



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER I

Original: English

Before: Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registry: Ms Aminatta N'gum

Decision date: 10 May 2000

THE PROSECUTOR vs. HASSAN NGEZE
(Case No. ICTR-97-27-I)

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**DECISION ON THE DEFENCE MOTION TO HAVE THE COURT REQUEST A
SUBPOENA DUCES TECUM FOR THE PRODUCTION OF THE
DEFENDANT'S ARREST AND CERTIFIED COURT RECORDS**

Office of the Prosecutor:

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Counsel for the Accused:

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

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay, Presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

CONSIDERING the Defence's motion filed on 23 March 2000 requiring the Tribunal to issue a *Subpoena duces tecum* to the Minister of Justice of Rwanda to Produce the documents relating to the Defendant's arrest and certified court records;

CONSIDERING the Prosecutor's reply to the Defence's motion, filed on 11 April 2000;

NOTING that the motion was considered on the basis of the written briefs of the Parties, pursuant to Rule 73 of the Rules of Procedure and Evidence ("the Rules"), as notified to the parties on 28 March 2000.

The submissions

The Defence has submitted that the accused was arrested several times between 1980 and 1994, by the Rwandan government, because he exercised his freedom of expression. It is contended that the records of the accused's arrest will constitute a basis for the defence of alibi of the accused, in view of the fact that the crimes the accused is alleged to have committed, were committed at the time he was in prison.

The Defence requested that the Tribunal issue a *Subpoena duces tecum* to the Minister of Justice of Rwanda, to provide the accused arrest and court records.

The Prosecution responded that there is no legal basis for the Trial Chambers to issue a *Subpoena duces tecum* ordering the Government of Rwanda to provide the accused with the said documents. Moreover, the motion is unclear and premature.

The Deliberations

With Regard to the Issuance of a Subpoena Duces Tecum to a State or a State Official by this Tribunal.

The Defence submitted that all court records concerning Hassan Ngeze, that are in the custody of the Government of Rwanda, should be made available to the Defence.

The Trial Chamber notes that there is no provision in the Statute or the Rules to support the Defence submission. It is not the practice of the Tribunal and there is no precedent to issue a *Subpoena duces tecum*. Indeed, Article 28 of the Statute, which relates to the cooperation and judicial assistance of States, does not confer on the Trial Chamber the power to order a *Subpoena duces tecum* to a State Official or a State. However, Article 28 vests the Tribunal with the power to require assistance from States, which shall comply

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with the orders, under their international obligations. In the event of non-compliance, the Tribunal may refer the matter to the Security Council.

In regard to the issuance of a *Subpoena duces tecum* to a State or a State Official, the Trial Chamber agrees with the views expressed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the case *The Prosecutor v. Tihomir Blaskic*, in its Judgement of 29 October 1997, on the Request of the Republic of Croatia, for Review of the decision of Trial Chamber II of 18 July 1997. The Appeals Chamber held that:

The International Tribunal does not possess any power to take enforcement measures against States. Had the drafters of the Statute intended to vest the International Tribunal with such a power, they would have expressly provided for it. In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions. Under current international law, States can only be the subject of countermeasures taken by other States or of sanctions visited upon them by the organized international community, i.e., the United Nations or other intergovernmental organizations ... With regard to States, the Appeals Chamber therefore holds that the term "subpoena" is not applicable and that only binding "orders" or "requests" can be addressed to them.¹

As to the direction of binding orders to State officials by the International Tribunal, the Appeals Chamber further stated that:

Clearly, as State officials are mere instruments in the hands of sovereign States, there is no practical purpose in singling them out and compelling them to produce documents, or in forcing them to appear in court.²

The Chamber agrees also with this reasoning. Consequently, there is no legal basis for granting the motion of the Defence to issue a *Subpoena duces tecum*. This falls beyond the jurisdiction of the Tribunal.

With Regard to the Content of the Defence Motion.

Assuming that the Defence motion is based on Article 28 of the Statute, it is the view of this Chamber that the Defence's motion is vague and lacks specificity. The Defence has not specified the documents that it wants the Government of Rwanda to produce. The Chamber shares the view expressed by Trial Chamber II of the Tribunal, in its decision of 27 November 1997, on the Defence motion for disclosure, in the case *The Prosecutor v. Theoneste Bagosora*, were it held that:

...the Defence Counsel must make specific identification of any requested documentation, thus enabling the Trial Chamber to take action. In this regard, the

¹ Case No. IT-95-14-PT, para 25, p.7

² Id, para 44, p. 14

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Defence Counsel, however, has only made a broad request for documents without specifying any categories from the archives of the Ministry of Defence of the Republic of Rwanda.³

The Trial Chamber notes that there is no evidence to show that the Defence has first made an effort to obtain the documents it needs from the State authority concerned, before requesting the Tribunal. In this regard we wish to refer to the observation made by the Appeals Chamber in its decision of 29 October 1997, which states as follows,

...It is therefore to be regarded as sound policy for the Prosecutor, as well as Defence counsel, first to seek, through cooperative means, the assistance of States, and only if they decline to lend support, then to request a Judge or a Trial Chamber to have recourse to the mandatory action provided for in Article 29⁴

Having considered the Defence request in the light of the said observation, with which this Chamber agrees, we are of the view that the said Defence request is premature.

³ Case No. ICTR-96-7-T, p.5.

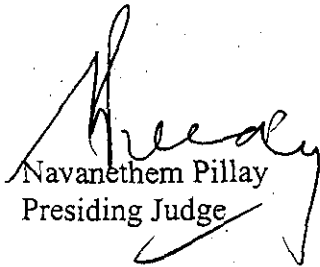
⁴ Id, para 31, p. 9


FOR THESE REASONS,


THE TRIBUNAL

REJECTS the Defence's Motion to the Tribunal to issue a *Subpoena duces tecum* to the Minister of Justice of Rwanda to Produce the documents relating to the Defendant's Arrest and Certified Court Records.

Arusha, 10 May 2000


Navanethem Pillay
Presiding Judge


Erik Møse
Judge


Asoka de Zoysa Gunawardana
Judge



Seal of the Tribunal