



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 10 May 2011

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Solomy

THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

**DECISION ON NZABONIMANA'S MOTION FOR SUBPOENA, PROTECTIVE
MEASURES AND THE COOPERATION OF FRANCE IN RESPECT OF
PROSPECTIVE WITNESS T171**

(Article 28 of the Statute, Rules 54, 69 (A) and 75 of the Rules of Procedure and Evidence)

Office of the Prosecutor

Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse
Philippe Larochelle

INTRODUCTION

1. On 7 April 2011, the Trial Chamber issued an oral decision wherein it allowed the Defence to call two further alibi witnesses pursuant to Rule 98 of the Rules of Procedure and Evidence ("Rules") during the final scheduled trial session of 3-6 May 2011.¹ The Chamber then ordered the Defence to disclose its proposed alibi witnesses by 21 April 2011.²
2. On 21 April 2011, the Defence sent a correspondence to the Trial Chamber identifying three potential alibi witnesses, one of whom was identified by the pseudonym T171. The Defence further noted it was having difficulties securing the attendance of that witness at trial.³
3. That same day, the Defence filed a motion seeking the Trial Chamber to issue a subpoena and protective measures for witness T171, as well as to order the cooperation of the government of France in executing the desired subpoena ("Motion").⁴
4. On 26 April 2011, the Prosecution filed a response to the Defence Motion ("Response").⁵
5. On 29 April 2011, the Defence filed a reply to the Prosecution Motion ("Reply").⁶
6. On 3 May 2011, the Trial Chamber issued a decision denying a Prosecution request to preclude the alibi witnesses proposed by the Defence from testifying. In that decision, the Chamber noted that "[f]or reasons to be explained in a forthcoming decision, the Trial Chamber does not find that a subpoena for T171 is warranted".⁷ Witness T171 was consequently replaced by a substitute witness identified as T400.⁸
7. On 3-5 May 2011, two additional alibi witnesses testified before the Trial Chamber.⁹

¹ Transcript of Trial Proceedings, 7 April 2011 (English), p. 2, l. 1 – p. 3, l. 25 ("Transcript").

² Transcript, p. 11, ll. 5-7.

³ E-mail from Vincent Courcelle-Labrousse to Trial Chamber dated 21 April 2011.

⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Request for Subpoena, Protective Measures and the Cooperation of France in Respect of [Witness T171], 21 April 2011.

⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Request for Subpoena, Protective Measures and the Cooperation of France in Respect of Witness T171, 26 April 2011.

⁶ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Reply to the Prosecutor's Response to Nzabonimana's Motion for Request for Subpoena, Protective Measures and the Cooperation of France in Respect of Witness T171, 29 April 2011.

⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecution Motion to Order the Defence to Drop Witnesses T171 and T400, 3 May 2011, para. 19 ("Alibi Decision").

⁸ Alibi Decision, paras. 4, 19.

⁹ See generally, Transcript, 3 May 2011 to 5 May 2011.

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SUBMISSIONS OF THE PARTIES

Motion

8. The Defence argues that the Trial Chamber should subpoena witness T171, who, despite the fact that “the Defence has attempted on numerous occasions through phone calls and e-mails, to convince [her] to testify before this Chamber in the Nzabonimana case... simply refuses to come and testify because she fears for her life and for her family’s security”.¹⁰ In support of this argument, the Defence avers that witness T171’s prospective evidence would materially assist the Defence by corroborating the Accused’s alibi that he was present at the French embassy in Kigali between 7 and 12 April 1994.¹¹ The Defence further submits that it has made reasonable attempts to obtain the cooperation of witness T171, to no avail, but submits that a subpoena would effectively secure the witness’ attendance because “[t]he Defence believes that [T171] is a law abiding citizen who will respond to summons, if they are issued through the French government and if she is granted protected witness status”.¹²

Response

9. In its Response, the Prosecution: 1) objects to the issuance of a subpoena “for the reason that [T171] is not within the purview of the two witnesses that were contemplated by the Trial Chamber in its order of 7 April 2011”;¹³ 2) argues that the Defence has not satisfied the requirements for the issuance of a subpoena;¹⁴ and 3) submits that the request for protective measures is “duplicative since such protective measures are already in place”¹⁵ from a prior decision of this Chamber extending protective measures to all potential Defence witnesses.¹⁶
10. On the specific issue of whether the Defence has satisfied the requisite criteria for the issuance of a subpoena, the Prosecution first argues that the anticipated testimony of witness T171 is neither necessary nor appropriate for the conduct and fairness of the trial because the evidence to be offered by T171 is obtainable through other means; namely employees of the French embassy in Kigali in 1994 that the Defence has been making ongoing efforts to secure as witnesses in the present proceedings.¹⁷ The Prosecution further argues that the

¹⁰ Motion, paras. 22-23.

¹¹ Motion, paras. 15-21.

¹² Motion, paras. 22-29.

¹³ Response, paras. 2, 5-17.

¹⁴ Response, paras. 3, 34-45.

¹⁵ Response, para. 4.

¹⁶ Response, paras. 18-28.

¹⁷ Response, paras. 34-43.

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Defence has not adequately demonstrated that a subpoena would ensure witness T171's attendance, as "[t]he Defence's submission that Witness T171 is a law abiding citizen who respond [sic] to the subpoena" amounts to nothing more than "unsubstantiated" conjecture.¹⁸

Reply

11. In its Reply, the Defence: 1) disputes the Prosecution characterisation that witness T171 falls outside the purview of the decision of 7 April 2011;¹⁹ 2) dismisses the precedent advanced by the Prosecution as inapposite;²⁰ and 3) "points out that subpoenas are ordinarily issued to persons who have exhibited unwillingness to testify before a court", meaning that "[t]he argument propounded by the Prosecution that the refusal of T171 to testify before this Chamber should militate against the issuance of a subpoena is... an absurd novelty".²¹

DELIBERATIONS

Applicable Law

12. Rule 54 provides that

[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

The jurisprudence of this Tribunal has established that a Trial Chamber may subpoena a prospective witness when the following cumulative criteria are met: 1) the moving party has made reasonable attempts to obtain the voluntary cooperation of the witness; 2) the prospective witness possesses information which can materially assist the applicant's case; and 3) the witness' expected testimony is necessary and appropriate for the conduct and fairness of the proceedings.²² "Indeed, subpoenas should not be issued lightly",²³ and ought to be issued only if at least reasonably likely to produce the cooperation sought.²⁴

¹⁸ Response, paras. 44-45.

¹⁹ Reply, paras. 6-10.

²⁰ Reply, para. 13.

²¹ Reply, para. 16.

²² See, e.g., *Prosecutor v. Kristić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 10; *Prosecutor v. Bagosora et al.*, ICTR-98-44-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Government of Ghana, 23 June 2004, para. 4; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirodera's Motion for Subpoena to Jean-Marie Vianney Mudahinyuka, 24 March 2009, para. 3 ("Karemera 24 March 2009 Decision").

²³ *Bagosora*, para. 4; *Karemera*, Decision on Nzirodera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3, 12 July 2006, para. 10 ("Karemera 12 July 2006 Decision"); *Prosecutor v. Halilović*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 6.

²⁴ *Karemera* 12 July 2006 Decision, para. 10; *Karemera* 24 March 2009 Decision, para. 4; *Kristić*, para. 12.

Preliminary Matter

13. The Trial Chamber notes that both parties have devoted substantial portions of their submissions to analysing whether witness T171 was envisaged by the Chamber's Rule 98 decision of 7 April 2011, in light of the fact that she was not drawn from a list 31 former employees of the French embassy in Kigali in April 1994 that was disclosed to the Defence by French authorities. Because this matter has been conclusively disposed of in a decision recently issued by this Chamber,²⁵ it shall not be addressed in the ensuing analysis.

Analysis

Whether the Defence has Satisfied the Test for the Issuance of a Subpoena

14. In applying the relevant test for the issuance of a subpoena, it should be noted that the Prosecution does not dispute that the Defence has made reasonable attempts to obtain the voluntary cooperation of witness T171, nor does it argue that her prospective testimony would not materially assist the Defence case. Given the absence of any reason to doubt the Defence's submission that it "has attempted on numerous occasions... to convince [T171] to testify",²⁶ and in light of the longstanding emphasis the Defence has placed on the Accused's alibi, the Trial Chamber likewise finds that these criteria have been satisfied by the Defence.

15. While the Prosecution disputes that witness T171's testimony is necessary and appropriate for the conduct and fairness of trial, this argument relies heavily on the theory that "the Defence has a large pool of witnesses to pick the said two (2) witnesses from" amongst the list of French embassy employees supplied to the Defence. As mentioned above, the Trial Chamber considers this issue to have been exhaustively dealt with in a prior decision, and therefore the Prosecution's present reliance on it must fail.

16. However, as to whether the Defence has demonstrated that a subpoena would secure witness T171's attendance at this trial, the grand sum of the argument in this regard is a single sentence containing the speculative assertion that "[t]he Defence believes that [T171] is a law abiding citizen who will respond to [a] summons".²⁷ When challenged by the Prosecution that this "bald statement in itself is not enough to show that the subpoena will

²⁵ See Alibi Decision, *supra* note 7.

²⁶ Motion, para. 22.

²⁷ Motion, para. 26. (emphasis added)

produce the degree of cooperation that is needed",²⁸ the Defence's reaction is to turn the applicable burden of persuasion on its head, by accusing the Prosecution of "fail[ing] to demonstrate why T171 is unlikely to be unreceptive [sic] to [a] summons".²⁹ Indeed, there is established precedent at this Tribunal that where all available evidence suggests that a "witness is firmly unwilling to cooperate with the Tribunal... it is unlikely that a subpoena will produce the degree of cooperation needed", and thus "[t]here is... no ground for issuing a subpoena".³⁰ For these reasons, the Defence has clearly failed to demonstrate with concrete facts, rather than mere conjecture, why witness T171 would be responsive to a subpoena issued by the Trial Chamber. The Defence request for a subpoena to compel witness T171 to appear before the Chamber in the present proceedings consequently fails.

Requests for Protective Measures and State Cooperation

17. Because the Defence has failed to demonstrate that a subpoena for prospective witness T171 is warranted, its corollary requests for protective measures and state cooperation from France are thus moot.

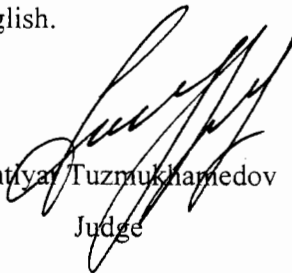
FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

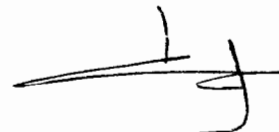
Arusha, 10 May 2011, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



Mparany Rajohnson
Judge



²⁸ Response, para. 45.

²⁹ Reply, para. 14.

³⁰ Karemera 12 July 2006 Decision, para. 12. See also Karemera 24 March 2009 Decision, para. 10.