



ICTR-98-41-T  
23-05-2007  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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(38295-38291)

**TRIAL CHAMBER I**

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

**Registrar:** Adama Dieng

**Date:** 23 May 2007

**THE PROSECUTOR**

**v.**

**Théoneste BAGOSORA**  
**Gratien KABILIGI**  
**Aloys NTABAKUZE**  
**Anatole NSENGIYUMVA**

*Case No. ICTR-98-41-T*

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**DECISION ON BAGOSORA REQUEST FOR RULING  
OR CERTIFICATION CONCERNING SUBPOENA ISSUED  
TO GENERAL MARCEL GATSINZI**

**The Prosecution**

Barbara Mulvaney  
Drew White  
Christine Graham  
Rashid Rashid  
Kartik Murukutla

**The Defence**

Raphaël Constant  
Allison Turner  
Paul Skolnik  
Frédéric Hivon  
Peter Erlinder  
Marc Nerenberg  
Kennedy Ogetto  
Gershom Otachi Bw'Omanwa

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**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 "Bagosora Defence Application for Ruling on 10 October 2006 Motion and Alternative Request for Certification", filed on 9 May 2007;

**CONSIDERING** the Prosecution response, filed on 14 May 2007;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. At the request of the Bagosora Defence, the Chamber issued a subpoena to General Marcel Gatsinzi, the current Minister of Defence of the Government of Rwanda, on 11 September 2006. In its decision, the Chamber noted that it does not take the issuance of a subpoena to a serving Minister of State lightly but that the Defence had demonstrated that General Gatsinzi may have relevant and material information to the Accused's defence. The Chamber instructed the Registry to communicate the subpoena to General Gatsinzi through appropriate diplomatic channels.<sup>1</sup>

2. On 5 October 2006, the Registrar filed submissions with the Chamber concerning the outstanding subpoena for General Gatsinzi and transmitting copies of the responses of the Prosecutor General of Rwanda and of General Gatsinzi himself. The Registry submitted that General Gatsinzi was prepared to testify before the Tribunal under two conditions: (i) that he be called by the Chamber and not by the Bagosora Defence and (ii) that he be allowed to testify by video link from Kigali due to his demanding professional schedule.<sup>2</sup>

3. The Bagosora Defence thereafter filed a motion in response to the Registrar's submissions, noting its disagreement with the conditions requested by General Gatsinzi and vigorously arguing that the conditions were unjustified. The Defence asked the Chamber to issue a ruling to this effect and to request that the Rwandan Government take all necessary measures to ensure the appearance of the witness.<sup>3</sup>

4. On 8 December 2006, the Chamber stated that it had no intention of calling General Gatsinzi as a Chamber witness.<sup>4</sup> During the status conference on 12 December 2006, the Bagosora Defence raised the issue of the outstanding subpoena and requested that the Chamber direct the Registry to inform General Gatsinzi that his requested conditions are unacceptable to the Chamber and that he must comply with the subpoena. The Prosecution argued that the subpoena continued to be in full force and that no further action was required by the Chamber. The three other Defence teams reiterated their opposition to Gatsinzi

<sup>1</sup> *Bagosora et al.*, Decision on Request for a Subpoena (TC), 11 September 2006, in particular paras. 6-8. The Chamber notes that the Ntabakuze and Nsengiyumva Defence teams opposed the request, arguing that the witness would provide unreliable testimony favourable to the Prosecution.

<sup>2</sup> *Bagosora et al.*, The Registrar's Submissions Regarding the Trial Chamber's Decision on Request for a Subpoena of 11 September 2006, filed on 5 October 2006, paras. 6-7.

<sup>3</sup> *Bagosora et al.*, Mémoire de la défense de Bagosora en réponse à The Registrar's Submissions Regarding the Trial Chamber's Decision on Request for a Subpoena of 11 September 2006 déposés le 5 octobre 2006, filed on 10 October 2006, paras. 20-34, 58-60.

<sup>4</sup> T. 8 December 2006 p. 5.

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testifying before the Chamber. After hearing arguments by the parties, the Chamber agreed to clarify its position in the form of a decision or a memorandum to the Registry.<sup>5</sup> The Bagosora Defence raised the matter again at a status conference on 19 January 2007, at which time the Chamber asserted its intention to issue a decision in writing.<sup>6</sup> The Chamber issued its decision declining to take further action on 2 May 2007.<sup>7</sup>

## **SUBMISSIONS**

5. The Bagosora Defence now files a motion seeking clarification as to whether the Chamber has issued a definitive ruling on the outstanding Gatsinzi subpoena. It argues that the Chamber's decision of 2 May 2007 did not constitute a "judicial decision" and requests that the Chamber immediately rule on the matter. It accuses the Chamber of inertia for not pursuing the appearance of this witness more rigorously through its statutory authority. In the alternative, if the Chamber ruled on the matter in its 2 May 2007 decision, the Defence seeks certification to appeal that decision.<sup>8</sup>

6. The Prosecution asserts that the Defence is responsible for the non-appearance of the witness and that its request for further judicial action by the Chamber is merely an attempt to be relieved of the "burden of having to live with the consequences of the choice that was made" not to accept the conditions requested by General Gatsinzi for his testimony. It further argues that the Defence claim that the witness is central to the Accused's defence is speculative given that the Defence has never spoken to, interviewed, or taken a statement from the potential witness.<sup>9</sup>

## **DELIBERATIONS**

### *(i) Defence Request for Clarification*

7. The Chamber's decision of 2 May 2007 did, in fact, dispose of all outstanding issues relating to the appearance of General Gatsinzi. It held:

The Chamber has already made its position clear. On 8 December 2006, the Chamber stated that it had no intention of calling General Gatsinzi as a Chamber witness.<sup>10</sup> At that time, the Chamber further noted that the Defence had made no request for the witness to appear by video-link.<sup>11</sup> The Defence had the opportunity to make such an application but chose not to do so. This means that the Chamber's initial decision of 11 September 2006 to issue the subpoena remained in force but that the conditions stipulated by the witness led to his non-appearance. Meanwhile, all parties completed the presentation of evidence on 12 December 2006, with the exception of three Kabiligi witnesses who testified in the week from 15 January 2007. Other than noting that General Gatsinzi was unwilling to testify as a Bagosora witness in Arusha, the Chamber can do nothing more at this time.<sup>12</sup>

<sup>5</sup> T. 12 December 2006 pp. 13-15.

<sup>6</sup> T. 19 January 2007 pp. 17-18.

<sup>7</sup> *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007.

<sup>8</sup> Motion, paras. 6-9, 12, 66-73, 83-93.

<sup>9</sup> Response, paras. 2, 3, 7.

<sup>10</sup> T. 8 December 2006 p. 5 ("Mr. President: Mr. Constant, the Chamber has no intention to call Mr. Gatsinzi as a Chamber witness").

<sup>11</sup> T. 8 December 2006 p. 4 ("Mr. President: The Chamber has issued a subpoena. Mr. Gatsinzi has said that he's only willing to come and testify by video link. There is no request for video link").

<sup>12</sup> *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007, para. 7 (internal footnote references altered).

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8. Despite the Defence's challenge to and detailed analysis of this paragraph in its motion, the Chamber sees no need to delve into the semantics of the language used in its decision or to provide additional reasoning for its ruling. The Chamber issued the requested subpoena and received the Registrar's submissions concerning the appearance of the witness. On 8 December 2006, the Chamber stated its intention not to call the witness and made clear that the initial subpoena remained in force. Following subsequent reflection, the Chamber decided that the only clarification needed was that given in its 2 May 2007 decision.

*(ii) Defence Request for Certification*

9. Leave to appeal a Trial Chamber decision may, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence, be granted where it "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

10. The Defence argues that the Chamber has committed both an error of law and an error of fact insofar as it has concluded that there is nothing more it can do. In the Defence's view, this position overlooks the Chamber's statutory authority to enforce the subpoena for General Gatsinzi. The Chamber's refusal to take additional enforcement measures is alleged to be "so unfair and unreasonable that it constitutes an abuse of judicial discretion".<sup>13</sup>

11. The Chamber finds that the Defence has failed to satisfy the criteria for obtaining certification. Rule 89 (C) provides that the Chamber "may admit any relevant evidence which it deems to have probative value". The Defence asserts that General Gatsinzi is a key witness. In its decision issuing the subpoena, the Chamber acknowledged that the witness may have relevant and material information to provide. However, Rule 85 also allows the Trial Chamber to limit the presentation of evidence "in the interests of justice". Here, the parties and the Tribunal have made diligent efforts to secure the appearance of this witness. The witness declined to appear and set forth conditions under which he was willing to testify, which the Bagosora Defence rejected. At this late stage, given the conclusion of evidentiary proceedings on 18 January 2007, the Chamber finds it in the interests of justice to conclude this trial and to proceed with closing arguments scheduled for 28 May to 1 June 2007. As the presentation and admission of evidence is a matter within the discretion of the Trial Chamber, the Chamber finds that a decision by the Appeals Chamber on whether further steps should have been taken to enforce the subpoena is not an issue that would affect the fair and expeditious conduct of the proceedings or the outcome of trial or an issue whose resolution would materially advance the proceedings.

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<sup>13</sup> Motion, paras. 108-109.


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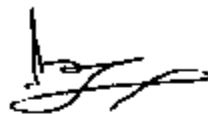
**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the motion.

Arusha, 23 May 2007



Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]

