedy in appropriate circumstances. The Chamber took the view that no rule permitted the provision of a remedy for a grave and manifest injustice. It is submitted that Rule 54 can serve this purpose.

> ***Rule 54: General Provision***
> *At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.*

50. The word 'trial' in that provision should be interpreted to include all the relevant stages of the proceedings. It would be artificial to suggest that the powers of the

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court to make orders, which are necessary for the proper conduct of proceedings, stops with the judgment. This broader interpretation was given to the word 'trial' in the 'right to a fair trial' by the European Court of Human Rights precisely to avoid such artificiality. In the case of *Hornsby v Greece* it was held:

> Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (art. 6)(...)[9]

In certain instances, the Court has also found the provision applicable to judicial decisions taken after the discontinuation of such proceedings (see in particular the following judgments: *Minelli v. Switzerland*, 25 March 1983, Series A no. 62, and *Lutz, Englert and Nölkenbockhoff v. Germany*, 25 August 1987, Series A no. 123), or following an acquittal (see *Sekanina* and *Rushiti* cited above and *Lamanna v. Austria*, no. 28923/95, 10 July 2001). The latter decisions concerned proceedings relating to such matters as an accused's obligation to bear court costs and prosecution expenses, a claim for reimbursement of his necessary costs, or compensation for detention on remand, and which were found to constitute a consequence and the concomitant of the criminal proceedings.

Further, the provision should be given the interpretation that most favours the accused. This is to be done by looking at the words in their context and in the light of their object and purpose. This is the applicable rule for the interpretation of treaties and applies *mutatis mutandis* to the Rules of Procedure and Evidence, it being an international instrument derived from the authority of a treaty, in this case the UN Charter.

51. In the alternative, the legal basis of the exercise of such a power is inherent in the international legal legitimacy of an International Criminal Tribunal. We submit that, once it is determined that a tribunal for criminal trials has been lawfully established, it can exercise such powers as are necessary for it to do justice. This

[9] *Hornsby v Greece*, (ECHR), Judgment of 19 March 1997, Series A, No 18

is an implied term of the international instrument establishing the tribunal. The tribunal does not need to satisfy itself that a procedure which it intends to adopt is provided for expressly in the rules, or is justified under customary international law. It is sufficient that the procedure is required for it to do justice and it may refer to general principles of law, as a subsidiary source of international law, for adopting and applying its procedures.

52. *In the alternative, if the* Chamber requires some customary basis for the exercise of such a discretion, then it is submitted it falls under the principle against denial of justice. The adoption of an appropriate procedure could also be based upon the principle of access to justice. In the *Golder* judgment the right to a fair hearing was interpreted by the European Court of Human Rights as including the right of access to court.[10] As noted above, the court held that the provision on fair hearing must be read in the light of the principle that 'a civil claim must be capable of being submitted to a judge' and 'the principle of international law which forbids the denial of justice'. The principle of access to court as an integral aspect of the right to a fair hearing has further been endorsed as a constitutional requirement in a number of domestic jurisdictions.[11] It is essential, if justice is not to be denied the acquitted person, and his rightss respected, that the Tribunal possess the means to address violations of such rights.

53. Such access to justice must be considered in the light of the principle of equality of arms requiring a fair balance between the interests of parties to proceedings.[12] According to the UN draft *Principles and Guidelines on the Right to a Remedy and Reparation for Victims of violations of International Human Rights and Humanitarian law*,[13] there is a duty to 'provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of the

[10] *Golder* judgment of 21 February 1975, Series A no. 18, at 17-18
[11] See *Vernon Lee Bounds, etc et al v Robert (Bobby) Smith et al.* 430 US 817, 52 L Ed 2d 72, 97 S Ct 1491 (SC), *Raymond v Honey* [1983] AC 1 (HL); *R v Lord Chancellor, Ex parte Witham* [1998] QB 575
[12] *Dombo Beheer v The Netherlands*, 27 October 1993 (1993) 18 ECHR 213
[13] UN Doc. E/CN.4/2000/62 of 18 January 2000 (Commission on Human Rights' final report of the Special Rapporteur, Mr M Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33)

responsibility for the violations.' The tribunal is set up for the victims of the conflict in Rwanda. It would violate the principle of equal access to justice if the tribunal were to claim to have the power to protect the rights of the accusers by punishing the perpetrator, to vindicate the rights of the victims, but not to protect the rights of the accused by providing remedy for a grave and manifest injustice once acquitted.

David Hooper

David Hooper

7 Andreas O'Shea

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[word count 6,273]

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Case Name:	The Prosecutor vs. **RWAMAKUBA**	**Case Number:**	ICTR-98 44 CA
Dates:	Transmitted: **1 MAy 2007**	Document's date: **1 MAy 2007**	
No. of Pages:	**24**	**Original Language:** ☒ English ☐ French ☐ Kinyarwanda	
Title of Document:	DEFENCE BRIEF ON APPEAL CONCERNING APPROPRIATE REMEDY		

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ACCUSED / DEFENSE

☒ Accused / *Accusé* **RWAMAKUBA**..... see / *voir* " CMS4

☒ Lead Counsel / *Conseil Principal:* **D. Hooper**

☐ In Arusha / à Arusha: (see / voir CMS3) ☐ Fax:

☐ Co-Counsel / *Conseil Adjoint:* **A. O'Shea**

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☒ **D. Fall,** SeniorTrial Attorney in charge of case: (☐name)
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