



UNITED NATIONS
NATIONS UNIES

ICTR-98-44C-T
2-11-2005
(1498 - 1495)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1498
2005

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 2 November 2005

Handwritten signature and date: 2005 Nov 2

THE PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION FOR VARIATION, OR IN
ALTERNATIVE RECONSIDERATION OF THE DECISION ON PROTECTIVE
MEASURES FOR DEFENCE WITNESSES**

Office of the Prosecutor:
Don Webster
Dior Fall
Adama Niane
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Defence Counsel
David Hooper
Andreas O'Shea

Handwritten initials

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

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

BEING SEIZED of the “Prosecutor’s Motion Pursuant to Rule 54, For Variation or, in the Alternative, Reconsideration of the Trial Chamber’s “Decision on the Defence Motion for Protective Measures” filed on 30 September 2005;

CONSIDERING the Prosecutor’s Supplementary Submission thereto, filed on 7 October 2005;

CONSIDERING that the Defence for the Accused André Rwamakuba has filed no reply to the Motion;

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

INTRODUCTION

1. The trial against the Accused commenced on 9 June 2005 with the presentation of the Prosecution’s evidence. On 21 September 2005, at the Defence’s request and without any opposition from the Prosecution, the Chamber granted protective measures to apply automatically to potential Defence witnesses living in Rwanda and to witnesses outside of Rwanda (“Decision on Defence Protective Measures”). Amongst these protective measures, the Chamber ordered that:

V. Members of the Prosecution team in the *Rwamakuba* case shall not share, reveal or discuss, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity, private or governmental, other than the members of the assigned counsel or other persons working on the Prosecution team in the *Rwamakuba* case.

VI. The Prosecution shall provide the Witnesses and Victims Support Section with a designation of all persons working on the Prosecution team in the case of Rwamakuba who will have access to any information concerning any protected witness, and shall advise the Witnesses and Victims Support Section in writing of any changes in the composition of this team and ensure that any member leaving the Prosecution team has remitted all materials that could lead to the identification of protected persons specified.

(...)

IX. The Prosecution shall not attempt to make an independent determination of the identity of any protected witness, nor encourage or otherwise aid any person in so doing.¹

2. The Prosecution now requests modification of Clauses V and VI of the Decision on Defence Protective measures, even though it acknowledges originally granting consent to such measures. It is submitted that the restriction established by the said clauses to members

¹ *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Protective Measures (TC), 21 September 2005.

of the Prosecution team only in the *Rwamakuba* case is contrary to the Prosecutor's obligations under Rules 68 and 75 (F) of the Rules. In addition, this restriction would directly interfere with the ability of the Prosecutor to carry out his mandate under the Statute and the Rules. To support its Motion, the Prosecution refers to the Appeals Chamber Decision of 6 October 2005 in the *Bagosora* case.²

3. The Prosecution further solicits the deletion of Clause IX which it considers to be vague and impossible for its compliance, which would create a risk of an inadvertent breach of the order by the members of the Prosecution.

DELIBERATIONS

4. Following the jurisprudence of the Tribunal, a Trial Chamber has an inherent power to reconsider its own decisions in exceptional 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.³

5. The Chamber ascertains that the Appeals Chamber, in its Decision of 6 October 2005 in the *Bagosora* Case,⁴ interpreted the mandate to the Prosecutor as being an individual organ of the Tribunal and made clear that nowhere in the Statute or Rules is it stated that the Prosecutor's obligations may be limited to specific teams within the Office of the Prosecutor.⁵ In that case, the Trial Chamber restricted the application of protective measures for Defence witnesses to the Prosecution team in the case. The Appeals Chamber found that the Trial Chamber erred by construing the protective measures in a manner that contradicts the Prosecutor's obligation pursuant to Rule 68 of the Rules.⁶

6. In the light of this Appeals Chamber Decision, the Chamber finds that in the present case, a clear error of reasoning in the previous decision has been demonstrated and that the decision sought to be reconsidered has led to an injustice. Clauses V and VI of the Decision on Defence Protective Measures should be amended so that the sentences, "Prosecution team in the *Rwamakuba* case" and "Prosecution team in the case of *Rwamakuba*" be replaced by the word "Prosecution".

7. Concerning clause IX of the Decision, the Prosecution has failed to show any evidence or circumstances warranting reconsideration in this instance, and no injustice will occur.

8. Furthermore, the Chamber notes that the Prosecution's request to delete Clause IX is moot since the identity of the Defence witnesses has already been disclosed to the

² *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73 (B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005 ("*Bagosora et al.* Appeals Chamber Decision"), spec. par. 39-46.

³ *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.

⁴ *Bagosora et al.* Decision, par. 43.

⁵ *Ibid.*, par. 43.

⁶ *Ibid.*, par. 46.

Prosecution on 10 October 2005 in accordance with Clause XII of the Decision on Defence Protective Measures.


FOR THE ABOVE REASONS, THE CHAMBER

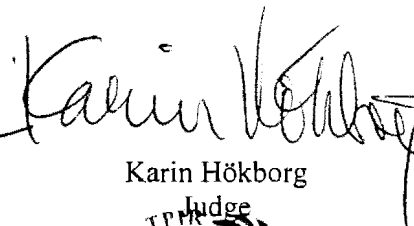
GRANTS the Motion in part;

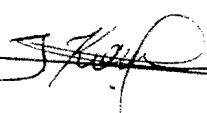
ORDERS that the words “Prosecution team in the *Rwamakuba* case” and “Prosecution team in the case of *Rwamakuba*” in Clauses V and VI of the Decision on Defence Protective Measures be replaced with the word “Prosecution”;

DENIES the remainder of the Motion.

Arusha, 2 November 2005, done in English.


Dennis C. M. Byron
Presiding Judge


Karin Hökberg
Judge


Gberdao Gustave Kam
Judge

