



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Sergei Alekseevich Egorov
Registrar: Adama
Date: 14 June 2004

THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-I

**DECISION ON EXTREMELY URGENT DEFENCE MOTION FOR THE
DEPOSITION OF ALIBI WITNESSES**

Office of the Prosecutor:

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Counsel for the Defence

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

SITTING as Trial Chamber I, composed of Judge Sergei Alekseevich Egorov, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal (“the Rules”);

BEING SEIZED OF the “Requête en extrême urgence de la défense aux fins de recueillir les dépositions des témoins institutionnels de l’alibi”, filed on 17 May 2004;

CONSIDERING the Prosecution’s Response, filed on 21 May 2004;

FURTHER CONSIDERING the “Réplique de la défense”, filed on 26 May 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004. During the Pre-Trial Conference on 13 May 2004, the Defence requested that the Prosecution interview the Accused, on the issue of alibi, as part of its investigations. The Chamber, in an oral decision delivered the same day, denied the request as it was not for the Chamber to decide how the Prosecution should conduct its investigations, nor is such an interview a requirement with respect to alibi.

SUBMISSIONS

2. The Defence requests that the Chamber order a deposition of five Defence alibi witnesses, some of whom may not wish to speak to Counsel for the Defence, and request that their statements during the deposition be treated confidentially. In support of its motion, the Defence cites Article 28 and Rules 71 and 73.

3. The Prosecution objects to the motion and submits that the motion is similar to the previous request made by the Defence, which was rejected, for the Prosecution to interview the Accused, as the Prosecution would then be compelled to question alibi witnesses. The Prosecution notes that a previous deposition motion filed by the Defence was rejected due to a lack of information as to the exceptional circumstances justifying a deposition. Moreover, Article 28 is inapplicable as the Defence has not exhausted all avenues of investigation, and authorization from the Rwandan Government is not necessary. The Prosecution also notes that the alibi witnesses may come to Arusha to testify to alibi during the Defence case.

4. In its reply, the Defence submits that it could not contact the witnesses directly because of the witnesses' present positions as officials or as detainees, or because the Defence did not want to appear to have influenced their testimonies. For this reason, the Defence makes an application under Article 28 for the cooperation of the Rwandan Government. The Defence contends that there is an interest in hearing these witnesses, and that there are difficulties in obtaining their testimonies. The Reply contains the information that the Defence seeks to obtain from the witnesses via a deposition hearing. The Defence also seeks to substitute Tharcisse Muvunyi with another as an alibi witness.

DELIBERATIONS

5. The Defence has made two applications within one motion, one for depositions (Rule 71) and another for cooperation from States (Article 28). With respect to the Article 28 aspect of the motion, the Chamber notes that the Defence has not shown that previous efforts to obtain the assistance were unsuccessful, for example, that it has written

unsuccessfully to the Rwandan Government to seek audiences with the witnesses who require such authorization from the Rwandan Government.

6. Pursuant to Rule 71(A), the Chamber has the discretion to grant the taking of depositions where exceptional circumstances exist and where it would be in the interests of justice. Rule 71(B) stipulates certain information that the request must provide: the name and whereabouts of the witness, the date and place of deposition, a statement of matters for examination and of the exceptional circumstances justifying the deposition. The Chamber notes that the list of witnesses is not annexed to the motion, as indicated in the motion. The Chamber also notes that the Defence did not elaborate upon the exceptional circumstances, nor on the matters for examination, in its motion, but rather in its Reply.

7. With respect to one of the witnesses, the Chamber previously issued a decision on 11 March 2004 denying a similar request for deposition.^[1] The Chamber held that although it accepted that the ill-health of the witness was an exceptional circumstance, it would have been preferable to have more precise information regarding the witness's health. The Chamber further held that the statement of matters for examination was vague, and the matter could be reconsidered upon provision of this information. At that time, the information regarding the witness's health was derived from a medical certificate dated 7 January 2004 from Dr. Philippe Bertaud. The Chamber notes that in support of its present second motion with respect to this potential witness, the Defence again supplies the Chamber with the same medical certificate that was deemed insufficient in the previous decision. In its present Reply however, the Defence provides the statement of matters for examination that was lacking before, and the Chamber will consequently grant the deposition with respect to this witness.

8. In respect of the two military and government officials, it is not clear if they have consented to being witnesses for the Defence, as the Defence has not approached the two witnesses. A deposition is an alternative method, from live in-court testimony, of hearing a party's witness, and is not a means by which to compel witnesses who do not wish to testify. The Defence alludes to immunity privileges of the witnesses, which may prevent them from testifying at all, whether by live testimony or by deposition. The Chamber is of the view that the Defence should have clarified the situation regarding the two officials, perhaps with the Rwandan Government, before applying to the Chamber.

9. Annexed to the motion are two unsigned statements from the two religious witnesses, attesting to their knowledge of the Accused and the events at the time. One witness has raised security concerns if s/he testifies before the Tribunal, as the proceedings are not closed, and his/her name will be revealed. However, these concerns would be addressed if protective measures were granted. The other witness has stated simply that s/he cannot come to Arusha to testify, without specifying the reasons. The Defence submits that the witnesses have security concerns and require authorization from their superiors. A deposition cannot be used to circumvent the necessary authorization witnesses may require from their superiors to testify. The security concerns raised do not explain why the witnesses could not come to Arusha as protected witnesses, whose identities would

not be revealed to the public. Furthermore, when the witness is to testify, if the Chamber deems appropriate at that time, the witness could testify in closed session, where proceedings are not open to the public. A deposition is a special measure to be granted only in exceptional circumstances where it would serve the interests of justice. Rule 90(A) provides that in principle, witnesses shall be heard directly by the Chamber.

10. The Chamber is of the view that the Defence has misunderstood the use of depositions under Rule 71. The Chamber strongly urges the Defence to ensure that all necessary steps to be taken, as mandated by the Statute or the Rules, or by the jurisprudence of this Tribunal, have been taken, and that all legal requirements to be fulfilled have been fulfilled, before applying to the Chamber. The applications relating to Article 28 and the deposition of the two officials and two religious witnesses were misconceived.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion with respect to one witness for health reasons and **DENIES** the motion in all other respects.

Arusha, 14 June 2004

Sergei Alekseevich Egorov
Judge
(Seal of the Tribunal)

[1] *Prosecutor v. Aloys Simba*, Decision on the Defence's Extremely Urgent Motion for a Deposition (TC), 11 March 2004.