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ICTR-98-44C-A
17-5-2007
(132/A -122/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 17th May 2007

THE PROSECUTOR

V

DR ANDRE RWAMAKUBA

APPELLANT'S RESPONSE TO REGISTRAR'S SUBMISSIONS ON APPEAL CONCERNING APPROPRIATE REMEDY

Counsel for Dr Andre Rwamakuba

David Hooper
Andreas Gordon O'Shea

THE PROSECUTOR

V

DR ANDRE RWAMAKUBA

APPELLANT'S RESPONSE TO REGISTRAR'S SUBMISSIONS ON APPEAL CONCERNING APPROPRIATE REMEDY

Admissibility of issues raised by the Registrar

1. The Appellant does not dispute the Appeal Chamber's right to receive and consider the Registrar's submissions.

   However, if we understand the submission correctly, we submit that the relief sought at paragraph 73 (V) - in respect of the finding of breach by failure to provide legal assistance and delay in initial appearance of six months - is not a matter that can or should be reconsidered given the lapse of time since that finding in 2000, the fact of previous appeal in the issue, and the failure of the Registrar to address the matter earlier. The matter is *res judicata*.

The question of the admissibility of the claims for appropriate remedies to the Trial Chamber

2. In respect of the Registrar's submissions relating to 'Grave and manifest injustice' - that the Trial Chamber 'exceeded the limits of its leave' (para 6) and that this was done on an 'inadequate basis' (para 9) - the Appellant submits that entertaining submissions that 'could pertain to the fundamental rights of a former accused' is a proper exercise of the Trial Chambers duties and discretion.

3. While the Defence concedes that its request exceeded the scope of the invitation of the Trial Chamber, it is submitted that it was not foreclosed from seeking other relief. In inviting the defence to make submissions on the issue of a violation of the acquitted person's fundamental rights, the Chamber was not granting leave. There is no indication in the Judgement that the Chamber believed it had to grant leave. It was simply recording the previous violation of the rights of the accused and extending an invitation to the defence to deal with it. Given the previous finding of a violation, it would have been extraordinary if the defence were precluded from making an application merely on the basis that it not been mentioned in the judgement.

4. In any event, leave was not required for either the narrower or the wider application. There is nothing in the Rules which indicates any procedure for seeking leave to make applications save in the case of interlocutory appeals under Rule 73(B). In the absence of a specific provision or practice requiring a party to seek leave, it is submitted that a party or even a non-party in appropriate circumstances, can apply to the Trial Chamber for appropriate relief.

5. This position is not affected by the Chamber making a Judgement. There are a variety of circumstances where a party, or even a non party, may need to approach the Trial Chamber for an order following its judgement as illustrated by the following examples. Consequential orders may be required to give effect to the judgement or to seek relief flowing from the findings in the judgement. In the event that a person is convicted the Trial Chamber may need to be approached to protect the fundamental rights of the person affected thereafter by the actions of a State. Parties to other proceedings may need to approach the Chamber for permission to review materials from the former trial.

6. Rule 73 of the Rules of Procedure and Evidence permits any party to move for appropriate relief. The right to seek relief is not limited to invitations from the

Trial Chamber. Apart from Rule 73, Rule 54 permits the making of orders for the conduct of the trial and this, as we have submitted, means all stages of the proceedings. It is implied that relief may be sought.

7. Further, where the Rules have not envisaged a specific situation, nothing precludes a person from making an application. It is then for the Chamber to decide if it has jurisdiction to decide the matter either under the Rules or by inherent powers essential for its proper functioning. In the alternative, it is perfectly within the right and discretion of the Chamber to accept the consideration of an issue raised in the interests of justice, even where, technically, leave may be required and the application exceeds the scope of the leave granted. Nothing in the Rules excludes such discretion, which is inherent to the proper functioning of a court of justice.

8. In respect of the submission (para 9) that the Trial Chamber had -'not reached any conclusion as to the falseness or the manipulation of the evidence / Defence's request not sufficiently specific / no evidential foundation laid for an enquiry'- and that the Chamber should not therefore have embarked on such a discussion, the Appellant submits that that is an unrealistic assessment of the situation in which the Trial chamber found itself. The Trial Chamber had heard and seen each of the prosecution witnesses and concluded at paragraph *214. 'After assessing the evidence as a whole the Chamber found that all of the Prosecution witnesses not to be credible or reliable……"* Indeed, the evidence was such that no reasonable tribunal could have taken any other view. There was no room here for the evidence to have been merely the product of simple error, forgetfulness or confusion. The witnesses, in our submission, simply lied. The Trial Chamber did not have to determine or expand on that point in the Decision on Relief as it approached the matter on the basis of whether the defence had made first base - i.e. was there a right to relief at all. As the Trial Chamber found that the defence do not get past that point it was unnecessary for it to go further and to make an express, public finding on the defence assertions.

9. The Appellant reiterates his submission that the Trial Chamber, being best placed to assess the witnesses, is the appropriate forum to determine the factual basis of the submission. For that reason the Appellant submits that the relief sought by the Registrar, at paragraph 73 (XI), namely, that the Appeal Chamber do not remit to the Trial Chamber is, on that issue, impracticable.

10. The Registrar characterises the Chamber's response as 'an unusual creature to find in a judicial decision.' Whether or not the Chamber's choice to address the legal nature of the application was unusual, the fact remains that it has been addressed and this necessarily permits the defence to challenge the Chamber's findings on the application.

11. If it is being suggested that that the Appellant's failure to set out the factual premise for its legal submission and request for relief precluded the Trial Chamber from addressing the matter, then this is mistaken in our submission. An may application suffer from defects in terms of the scope or quality of the submissions but the Chamber is entitled to address the application, and have regard to such matters as it deems appropriate *proprio mutu*. It was unnecessary for the Appellant to present a detailed analysis of the factual premise, given that the Judges had seen the witnesses and heard and deliberated on the evidence. Had the wished, they could have sought further assistance.

12. We submit that it would be unnecessary to establish male fides or abuse of power on the part of the Prosecution for there to be a finding of a grave and manifest injustice. The Trial Chamber judges are best placed to take the necessary overview of a case and to determine whether, in all the circumstances, including the behaviour of the accused, there has been a grave and manifest injustice, whatever meaning is given to those words.

The question of the length of detention

13. The Registrar refers to the Chamber's prior finding that there had not been a violation of the right to be tried without undue delay for the purposes of establishing an abuse of process. That decision was made in the context of an earlier application for dismissal of the charges on grounds of abuse of process arising out of delay. In so far as the Chamber held there to be no violation of the right to be tried without undue delay, such finding was obiter since the actual question before the Chamber was whether there was a violation amounting to an abuse of process which would justify dismissal of the charges. The question of whether there has been a grave and manifest injustice arising out of the length of detention in combination with other factors is a different question which might warrant a different answer. Furthermore, in so far as the existence and implementation of procedural safeguards might militate against a finding of a violation of the right to be tried without undue delay, it might not prevent a finding that the length of detention nonetheless constituted a grave and manifest injustice in the light of the choices properly open to the prosecution.

Views of the Office for Legal Affairs

14. The Registry refers to the views of the Office for Legal Affairs in support of the proposition that there is no power under the Statute to provide compensation. It is clear that the Statute does not expressly provide for a right to compensation or a remedy generally. Requests for compensation made through correspondence therefore face the difficulty of there being no procedure in place for the granting of a remedy. The moves to have the Statute amended must therefore be seen in that context. Furthermore, the issue of the powers of a Chamber to grant a remedy have not been previously litigated and fully argued. Consequently, the

developments referred to by the Office for Legal Affairs cannot resolve the issue before this Chamber.

15. The fact that there is no express provision in the Statute does not however determine the issue. The Statute was not, unlike the International Criminal Court Statute, designed to be an exhaustive document but merely the constitutive document and basic framework for the establishment of the Tribunal. A similar observation was made by the Appeals Chamber in relation to the Statute of the ICTY in the case of *Ojadanic*, where it noted:

> The Statute of the ICTY is not and does not purport to be, unlike for instance the Rome Statute of the International Criminal Court, a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate.[1]

16. The Statute must be interpreted in the light of its object and purpose.[2] The object of the Tribunal according to SC resolution 955 (1994), is to bring to an end the reported widespread violations, bring to justice the persons responsible for those violations of international humanitarian law, and contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda.

17. It is submitted that the provision of an effective remedy to an acquitted person falls within the second and third limbs of the object of establishing the Tribunal. With regard to the second limb, a person is to be brought to justice then the Tribunal is designed to do what justice requires. With regard to the third limb, international criminal proceedings before the Rwanda Tribunal have the special

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[1] *Prosecutor v Milutinovic et al* (IT-99-37-AR72), Decision on Dragoljub Ojanic;s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003

[2] *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction Case (IT-94-1-AR72), 2 October 1995, par 88; *Prosecutor v Seselj*, Decision on the Interlocutory Appeal Concerning Jurisdiction (IT-03-67-AR72.1), 31 August 2004, par 12

feature that they are designed to have and do have a direct impact on national reconciliation. A proper contribution to the process of national reconciliation and to the restoration and maintenance of peace requires that international justice does not appear to be one sided, and that the rights of those accused as well as those ultimately acquitted are fully respected and enforced. Unlike in the context of national criminal proceedings where there are parallel institutions for the provision of remedies to those unfairly prosecuted or having their rights violated, on the international plane, there is no other forum to address the wrongs to a person newly acquitted by the International Criminal Tribunal for Rwanda.

Violation of the Right to Assistance of Counsel

18. Breach of the right to legal assistance and delay in the initial appearance are adjudicated facts and do not merit further review here.

In respect of the application of Rule 5 the Appellant submits that the Trial Chamber was correct in its approach and interpretation as set out in paragraph 36 and 37 of the decision. The purpose of the Rule must be understood in terms of what is necessary for the administration of justice and cannot be confined narrowly to the notion of prosecution.

19. In addition, it is suggested that, having regard to the English version, even the French version does not clearly confine itself to *actual* parties to the proceedings. That would have been the clear meaning of the French version if it had stated '...d'un acte d'une autre partie *au proces*' [our addition]. In the absence of such precision, and having regard to the English version, it is submitted that the word 'partie' could be construed in a more generic way to include entities not necessarily before the Tribunal at that instance but who by virtue of their acts are *potential* parties to the proceedings. This is particularly a possible interpretation if one adopts a more teleological as opposed to the strictly textual approach to interpretation in accordance with the principles underlined in Article 31 on the Vienna Convention on the Law of Treaties of 1969.

20. Here an ambiguity arises by virtue of the divergence between the French and English versions, but also within the French version itself. Where there is an ambiguity in the interpretation of a rule applicable to a criminal matter it should be interpreted in favour of the accused, according to the principle of *in dubio pro reo*. As noted in the *Akeyesu* Trial Judgment,

> The general principles of law stipulate that, in criminal matters, the version favourable to the accused should be selected. [3]

21. However the Trial Chamber was wrong to find Rule 5 inapplicable. We submit that the Trial Chamber was mistaken in paragraph 38 in conflating 'material prejudice' with 'serious and irreparable prejudice'. The two concepts are quite different. Prejudice may be material without it necessarily being serious and irreparable. The Appeals Chamber has held that:

> ...any violation, even if it only entails a relative degree of prejudice, requires a proportionate remedy.[4]

It would be inconsistent with the purpose of Rule 5 to consider that it is intended to depart from such a basic principle of fairness. The word 'material' must be taken to simply require that the prejudice be real and not illusory.

22. Where an accused is deprived of legal assistance over a period of time, it is submitted that the prejudice is 'material' necessarily by virtue of the absence of a lawyer. It is difficult to speculate as to what the lawyer may have been able to do to expedite matters but it must be assumed that a lawyer might have taken steps to ensure expedition of the process. Furthermore, while past emotional stress cannot

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[3] *Akeyesu* Trial Judgment, par 319; see further *Prosecutor v Dusco Tadic*, (IT-94-1-A), Decision on the Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, par 73: '... any doubt should be resolved in favour of the Appellant in accordance with the principle *in dubio pro reo*'; *Prosecutor v Halilovic*, (IT-01-48-T), Judgment of 16 November 2005, par 12.
[4] *Prosecutor v Semanza*, Decision of 31 May 2000 (AC), par 125

be proved, it may be assumed that an accused detained for a period of months without legal assistance will suffer a degree of emotional stress from that fact. This is necessarily prejudice of a material nature, even if not serious and irreparable.

23. The effect of the breach was sympathetically portrayed in paragraph 73 of the Decision. The 'moral damage' conclusions were a fair and humane demonstration of a Trial Chamber's capacity to understand the real hurt occasioned to an accused by such circumstances.

24. The Registrar further submits that Rule 5 would not permit the provision of financial compensation. There is nothing in the Rule to support such a contention. The word 'relief' is sufficiently broad to encapsulate a power to grant financial compensation if the Chamber deems it appropriate.

25. The Registrar submits that the asserted inherent power to grant a remedy is not necessary for the functioning of the tribunal. We submit that if the object goes beyond that asserted by the Registry, or even if it consists merely in having a tribunal for the prosecution of individuals, then what is necessary depends on what is required for the proper administration of justice in a criminal matter. This must be considered in the light of international human rights standards. It must be necessary for the administration of justice in a criminal matter that there is provision of the awarding of a remedy for a clear violation of a right of an accused person. In the absence of other mechanisms for respecting the right to an effective remedy, the tribunal responsible for the conduct of the trial must be assumed to possess such powers as a necessary corollary of its mandate to administer justice in criminal proceedings.

26. It is suggested by the Registry that the Chamber's view, - that the violation of the right to counsel did not have a significant effect on the expeditiousness of the trial and did not cause material prejudice, - implies that remedies other than financial

compensation should have been considered. It is not explained of what these remedies should consist. Neither is it explained why the Chamber should be taken as a matter of law to have made a wrong decision by providing compensation instead of, or in addition to, the other alternative remedies. Surely, if the Chamber has the power to grant a remedy, it possesses the discretion to grant compensation if it deems appropriate in the exercise of its discretion. It is submitted that if the power exists to grant a remedy, it is a matter of discretion as to what form the remedy should take. The Appeals Chamber should only interfere in the exercise of such discretion where there has been a clear misapplication of the Chamber's power or where the remedy is manifestly disproportionate to the circumstances. In the present case $2,000 is a very modest compensation. Had the breach been more serious, then a larger financial sum may have been appropriate. In terms of available resources it is trifling when set against the expenditure of the Tribunal to date (in excess of $1,000,000,000) and doubtless less than the expense of the Registrar's current submissions.

David Hooper

David Hooper
Andreas O'Shea

17 May 2007

[Word count 3,017]

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Case Name:	The Prosecutor vs. **Dr Andre Rwamakuba**		**Case Number:**	ICTR-98 44 C A
Dates:	Transmitted: **17 5 07**		Document's date: **17 5 07**	
No. of Pages:	**11**	**Original Language:**	☐ English ☐ French	☐ Kinyarwanda
Title of Document:	**Appellants response to Registrar's submissions concerning appropriate remedy**			

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ACCUSED / DEFENSE

☒ Accused / *Accusé* **RWAMAKUBA**..... see / *voir* CMS4
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☐ In Arusha / à Arusha: (see / voir CMS3) ☐ Fax:
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☒ **D. Fall**, SeniorTrial Attorney in charge of case: (☐name)
☐ The Hague / *La Haye* ☐ Arusha (see / *voir* CMS3) ☐ Kigali

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