

ICTR-98-44C-T
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(1893-1890)

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UNITED NATIONS
NATIONS UNIES

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: 20 January 2006

THE PROSECUTOR

v.

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

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

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Dior Fall

Iain Morley
Adama Niane
Tamara Cummings-John

Defence Counsel
David Hooper
Andreas O'Shea

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 Witness" ("Motion"), filed by the Defence for the Accused ("Defence") on 17 January 2006;

HEREBY DECIDES the Motion pursuant Rules 73(A) and 54 of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. The Defence case in this trial started on 7 November 2005. Respectively on 29 September 2005 and 16 December 2005, at the Defence's request, the Chamber ordered protective measures with respect to Defence Witnesses,¹ and issued subpoena orders directed to four Defence witnesses.² The Defence now seeks the Chamber to issue further subpoena orders regarding Witness 4.7., 4.18., 9.21. and 9.22.

DELIBERATIONS

2. As a preliminary matter, the Chamber considered whether or not the *ex parte* filing of the Motion is appropriate under the circumstances; recalling the reasoning in its previous decision on subpoenas in the present case, the Chamber concludes that *ex parte* applications are necessary when they respond to the interests of justice and where the disclosure of the information conveyed by the application to the other party in the proceedings would be likely to cause prejudice to an individual involved in or related to that application³. The Chamber therefore finds that in the particular circumstances of the case, disclosure of the present Motion to the other party risks causing prejudice to the witnesses.

¹ *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.

² *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Confidential Ex parte Motion for Subpoenas directed to Defence witnesses, 16 December 2005

³ See, *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, *Decision on Confidential Ex parte Motion for Subpoenas directed to Defence witnesses*, 16 December 2005; See also, *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.

3. As regards the content of the Motion, the Defence submits that the testimony of Witnesses 4.7, 4.18, 9.21 and 9.22 is relevant with regard to the charges against the Accused relating to his presence at Butare Hospital on or between 18 and 25 of April 1994. It contends that these four witnesses would not testify voluntarily due to major concerns for their security. The Defence further submits that the lack of cooperation of the Rwandan authorities and the spreading of allegations against the Defence team affected the preparation of the defence of the Accused and the presentation of evidence at trial, which became in part unavailable due to the witnesses' unwillingness to testify. Such evidence, according to the Defence, is not adequately replaceable and it would constitute corroboration of the evidence of other witnesses regarding the absence of the Accused from Butare during the period considered by the Indictment.

4. With regard to Defence Witness 9.21, the Chamber notes that in addition to the unwillingness of this Witness to come and testify in Arusha, the Witness stated that she does not know the Accused and therefore would not be able to testify either as Prosecution or Defence witness. Further, the Chamber is not convinced that the anticipated testimony of Witness 9.21, as indicated in her statement attached to the Motion, is material to the cause of the Accused.⁴ The Chamber will therefore not order the attendance of this Witness. With regard to witness 4.7, the Chamber observes that the expected testimony of the Witness, as it appears from the Statement attached to the Motion, lacks materiality to the case.⁵ For the same reason, the Chamber will not order the attendance of this Witness.

5. Concerning Defence Witnesses 9.22 and 4.18, the Chamber is satisfied that good reason has been adduced for their unwillingness to travel to Arusha and that their proposed evidence may be relevant to the Defence case.

6. However, after considering the specific circumstances surrounding Witnesses 9.22 and 4.18, the Chamber is of the view that issuing of subpoenas orders could be avoided, at this stage, if the witnesses would accept to give their testimony voluntarily by means of video-link testimony. The Chamber estimates that the taking of a video-link testimony can properly address the Witnesses' concerns and will also guarantee that the Witnesses will be heard during the time allocated for the Defence case. The Chamber recalls that video-link testimony has been authorized by this Tribunal on several occasions, including in the present case, as an additional

⁴ See Statement of Witness 9.21, in Annex B of the Defence Motion

⁵ See Statement of Witness 4.7, in Annex B of the Defence Motion

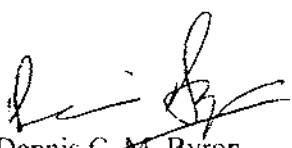


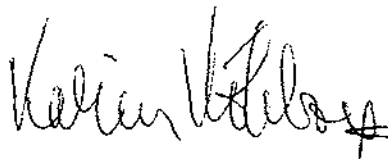
measure for witness protection on the basis of Rule 75 of the Rules⁶. In addition, the Chamber notes that the Prosecution does not oppose in principle testimony via video-link.⁷ Therefore the Chamber deems that, under the particular circumstances of the case, a video-link testimony would serve the interests of justice and would guarantee the rights of the Accused to be safeguarded by avoiding to delay the completion of the trial. Nevertheless, the Chamber reserves its discretion to issue subpoenas addressed to witnesses 9.22 and 4.18 in the event they should refuse to testify by video-link;

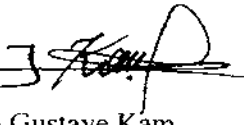
FOR THE ABOVE REASONS, THE CHAMBER

- I. **REQUESTS** the Registry to enquire on the availability of witnesses 9.22 and 4.18 to testify by video-transmission and subsequently report to the Chamber, as soon as possible, on arrangements made to secure their testimony via video-link;
- II. **DISMISSES** the Defence Motion with regard to subpoenas orders for Witnesses 9.21 and 4.7.


Arusha, 20 January 2005, done in English.


 Dennis C. M. Byron
 Presiding Judge


 Karin Hökberg
 Judge


 Gberdao Gustave Kam
 Judge

[Seal of the Tribunal]



⁶ *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Defence Confidential Motion for the Testimony of defence Witness 1.15 be taken by Video-link, 8 December 2005; *Prosecutor v. Simba*, ICTR-2001-76-I, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJKI by Video-Link (TC), 4 February 2004, para. 4; *Prosecutor v. Bagosora et al.*, Decision on Testimony by Video-Conference (TC), 20 December 2004, *Prosecutor v. Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 June 2005.

⁷ Statement made by Prosecution Lead Counsel, T. 18 January 2005.