

ICTR-98-41-T
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
03-05-2005
(24732 — 24730)

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Ivan

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 3 May 2005

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA
Case No. : ICTR-98-41-T

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DECISION ON MOTION TO ORDER RWANDA TO TRANSFER WITNESS DO

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

24731

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

BEING SEIZED OF the Nsengiyumva Defence's "Extremely Urgent Motion Requesting for an Order to the Government of Rwanda to Co-operate in the Transfer of Witness DO to Arusha, Tanzania", filed on 21 April 2005;

NOTING that the Prosecution has not filed a response;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Nsengiyumva Defence requests the Chamber to order Rwanda to transfer Prosecution Witness DO, who is a detainee, to the Tribunal. The witness testified before the Chamber from 30 June to 2 July 2003.¹ On 9 July 2004, the Defence requested that he be recalled for further cross-examination on the basis of newly obtained material, allegedly showing contradictions in his testimony. The Chamber granted this request on 14 October 2004.²

DELIBERATIONS

2. The Defence request is made pursuant to Article 28 of the Statute, which provides that states shall cooperate with the Tribunal. Recourse to this provision is only necessary where the state or the witness refuse to voluntarily comply with the requested transfer.³ There is no indication that this is the case.

3. An order to transfer a detained witness is governed by Rule 90 *bis* (A), which provides that: "[a]ny detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal". In addition, Rule 90 *bis* (B) requires that, prior to ordering the transfer, the Chamber must be satisfied that: (i) the witness is not required for any criminal proceedings in the requested state during the relevant period; and (ii) the transfer would not extend his detention.

4. The party seeking a transfer order has the burden of providing specific information that the conditions set out in Rule 90 *bis* (B) are met.⁴ The Defence has made no submissions in this respect. The Chamber cannot therefore make any order under Rule 90 *bis* at this stage.⁵ The Defence may seek the assistance of the Registry to these ends.

¹ Witness DO was transferred to the Tribunal pursuant to an order issued under Rule 90 *bis*. See *Bagosora et al.*, Decision on the Prosecution's Request for the Transfer of Detained Witnesses (TC), 4 June 2003.

² T. 14 October 2004 p. 23, lines 4-5 ("[W]e are now ordering the recall of this Witness DO so that the Defence may further cross-examine the witness on alleged discrepancies").

³ See, e.g., *Bagosora et al.*, Request to the Government of Rwanda for Co-operation and Assistance pursuant to Article 28 of the Statute (TC), 31 August 2004.

⁴ *Bagosora et al.*, Order for Transfer of Witness AAA (TC), 25 May 2004, para. 3; *Simba*, Order for the Transfer of Detained Witnesses (TC), 17 February 2005, para. 3.

⁵ *Simba*, Decision on the Defence Request for a Subpoena for Witness SHB (TC), 7 February 2005, para. 5, footnote 4; See also *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").

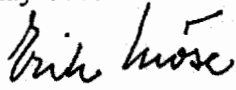
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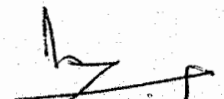
FOR THE ABOVE REASONS, THE CHAMBER

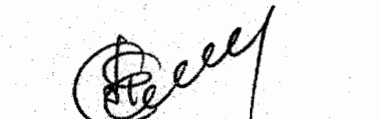
24730

DENIES the motion.

Arusha, 3 May 2005


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

