ICTR-98-44C-A
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119/A

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda
Arusha International Conference Centre
P.O. Box 6016, Arusha, Tanzania
Tel: 255 27 2504207-11/2504367-72 or 1 212 963 2850 — Fax: 255 27 2504000/2504373 or 1 212 963 2848

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The Registrar
Le Greffier

BEFORE THE APPEALS CHAMBER

Registrar: Adama Dieng

Date: 14 May 2007

THE PROSECUTOR

v.

André RWAMAKUBA

Case No. ICTR-98-44C-A

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

The Prosecution:
Hassan Bubacar Jallow
James Stewart
Georges Mugwanya
Neville Weston

Counsel for the Appellant:
David Hooper
Andreas O'Shea

1) In reply to the Defence Brief dated 31st July 2007, the Registrar of the ICTR makes the following submissions.

Defence Notice

2) The Registrar wishes to submit that he opposes all the prayers for relief made in the Defence Notice and recalls that in that Notice, the Relief sought was stated at:

> Paragraph 6(a) to be a finding that the 'Chamber' has the power to grant compensation to an acquitted person in circumstances where there has been a grave and manifest miscarriage of justice;
>
> Paragraph 6(b) to be a finding that the circumstances of this case are such that it would be just and right to award compensation;
>
> Paragraph 6(c) to be an award of compensation for such injustice; and
>
> Paragraph 6 (last line) alternatively, a reference of the matter back to the Trial Chamber.

3) The Registrar wishes to submit that he opposes both Grounds of Appeal set out in the same Defence Notice and recalls that there were stated to be two Defence Grounds of Appeal:

Paragraph 5(i) of the Notice stated that the Trial Chamber had erred in finding that the right to compensation for a grave and manifest injustice was not founded in custom since the right to an effective remedy is a right under international customary law and the Ground asserted that this was sufficient for the provision by the Trial Chamber of compensation for a grave and manifest miscarriage of justice.

Paragraph 5(ii) of the Notice stated that the Trial Chamber erred in finding that compensation for grave and manifest miscarriage of justice did not form a customary right since the Trial Chamber had an inherent discretion to provide an effective remedy.

Defence Brief

4) In respect of Section B, headed The Grave and Manifest Injustice, there is a sub-heading "The Moral argument is compelling". The Registrar respectfully submits that the moral argument is not compelling in the absence of any factual or legal foundation for the assertion that there has been a grave and manifest miscarriage of justice.

5) In respect of paragraph 10, the Registrar submits that the Defence fails to refer the Appeals Chamber to any evidence of the contention contained in the first two lines.

6) In respect of paragraph 11, while the meaning is not transparent, the Registrar construes "this assertion" as being a kind of summary assertion of the bundle of assertions contained in paragraph 10, all amounting to an assertion of damage to Mr. Rwamakuba. The Registrar submits that the particular part of the assertions that describe considerable mental anxiety and upset have no foundation in evidence. The Registrar submits that there is no moral imperative of the kind described in paragraph 11 and, upon analysis of the facts, no wrong done to Mr. Rwamakuba. The Registrar notes that while the Defence state that they do not wish to bring out the facts that lie behind the veil of acquittal, they hint that that there are, behind that veil, facts that they wish to be spied in outline. There is no Prosecution Appeal, and – in keeping with his neutrality - the Registrar does not seek to go behind the acquittal.

7) In respect of paragraph 12, the Defence asserts that the proper forum to assess damage is the Trial Chamber. The Registrar submits that if there was any legal and factual foundation for such an enquiry, and if the enquiry was relatively factually straightforward, the Trial Chamber would be an appropriate forum. The Registrar notes that in respect of national practice and in respect of the International Criminal Court provisions, there is no unanimity on this issue.

8) In respect of paragraph 13, the Registrar notes that the Trial Chamber has ceased to be constituted as it was during the trial but that two of the original judges remain in Arusha.

9) In respect of paragraph 14, the Registrar repeats that the United Nations Organisation and its Secretariat might have been the place of first resort for any claim. As to the suggestion at line 5 that he cannot sue those who are alleged to have borne false witness against him, there is no factual foundation laid for such a claim, nor does the Appellant point to any part of the trial record to show that they attempted to seise the Trial Chamber with any jurisdiction to deal with false testimony. In the same paragraph, at lines 2 and 3 of page 6, the Appellant alleges that there was some evidence to support the suspicion that the witnesses were sponsored by "some authority in Rwanda." The Appellant does not assist the Appeals Chamber by pointing to the record to offer a foundation for this contention. The Registrar does not accept the assumption underlying the paragraph that the Appellant is being denied a remedy for a miscarriage of justice.

10) In respect of paragraph 15, the Registrar submits that Annex A was not filed with the Registry.

11) In the paragraphs 15 to 19 there is an attempt by the Appellant to argue that the chronology illustrates that a protracted detention was a "delay" which is ascribed to systemic deficiencies in investigation and trial which was "excessive, wrong and avoidable". The attempt is analytically incoherent.

12) In paragraph 16, the purported example is given of a failed Defence application for severance and a later decision to sever. A contorted but ultimately unconvincing attempt is made to avoid laying the blame upon the judges who made the first decision not to sever an earlier indictment and a later decision to sever the subsequent four-accused indictment. However, the decisions were made by judges who reviewed the supporting evidence for the allegations in the respective indictments and came to perfectly sound legal conclusions on the basis of the interests of justice.

13) In paragraph 17, the United Nations generally is held to be to blame for the protracted period of detention although no reasons are clearly identified. It is noted that in this paragraph, the device of opacity rather than contortion is used to avoid any discussion of the role of the judges. The suggestion appears to be that there were insufficient resources to deal with the Appellant's trial in a timely fashion. If asked to do so by the Appeals Chamber, the Registrar could make

submissions in respect of this allegation, but is otherwise content to leave the accuracy of the allegation to be determined by the Appeals Chamber.

14) In respect of paragraph 19, the Registrar does not accept that acquittal is insufficient. The judges evaluated the evidence and found reasonable doubts. The Registrar will avoid the Defence's implied invitation to go behind the verdict, but considers that "the average decent onlooker" to whom the Defence ultimately appears to be appealing, might have a less emotional response if he or she was fully informed.

15) In respect of paragraph 20, the prosecution evidence is described as "palpably dishonest". The Registrar reiterates that this allegation has the same inadequacy of Defence foundational pleading as is encountered with the other similar formulations.

16) In respect of paragraph 21, it appears in essence to be a repetition of paragraph 19. It is not entirely clear why a verdict of acquittal is, in any way, a form of declaratory relief.

17) In respect of paragraph 22, the Registrar notes that it is repetitive of allegations previously made and the same responses apply. The Defence do not advert to the role of the judges who reviewed the indictment and the supporting evidence, the judges who reviewed the detention of the Appellant, the judges who reviewed the joinder issues, the judges who rejected the Motion for a Stay of Proceedings, and the judges who rejected the defence submissions that there was no case to answer after the close of the Prosecution case.

18) In respect of paragraph 23, this is an alternative pleading on the basis of lack of fault. The length of time in custody on scandalous charges is claimed in itself to warrant relief. The exact meaning of "scandalous" in this context is unclear. Is it the fact that the charges are very serious ones that makes them "scandalous" and therefore requires that the time spent in custody is one for relief? Or is it the fact that the charges are said to be seriously defective that makes them "scandalous"? If so, this is a repetition of the assertions made without foundation elsewhere and is likewise contradicted. If the former interpretation is intended, it is submitted that the various

judicial reviews of the Appellant's detention and the review of the results in the Stay Decision, prevent the length of detention itself being such as to require relief.

19)

a) In respect of paragraph 24, the Defence seek to lay some kind of foundation for the allegation that the Prosecution evidence was false. The quotation from the Trial Chamber judgement is brief and misleading. The full quotation is:

"214. After assessing the evidence as a whole, the Chamber found that *(sic)* 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."

b) In respect of this finding, the Registrar notes that different considerations apply to testimony that is not consistent with the indictment than that which is described as in itself unreliable or incredible. Additionally, the review of the matter in these two paragraphs concludes that cumulatively there is a reasonable doubt. Review of the findings in the judgment confirms that this reflects the view of the Trial Chamber. So does examination of the review of the evidence in the Trial Chamber's findings after the conclusion of the prosecution case.

20) In respect of paragraph 31, it is understood that the Defence is submitting that the Trial Chamber's treatment of the two issues is disparate. The Trial Chamber analysed the claim for *compensation* for an alleged *grave and manifest miscarriage of justice* specifically in those exact terms. It did not examine 'grave and manifest miscarriage of justice' in terms of its fundamental human rights implications and it did not address the issue of remedy generally for such a violation. If a fundamental right to liberty is violated by the deliberate use of fabricated evidence,

presumably an analysis would follow based upon a violation of a fundamental human right. If so, presumably an analysis of the existence or not of a remedy should follow and a discussion of compensation might be part of that analysis. The Registrar's duty is to assist the Appeals Chamber and not to be partisan on issues of law. The Registrar agrees with the Defence that the Trial Chamber's treatment of grave and manifest injustice is in contrast to that of the violation of the right to counsel. The Registrar reiterates his submission is that there was no or an inadequate basis for the analysis in the first place.

21) In respect of paragraph 33 to 48, the Registrar observes that the analysis in the Defence Brief is incorrect. It is not accepted that at this time, as stated in paragraph 33, "a sufficient basis exists in customary law for providing a remedy to those who have been acquitted following a grave and manifest injustice" (sic). The ICC provisions certainly provide guidance, but in this case do not create or declare international law.

22) In respect of paragraph 34 et seq, it is agreed that there is a general principle of international law that requires a remedy for grave violations of human rights. It is not agreed that monetary compensation is, as a general principle, an accepted remedy.

23) In respect of paragraph 38, what the Defence are submitting about monetary compensation is not clear. It "*may* not be specifically required" but at the same time "it *may* be the appropriate relief for effective remedy". The only certainty in the paragraph comes when the customary norm for an effective remedy "certainly" provides a sufficient basis for a power to award compensation. The Registrar submits this is a confusing formulation. It is submitted that there is no universal acceptance that international custom requires monetary compensation. The judicial decisions in favour of compensation are interpreting not custom but the specific treaty provisions under which they operate. Monetary compensation is not yet a right in all circumstances under international law. It is reiterated that in the UN Commission on Human Right's van Boven/Basiouni drafts and the Principles and Guidelines emerging therefrom, monetary compensation is not specified as an existing obligation under international law. Specifically, it is specified an emerging norm.

24) In respect of paragraphs 39 and 40, it is clearly an inference that if states have the intention to apply emerging customary norms of international law, they can easily incorporate provisions articulating the norm into treaties. The fact remains that in respect of grave and manifest miscarriages of justice, it has been specifically incorporated into one treaty and is expressed to be operable in exceptional circumstances and only at discretion. That is not an established right. It is not a vehicle to invent a new remedy when an enabling Statute and Rules made thereunder talks explicitly of some remedies but remains silent on this one.

25) In respect of paragraphs 41 to 48, the Registrar submits that the enumeration of rights violated does not add to the argument. None of the different formulations of the circumstances of violation and the different speculative allegations against the Prosecution contained in the paragraphs have any demonstrable foundation.

26) In respect of paragraph 49, the Defence urge that the power to deal with an alleged grave and manifest miscarriage of justice arises from Rule 54. This appears to be in excess of the Grounds in the Defence Notice of Appeal. Article 14 of the Statute empowers judges to adopt Rules for the purposes of proceedings before the ICTR, it gives examples and adds "...and other appropriate matters..." It is a wide grant but is one to be interpreted in the light of the specific mandate of the ICTR. Rule 54 was introduced by the ICTY judges to give effect to the principle of efficacy. Both the Statute and the Rules set out numerous explicitly defined rights of an accused and, as is elsewhere in the pleadings noted, the judges have incorporated a Rule, Rule 5, specifically granting a remedy for breaches of the Rules resulting in material damage. It is an elementary principle of construction that where a creating body establishes specific measures targeted to a result, and is silent upon others, then the creating body, absent any other evidence, intended to exclude measures not set out. Rule 54 was not associated in any way with the remedy regime set out in Rule 5. Rule 54 arises under a heading "Orders and Warrants". It is clearly designed to give efficacy to the investigative, pre-trial and trial process. It is not designed to act as a vehicle for the invention of new and uncontemplated remedies for alleged violations of human rights under customary international law.

27) In respect of paragraph 51, the Registrar has made submissions on this in his Brief.

28) In respect of paragraph 52, Golder[1] is authority for the right to have access to a court lest there be a denial of justice. The Appellant had access to the court and the court decided against him.

29) In respect of paragraph 53, it is submitted that the Tribunal manifestly protects the rights of the Accused in respect of the numerous rights set out in the Statute and the Rules. When 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. Time and again, the judges of the Tribunal ensured fairness at each stage of the proceedings against this Appellant. The Appellant invites the Appeal Chamber to engage in speculation without foundation. The Registrar is content to leave the matter in the custody of the Appeal Chamber.

Done in Arusha, Monday 14 May 2007

Word count: 2,860 words

Adama Dieng
Registrar

[1] Golder judgement, ECtHR, 21 February1975, Series A *no* 18.

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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**
☐ Arusha (see / voir CMS3) ☐ Fax:

OTP / *BUREAU DU PROCUREUR*

☐ Hassan Bubacar Jallow, Prosecutor
☐ B. Majola, Deputy Prosecutor
☐ J. Stewart, SAC
☒ **D. Fall,** SeniorTrial Attorney in charge of case: (☐name)
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