

31/H



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

IN THE APPEALS CHAMBER

ICTR-98-44C-A

18 April 2007

(31/H - 26/H)

P.T.

Before:

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

Registrar:

Mr. Adama Dieng

Decision of:

18 April 2007

André RWAMAKUBA

v.

THE PROSECUTOR

Case No. ICTR-98-44C-A

ICTR Appeals Chamber

Date: 18 April 2007

Action: P.T.

Copied To: Concerned Judge
Patrol, Stas, LGS, HOS, etc.

Archives

Decision on Prosecution's Notice of Appeal and Scheduling Order

Counsel for André Rwamakuba:

Mr. David Hooper
Mr. Andreas O'Shea

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. George Mugwanya
Mr. Neville Weston

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: Patrice Tchidimba

SIGNATURE: DATE: 18/04/07

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of two appeals, filed respectively by Mr. André Rwamakuba¹ and the Prosecution² against a decision taken by Trial Chamber III ("Trial Chamber").³ In addition, the Registrar of the Tribunal has filed notice of his intention to make submissions pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") or, in the alternative, to request the Appeals Chamber to hear his appeal against the Impugned Decision.⁴ No further submissions from the parties have been filed.

Background

2. In its Judgement of 20 September 2006, the Trial Chamber acquitted Mr. Rwamakuba of all charges against him.⁵ The Trial Chamber further recalled that Mr. Rwamakuba's right to legal counsel was violated in the first several months of his detention at the Tribunal and stated that he was at liberty to file an application seeking an appropriate remedy for this violation.⁶ The disposition of the Trial Judgement set out a scheduling order for the filing of submissions in this respect and invited responses from both the Prosecution and the Registrar.⁷

3. On 25 October 2006, Mr. Rwamakuba filed an application for a remedy for the violation of his right to legal assistance.⁸ The Registrar responded on 2 November 2006.⁹ The Prosecution made no submissions.¹⁰ In the Impugned Decision, the Trial Chamber awarded Mr. Rwamakuba 2,000 United States dollars for the "moral injury" sustained as a result of the violation of his right to counsel and ordered the Registrar, among other things, to provide an apology.¹¹ However, the Trial Chamber dismissed Mr. Rwamakuba's claim for a remedy for "a grave and manifest miscarriage of

¹ Defence Notice of Appeal of Decision dated 31 January 2007, 12 February 2007 ("Rwamakuba Notice of Appeal").

² Prosecutor's Notice of Appeal, 23 February 2007 ("Prosecution Notice of Appeal").

³ *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007 ("Impugned Decision").

⁴ The Registrar's Notice of Intention to Make Submissions to the Appeals Chamber Pursuant to Rule 33(B) of the Rules of Procedure and Evidence or, in the Alternative, the Registrar's Notice of Appeal Regarding the Trial Chamber's Decision on Appropriate Remedy of 31 January 2007, 28 February 2007 ("Registrar's Notice").

⁵ *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Judgement, 20 September 2006, Chapter IV ("Trial Judgement").

⁶ Trial Judgement, paras. 217, 220.

⁷ Trial Judgement, Ch. IV.

⁸ Impugned Decision, para. 5.

⁹ Impugned Decision, para. 6.

¹⁰ Impugned Decision, para. 6.

¹¹ Impugned Decision, pp. 23-24.

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justice" based on his assertion that he was "indicted and prosecuted on false and manipulative evidence" coupled with nine years of pre-trial and trial detention.¹²

4. In his appeal, Mr. Rwamakuba solely contests the Trial Chamber's decision to dismiss his claim based on "a grave and manifest miscarriage of justice".¹³ The Prosecution appeals the Trial Chamber's decision to award compensation to Mr. Rwamakuba for the violation of his right to legal assistance.¹⁴ The Registrar gives notice of his intention to file detailed submissions pursuant to Rule 33(B) of the Rules in the present matter on all aspects of the Impugned Decision and requests to be heard in oral argument.¹⁵ Alternatively, the Registrar gives notice of his intention to request the Appeals Chamber to hear his appeal against the Impugned Decision and his response to Mr. Rwamakuba's appeal.¹⁶

Discussion

5. At this stage, the Appeals Chamber finds it appropriate to address several threshold procedural issues and to issue a scheduling order to facilitate the consideration of this matter. From the foregoing, the Appeals Chamber considers the following questions:

(a) whether the Prosecution may file an appeal and advance new arguments when it has made no submissions before the Trial Chamber; and

(b) whether the Registrar may make submissions pursuant to Rule 33(B) of the Rules; or, in the alternative, appeal against the Impugned Decision and respond to Mr. Rwamakuba's appeal.

6. With respect to the Prosecution's Notice of Appeal, the Appeals Chamber recalls that, in the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could have reasonably done so in the first instance.¹⁷ The Appeals Chamber notes that the Prosecution did not file any submissions in the underlying proceedings before the Trial Chamber resulting in the Impugned Decision even though it was specifically invited to do so, and demonstrates no special circumstances justifying its failure. Consequently, the Prosecution is deemed to have waived its right to appeal against the Impugned Decision, and the Appeals Chamber dismisses the Prosecution's Notice of Appeal.

¹² Impugned Decision, para. 19.

¹³ Rwamakuba Notice of Appeal, paras. 1, 5.

¹⁴ Prosecution Notice of Appeal, paras. 1-23.

¹⁵ Registrar's Notice, para. 6.

¹⁶ Registrar's Notice, para. 6.

¹⁷ *Édouard Karamera v. The Prosecutor*, Case No. ICTR-98-44-AR72.2, Decision on Validity of Appeal of Preliminary Motion of Édouard Karamera Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 11 June 2004, p. 4; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 21.

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7. As for the Registrar's Notice, the Appeals Chamber notes that the Impugned Decision is directed at the Registrar, who participated in the proceedings below on this matter upon invitation from the Trial Chamber to do so. Accordingly, the Appeals Chamber finds it appropriate and within the scope of Rule 33(B) of the Rules in the present circumstances to allow the Registrar to make submissions on all aspects of the Impugned Decision, including the award of compensation for the violation of Mr. Rwamakuba's right to legal counsel.¹⁸ The Appeals Chamber therefore does not need to consider the Registrar's alternative request to appeal. The Appeals Chamber further considers that it is premature at this time to consider the Registrar's request for oral argument prior to receiving the Registrar's submissions.

8. With respect to briefing in this matter, given that a final judgement has been rendered in this case, and there are no prescribed procedural rules for disposing of Mr. Rwamakuba's appeal and the Registrar's submissions against the Impugned Decision, the Appeals Chamber finds it appropriate to establish those rules from the outset. The Appeals Chamber considers that paragraph 2 of the Practice Direction on the Length of Briefs and Motions on Appeal¹⁹ setting the length of submissions for interlocutory appeals shall be applicable *mutatis mutandis* in the present matter. Furthermore, pursuant to Article 19 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal,²⁰ the Appeals Chamber considers it proper to issue a scheduling order for briefing in this case.

Disposition

9. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Prosecution's Notice of Appeal, **ALLOWS** the Registrar to make submissions in accordance with Rule 33(B) of the Rules on all aspects of the Impugned Decision, and **ORDERS** briefing as follows:

- (i) Mr. Rwamakuba and the Registrar shall file their briefs no later than fourteen (14) days from the date of the filing of this decision;
- (ii) Responses, if any, shall be filed no later than ten (10) days from the date of the filing of the initial briefs;
- (iii) Replies, if any, shall be filed no later than four (4) days from the date of the filing of the responses.

¹⁸ The Appeals Chamber considers that Rule 33(B) of the Rules broadly allows for the Registrar, in the execution of his functions, to make representations to Chambers "on any issue arising in the context of a specific case which affects or may affect the discharge of his functions, including that of implementing judicial decisions, with notice to the parties where necessary." (Emphasis added).

¹⁹ 8 December 2006.

²⁰ 8 December 2006.

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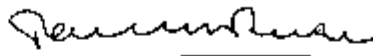
Done in English and French, the English version being authoritative.

Judge Shahabuddeen appends a partly dissenting opinion.

Done this 18th day of April 2007,
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Fausto Pocar
Presiding

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PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN


1. I agree with the Appeals Chamber that the Registrar may make submissions in this case pursuant to Rule 33(B). I write separately to note my different view that the Prosecution's appeal should be allowed.
2. I respectfully disagree with the conclusion of the Appeals Chamber that by failing to make submissions before the Trial Chamber on the issue of compensation, the Prosecution has waived its right to file an appeal. As a party in this case, the Prosecution has standing to appeal from the Impugned Decision, and the Appeals Chamber has jurisdiction to consider its appeal. Moreover, the Prosecution's Notice of Appeal has not been challenged; indeed, the Appeals Chamber is not seized of any motion or request which it has been asked to decide.
3. It is true that where a party has not advanced arguments before the Trial Chamber when it reasonably could have done so, the Appeals Chamber will, in the absence of special circumstances, find that the party has waived its right to make new arguments on appeal.¹ In some cases, the Appeals Chamber of this Tribunal and the ICTY Appeals Chamber have declined to consider arguments raised for the first time on appeal;² in others, they have addressed arguments that were not advanced below, based, for example, on the "general importance" of the issue concerned.³ In any event, the failure to raise an argument before the Trial Chamber does not constitute an absolute bar to the filing of an appeal. For this reason, I would allow the Prosecution's Notice of Appeal, reserving for later consideration, with the benefit of briefing and argument from all sides, the question whether the Prosecution's arguments should be addressed notwithstanding its failure to advance them below.

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

Dated 18th April 2007
The Hague,
The Netherlands.



[Seal of the Tribunal]


Mohamed Shahabuddeen

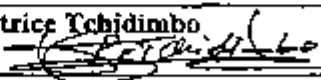
¹ See *Eliézier Ntuyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 199; *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, 1 June 2001.

² See, e.g., *Jean Kamukanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000, para. 28 (concluding, upon consideration of the Appellant's arguments, that he "ha[d] not been able to demonstrate the existence of special circumstances capable of constituting an exception to the waiver principle"); *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 212 (finding that that the Appellant had not sought to demonstrate in his submissions before the Appeals Chamber the existence of special circumstances warranting a departure from the ordinary waiver rule).

³ See, e.g., *Jean Kamukanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000, para. 55; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 34.

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April 18, 2007		Case Name / Affaire: RWAMAKUBA Case No / No. de l'affaire: ICTR-98-44C-A		THE PROSECUTOR v. Andre RWAMAKUBA	
To: A:		Arusha <input checked="" type="checkbox"/> Judicial Records and Archives Unit <input type="checkbox"/> Fax Number: 179 5251 APPEALS UNIT <input checked="" type="checkbox"/> Ms Félicité Talon, APPEALS CHAMBER <input checked="" type="checkbox"/> Judge / Juge Fausto Pocar, Presiding <input checked="" type="checkbox"/> Judge / Juge Mohamed Shahabuddeen <input checked="" type="checkbox"/> Judge / Juge Liu Daqun <input checked="" type="checkbox"/> Judge / Juge Theodor Meron <input checked="" type="checkbox"/> Judge / Juge Wolfgang Schomburg <input checked="" type="checkbox"/> Ms Catherine Marchi-Uhel <input checked="" type="checkbox"/> Mr Roman Boed <input checked="" type="checkbox"/> Concerned Associate Legal Officers <input checked="" type="checkbox"/> Ms. Fatou Fall DEFENSE <input checked="" type="checkbox"/> Accused / accusé : Mr. Andre RWAMAKUBA (complete CMS4 Form) <input checked="" type="checkbox"/> Lead Counsel / Conseil Principal: Mr. David HOOPER (name / nom) <input checked="" type="checkbox"/> In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: 44 20 7067 1507 <input checked="" type="checkbox"/> E-mail: clerks@25bedfordrow.com <input checked="" type="checkbox"/> Co-Counsel / Conseil Adjoint: MR. Andreas O'SHEA (name / nom) <input checked="" type="checkbox"/> In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: 031-204 4304 <input checked="" type="checkbox"/> E-mail: a_goshea@yahoo.co.uk			
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Documents name / Titre du document			Date Filed / Date d'enregistrement		Pages
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