



UNITED NATIONS
NATIONS UNIES

ICTR-78-91-1
14-07-2006
(28995-28992)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

28995

S. Munda

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 14 July 2006

JUDICIAL RECORDS/ARCHIVES
2006 JUL 14 P 2-33

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

DECISION ON REQUEST FOR A SUBPOENA FOR MAJOR JACQUES BIOT

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Allison Turner
Paul Skolnick
Frédéric Hivon
Peter Erlinder
André Trarablay
Kennedy Ogetto
Gershom C'achi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the “Urgent Motion Requesting the Chamber to Issue a Subpoena Compelling Major Jacques Biot to Appear Before the Trial Chamber for Oral Testimony”, filed by the Nsengiyumva Defence on 7 July 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Nsengiyumva Defence requests that a subpoena be issued to compel the appearance of Major Jacques Biot, who was a UNAMIR observer based in Gisenyi in April 1994. On 21 April 2006, the Chamber granted the Defence’s Article 28 request for assistance from the Kingdom of Belgium in order to interview Major Biot.¹ Based on that interview, which took place on 27 June 2006, the Defence submits that Major Biot has valuable information which is exculpatory of the Accused. Major Biot has, according to the Defence, refused to testify on the basis that he had “said all he could before the Examining Judge and had nothing to add”.²

DELIBERATIONS

2. Rule 54 permits the issuance of a subpoena where “necessary for the purposes of an investigation or for the preparation or conduct of the trial”. In the case of a subpoena to a prospective witness:

The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused. As the Appeals Chamber has emphasized, “Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction”.³

¹ *Bagosora et al.*, Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute (TC), 21 April 2006.

² Defence Motion, para. 9.

³ *Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 6; *Jrdanin and Talic*, Decision on Interlocutory Appeal (TC), 11 December 2002, para. 31; *Milosevic*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005 (“*Milosevic Decision*”), para. 35.

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In considering whether the prospective testimony will materially assist the applicant, "it is not enough that the information requested may be 'helpful or convenient' for one of the parties: it must be of substantial or considerable assistance to the Accused in relation to a clearly identified issue that is relevant to the trial".⁴ In this regard, the Chamber shall consider the specificity with which the prospective testimony is identified; whether the information can be obtained by other means;⁵ and whether the party seeking the subpoena has made reasonable attempt to secure the voluntary cooperation of the prospective witness.⁶

3. The Defence submits that Major Biot is able to testify that he witnessed no killings while he was in Gisenyi from 6 to 13 April 1994; that the Butotoki training facility was not used to train *Interahamwe* militia; and that the Accused was not involved in training or otherwise associated with militia groups.⁷ Although the Defence could have described the position of the proposed witness with greater specificity, the Chamber accepts that Major Biot, as a member of the UNAMIR force, was in a position to neutrally observe events which are relevant to the present trial. Not only would his testimony be relevant, but it may be particularly valuable. In these circumstances, the Chamber finds that a sufficient showing has been made that the prospective witness's testimony would materially assist the Defence.

4. Government officials enjoy no immunity from a subpoena, even where the subject-matter of their testimony was obtained in the course of government service.⁸ As the Defence has made reasonable efforts to secure the witness's voluntary appearance, a subpoena *ad testificandum* is both necessary and appropriate for the fair conduct of trial.

⁴ *Milosevic* Decision, para. 39; *Martic*, Decision on the Prosecution's Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena (TC), 16 September 2005, para. 12; *Krstic*, Decision on Application for Subpoenas (AC), 1 July 2003 ("*Krstic* Appeal Decision"), para. 11.

⁵ *Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7; *Krstic* Appeal Decision, para. 10; *Milosevic* Decision, paras. 36, 40.

⁶ *Bagosora et al.*, Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK32, DK39, DK51, DK52, DK311, and DM24 (TC), 26 April 2005, para. 3; *Bagosora et al.*, Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane (TC), 22 October 2004, para. 2; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

⁷ Defence Motion, paras. 5-8.

⁸ *Krstic* Appeal Decision, para. 27 ("But it is abundantly clear from the passages already quoted from the Blaskic Subpoena Decision, and from paras. 23-24, supra, that the statement made in par 38 of that Decision – that "The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity" – can be justified only in relation to the production of documents in their custody in their official capacity. The Appeals Chamber did not say that the functional immunity enjoyed by State officials includes an immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions. Nothing which was said by the Appeals Chamber in the Blaskic Subpoena Decision should be interpreted as giving such an immunity to officials of the nature whose testimony is sought in the present case. No authority for such a proposition has been produced by the prosecution, and none has been found. Such an immunity does not exist. No issue arises for determination in this case as to whether there are different categories of State officials to whom any such immunity may apply, and it is unnecessary to determine such an issue here"). Judge Shahabuddeen issued a dissenting opinion, but only on the issue of whether such a subpoena could be issued for a pre-testimonial interview with the Defence. No such issue arises in the present case. *Milosevic* Decision, para. 16 ("a subpoena is the correct procedural mechanism for seeking to compel a state official to testify").

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FOR THE ABOVE REASONS, THE CHAMBER

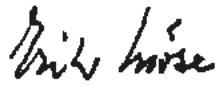
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GRANTS the motion;

ORDERS the Registrar to prepare a subpoena in accordance with this decision, addressed to Major Jacques Biot, requiring his appearance before this Chamber to give testimony in the present case, and to communicate it, with a copy of the present decision, to the Kingdom of Belgium;

DIRECTS the Registry to communicate the subpoena to Major Jacques Biot through appropriate diplomatic channels, accompanied by a copy of this Decision.

Arusha, 14 July 2006



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

