



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44C-T  
16-12-2005  
1843 - 1840  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1843  
Zump

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 16 December 2005

**THE PROSECUTOR**

v.

**André RWAMAKUBA**

**Case No. ICTR-98-44C-T**

2005 DEC 16 17:12:12  
16-12-2005  
Zump

**DECISION ON CONFIDENTIAL EX PARTE MOTION FOR SUBPOENAS DIRECTED  
TO DEFENCE WITNESSES**

*Article 28 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

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Dior Fall  
Iain Morley  
Adama Niane  
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**Defence Counsel**

David Hooper  
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Dj

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“Tribunal”),  
**SITTING** as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding,  
Karin Hökberg and Gberdao Gustave Kam (“Chamber”);  
**BEING SEIZED** of the “Confidential *Ex parte* Motion for Subpoenas Directed to Defence  
Witnesses”, filed by the Defence of the Accused (“Defence”) on 2 December 2005;  
**HEREBY DECIDES** the Motion pursuant to Rules 54 and 73 of the Rules of Procedure and  
Evidence (“Rules”).

#### INTRODUCTION

1. The Defence case in this trial started on 7 November 2005. On 29 September 2005, the Chamber ordered, at the Defence’s request, protective measures with respect to Defence Witnesses.<sup>1</sup> The Defence now requests the Chamber to issue subpoena orders to compel the testimony of Defence Witnesses 5.16, 5.7, 5.15 and 4.4.

#### DELIBERATIONS

2. As a preliminary matter, the Chamber recalls that *ex parte* applications are necessary when they respond to the interests of justice, and where the disclosure to the other party in the proceedings of the information conveyed by the application would be likely to cause prejudice to an individual involved in or related to that application<sup>2</sup>. Under the specific circumstances of the case, the Chamber finds that disclosure of the present Motion to the other party risks causing prejudice to the witnesses.

3. Rule 54 permits the issuance of “orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”. According to this Tribunal’s jurisprudence, a subpoena order to compel the attendance may be issued in particular cases when the requesting party shows that it has made

<sup>1</sup> *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Defence Motion for Protective Measures (TC), 21 September 2005, as amended on 2 November 2005, see *Rwamakuba* Case, Decision on Prosecution Motion For Variation, or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses (TC), 2 November 2005.

<sup>2</sup> See, inter alia, Prosecution’s application to submit an Indictment for review and confirmation, under Article 18 of the Statute; submissions pursuant to Rule 66(C) of the Rules or seeking protective orders under Rule 69 of the Rules, see *Prosecutor v. Simic et al.*, Case No. IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material (TC), 28 February 2000, par. 40 (*Simic et al.* Decision); Karemera et Al., Case No. ICTR-98-44-R66, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 And 49 from the Amended Indictment, 3 May 2005.

reasonable attempts to obtain the voluntary cooperation of the witness and that the witness' testimony can materially assist its case and the fairness of the trial.<sup>3</sup>

4. Based on the information annexed to the Motion, the Chamber is satisfied that the Defence has made reasonable attempts to obtain the voluntary cooperation of Witnesses 5.16, 5.7, 5.15 and 4.4. but that it failed due to the witnesses concerns for possible reprisals and their physical and psychological security. The Defence has shown good cause for the said witnesses' unwillingness to come to Arusha to testify.

5. The Chamber has carefully reviewed the nature and the scope of the evidence to be given by the four witnesses. In particular, the Chamber notes that the four witnesses' intended testimony is regarding the absence of the Accused in a location and during a period of time pleaded the Indictment. The Chamber finds that such prospective evidence is necessary for the conduct of the trial since it will materially assist the Defence for the Accused.

6. Furthermore, the evidence to be given by these witnesses will not be adequately replaced by other Defence witnesses, which could seriously prejudice the rights of the Accused. The Chamber is of the view that their testimony will serve the overall interests of the criminal process and will ensure the fairness of the trial. It is therefore in the interests of justice to issue subpoena orders directed to Defence witnesses 5.16, 5.7, 5.15 and 4.4.

7. With regard to the Defence's requests at paragraphs (b) and (c) of the Motion, the Chamber considers that it would be appropriate, due to the particular circumstances of the case, to solicit the cooperation of the national authorities for the implementation of the subpoena orders, only in case of persistent refusal of the four witnesses to comply with the order of the Chamber.

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<sup>3</sup> See, inter alia, *Prosecutor v. Krstic*, Decision on Application for subpoenas, AC, 1 July 2003; *Prosecutor v. Halilovic*, AC, Decision on the issuance of a subpoena, 21 June 2004; *Prosecutor v. Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004; *Prosecutor v. Bagosora et al.*, Decision on Request for Subpoenas (TC), 10 June 2004; ; *Prosecutor v Bagosora et al*, Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311 and DM 24, 26 April 2005; *Prosecutor v. Simba*, Decision on the Defence Request for Subpoenas, 4 May 2005.

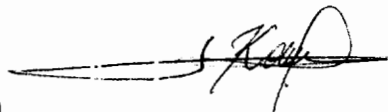
**FOR THE ABOVE REASONS, THE CHAMBER**

- I. GRANTS** the Motion; and
- II. INSTRUCTS** the Registry to prepare a subpoena addressed to each of the four witnesses designated by the pseudonyms 5.16, 5.7, 5.15 and 4.4., ordering their appearance before the Chamber for the next trial scheduled in January 2006;
- III. ORDERS** the Registrar to communicate the subpoenas to each of the four witnesses and, only if necessary, to the national authorities of the country in which the witnesses reside;
- IV. REQUESTS**, pursuant to Article 28 of the Statute of the Tribunal (“Statute”), the national authorities that receive a subpoena to provide any assistance that may be requested by the Registry to facilitate the witness’ attendance.

Arusha, 16 December 2005, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Karin Holmberg  
Judge

  
Gherdo Gustave Kam  
Judge

  
[Seal of the Tribunal]