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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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TRIAL CHAMBER III

Original: English

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Agwu U. Okali

Date: 20 October 2000

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THE PROSECUTOR
v.
LAURENT SEMANZA

Case No. ICTR-97-20-I

**DECISION ON SEMANZA'S MOTION FOR
SUBPOENAS, DEPOSITIONS, AND DISCLOSURE**

The Office of the Prosecutor:

Chile Eboe-Osuji
Frédéric Ossogo
Honoré Tougouri
Patricia Wildermuth
Holo Makwaia

Defence Counsel for the Accused:

Charles Achaleke Taku

1. **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (Tribunal),

SITTING as Trial Chamber III (Chamber), composed of Judges Lloyd George Williams, presiding, Yakov Ostrovsky, and Pavel Dolenc;

CONSIDERING Semanza's "Application for Subpoenae, Recording of Depositions and for Such Other Orders the Hon. Third Trial Chambers [*sic*] May Deem Fit [*sic*] [Fit] and Proper to Make in the Circumstances Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed 20 April 2000 (Application);

BEING SEISED of Semanza's "Corrected Copy" of the Application, filed 25 April 2000 (Motion);

CONSIDERING the "Prosecutor's Response", filed 1 June 2000 (Prosecutor's Response);

RECALLING the hearing of 6 July 2000, at which the Chamber decided to consider this matter on the briefs pursuant to Rule 73(A) of the Rules of Procedure and Evidence (Rules), ordered the Defence to file a supplement to the Motion before 7 August 2000, and ordered the Prosecutor to respond before 14 August 2000;

CONSIDERING Semanza's "Further Brief in Support of Corrected Copy of Application for Subpoenae, Recording of Depositions" filed 11 July 2000 (Further Brief);

CONSIDERING the "Prosecutor's Supplemental Response", filed 18 July 2000 (Supplemental Response);

NOW CONSIDERS the matter.

SUBMISSIONS OF THE DEFENCE

2. The Motion makes five requests, and relies on Rule 54 as its legal basis. First, the Defence requests a subpoena for several named persons. Regarding issuing a subpoena for, and a deposition of, Mrs. Habyarimana, the Defence submits that her testimony is relevant and it would prove that the Accused was not a man of influence in the community. Her testimony would show that the Accused and her family did not plot the crimes alleged in the indictment. The Defence would limit her testimony or deposition to issues in the prosecution witness statements and indictment.

3. Second, the Defence requests depositions from any witnesses relevant to the trial, including a deposition from Mrs. Habyarimana. The Defence submits that their depositions could provide an alibi or disprove prosecution assertions. The Defence contends that deposing the French Ministry of Cooperation and the French diplomatic missions in Bangui, Central Africa Republic "is proper."

4. Third, the Defence requests that prosecution investigators produce certain documents to facilitate cross-examination. The Defence submits that investigators Alfred Kwende, Degni-Ségui, and others should disclose to the Defence any findings on the activities of *inkontanyi*, *inyenzi*, or RPF, in Gikoro, Bicumbi, and in Rwanda. Mr. Degni-Ségui should produce his subsequent reports on Rwanda from 1996 to date, including any classified reports and testimony of certain witnesses under cross-examination.

5. Fourth, the Defence requests a report by Mr. Michael Hourigan (1 August 1997 Report) and related correspondence of the United Nations Legal Counsel, Mr. Hans Corell. Regarding disclosure of the 1 August 1997 report, the Defence submits that it could prove that the late President did not attend meetings at the Accused's house to plan and incite the genocide. The report would show that the Accused was not in a position to command the Army, the Presidential Guard, the *gendarmerie*, the police, and other state agents alleged to have committed crimes at the Accused's instigation. The Defence contests the Prosecutor's argument that the reports are internal investigative documents. The reports are Tribunal records, under seal by Tribunal order.

6. Fifth, the Defence requests documents, *notes verbales*, and representations, which Uganda, Belgium, France, and the United States of America filed at the United Nations Security Council from 1990 to 1996 on international involvement in the Rwandan crisis. The Defence seeks documents or information, including: the Arusha Accords of 1993; Rwandan official gazette No. 16 of 15 August 1991; Rwandan official gazette of 31 December 1999; all information about the present occupants of the Accused's property (including their official status in Rwanda); information about the National Assembly sworn in about 18 April 1994 pursuant to the Arusha Accords of 1993, and all maps and legal instruments on the status of the location of the swearing in Bicumbi and Gikoro *communes*. The Defence submits that information on the Accused's property is relevant and exculpatory.

7. The Defence, in its Further Brief, objects to the Prosecutor's attempt "to tender unresolved and pending motions in cases before different chambers as authorities in this case." Such conduct could lead to prejudice, and impugn the confidentiality, independence, and integrity of the cases. The Defence urges the Chamber to "disallow the admissibility of those motions and to make a proper order withdrawing them from these proceedings."

SUBMISSIONS OF THE PROSECUTOR

8. The Prosecutor submits that the Defence request for subpoenas is premature because the parties have not yet delineated the facts in dispute.

9. The Prosecutor asserts that the Defence request for depositions does not comply with Rule 71. The Defence has failed to demonstrate that there exist "exceptional circumstances" warranting the taking of depositions. The Defence request is vague and unclear. The Defence, in its Further Brief, does not address its failure to satisfy Rule 71(B).

10. The Prosecutor argues the Defence request for certain documents is unfounded because the Prosecutor is under no obligation to disclose the requested documents. The Prosecutor has complied with Rules 66 to 68, which govern disclosure. Investigators' reports and documents by Hans Corell are internal documents, and not subject to disclosure under Rule 70.

11. Regarding the Defence request for reports relating to the death of President Habyarimana, the Prosecutor submits that the Defence requests internal documents not subject to disclosure and a report that the Tribunal placed under seal. The Prosecutor opposes the disclosure to the Defence of the report under seal, but in light of recent Tribunal decisions on this same report, "recognizes the inherent authority of the Tribunal to voluntarily release a document in possession of the Tribunal."

12. Regarding information on property previously owned by the Accused, the Prosecutor represents that she “is unaware of any exculpatory information relating to any of Semanza’s properties.” The Defence has failed to adequately describe the evidence sought. The Defence request is vague and unclear.

13. The Prosecutor prays that the Chamber defer ruling on the Defence request for subpoenas until the appropriate stage of the proceedings, or in the alternative, dismiss the Motion at this time and grant leave to the Defence to re-file a motion for such a request at another time.

14. The Prosecutor prays that the Chamber dismiss the Defence request for depositions, and grant leave to the Defence to re-file a motion for such a request under Rule 71.

15. The Prosecutor prays that the Chamber dismiss the Defence requests for disclosure and production of certain documents.

DELIBERATIONS

Subpoenas and Summonses

16. The Chamber first turns to the issue of whether it should issue subpoenas for witnesses, as the Defence requests, though the Prosecutor argues that this request is premature.

17. A Trial Chamber may issue a subpoena or summons under 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.

Rule 54 does not provide any further guidance as to the legal standard, scope, or execution of a subpoena or summons. Nor does Rule 54 provide the requirements for a request for a subpoena or summons. Rule 54 deals with a number of issues, including that of summonses and subpoenas. A summons is used to direct the attendance of a person to appear before the court and by which the court is moved to hear a particular matter. In other words, a summons is the process by which proceedings are initiated. A subpoena, on the other hand, is used for the purpose of compelling a witness to attend and give evidence.

18. Rule 98 also governs the summoning of a witness on the initiative of a Trial Chamber itself, and reads: “A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.” This Rule gives a Trial Chamber express authority to summon, but does not provide any further guidance as to the legal standard, scope, or execution of such a summon. Nor does Rule 98 provide the requirements for a request to summon a witness.

19. For guidance as to whether it is proper to issue a subpoena, the Chamber notes the requirements of Rule 17 of the United States Federal Rules of Criminal Procedure (USFRCP). This rule governs subpoenas and reads, in part: “[a] subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of

the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.”

20. The International Criminal Tribunal for the former Yugoslavia (ICTY) has issued subpoenas and summoned witnesses on several occasions. It also has relied on its Rule 54 that is identical to the Tribunal's Rule 54. Further, it has relied on Rule 98 that is the same in substance as the Tribunal's Rule 98. In *Prosecutor v. Delalic and others*, IT-96-21 (Order on the Motion of the Defence for Hazim Delic for the Issuance of Subpoenas) (25 June 1998), the ICTY, acting pursuant to its Article 29 and Rule 54, issued subpoenas for named "individuals acting in their private capacity" and requested state cooperation. The ICTY requested state cooperation under Article 29 of its Statute, which is identical to the Tribunal's Article 28. In *Delalic*, the ICTY also attached the subpoenas to the decision.

21. In *Prosecutor v. Blaskic*, IT-95-14 (Decision of Trial Chamber I in respect of the Appearance of General Enver Hadzihasanovic) (25 March 1999), the ICTY, relied on its Rule 98 that provides that a Trial Chamber *proprio motu* may "summon witnesses and order their attendance." In *Blaskic*, the ICTY ordered a military official of Bosnia and Herzegovina to appear before it and ordered the state to cooperate. Previously, in the same case, the ICTY, acting pursuant to its Article 29 and Rule 54, ordered the appearance of a Croatian military officer. See *Prosecutor v. Blaskic*, IT-95-14 (Order for a Witness to Appear) (5 November 1998); see also *Prosecutor v. Blaskic*, IT-95-14 (Decision of Trial Chamber I to Call Colonel Amir Kubura as a Witness of the Trial Chamber) (21 May 1999) (ordering the appearance of a voluntary witness from the military ranks of Bosnia and Herzegovina).

22. In *Prosecutor v. Kupreskic and others*, IT-95-16 (Decision on the Defence Motion to Summon Witnesses) (6 October 1998), the ICTY, relying on Rule 54, summoned four witnesses for the Defence. The *Kupreskic* Chamber held that Rule 98 was inapplicable to the motion to summon witnesses because such evidence was not "additional" evidence within the meaning of the Rule.

23. Thus, a Trial Chamber, under Article 28 of the Statute and Rule 54, has the authority to issue subpoenas of witnesses, but must rely primarily on state cooperation and state judicial mechanisms to execute and enforce subpoenas, short of referring a matter to the Security Council under Rule 7bis(A). Having the power to issue subpoenas, it is a matter for a Trial Chamber's discretion to decide if it is proper and warranted under the particular circumstances.

24. In the particular circumstances of the case at bench, the Chamber finds that the Defence has failed to specify a date on which the named persons would testify. The Chamber is not inclined to issue a subpoena lacking a specific date and time. The Chamber started the trial of the Accused on 16 October 2000, and, at this time, is not in a position to set a date for the presentation of the Defence case. The Chamber finds it more prudent to wait until the proceedings have progressed further and until such a time as the Chamber, in consultation with the parties, can determine the date of any proposed testimony before issuing any subpoena. At this stage of the proceedings, the Defence request for subpoenas is premature. Further, the Chamber finds that the Defence has failed to satisfy the Chamber of the relevancy of the proposed witnesses' testimony. This finding on relevancy is without prejudice to any later request for a subpoena.

Depositions

25. The second issue that the Defence raises is that of depositions. Rule 71 governs depositions, and reads, in part (emphasis added):

(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

(B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the witness whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.

26. The ICTY, in interpreting its Rule 71, has found "exceptional circumstances" justifying a deposition based on "the length of the pre-trial detention of the accused and the complexity of the cases currently assigned to this Trial Chamber which precludes it from setting a date for the commencement of this trial". *Prosecutor v. Kvočka and others*, IT-98-30 (Decision to Proceed by way of Deposition Pursuant to Rule 71) (15 November 1999). The ICTY also found that the unavailability of one of the Judges of a Trial Chamber constituted such an exceptional circumstance. See *Prosecutor v. Kordić & Cerkez*, IT-95-14/2 (Decision on the Prosecutor's Request to Proceed by Deposition) (13 April 1999); *Prosecutor v. Kupreskić and others*, IT-95-16 (Decision on Prosecutor's Request to Proceed by Deposition) (25 February 1999); *Prosecutor v. Kupreskić and others*, IT-95-16 (Decision on Prosecution and Defence Requests to Proceed by Deposition) (11 February 1999).

27. The Chamber first applies Rule 71(A). Here, the Defence alleges that depositions are proper because the would-be subjects of depositions are protected witnesses, poor, or fearful of harm coming to them. The Chamber finds that these three allegations do not constitute exceptional circumstances. The Tribunal provides protection to witnesses for purposes of having their testimony in court, not by deposition. A witness's financial status should have no bearing on whether he or she appears as a witness before the Tribunal. The Tribunal's Witness and Victim Support Section exists exactly to assuage the fears of would-be witnesses, and it could bring the subjects of the sought depositions to the Tribunal. It is incumbent on the Defence to apply for witness protection measures, if necessary, to bring its witnesses to court. Thus, the Chamber finds that the Tribunal's witness protection regime suffices in this situation, and the Defence allegation in this regard does not amount to exceptional circumstances under Rule 71(A).

28. The Chamber further applies Rule 71(B). The Defence, in its Motion, has failed to indicate the precise whereabouts of the witnesses, save one, nor specified the date and place of the deposition. Moreover, the Defence has not provided a sufficient statement of the matters on which it seeks to examine the named persons, nor justified the deposition. The Defence contends that depositions "could prove an alibi" but does not support this assertion. The Chamber also notes that to date the Defence has not given notice of any special defence, including alibi, under Rule 67(A)(ii). For these deficiencies, the Chamber finds that the request for depositions must fail.

Disclosure of Investigator's Documents

29. The Chamber turns to the third issue, whether the Statute and Rules require the Prosecutor to provide to the Defence the requested investigators' documents.

30. Rules 66, 67, and 68 impose an affirmative duty on the Prosecutor to disclose evidence to the Defence. Disclosure of a particular piece of evidence under these Rules may hinge on whether or not the Prosecutor will seek to introduce such evidence at trial. Moreover, Rule 70(A) limits disclosure under Rules 66 and 67 and provides that internal documents prepared by the Prosecutor or her investigators are not subject to disclosure.

31. Here, the Chamber finds that this Defence request is extremely broad in scope, seeking "any findings on the activities of *inkontanyi*, *inyenzi*, or RPF, in Gikoro, Bicumbi, and in Rwanda . . . including any classified reports . . ." The Defence has failed to establish that the Rules provide for disclosure of the investigators' documents, nor sufficiently rebutted the Prosecutor's representation that these documents are internal documents prepared by representatives of the Prosecutor in connection with the investigation, within the meaning of Rule 70(A). Thus, the Chamber finds that this request must fail.

Disclosure of the 1 August 1997 Report

32. The Chamber now turns to the fourth Defence request, that seeking the disclosure of the 1 August 1997 report. The Chamber notes that it already has ordered the release of this report in other cases. *See Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, at paras. 21-25 (Decision on Ntabakuze's Motion for Disclosure of Material) (8 June 2000); *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, at paras. 15-18 (Decision on Kabiligi's Supplementary Motion for Investigation and Disclosure of Evidence) (8 June 2000); *Prosecutor v. Ntagerura*, ICTR-99-46-I, at 5 (Decision on the Defence Motion for Disclosure of Evidence Pursuant to Rules 66 et al of the Rules of Procedure and Evidence and Articles 19(1), 20(2) and 20(4)(b) of the Statute of the Tribunal) (26 June 2000); *Prosecutor v. Bagambiki & Imanishimwe*, *Prosecutor v. Ntagerura*, ICTR-99-46-I, at paras. 9-11 (Decision on Imanishimwe's Motions for Amendment of the Indictment and Disclosure) (23 August 2000).

33. The Chamber, as it has done in its decisions cited above, makes no finding as to the relevance of the 1 August 1997 report at this time. In the interests of justice and the particular circumstances of this case, the Chamber invokes the inherent powers of the Tribunal and orders the release of a copy of the report to the parties. The circumstances existing are exceptional, and the Chamber's action does not set any precedent.

34. The Chamber has no legal basis to make an order relating to internal UN documents by Hans Corell, UN Legal Counsel, and, therefore, denies this request.

35. The Defence objects to the Prosecutor's citation of allegedly inadmissible authority or documents. The Prosecutor's Response cites her responses to other pending motions in other cases at the time. Prosecutor's Response, at para. 18. The Supplemental Response cites several relevant decisions of this Chamber with regard to the disclosure of the 1 August 1997 report. Supplemental Response, at para. 5. The Defence objection to the citation of these authorities or documents is without merit. The Chamber overrules this Defence objection.

Disclosure of Various Documents

36. The Chamber turns to the fifth Defence request, that seeking the disclosure of various documents. For several documents, it is unclear what exactly the Defence seeks, and from whom the Defence seeks the documents. Moreover, the Defence has failed to satisfy the Chamber that the Prosecutor has not fulfilled her obligations under the Statute and Rules with regard to disclosure.

37. It also appears that several of the documents that the Defence seeks are public documents, official United Nations documents available to the public, and public laws of Rwanda. With regard to public documents, the Defence can receive them through diligent legal research. It is not for the Chamber to order disclosure of legislative instruments or reports, which are available to the public.


38. The Statute and Rules do not impose an affirmative duty on the Prosecutor to collect evidence for an accused. Rules 66, 67, and 68 merely oblige the Prosecutor to disclose evidence already in her possession or known to her.


39. Here, the Defence has failed to request a proper subpoena for the documents that are not public in nature and in the possession of third parties. The Defence has not identified sufficiently the precise documents, the persons in possession of the documents, their exact whereabouts, nor their particular relevance. The Chamber holds that this request must fail.

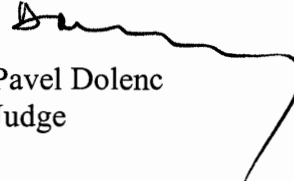
40. For all the reasons above, the Chamber:

- (a) **GRANTS** the Defence request for disclosure of the 1 August 1997 report;
- (b) **DIRECTS** the Registrar to make the 1 August 1997 report available to the Defence and the Prosecutor solely for the use in this case, and;
- (c) **DENIES** the Motion in all other respects.

Arusha, 20 October 2000.


Lloyd George Williams
Judge, Presiding


Yakov Ostrovsky
Judge


Pavel Dolenc
Judge

Seal of the Tribunal

