

-0899

23231
PM



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 6 October 2006

ICTR-00-56-1
06-10-2006
(23231-23228)

The PROSECUTOR
v.
Augustin BIZIMUNGU
Augustin NDINDILYIMANA
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

JUDICIAL RECORDS/ARCHIVES
RECEIVED
2006 OCT -6 1 A 9 31

DECISION ON THE PROSECUTOR'S MOTION FOR SUBPOENA

Office of the Prosecutor:

Mr Ciré Aly Bâ
Mr Moussa Sefon
Mr Segun Jegede
Mr Lloyd Strickland
Mr Abubacarr Tambadou
Ms Felistas Mushi
Ms Faria Rekkas
Ms Anne Pauline Bodley

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu
Mr Christopher Black and Mr Patrick De Wolf for Augustin Ndindiliyimana
Mr Charles Taku and Mr Hamuli Rety for François-Xavier Nzuwonemeye
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF the Prosecutor's "Motion for the Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed on 25 September 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED

- (i) "Nzuwonemeye's Response to Motion for Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed on 27 September 2006;
- (ii) The «*Réponse à la* "Motion for the Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence"», filed by Innocent Sagahutu on 29 September 2006;
- (iii) The «*Réponse d'Augustin Ndingiyimana au* "Motion for Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence"», filed on 2 October 2006;
- (iv) The «*Réponse de la Défense d'Augustin Bizimungu à la requête du Procureur intitulée* "Motion for the Subpoena of Annonciata Kavaruganda"», filed on 2 October 2006.

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 54;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS BY THE PARTIES

The Prosecution

1. The Prosecution requests that a subpoena be issued to Annonciata Kavaruganda. The Prosecution claims that because Madame Kavaruganda was the wife of late Joseph Kavaruganda, former President of the Constitutional Court in Rwanda at the beginning of the genocide in April 1994, she has a unique and special knowledge of the events leading to the abduction and killing of her husband by Rwandan Armed Forces on 7 April 1994.

2. Referring to paragraphs 22, 25, 48, 49 and 50 of the Amended Indictment, the Prosecution submits that Madame Kavaruganda's testimony is necessary to prove the existence and execution of a common scheme by the accused persons in collaboration with others mentioned in the Indictment to eliminate certain members of opposition parties and other important actors with a view to obstructing the implementation of the Arusha Accords. According to the Prosecution, this information will significantly corroborate prosecution evidence of a deliberate and systematic targeting and elimination of those political and other actors by the Rwandan Armed Forces in the early days of the genocide in April 1994.

3. The Prosecution further submits that Madame Kavaruganda is uniquely positioned to provide a useful insight into the activities of her husband within the framework of the implementation of the Arusha Accords and to inform the Court of her husband's activities.



4. Finally, the Prosecution submits that substantial and serious attempts have been made to secure the voluntary attendance of Madame Kavaruganda but to no avail.

Nzuwonemeye's Response

5. The Defence for Nzuwonemeye opposes the Motion and submits that the Prosecution has not addressed the reasons put forward by Madame Kavaruganda for her refusal to testify in this case, that is, that she does not hold the accused persons accountable for the death of her husband.

6. The Defence further submits that the Prosecution has omitted to mention that, according to Madame Kavaruganda, Major Protais Mpiranya from the Presidential Guard and Major Kabera, Officer *d'Ordonnance* of President Habyarimana, were involved in the killing of her husband. The Defence argues that there is no connection between the Presidential Guard and the Reconnaissance Battalion.

7. Finally, the Defence submits that leading this evidence with respect to Major Protais Mpiranya and the Presidential Guard, would only waste court time and delay the end of the Prosecution case.

Sagahutu's Response

8. The Defence for Sagahutu submits that the testimony of Madame Kavaruganda would not assist the Prosecution at all since Major Mpiranya and Major Kabera, whom the witness believes are responsible for the death of her husband, have not been tried and any attempt to convince the Chamber of a conspiracy is a waste of time.

9. The Defence further submits that Madame Kavaruganda's testimony is not necessary since it has no direct or indirect link to any of the accused persons in the present case and prays the Chamber to dismiss the Motion.

Ndindiliyimana's Response

10. The Defence for Ndindiliyimana adopts the submissions made by Nzuwonemeye's Defence and further submits that the Prosecution has not shown that Madame Kavaruganda is best placed to describe the contents of the Arusha Accords since she did not participate in their negotiation and the Prosecution has not indicated any public or political functions that Madame Kavaruganda held in Rwanda in 1994 that may have enabled her to form an opinion about the full details of the Arusha Accords and the obstacles to their implementation.

11. The Defence argues that Madame Kavaruganda would not assist in ascertaining the truth, in particular since the paragraphs of the Indictment on which the Prosecution tries to lead evidence through this witness, have been cited with regard to the testimonies of several other witnesses and will be the subject of General Dallaire's testimony.

Bizimungu's Response

12. The Defence for Bizimungu adopts the submissions made by Nzuwonemeye and Ndindiliyimana's Defence and, recalling the Chamber's decision of 24 November 2005, further submits that it had already on that occasion opposed the appearance of Madame Kavaruganda arguing that this witness's testimony could not go to proof of the count of conspiracy to commit genocide or to Bizimungu's superior responsibility.

DELIBERATIONS

13. The Chamber recalls Rule 54 of the Rules which 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 of the trial." According to the



jurisprudence of both this Tribunal and the International Criminal Tribunal for the former Yugoslavia (ICTY), an applicant for 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.¹ The Chamber recalls that "subpoenas should not be issued lightly" and that it 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."² In this respect, it may also be considered whether the information sought can reasonably be obtained elsewhere.³

14. After having carefully read the material disclosed by the Prosecution in respect of this witness, the Chamber is satisfied that Madame Kavaruganda holds a special position with respect to the events leading to death of her husband and that she may provide insight into the activities of her husband within the framework of the implementation of the Arusha Accords. The Chamber notes paragraphs 48 and 50 of the Amended Indictment of 23 August 2004 which refer to the killing of Joseph Kavaruganda and the alleged obstruction of the implementation of the Arusha Accords. The Chamber further notes paragraph 49 of the Indictment which alleges that the *Gendarmerie* was, *inter alia*, responsible for protecting Joseph Kavaruganda. Finally, the Chamber notes paragraph 22 of the Indictment which describes Major Mpiranya as a co-conspirator of the accused persons. Based on the aforementioned, the Chamber concludes that Madame Kavaruganda's testimony can materially assist the Prosecution case.

15. The Chamber is further satisfied that Madame Kavaruganda's evidence cannot be reasonably obtained elsewhere and, based on the material annexed to the Motion, that the Prosecution has made reasonable efforts to secure her voluntary cooperation, without success.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Registrar to prepare a subpoena, in accordance with this decision, and to serve it, through appropriate channels in the Kingdom of Belgium, pursuant to Article 28 of the Statute, to Annonciata Kavaruganda, requiring her appearance before this Chamber to testify in the present case;

DIRECTS the Registry to communicate with the Prosecutor with respect to the timeframe within which the evidence of the witness would be heard.

¹ *Prosecutor v. Bagosora*, Case No. ICTR-98-41 T, Decision on Request for a Subpoena, 11 September 2006, para. 5; *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para.10; *Prosecutor v. Karemera*, Case No. ICTR-9-44-T, Decision on Nzirorera's *Ex Parte* motion for order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006, para 9.

² *Prosecutor v. Halilovic*, Case No. IT-01-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras. 6, 7.

³ *Prosecutor v. Bagosara*, Case No. ICTR-98-41 T, Decision on Request for a Subpoena, 11 September 2006, para. 7.



Arusha, 6 October 2006.


Asoka de Silva
Presiding Judge



Taghrid Hikmet
Judge


Seon Ki Park
Judge

[Seal of the Tribunal]