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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Karin Hökberg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 29 September 2005

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THE PROSECUTOR

v.

André RWAMAKUBA
Case No. ICTR-98-44C-T

**DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OR, IN THE
ALTERNATIVE, CERTIFICATION TO APPEAL CHAMBER'S DECISION
DENYING REQUEST FOR ADJOURNMENT**

Article 19 of the Statute and Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Dior Fall
Adama Niane
Tamara Cummings-John

Defence Counsel
David Hooper
Andreas O'Shea

DSY

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökberg and Gustave Gberdao Kam (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion for Reconsideration or, in the alternative, Motion, Pursuant to Rule 73(B), for Certification to Appeal the Trial Chamber's Decision to Deny the Prosecutor's Request for an Adjournment" (the "Motion"), filed on 16 September 2005;

CONSIDERING the Defence Response thereto filed on 21 September 2005 and the Prosecutor's Reply thereto filed on 22 September 2005;

HEREBY DECIDES the Motion pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules").

INTRODUCTION

1. André Rwamakuba (the "Accused") was arrested on 2 August 1995 and detained until 7 February 1996 in Namibia. In a Decision of 12 December 2000,¹ a prior Trial Chamber reviewed fully the circumstances of the Accused's detention in Namibia. That Chamber was satisfied that the Prosecution was not aware of the Accused's arrest prior to 21 December 1995. The Trial Chamber noted that "[i]n his *fac simile* letter dated 22 December 1995, Prosecutor Goldstone informed the Namibian Attorney-General that "[he had] instructed [his] Office in Kigali to take urgent steps to ascertain whether we are interested in a possible prosecution of Dr Rwamakuba on charges which fall within the jurisdiction of the International Tribunal". He further "hope[d] to be in a position to make a decision in this regard by the middle of January, 1996" and further noted: "I would be grateful if your laws permit this, that Dr Rwamakuba be kept in detention until that time".²

2. On 18 January 1996, the Prosecution notified the Namibian Ministry of Foreign Affairs, that at that time the Prosecution did not "[...] possess evidence which would entitle us to request the Namibian authorities to detain Dr Andre Rwamakuba." The Accused was released by the Namibian authorities on 8 February 1996 but, two and a half years later, an Indictment against the Accused and seven other Co-Accused was filed by the Prosecution and confirmed on 29 August 1998.³ The Accused was then arrested on 21 October 1998 in Namibia, in compliance with the Warrant of Arrest and Order for Transfer and Detention,⁴ and transferred to the Tribunal on 22 October 1998. He had his initial appearance on 7 April 1999.

¹ *Prosecutor v. André Rwamakuba*, Case ICTR-98-44-T, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused (TC), 12 December 2000, *ICTR Report 2000*, p. 786. The Trial Chamber found that the question of whether the Accused's arrest and detention on 2 August 1995 was based on a request of the Prosecutor remained to be determined. The Chamber was satisfied that the Namibian Authorities did not arrest the Accused on the basis of a list of suspects previously circulated by the Prosecutor.

² *Ibid.*, par. 32.

³ *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44 (*Bizimana et al.* Case), Confirmation and Non-Disclosure of the Indictment, 29 August 1998, *Report 1998*, p. 950.

⁴ *Prosecutor v. André Rwamakuba*, Case ICTR-98-44-I, Warrant of Arrest and Order for Transfer and Detention (TC), 8 October 1998, *ICTR Report 1998*, p. 954.

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3. On 14 February 2005, at the Prosecution's request, the Chamber granted severance of the Accused and an amendment of the Indictment against him.⁵ The Amended Indictment against the Accused was filed ten days later.⁶

4. Pursuant to the Scheduling Order of 24 March 2005,⁷ the Prosecution filed its Final Witness List on 1 April 2005 containing 18 factual Witnesses, including Witnesses ALX and AWZ. The trial in the current case commenced on 9 June 2005 with the presentation of the Prosecution's case.

5. Witness ALX was initially scheduled to testify on 11 July 2005. But on that day, the Prosecution stated to the Chamber that this Witness refused to come to Arusha to testify and had not even been brought to Arusha by the Witnesses and Victims Support Section ("WVSS").⁸ Neither ALX nor AWZ testified during that trial session, which was adjourned on 15 July 2005 before the Prosecution case was completed.

6. After discussion with the parties, the trial was scheduled to resume for the completion of the Prosecution case between 22 August 2005 and, at latest, 9 September 2005. This scheduling was made considering the necessity to allow sufficient time for the Defence before the presentation of its case scheduled to begin at the end of October 2005. Just before the resumption of the trial, on 18 August 2005, the Prosecution informed the parties, and the Chamber via email, that the "scheduling order of the witnesses" for this session would be as follows: 1. GIO; 2. ALW; 3. RJ and 4. XV.⁹ This notification did not include Witnesses ALX and AWZ.

7. On 24 August 2005, the Prosecution raised the matter of the refusal of these Witnesses to appear before the Chamber.¹⁰ It specified that giving testimony by video link was proposed to Witness AWZ but that she refused to exercise this option.¹¹ At that time, the Chamber drew the attention of the Prosecution to consider whether it would need to use the coercive powers of the Tribunal and if so, to make the appropriate application. The Chamber furthermore indicated that it "would not want to allow the matter to be pending without a definite resolution one way or the other".¹²

8. On 29 August 2005, the Prosecution filed a motion asking the Chamber to issue an immediate subpoena to compel testimony from Witnesses AWZ and ALX during the week of 29 August to 2 September 2005.¹³ In that motion, the Prosecution claimed that these Witnesses did not wish to testify due to fear for their personal safety. It did not provide any supporting statement from the Witnesses, stating that they had failed to cooperate with the

⁵ *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("Karemera et al."), Decision on severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

⁶ That Indictment has been filed on 23 February 2005 and re-filed on 9 March 2005, due to typographical errors and in accordance with the Order to Re-File the Amended Indictment (TC), 8 March 2005.

⁷ *Prosecutor v. André Rwamakuba*, Case ICTR-98-44C-PT, Scheduling Order (TC), 24 March 2005.

⁸ T., 11 July 2005, statement of Lead Counsel for Prosecution, Ms. Fall at p. 2 (note that "ALW" should be read "ALX" – see erratum to the transcript and French transcript, at p. 3); and statement of Lead Counsel for Rwamakuba at p. 3.

⁹ Email from Lead Counsel for Prosecution, Ms. Fall, sent to the attention of Lead Counsel for Rwamakuba and copied to Trial Coordinator in the instant case, 18 August 2005 ("Email from Lead Counsel for Prosecution", see Annex).

¹⁰ T., 24 August 2005, statement of Lead Counsel for Prosecution, Ms. Fall at p. 70 (note that "ANX" should be read "ALX" – see French transcript, at p. 69); and statement of Lead Counsel for Rwamakuba at p. 3.

¹¹ *Idibem*.

¹² T., 24 August 2005, p. 70.

¹³ Prosecution Motion for the *Urgent* Issue of Subpoenas to Require the Witnesses AWZ and ALX to Offer Testimony to the Trial Chamber, dated of 26 August 2005 but effectively filed only on 29 August 2005.

Office of the Prosecutor. No additional information or evidence was provided to support that motion.

9. On 2 September 2005, at the Prosecution's request, the Chamber granted leave for the withdrawal of the motion for subpoena.¹⁴ The Prosecution Counsel declared that "[r]egarding these two witnesses, [the Prosecution] is going to make every necessary effort for them to appear before the Trial Chamber".¹⁵

10. Four days later, while the last witness scheduled in the Prosecution's list was completing her testimony before the Chamber, the Prosecution again raised the issue. It requested the Chamber for a postponement of the proceedings and the conclusion of its case so that Witnesses ALX and AWZ could be brought to the Tribunal to testify in person.¹⁶ It indicated that none of these Witnesses had been really contacted by its team. The Prosecution stated that some representatives of the Prosecutor were in the country where resides Witness AWZ, on other business, and were in the process of making contact, and that it intended to send contact information for Witness ALX to its agent in Kigali.¹⁷

11. The Chamber requested the Prosecution to provide more information about the eventual scheduling of these Witnesses and granted additional times to the Prosecution to investigate the matter.¹⁸ On 9 September 2005, the Prosecutor, Mr. Jallow, was also invited to provide further details. On that date, he was not able to confirm whether either of the two Witnesses was in fact going to testify. Information was given about communications made with Witness AWZ but none about the Rwandan based witness.

12. After that hearing, the Chamber granted one final adjournment on this matter until 13 September 2005 at which the Prosecution was expected to give a more specific report.¹⁹ On that day, the Chief of Prosecutions, Mr. Rapp, explained that Witness ALX had changed her mind and agreed to appear but, for personal and professional reasons, would not be available before 3 October 2005. Conversely, he declared that Witness AWZ was unclear about her appearance before the Tribunal and that the Prosecution was still trying to convince her to come to Arusha as a witness. He then requested the Chamber to adjourn the proceedings until some time in October, when presumably Witness AWZ could also come to testify.²⁰ The Defence orally opposed the Prosecution's request.

13. After consideration of both parties' arguments, the interests of justice, and the rights of the Accused to be tried without undue delay, the Chamber orally ruled on the matter and rejected the Prosecution's application, i.a. due to the inconsistency between the Prosecution's behavior and its allegation that it intended to adduce evidence from these witnesses, the lack of details given by the Prosecution on its efforts to timely contact the Witnesses, on the reasons why the Witnesses could not testify before the Tribunal and on the importance of these Witnesses for the Prosecution's case ("Decision Denying Further Adjournment").²¹

14. In the instant Motion, the Prosecution seeks reconsideration of the Decision Denying Further Adjournment or, in the alternative, certification to appeal it pursuant to Rule 73(B) of the Rules. The Defence opposes the Motion on its two alternatives.

¹⁴ T., 2 September 2005, p. 2.

¹⁵ *Ibidem*.

¹⁶ T. (Closed Session), 6 September 2005, p. 6 and seq.

¹⁷ *Ibidem*.

¹⁸ See T. (Closed Session), 6 September 2005, p. 41, and T., 7 September 2005, p. 4.

¹⁹ T., 9 September 2005.

²⁰ T., 13 September 2005, p. 3.

²¹ T., 13 September 2005, pp. 13-14.

DELIBERATIONS

15. While the Rules do not contain any specific provision on the matter, the option to reconsider decisions on motions has been exercised on a number of occasions by the Tribunal.²² From this jurisprudence follows that reconsideration is an exceptional measure that is available only in particular circumstances, where (i) a clear error of reasoning in the previous decision has been demonstrated and (ii) the decision sought to be reconsidered has led to an injustice.²³

16. Certification for an interlocutory appeal is also an exceptional measure and may be granted only if both conditions set out by Rule 73(B) of the Rules are cumulatively satisfied: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an “immediate resolution by the Appeals Chamber may materially advance the proceedings”.

17. In the instant Motion, the Prosecution contends that the arguments presented for a certification to appeal demonstrate an error in the reasoning of the Decision Denying Further Adjournment which would justify reconsideration. The Chamber will therefore first consider these alleged errors.

18. The Prosecution contends that, for the following reasons, the Chamber committed an error in the exercise of its discretion, to the detriment of the Prosecution and the fair and expeditious conduct of the proceedings:

- a. The Decision Denying Further Adjournment is incorrect in its conclusion that the Prosecution did not provide any particular account of its efforts to get the two Witnesses to testify;
- b. The efforts mentioned by the Prosecution in its Motion clearly demonstrate that all due diligence was exercised;
- c. The Prosecution provided information to the Chamber and the Defence on how the Witnesses are crucial for its case;
- d. The Prosecution has not previously sought any adjournment, nor occasioned any undue delay; the situation relating to these Witnesses was exceptional;
- e. The Chamber erred by failing to consider that, on 13 September 2005, the Prosecution complied with the direction given on 9 September 2005 to report on whether and when the Witnesses would be available to testify. At that date, the Prosecution reported that ALX accepted to testify. It was therefore unreasonable for the Chamber to deny further adjournment;
- f. The Chamber failed to afford every practicable facility and time to assist the Prosecution to complete its case and bring the Witnesses to testify;

²² *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (*Bagosora et al.* Case), Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003; *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko’s Motion for Reconsideration of the Decision of the “Decision on Defence Motion for Certification to Appeal the ‘Decision on Defence Motion for a Stay of Proceedings and abuse of process’” (TC), 20 May 2004; *Bagosora et al.* Case, Decision on Prosecutor’s Second Motion for Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)” (TC), 14 July 2004.

²³ *Prosecutor v. Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-Abis, Judgment on Sentence Appeal (AC), 8 April 2003, par. 50; *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, par. 8.

g. The Chamber failed to take into account or to give sufficient weight to the protection of victims and witnesses in the light of the expressed fears of ALX and AZW for their security;

h. The Chamber relied on inappropriate considerations when referring to the delay that may be occasioned to other cases and completion strategy as a justification to deny the Prosecution request for adjournment.

19. The Prosecution further claims that the Decision Denying Further Adjournment involves an issue that would significantly affect the outcome of the trial since the refusal of an adjournment denies the Prosecution the ability to complete its case with the evidence it intended to call, and could affect the final judgement on the case.

20. The Chamber does not fully share the Prosecution's interpretation of occurrences in relation to the issue at hand.

21. While it is true that on several occasions and upon specific requests from the Chamber, the Prosecution reported back about the appearance of the two Witnesses, these oral reports only affirmed that the Prosecution had made efforts to bring them to court but did not produce any evidence of diligence to that end. The only information provided about the Prosecution's efforts to secure the attendance of the Witnesses was the allegation that its representatives went to the country of residence of Witness AWZ, on other business and intended to contact her during the week of 5 September 2005. In relation to Witness ALX, on 9 September 2005, the Prosecution was still in the process of exchanging contact information with its agent in Kigali. The Prosecution never indicated whether or how this Witness was ever contacted. No details of the contact were provided and it was not until 13 September 2005 that the Chamber was informed that Witness ALX may appear.

22. As already stated in the Decision Denying Further Adjournment, the behaviour of the Prosecution shows a lack of diligence in dealing with this matter. The Prosecution was aware since 11 July 2005 that Witness ALX no longer wanted to testify and only indicated its efforts at the end of August to contact the Witnesses and to convince them to appear. It should also be recalled that on 18 August 2005, these Witnesses were not scheduled to appear following information provided by the Prosecution Counsel herself.²⁴

23. In spite of this information, several opportunities and adjournments were offered to the Prosecution to provide detailed and substantive explanations to allow the Chamber to rule on this matter.²⁵ The Chamber did not make an invitation for any further adjournment. The Chamber had discretion, depending on the information brought forth by the Prosecution, to decide whether or not an adjournment was appropriate.

24. Eventually, on 13 September 2005, when the deadline for closing the Prosecution's case was long overdue, the Prosecution indicated the eventual availability of Witness ALX to testify at some point in October, which was dependent on her personal and professional obligations. Considering this late and still uncertain information as well as the potential consequences on the right of the Accused to a fair trial without undue delay, the Chamber decided that such adjournment until early October was not in the interests of justice.

25. The Chamber has reviewed the alleged importance of the two Witnesses. It is the Chamber's view that the witness statements filed by the Prosecution do not reveal new or additional evidence of the Accused's role in the alleged crimes. This circumstance when coupled with the lack of diligence of the Prosecution in bringing them is not easily

²⁴ See Email from Lead Counsel for Prosecution, 18 August 2005.

²⁵ See the facts described in the Introduction, above.

reconcilable with the Prosecution's affirmation that these Witnesses were critical to its case against the Accused. This also has been explicitly stated in the Decision Denying Further Adjournment. In fact, from the early beginning of the trial and for all its duration, the Prosecution was offered time and facilities to complete its case and bring its Witnesses to testify.

26. The Prosecution did not provide any detail or evidence of the alleged security fear expressed by the two Witnesses.

27. The Chamber also recalls that in addition to its impact on the rights of the Accused in the instant case and on the interests of justice, the requested adjournment will delay the start or resumption of other cases. Contrary to the Prosecution's contention, the Chamber also has a duty with regard to the overall management of the Tribunal.

28. The Chamber recalls that the Tribunal was established to contribute to the process of reconciliation and of restoration of international peace and security in Rwanda. As the Chamber has noted several times in this matter, and while it is open to assist both parties in a proper conduct of their respective cases in the interests of justice, it also has to ensure a fair and expeditious trial as prescribed by Articles 19 and 20 of the Statute of the Tribunal. When addressing the issue of the adjournment, the Chamber must take into account the rights of the Accused. A delay of the proceedings of a few weeks should not be seen in relation to how long the case has already taken – and the delay therefore be deemed minor – but how much longer it is reasonable that it takes considering all the factual elements of each case. In the instant situation, it should be recalled that while the Chamber has found that, due to the particular circumstances of the case, there was until now no violation of the rights of the Accused to be tried without undue delay,²⁶ the Accused is in detention since 1998.

29. Having considered all of these elements, the Chamber does not find any error of reasoning in its previous decision which has led to an injustice. The Prosecution has not persuaded the Chamber that it misinterpreted the information that was available and it has not brought any new fact that could lead the Chamber to a different conclusion.

30. Furthermore, the Chamber does not consider that an immediate resolution of the issue at stake by the Appeals Chamber may materially advance the proceedings.

31. It must be recalled that both conditions set out by Rule 73(B) of the Rules require a specific demonstration, and are not determined on the merits of the appeal against the impugned Decision. In the instant case, the Chamber finds therefore that the Prosecution has not shown that the second requirement to grant certification to appeal the Decision is met.

²⁶ *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Defence Motion for Stay of Proceedings (TC), 3 June 2005, par. 37.

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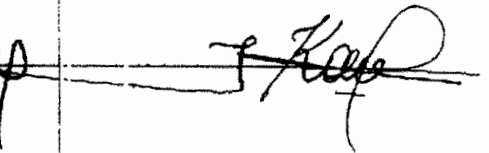
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 29 September 2005, done in English.



Dennis C. M. Byron
Presiding Judge



Gbedao Gustave Kam
Judge