

ICTR-01-76-T
07-02-2005
(3235-3232)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3235
S. Mussa

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Dennis C. M. Byron

Registrar: Adama Dieng

Date: 7 February 2005

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THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-T

DECISION ON THE DEFENCE REQUEST FOR A SUBPOENA FOR WITNESS SHB

Office of the Prosecutor:

Richard Karegyesa
Sulaiman Khan
Ignacio Tredici
Amina Ibrahim

Counsel for the Defence

Sadikou Ayo Alao
Beth Lyons

6h

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Requête de la Défense en vue d'ordonner la comparution du témoin SHB conformément aux dispositions de l'article 54 du RPP et son transfert subséquent conformément aux dispositions de l'article 90 *bis* (B) du RPP ", filed on 7 January 2005;

NOTING that the Prosecution has not filed a response;

HEREBY DECIDES the motion.

INTRODUCTION

1. Witness SHB is detained in Rwanda. He held a position of authority in Butare and Gikongoro prefectures. The Chamber has denied an earlier request to take a deposition of this witness.¹ The Defence now requests the Chamber to issue a subpoena to Witness SHB and to order his transfer to Arusha.

SUBMISSIONS

2. The Defence argues that Witness SHB's evidence is relevant given his position of authority during the events in 1994 and the crimes charged in the Indictment. The Chamber should therefore hear him as an "institutional witness". The Defence has not been able to meet with the witness despite its efforts to do so during its mission to Rwanda from 24 July to 7 August 2004. These efforts are documented in a mission report prepared by Co-Counsel annexed to the present request. According to the report, Co-Counsel explained that the Defence contacted a Rwandan liaison officer on 30 July 2004 to set up the interview with the witness. The officer said that he would contact the relevant prison director. The Defence was unable to reach the liaison officer over the next few days to confirm the interview with the witness. When approached by the Defence, the prison director stated that he had not yet been contacted by the officer. On 3 August 2004, the liaison officer contacted the Defence to explain that the procedure had changed and that authorization was required from a particular government ministry. A representative of the Tribunal's Witness and Victims Support Section (WVSS) drafted a letter to the relevant Rwandan Ministry, but no authorization was obtained.

¹ *Simba*, Decision on Extremely Urgent Motion for Deposition of Alibi Witnesses (TC), 14 June 2004, para. 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 ... 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.").

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DELIBERATIONS

3. 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”. The criteria for issuing a subpoena, an order compelling the attendance of a witness under threat of penalty for non-compliance, is well established in the Tribunal’s jurisprudence.² The requesting party must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful. Additionally, the party must have a reasonable belief that the prospective witness can materially assist its case. Indeed, subpoenas should not be issued lightly.³

4. The Chamber notes that the Defence made an unsuccessful attempt to meet with Witness SHB during its two week mission to Rwanda just before the commencement of trial. The Defence therefore has not yet had the opportunity to interview the witness in order to assess his willingness to testify voluntarily or to determine the specific nature of his proposed testimony and how it relates to the case. In the absence of such information, the Chamber does not have a basis for issuing a subpoena to the witness in order to provide testimony at trial. The difficulties encountered by the Defence in arranging a meeting with Witness SHB do not indicate unwillingness on the part of the witness, but are due to lack of authorization from the Rwandan authorities. However, there has been no official refusal, and the Chamber has insufficient information concerning the nature of the exchange between the Defence, WVSS and the relevant Rwandan authorities.

5. The Defence is advised to make a new attempt, with the support of WVSS, in conformity with the Rwandan authorities’ present procedure for contacting detained witnesses. At this stage, the request for a subpoena has to be denied.⁴

² *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004; *Bagosora et al.*, Decision on Request for Subpoenas (TC), 10 June 2004. See also *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004; *Kamuhanda*, Decision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54 (TC), 20 August 2002.

³ *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6, 10; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 7.

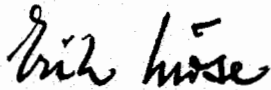
⁴ The Chamber is also not in a position to make any order under Rule 90 *bis* (B), as the Defence has made no submissions in connection with the threshold requirements for transfer under that provision. Rule 90 *bis* (B) provides: “The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met: (i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal; (ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested state.” See *Akayesu*, Decision on Defence Motion for the Transfer, Appearance, and Protection of Thirteen Detained Witnesses (TC), 9 March 1998 (“the Tribunal is of the view that the conditions stipulated in Rule 90 *bis* are *sine qua non* and that if they are not complied with, the requested transfer order cannot, consequently, be issued”).

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 7 February 2005



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge



Dennis C. M. Byron
Judge

(Seal of the Tribunal)

