



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-1
31-08-2006
(29234-29231)

29234

S. Muna

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 31 August 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

JUDICIAL RECORDS/ARCHIVES
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DECISION ON REQUEST FOR A SUBPOENA COMPELLING WITNESS DAN TO
ATTEND FOR DEFENCE CROSS-EXAMINATION

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi 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 Prosecution "Confidential Motion Requesting a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination", filed on 19 June 2006;

CONSIDERING the Responses filed by the Ntabakuze and Bagosora Defence on 27 and 29 June 2006, respectively; and Replies filed by the Prosecution on 29 June 2006 and 4 July 2006; and the further Reply filed by the Bagosora Defence on 3 July 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Prosecution requests a subpoena for the appearance before the Chamber of one of its witnesses, Witness DAN. The Chamber admitted a written statement of the witness in lieu of oral testimony, as is permitted under Rule 92 *bis* where the statement does not concern "acts and conduct of the accused", but required her to appear for cross-examination.¹ Having failed to secure the witness's voluntary attendance, the Prosecution now requests a subpoena. Ntabakuze and Bagosora oppose the motion, arguing that the witness should have appeared before the close of the Prosecution case on 14 October 2004. Permitting the witness to testify at this stage would, according to the Defence, effectively allow the Prosecution to re-open its case.

DELIBERATIONS

2. Rule 54 of the Rules of Procedure and Evidence authorizes a Trial Chamber to issue "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 applicant for a subpoena must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.² It has been said that "subpoenas should not be issued lightly" and that a Chamber must consider "not only the usefulness of the information to the applicant but ... its overall necessity in ensuring that the trial is informed and fair".³

3. The attempts to obtain Witness DAN's voluntary cooperation, as described in the Motion, have been reasonable. The first criterion is satisfied.

¹ *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92*bis* (TC), 9 March 2006, para. 25 ("the Chamber considers that fairness dictates that the statement be admitted with cross-examination").

² *Karemura et al.*, Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, para. 9; *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005, para. 36.

³ *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7

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4. The witness's testimony concerns events at the *Centre Christus* between 6 April and 12 April 1994. In particular, her statement indicates that she saw civilians being attacked by men in military uniform using guns and grenades.⁴ This information could, potentially corroborate Prosecution evidence of criminal acts by subordinates of the Accused. Under these circumstances, the witness's testimony is not only material to clearly identified issues in the trial, but is also necessary and appropriate for its conduct.

5. The Chamber finds no merit in the Defence's argument that the issuance of a subpoena at this juncture would constitute a re-opening of the Prosecution case. The witness is being called for cross-examination by the Defence. Such cross-examinations have been permitted in the past at the request of the Defence.⁵ Under these circumstances, there is no danger of the Prosecution case being re-opened or enlarged by requiring the witness to appear for cross-examination.

6. Although subpoenas are addressed to the prospective witness, the Chamber notes that the assistance of the Government of Rwanda may be desirable in order to facilitate the service of the subpoena and to secure the appearance of the witness.⁶ Under Article 28 of the Statute of the Tribunal, the Chamber is empowered to solicit the cooperation of a state for the "investigation and prosecution of persons accused of committing serious violations of international humanitarian law". Thus, the Chamber requests the Government of Rwanda to assist, if necessary, in the service of the subpoena on the addressee, and to provide any assistance that may be requested by the Registry to facilitate the attendance of the witness.

⁴ Written statement of Witness DAN, *Bagosora et al.*, doc. K0275572-K0275576.

⁵ As was the case for Witnesses DO and XBH. See *Bagosora et al.*, Nsengiyumva Defence Extremely Urgent Request to Recall Prosecution Witness DO for further Cross-Examination and for Urgent Translation into French and English, of Documents from Rwanda, Relevant to Witness DO, filed on 9 July 2004; T. 14 October 2004 p. 23; *Bagosora et al.*, Anatole Nsengiyumva's Extremely Urgent Motion to Recall Prosecution Witness XBH for further Cross-Examination Pursuant to Rules 54, 90(G), 73(A), & 91(B) of the Rules of Procedure & Evidence & Articles 19 & 20 of the Statute, filed on 6 April 2005; T. 18 May 2005 p. 7.

⁶ *Bagosora et al.*, Decision on Prosecutor's Request for a Subpoena Regarding Witness BT (TC), 25 August 2004, para. 8; *Bagosora et al.*, Decision on Request for Subpoena for Witness BW (TC), 24 June 2004, para. 4; *Bagosora et al.*, Decision on Request for Subpoenas (TC), 10 June 2004, para. 5.

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FOR THE ABOVE REASONS, THE CHAMBER

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GRANTS the motion;

ORDERS the Registry to prepare a subpoena addressed to Witness DAN in accordance with this decision, and to transmit it to the Government of Rwanda, along with a copy of the present decision;

REQUESTS the Government of Rwanda 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 the attendance of the witness.

Arusha, 31 August 2006



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

