



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-00-55C-PT

14-01-2011

(5639-5633)

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OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 14 January 2011

THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

2011 JAN 14 P 10:10
JUDICIAL SECRETARIAT
ICTR

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

Office of the Prosecution:

Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani
Astou Mbow

Defence Counsel for Ildephonse Nizeyimana:

John Philpot
Cainnech Lussiaa-Berdou
Myriam Bouazdi

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INTRODUCTION

1. The trial in this case is scheduled to commence on 17 January 2011.¹
2. On 4 January 2011, the Defence team of the Accused, Ildéphonse Nizeyimana, ("Defence") filed, confidentially, the "Urgent Pre-Trial Motion for Issuance of Three Subpoenas" ("Motion"). In this motion, the Defence requests that the Chamber order three witnesses to provide to the Defence, via the Registry, a number of documents pertaining to these witnesses' immigration arrangements ("Documents").² The Defence notes that it has requested this relief because the Prosecution has failed to obtain or commit to obtaining the Documents, and because the Documents' confidential status prevents the Defence from asking for them from relevant national authorities.³
3. The Office of the Prosecutor ("Prosecution") filed a response on 10 January 2011,⁴ submitting that the Motion repeats a prior Defence motion requesting that three subpoenas be issued for the same reasons.⁵ The Prosecution submits that since the 25 November 2010 Decision, it has taken steps to obtain the Documents on behalf of the Defence, and disputes allegations of non-cooperation.⁶ In addition, the Prosecution alleges that "[w]itness [i]ntimidation" by the Defence has hindered efforts to obtain information from the witness affected.⁷
4. On 13 January 2011, the Defence filed its confidential "Reply to Prosecution Response to Urgent Pre-Trial Motion for Issuance of Three Subpoenas" ("Defence Reply"). The Defence submits that the Prosecution made defamatory statements about them when referring to the Defence's contact with a particular witness.⁸ The Defence advises that they received a message to call the witness in question, did so around 2 December 2010 and had, on that day, a "cordial conversation" with the witness.⁹

¹ Scheduling Order (TC), 3 November 2010, Order II.

² Motion, paras. 39-42.

³ Motion, paras. 26-31.

⁴ Prosecutor's Response to Defence's Urgent Pre-Trial Motion for Issuance of Three Subpoenas (Confidential), filed 10 January 2011 ("Response").

⁵ Response, paras. 3-6, *citing* "Decision on Defence Extremely Urgent Pre-Trial Motion for Issuance of Three Subpoenas", filed 25 November 2010 ("25 November 2010 Decision").

⁶ Response, paras. 10-14, 19-20.

⁷ Response, p. 3. *See also* Response, paras. 15-18.

⁸ Defence Reply, para. 3.

⁹ Defence Reply, para. 5, *see also* Defence Reply, para. 4.



DELIBERATIONS

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Preliminary Matter

5. As a preliminary matter, the Chamber notes that each of the relevant witnesses have been contacted by the Witness and Victims Support Section ("WVSS") and declined to meet with the Defence.¹⁰

Request for Subpoenas

6. The Chamber recalls the law regarding the issuance of subpoenas, as outlined in its 25 November 2010 Decision:

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.

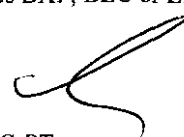
6. The Chamber recalls that the Appeals Chamber has stated that there are two criteria which must be satisfied prior to the Chamber issuing a subpoena. The Trial Chamber is required to consider; firstly, whether the information to be subpoenaed is necessary under Rule 54 of the Rules of Procedure and 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[;]" and secondly, whether the required information is obtainable through other means. 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."¹¹

7. The Chamber recalls the Defence's submission that since the issuance of the Chamber's 25 November 2010 Decision, no progress has been made in obtaining the Documents. The Prosecution submits that on 30 November 2010 and 1 December 2010, it received confirmation from Witnesses BZC and ZBJ that they previously had the Documents in their possession but are no longer in possession of them. The Prosecution further submits that both of these witnesses have contacted their legal representatives to inquire about the status of the Documents. The Prosecution advises that the same situation applies to Witness BXF.¹² Relying on these submissions by the Prosecution, the Chamber finds that the

¹⁰ Email from Registry to Nizeyimana Parties dated 10 January 2011 attaching signed form by Witness BXF, dated 7 December 2010, declining their consent to be contacted by the Defence; Email from Registry to Nizeyimana Parties dated 17 December 2010 attaching signed form by Witness ZBJ, dated 7 December 2010, declining their consent to be contacted by the Defence; Email from Registry to Nizeyimana Parties dated 7 December 2010 attaching signed form by Witness BZC, dated 6 December 2010, declining their consent to be contacted by the Defence. The Chamber notes that WVSS undertook this action after the Chamber ordered the Prosecution to make all reasonable enquiries as to whether Witnesses BXF, BZC or ZBJ had relevant documents in their possession. See 25 November 2010 Decision, p. 4.

¹¹ Internal citations omitted.

¹² Response, paras. 10-14.



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Documents may be obtainable by alternative means and thus the criteria for issuance of a subpoena have not been met. The Chamber therefore denies the Defence Motion.

8. The Chamber is concerned that the Defence is being vexatious in filing the Motion and warns the Defence to carefully assess whether alternative avenues for obtaining the Documents have been exhausted before bringing another motion of this kind.

Allegation by Prosecution of Witness Intimidation by the Defence

9. Finally, the Chamber has grave concerns regarding the Prosecution's allegation that a member of the Defence attempted to contact Witness BZC and that, having failed to speak to the witness, posed questions to the witness's mother.¹³ This allegation should not be made lightly. Should the Prosecution wish to pursue this matter further, it is invited to file a separate motion. In any event, the Chamber underscores to the parties the importance of respecting the rules set out by the Chamber with respect to interactions with protected witnesses.



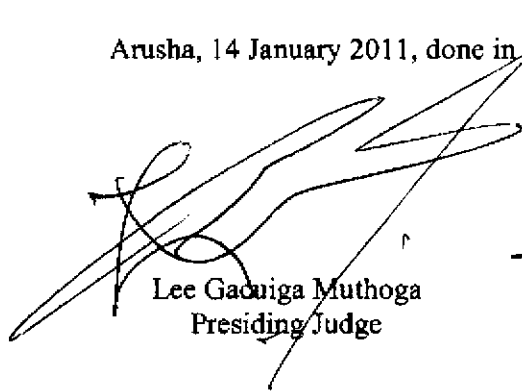
¹³ Response, para. 15.

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FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

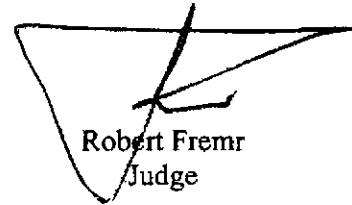
Arusha, 14 January 2011, done in English.



Lee Gaciga Muthoga
Presiding Judge



Seon Ki Park
Judge



Robert Fremr
Judge

