

ICTR-98-41-7
25-08-2004
(21527-21524)

21527
Ivan



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

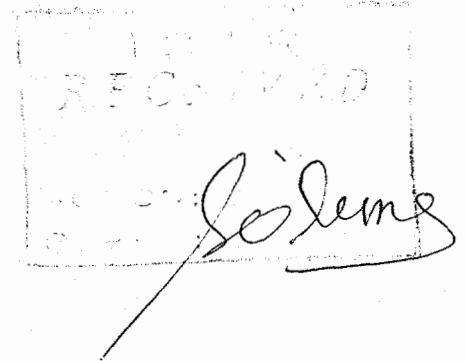
Date: 25 August 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T



DECISION ON PROSECUTOR'S REQUEST FOR A SUBPOENA REGARDING
WITNESS BT

Office of the Prosecutor:

Barbara Mulvaney
Drew White
Segun Jegede
Christine Graham
Rashid Rashid

Counsel for the Defence

Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'omanwa

8/25

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Prosecutor’s Urgent and Confidential Request for a Subpoena Compelling Protected Prosecution Witness BT to Appear for Testimony and a Request for Cooperation from the Kingdom of Belgium to Facilitate Such Testimony”, filed on 19 July 2004;

CONSIDERING the Bagosora Defence’s Response filed on 26 July 2004; the Ntabakuze Defence’s Response filed on 27 July 2004; and the Defence for Kabiligi’s Response filed on 30 July 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. Witness BT appears as a protected Prosecution witness on the Prosecution’s list of witnesses filed on 30 April 2003. Subsequently, the witness was removed from the list of 28 May 2004. However, in a previous decision, the Chamber noted that the Prosecution had maintained in other communication that it intended to call Witness BT.¹

SUBMISSIONS

2. The Prosecution requests the Chamber to solicit the Belgian authorities to compel Witness BT to testify in person, alternatively, via video-link from Belgium. As a second alternative, the Prosecution wishes the testimony of the witness to be given by way of a deposition. The Prosecution submits that the Chamber has the power to issue subpoenas, and that Belgium, by way of enacted law, has an obligation to serve the subpoena. Witness BT has material information for the Prosecution case, relating to statements made by the Accused Bagosora at a meeting attended by the Accused Ntabakuze as well. The witness also has evidence of the Accused Bagosora’s role in a plan to eliminate Government members in favour of the Arusha Accords. Furthermore, Witness BT has information on the Accused Bagosora’s and Ntabakuze’s whereabouts and conduct during the killing of ten Belgian UNAMIR peacekeepers. The witness refuses to travel to Arusha or to testify via video-link, but has not provided the reasons for this refusal.

3. The Bagosora Defence takes no position on the merits of the Prosecution’s request for a subpoena, but asserts that it is premature for the Prosecution to seek video-link testimony or a deposition, as they are not alternatives to a subpoena. Video-link testimony is granted where there is a security risk, which has not been demonstrated. A deposition equally has pre-conditions which are not satisfied here.

¹ *Bagosora et al.*, Decision on Defence Motion to Compel the Prosecution to File A Revised Witness List (TC), June 2004, para. 6.

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¹ *Bagosora et al.*, Decision on Defence Motion to Compel the Prosecution to File A Revised Witness List (TC), 15 June 2004, para. 6.

4. The Ntabakuze Defence submits that Witness BT should not be permitted to testify as the witness has never agreed to speak to the Prosecution or to testify, and was not re-instated as a witness with the leave of the Chamber. The allegation that Witness BT will speak to has been dropped from the Indictment in the Military II case, and should therefore be withdrawn in respect of the Accused in the case at bar. The Prosecution has not proved the Belgian laws to support its motion, and the legal basis of Belgian enforcement of the subpoena is unclear. The Ntabakuze Defence notes that other than the Accused Bagosora's statement regarding the beginning of "work", the witness's evidence has been or can be provided by other witnesses. With respect to the alternative requests, the Ntabakuze Defence submits that video-link testimony is a tool relating to witness protection, not a tool to compel testimony; its use here would be unjust. As for the second alternative of a deposition, it is argued that if the subpoena cannot be enforced outside Belgium, that is not an exceptional circumstance warranting a deposition.

5. The Kabiligi Defence questions whether it is appropriate in this instance for the Chamber to exercise its discretion to subpoena a witness, and whether Belgian law provides for such a measure. The video-link device cannot be used for reluctant witnesses, and there are no exceptional circumstances warranting a deposition.

DELIBERATIONS

6. The Chamber's power to issue a subpoena, "an order commanding the attendance of a witness, under threat of penalty to the addressee for non-compliance", is derived from the Statute and Rule 54 of the Rules of Procedure and Evidence ("the Rules").² Rule 54 permits the issuance of "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".

7. The Prosecution has maintained its stated intention to call Witness BT as a witness. Witness BT has information relevant to the issues at trial, and refuses to come to Arusha to testify. The issuance of a subpoena is necessary and appropriate to the conduct of the trial. The request for a subpoena is therefore justified, and the Chamber has previously granted such requests in these circumstances.³ The Registry shall prepare a subpoena addressed to Witness BT, ordering her appearance at the Tribunal, at a date and time to be specified by the Registry, to give evidence in the matter of *The Prosecutor v. Bagosora et al.*

8. Although the subpoena shall be addressed directly to Witness BT, the Chamber notes that the Prosecution seeks the cooperation of the Kingdom of Belgium, where the witness is presently located, and that such notification and assistance are desirable. Article 28 of the Statute expressly identifies the service of documents as one of the forms of cooperation which the Tribunal may request of a State. The Chamber requests the Kingdom of Belgium to effect service on the addressee of the subpoena which is filed in accordance with this decision, and to provide any assistance that may be requested by the Registry to facilitate the attendance of the witness.

² *Bagosora et al.*, Decision on Requests for Subpoenas (TC), 10 June 2004, paras. 2-3; Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4; Decision on Request for Subpoena for Witness BW (TC), 24 June 2004, para. 2.

³ *Id.*

9. The witness is scheduled to appear during the next trial session which begins on 6 September 2004. Service of, and prompt compliance with the subpoena authorized by the present decision is, therefore, a matter of urgency.

10. As the request for a subpoena is being granted, it would be premature at this juncture to consider the alternative requests for video-link testimony or deposition.


FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to prepare a subpoena in accordance with this decision, addressed to the Prosecution witness designated by the pseudonym BT, and to communicate it, with a copy of the present decision, to the Kingdom of Belgium;

REQUESTS the Kingdom of Belgium to serve the subpoena on the addressee as soon as possible, and to provide any other assistance that may be requested by the Registry to facilitate his attendance.

Arusha, 25 August 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
pp. Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

