UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 6 November 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No.: ICTR-98-41-T

DECISION ON BAGOSORA REQUEST FOR CERTIFICATION TO APPEAL DECISION ON REQUEST FOR ASSISTANCE UNDER ARTICLE 28

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend

The Defence
Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the "Request for Certification of a Decision of 20 October 2006", filed by the Bagosora Defence on 27 October 2006;

CONSIDERING the Prosecution Response, filed on 27 October 2006;

HEREBY DECIDES the request.

INTRODUCTION

1. The Bagosora Defence requests leave to file an interlocutory appeal against a decision of this Chamber of 20 October 2006 (the "Impugned Decision"), declining to issue a request for cooperation to the Government of France, pursuant to Article 28 of the Statute.[1] The nature of the requested assistance was for the appearance before this Chamber of a military officer to give testimony.

DELIBERATIONS

2. Leave to file an interlocutory appeal of a decision "may" be granted under Rule 73 (B) where it "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings".

(i) Materially advances the proceedings

3. The Defence advances several grounds upon which the Impugned Decision is said to be erroneous, immediate resolution of which would materially advance the proceedings.[2] The Defence contends that the Chamber erred by requiring not only that the information be "relevant to the trial", but also that it be "necessary for a fair determination" of any matter before the Chamber.[3] The jurisprudence concerning the issuance of requests to States under

---

[1] *Bagosora et al*., Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness (TC), 20 October 2006.

[2] *Bagosora et al*., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals (TC), 16 February 2006, para. 4 ("Numerous Trial Chamber decisions – and not only by this Trial Chamber – have applied this concept more generally, and inquired into the basis of the prospective appeal …. It must be "the opinion of the Trial Chamber" that certification could "materially advance the proceedings": in the absence of any reasonably articulated ground of appeal, certification could not materially advance the proceedings. This does not mean, of course, that a Trial Chamber should simply substitute its own opinion for that of the Appeals Chamber; rather, the appropriate inquiry is whether a showing has been made that the appeal could succeed. That threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion").

[3] Motion, paras. 6-7. The Defence refers to footnote 3 of the Impugned Decision, which reads: "Relevance has not always been formulated in exactly the same words from one case to another. Some decisions, particularly where the relevance of the information is obvious, say no more than that the applicant must articulate its 'relevance to the trial'. *Ndindiliyimana et al*., Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute (TC), 13 February 2006, para. 6; *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3. Where relevance is contested, however, it has also been required that the

Article 28 does not, according to the Defence, support such a standard. The Chamber failed to appreciate a distinction between a mere request for cooperation under Article 28, sought by the Bagosora Defence in this case, and a binding order to a State, which might arguably be subject to the higher standard.[4] Furthermore, the Impugned Decision is said to create an inappropriate distinction between the standard for admission of evidence, which is relevance alone, and the standard for requests for the production of evidence.[5]

4. The Impugned Decision explicitly acknowledges that the relevance of information sought from a State has been accepted on some occasions as sufficient for the issuance of a request under Article 28, without the need for also showing that it is "necessary for a fair determination" of an issue before the Chamber.[6] Indeed, in 2004 this Chamber made such a request in respect of this very witness.[7] On that occasion, however, the Defence sought only an informal meeting with the prospective witness, to ascertain the extent of his knowledge. The question before the Chamber in the Impugned Decision, however, was not whether the "necessary for a fair determination" standard is applicable to any and all Article 28 requests, but whether it applies to the specific request for the personal appearance of the state official before the Chamber to give testimony.

5. The Defence argues that the standard for the issuance of a subpoena is inapposite as it concerns a binding order, whereas the Defence in the present case sought only a non-binding request under Article 28. This purported distinction between binding and non-binding requests is unsustainable. Article 28 does not contemplate non-binding orders to States. Article 28 (2) provides that "States *shall comply* without undue delay with any request for assistance or an order issued by a Trial Chamber…" (emphasis added). Whether the term "request" or "order" is used is immaterial to its binding character. Furthermore, the content of the specific requests by the Defence were sought as a specific remedy for the alleged non-compliance of the State.[8] The intervention of the Chamber would serve no purpose if its requests to States pursuant to Article 28 were not binding. Furthermore, nothing short of the actual appearance of the witness before the Chamber would have complied with the requests as proposed by the Defence. Accordingly, no basis has been presented to believe that the Chamber's consideration of the standard for the issuance of subpoenas was misplaced or erroneous.

---

information be 'relevant to any matter in issue before the Judge or Trial Chamber', and that the information be 'necessary for a fair determination' of that matter. *Karemera et al*., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation (TC), 19 April 2005, para. 8. This language mirrors the standard codified in Rule 54 *bis* of the ICTY Rules which deals specifically with the conditions and modalities for issuing orders to States under Article 29 of the ICTY Statute. The Chamber considers this to be the appropriate standard. The limitation that the information be 'necessary for a fair determination' of a question before the Chamber reflects a sensible concern that States and international organization not be burdened with numerous requests for information based on relevance alone, a standard which could potentially cast an unduly broad net. In addition, this is an area where a common standard amongst the international tribunals is desirable."

[4] Motion, paras. 8, 10-19.

[5] *Id*., paras. 8-9.

[6] Impugned Decision, fn. 3.

[7] *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004.

[8] The original request was reformulated in a submission of. 16 October 2006, to: "Requérir la coopération de la République française afin qu'elle adhere aux modalités proposés par la défense de Colonel Bagosora et qu'elle facilite la comparution du [témoin] devant la Chambre de céans avant … [le] 13 décembre 2006". Mémoire additionel, etc., filed on 16 October 2006. The Chamber was also asked to "Déclarer applicables à l'audition du [témoin] devant la Chambre de céans les modalités proposés par la défense". In several respects, those proposed modalities conflicted with those proposed by the French authorities.

6. The standard for the admission of evidence does not dictate the standard for the issuance of requests or orders for the production of evidence, as is amply demonstrated by the conditions for the issuance of a subpoena.[9] This consequence of the Impugned Decision does not constitute a ground to believe that it is erroneous.

7. The Defence also complains that the Chamber improperly relied on a *procès-verbal* of a hearing of the witness before the *Tribunal de Grande Instance de Paris*, arguing that this document is "defence privileged work product", and that it had been inappropriately transmitted by the Registry to the Chamber. Rule 97 of the Rules of Procedure and Evidence prescribes that "[a]ll communications between lawyer and client shall be regarded as privileged", subject to two conditions which are not relevant here. The document in question does not reflect any private communications between any lawyer and his or her client. Rather, it describes a formal hearing of a prospective witness before a French judicial officer, in the presence of counsel for the Accused.[10] It was entirely appropriate in these circumstances for the Registry to inform the Chamber of its efforts to secure the witness's testimony, including the results of the formal hearing of the witness. No impropriety or breach of privilege has been established in relation to the *procès-verbal* which could constitute a viable ground of appeal.

(ii) Fair and expeditious proceedings

8. Even assuming that the appeal would materially advance the proceedings, neither the fair and expeditious conduct of proceedings nor the outcome of the trial is affected by the absence of this witness. The *procès-verbal* shows that the witness has only limited knowledge of the Accused, and little or no recollection of his responses or attitude on those few occasions when they did meet. The Defence has failed to identify more general elements of the witness's prospective testimony which are of such significance as to affect the fair and expeditious conduct of proceedings or their outcome. Furthermore, evidence which does not concern the acts and conduct of the Accused may, in appropriate circumstances, be placed before the court by way of written statements.[11] The witness's appearance before the Chamber has not, therefore, been shown to be of sufficient importance to significantly affect the fair and expeditious conduct of the trial or its outcome.

[9] *Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7.
[10] The Chamber's first Article 28 decision in respect of this witness requested the Government of France to facilitate an informal meeting. *Bagosora et al.*, Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004. On 16 December 2005, the Bagosora Defence filed its motion for the appearance of the witness. Consideration of that motion was deferred after representations from the Bagosora Defence that progress was being made, with the assistance of the Registry, to secure the witness's appearance without the need for an Article 28 request. *E.g.* T. 5 July 2006 p. 2.
[11] Impugned Decision, para. 5.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 November 2006

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]