



ICTR-00-55c-T  
25-11-2010  
(4251 - 4248)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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UNITED  
NATIONS  
NATIONS OR: ENG  
UNIES

TRIAL CHAMBER III

**Before Judges:** Lee Gacuiga Muthoga, *Presiding*  
Seon Ki Park  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 25 November 2010

THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

*CASE NO. ICTR-2000-55C-PT*

JUDICIAL RECORDS/ARCHIVE  
2010 NOV 25 P 11: 46

DECISION ON DEFENCE EXTREMELY URGENT PRE-TRIAL MOTION FOR  
ISSUANCE OF THREE SUBPOENAS

*Rule 54 of the Rules of Procedure and Evidence*

**Office of the Prosecution:**

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## INTRODUCTION

1. The trial in this case is scheduled to commence on 17 January 2010.<sup>1</sup>
2. On 18 November 2010, the Defence filed an extremely urgent motion requesting that the Chamber issue a subpoena to each of proposed Prosecution Witnesses BXF, BZC and ZBJ with respect to particular documents that the Defence submit are relevant to the evidence they are to give at trial.<sup>2</sup> The Defence further submits that the Prosecution has “refused to promise to obtain” the documents it requests and the Prosecution has failed to help the Defence and as such the Defence’s motion is a last resort.<sup>3</sup>
3. On 22 November 2010, the Prosecution responded to the Defence Motion noting that the Defence filed its motion only two days after the Prosecution’s reply to the Defence’s letter requesting documents outlined in its motion.<sup>4</sup> The Prosecution notes that, due to the short timeframe in which the Defence has requested the documents in question, it has not had time to make the relevant enquires to the relevant persons or authorities.<sup>5</sup> The Prosecution submits that the Defence should be specific with its request for particular documents, rather than attempting a “fishing” expedition with “whole categories of information without use or purpose.”<sup>6</sup>
4. On 22 November 2010, the Defence filed its reply to the Prosecution’s response, in which it clarifies its request; it is requesting files in the possession of witnesses or their attorney(s) and not copies of court files from the relevant authorities.<sup>7</sup>

## DELIBERATIONS

5. Rule 54 of the Rules allows, at the request of either party or *proprio motu*, a Judge or a Trial Chamber to issue such orders or subpoenas (among other things) “as may be necessary for the ... preparation or conduct of the trial.” The Defence requests that the Chamber to issue three subpoenas with respect to documents in the possession of Prosecution Witnesses BXF, BZC and ZBJ.<sup>8</sup>
6. The Chamber recalls that the Appeals Chamber has stated that there are two criteria which must be satisfied prior to the Chamber issuing a subpoena.<sup>9</sup> The Trial Chamber is required to consider; firstly, whether the information to be subpoenaed is necessary under Rule 54 of the Rules of Procedure and Evidence (“the Rules”), which has been described as whether the information “will materially assist the applicant with respect to clearly identified issues in the forthcoming trial[;]”<sup>10</sup> and secondly, whether the required information is

<sup>1</sup> Scheduling Order (TC), 3 November 2010, Order II.

<sup>2</sup> Extremely Urgent Pre-Trial Motion for Issuance of Three Subpoenas (Confidential), filed 18 November 2010 (“Defence Motion”).

<sup>3</sup> Defence Motion, paras. 24, 26-27.

<sup>4</sup> Reply to Prosecution Response to the Extremely Urgent Pre-Trial Motion for Issuance of Three Subpoenas (Confidential), filed 22 November 2010 (“Prosecution Response”).

<sup>5</sup> Prosecution Response, para. 11.

<sup>6</sup> Prosecution Response, para. 8.

<sup>7</sup> Reply to Prosecution Response to the Extremely Urgent Pre-Trial Motion for Issuance of Three Subpoenas (Confidential), filed 22 November 2010 (“Defence Reply”).

<sup>8</sup> Defence Motion, paras. 35-38; Defence Reply, para. 3.

<sup>9</sup> *Prosecutor v Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, paras. 10-11; *Prosecutor v Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, paras. 5-7.

<sup>10</sup> *Halilovic*, Decision on the Issuance of Subpoenas (AC), para. 6; *Krstic*, Decision on Application for Subpoenas (AC), para. 10.

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obtainable through other means.<sup>11</sup> Further, the Chamber recalls that the Appeals Chamber has highlighted that “[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.”<sup>12</sup>

7. The Chamber will consider the second requirement first. The Defence has noted that it sent a letter to the Prosecution on 15 November 2010, which requested that the Prosecution obtain copies of documents pertaining to Prosecution Witnesses BXF, BZC and ZBJ. The Prosecution replied by letter to the Defence the next day, stating that the requested documents were not in its possession.<sup>13</sup> On 17 November 2010 the Defence filed the motion that is the subject of this decision, requesting these documents be subpoenaed. In its response to the Defence Motion, the Prosecution has stated that it has not yet had the opportunity to request to these documents from those who may have them in their possession.<sup>14</sup> Further, the Prosecution has stated that it is likely that there may be an avenue to obtain the requested documents.<sup>15</sup>

8. Given the extremely short timeframe in which this request has been made and that the Prosecution, by its own admission, has not made any enquires at all with respect to these documents, the Chamber finds that, at this early stage of enquiry, the information sought may be available through other means than by the issuance of three subpoenas by the Chamber. Further, the Defence has in no way shown that the witnesses themselves have refused to provide these documents, or in fact whether the Defence has exhausted all other reasonable means of enquiry. The Chamber therefore finds that the second criterion for the issuing of a subpoena has not been satisfied. Given that both criteria need to be satisfied in order for the Chamber to issue a subpoena, to the Chamber need not consider the first criterion.

9. The Chamber therefore denies the Defence request. The Chamber further notes that, should the Defence wish to request a subpoena as a remedy in the future, it should genuinely be the “last resort”.

10. Notwithstanding that the Chamber has denied the Defence request for a subpoena, the Chamber directs the Prosecution to make all reasonable enquires as to whether proposed Prosecution Witnesses BXF, BZC and ZBJ are in possession of documents in the form of immigration or asylum applications that describe the events about which these witnesses are proposed to testify. The Chamber has narrowed the class of documents that the Defence initially requested in its motion to the documents that it deems may reasonably be in the possession of the witnesses. The Prosecution is to keep the Defence informed of the progress of its enquiries. If the Prosecution comes into possession of the requested documents, they should be immediately disclosed to the Defence in accordance with Rule 66 of the Rules.

11. Further, the Chamber instructs the Prosecution to place these witnesses, if they are in fact called by the Prosecution to give evidence, towards the end of the list of appearance of witnesses.

<sup>11</sup> *Halilovic*, Decision on the Issuance of Subpoenas (AC), para. 7.

<sup>12</sup> *Prosecutor v Brdanin and Talic*, Case No. IT-98-33-AR73.9, Decision on Interlocutory Appeal (AC), 11 December 2002, para. 31, cited in *Halilovic*, Decision on the Issuance of Subpoenas (AC), para. 6.

<sup>13</sup> Defence Motion, Annexes 2A, 2B.

<sup>14</sup> Prosecution Response, para. 11.

<sup>15</sup> Prosecution Response, para. 12.



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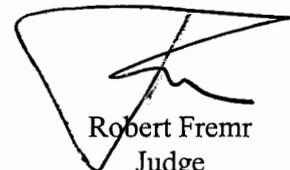
**FOR THESE REASONS, THE CHAMBER**

- I. **DENIES** the Defence request for issuance of three subpoenas;
- II. **DIRECTS** the Prosecution to make all reasonable enquires into whether proposed Witnesses BXF, BZC and ZBJ are in possession of documents in the form of immigration or asylum applications that describe the events that these witnesses are proposed to testify; and
- III. **INSTRUCTS** the Prosecution to place proposed Witnesses BXF, BZC and ZBJ towards the end of its order of appearance of witnesses.

Arusha, 25 November 2010, done in English,

  
Lee Gacunga Muthoga  
Presiding Judge

  
Seon Ki Park  
Judge

  
Robert Fremr  
Judge

[Seal of the Tribunal]

