



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**TRIAL CHAMBER I**

**OR: ENG**

**Before:**

Judge Erik Møse, Presiding  
Judge Asoka de Z. Gunawardana  
Judge Mehmet Güney

**Decision of:** 8 June 2000

**THE PROSECUTOR  
VERSUS  
IGNACE BAGILISHEMA**

**Case No. ICTR-95-1A-T**

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**DECISION ON THE REQUEST OF THE DEFENCE PURSUANT TO RULE 73  
OF THE RULES OF PROCEDURE AND EVIDENCE  
FOR SUMMONS ON WITNESSES**

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**The Office of the Prosecutor:**

Ms Anywar Adong  
Mr. Charles Adeogun Phillips  
Mr. Wallace Kapaya

**Counsel for the accused:**

Mr. François Roux  
Mr. Maroufa Diabira

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

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, Presiding, Judge Asoka de Z. Gunawardana and Judge Mehmet Güney;

**BEING SEIZED** of a motion filed by the Defence on 20 April 2000, requesting that the Trial Chamber summon three witnesses;

**HAVING RECEIVED** on 10 May 2000 the response of the Prosecutor to the said motion;

**HAVING HEARD** the parties on 25 May 2000;

**The Submissions of Parties**

1. The Defence recalls that the “Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda”, dated 15 December 1999, detailed the involvement of the United Nations and of the United Nations Assistance Mission in Rwanda (“UNAMIR”) during the massacres in Rwanda in 1994. The Defence requests that the Chamber issue summons, in terms of Rule 54 of the Rules, for three persons to appear as witnesses, each of whom were members of the UNAMIR contingent based in Kibuye Prefecture. It is submitted that these three officials participated in a Security Council meeting on 9 April 1994, in Kibuye Prefecture, during which the accused is said to have requested security reinforcements for his Commune. Furthermore, these witnesses would be able to provide important information concerning events in Kibuye in April 1994.

2. The Defence also requests that the Chamber order the Prosecutor to disclose all documents relevant to Security Council meetings which took place after 6 April 1994, in Kibuye Prefecture, and Security Council meetings in which the said three UNAMIR personnel participated. As paragraph 4.8 of the Indictment refers to such meetings, the Defence concludes that the Prosecutor must be in possession of these documents and must therefore disclose them.

3. In response, the Prosecutor contends that the Defence motion for summons is vague and fails to specify the relevance of the evidence to be adduced by the witnesses to this case, and it is too late in the case. The Defence has not shown whether the witnesses would be available and willing to appear at trial. Moreover, it is the submission of the Prosecutor that these individuals would fall within the category of privileged witnesses and therefore, whether they could be summoned as witnesses is doubtful. As regards the disclosure of documents, the Prosecutor states that she has complied with the requirements as envisaged in the relevant legal provisions. It was pointed out that the allegations in paragraph 4.8 of the Indictment are based on other sources, namely an expert report and other documentary exhibits already tendered. The Prosecutor contends that the Defence has not provided full details of the documents sought, their relevance to

the trial and their known or presumed location, together with written confirmation of the United Nations authority concerned. The Prosecutor notes that the documents, if they exist, have been available since 6 April 1994. The Prosecution has questions as to why the Defence has not or does not use the resources available to it by the Tribunal to obtain the said documents.

### **The Chamber**

4. The motion raises two questions, firstly the summons of three witnesses, and secondly the disclosure of documents.

### **Concerning the Summons of Witnesses**

5. The Defence is requesting that the Chamber to summon three witnesses, all of whom were personnel of the UNAMIR contingent in Kibuye. According to the Defence, they were witnesses to some of the events relevant to the present case. The legal basis of the motion is Rule 54 which reads:

“At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such 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.”

6. The Prosecutor argued that this request is vague and comes too late in the proceedings. Further, that the Defence has not shown whether the witnesses would be available to appear, and that these witnesses fall into the category of privileged witnesses which makes it doubtful whether they can be summoned to appear.

7. The Chamber notes that the three ex-UNAMIR officers did not appear on the initial list of witnesses filed by the Defence in accordance with Rule 73ter (B)(iii) on 26 April 2000. The Chamber shall therefore consider the Defence’s present motion under Rule 73ter(E). According to that provision, the Defence may, if it considers it to be in the interest of justice, file a motion to vary its decision as to which witnesses are to be called.

8. In order to show that the calling of these additional witnesses would be in the interests of justice, the Defence must demonstrate that the three ex-UNAMIR personnel will present evidence relevant to the case at hand. The Chamber must be convinced that the evidence to be presented by these witnesses could have a direct bearing on the case. The Defence must convince the Chamber, that it is cognisant, whether through previous meetings with these persons or through other information specific to their involvement, of their likely testimony. It does not suffice for the Defence to merely imply that such testimony may be relevant. Obviously, a finding of relevance in this matter does not imply an evaluation of the possible evidential value of the witnesses’ testimony. Such a finding comes after the presentation of evidence in the final determination of the case.

9. The Prosecutor has submitted that given the advanced nature of the case, the effectiveness of the summons, if issued, is doubtful. In support of this, she cites the

International Criminal Tribunal for the Former Yugoslavia (the “ICTY”) in its “Decision on the Alternative Request for Renewed Consideration of Delalic’s Motion for an Adjournment until 22 June or Request for Issue of Subpoenas to Individuals and Request for Assistance to the Government of Bosnia and Herzegovina”, dated 22 June 1998 in the Celebici case.

10. Although the Chamber agrees with the Prosecutor that motions should be filed in a timely manner and at an appropriate stage of the proceedings, it does not find that the Defence motion should fail in this regard. Rule 73ter is generally formulated in providing the possibility for the Defence to seek to vary its list of witnesses after the commencement of the Defence case. The restriction lies with showing that this is in the interest of justice. It should be noted, moreover, that the Prosecutor in her citation omitted, in the opinion of the Chamber key sentences:

“50. There are supervening logistical obstacles which will render such an effort an impossible task to accomplish. The Trial Chamber does not, and should not, do anything in vain. Counsel who is in charge of the case is conversant with the circumstances of the witnesses. This application is made too late to be meaningful. The application ought to have been made when Counsel became aware of the obstacles in the way of the witnesses required to testify within the relevant time frame.[...]” (Chamber’s emphasis)

**Thus, the reasoning of the ICTY above was in a context different to the situation in this case.**

11. In response to questions from the Bench, the Defence stated that it had not been in contact with the three ex-UNAMIR officers, and that it was only from information it had received, that it believed these individuals may have participated in the Security Council meeting on 9 April 1994, having left the region on or about 10 April 1994. Thus the Defence is not aware of any possible obstacles, as referred to in the decision, because it had not even been in contact with these individuals.

12. In its submissions, the Defence has limited itself to stating that, as the three individuals were based in the Kibuye region as part of the UNAMIR contingent, and because they might have participated in a Security Council meeting in the region, their testimonies should be heard. However, in the opinion of the Chamber, the Defence has not shown that it is aware of the likely content of their testimonies and whether the individuals would be prepared to testify.

13. Consequently, the Chamber finds that it would not be in the interests of justice to summon the three ex-UNAMIR officers as witnesses in the present case.

### **Concerning the Disclosure of Documents**

14. The Defence further request that the Chamber to order the Prosecutor to disclose all documents concerning the Security Council meetings in Kibuye Prefecture after 6 April 1994, with specific reference to a meeting said to have taken place on 9 April 1994 and

involving the three ex-UNAMIR personnel. It argues that, as reference is made in paragraph 4.8 of the Indictment to Security Council meetings, the Prosecutor must obviously be in possession of such documents, including minutes of the meetings. The Defence added that it previously made request for these documents, among others, both in person and in writing in the form of letters sent on 5 November 1999 to the Prefect of Kibuye and the Bourgmestre of Mabanza, but without success.

15. The disclosure obligations of the Prosecutor are provided for in Rules 66 (Disclosure of materials by the Prosecutor) and 68 (Disclosure of Exculpatory Evidence). In essence, pursuant to Rule 66, statements of the witnesses the Prosecutor intends to call to testify, and where good cause had been shown, statements of additional witnesses, must be disclosed to the Defence, and the Defence must be entitled to inspect materials to be used by the Prosecutor at trial or which belonged to the accused. Pursuant to Rule 68, exculpatory evidence known to the Prosecutor must disclosed to the Defence. Both Rules imply possession by the Prosecutor of the documents or evidence. During the hearing, the Defence confirmed these Rules as being the basis of their request for disclosure.

16. The Prosecutor stated unreservedly that she did not intend to rely upon minutes of the Security Council meetings in the Prefecture of Kibuye, and that all documents, which supported the allegations set out in paragraph 4.8 of the Indictment, had already been disclosed. Thus, in this regard, the Chamber notes that the Prosecutor has complied with her disclosure obligations under Rule 66 (A). Furthermore, the Prosecutor indicated that she did not have such documents, including the minutes of the pertinent meeting, in her custody or control. Consequently inspections of such documents by the Defence cannot be made under Rule 66 (B).

17. Consequently, the Chamber finds that the request of the Defence under Rule 68 for disclosure of all documents pertaining to Security Council meetings in Kibuye, in April 1994 and thereafter, including specifically the minutes of a meeting said to have taken place on 9 April 1994, cannot be granted.

#### **Rule 98 Request by the Trial Chamber**

18. Under Rule 98 the Chamber may, *proprio motu*, order either party to produce additional evidence. Having considered the facts and circumstances of this case, the Chamber is of the view that, for a better determination of the matters before it, the Prosecution is ordered to produce the minutes of the Security Council meeting, held on 9 April 1994, in Kibuye Prefecture.

19. The Chamber hereby decides that the Prosecution should take the necessary steps to obtain the minutes of the said Security Meeting of 9 April 1994. The Prosecution is directed to take such steps by 23 June 2000, and to forward the said minutes to the Chamber.

**FOR ALL THE ABOVE REASONS,  
THE TRIBUNAL**

**DISMISSES** the motion of the Defence for summons on the said three witnesses.

**ORDERS** the Prosecutor, pursuant to Rule 98, to take the necessary steps, by 23 June 2000, to obtain the minutes of the Security Council meeting, held on 9 April 1994, in Kibuye Prefecture, and to forward them to this Trial Chamber.

Signed in Arusha on 8 June 2000.

Erik Møse  
Presiding Judge

Asoka de Z. Gunawardana  
Judge

Mehmet Güney  
Judge