UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
04-10-2004
(22008-22004)

22008
S. Mussa

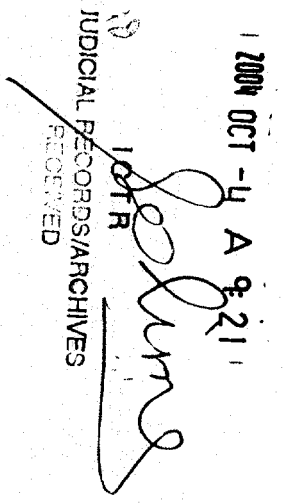
OR: ENG

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 4 October 2004



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON PROSECUTION REQUEST FOR DEPOSITION OF WITNESS BT

The Office of the Prosecutor
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Jean Yaovi Degli
Peter Erlinder
André Tremblay
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

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

BEING SEIZED of the Prosecution motion to allow Witness BT to give testimony by way of deposition, filed on 9 September 2004;

HAVING CONSIDERED the Responses filed by the Defence for Nsengiyumva on 15 September 2004; by the Defence for Ntabakuze on 16 September 2004; by the Defence for Kabiligi on 17 September 2004; and by the Defence for Bagosora on 20 September 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 25 August 2004, the Chamber granted the Prosecution request for the issuance of a subpoena commanding the appearance of Witness BT before the Chamber to give testimony. In its decision, the Chamber considered the alternative requests by the Prosecution that testimony be given by video-link, or by deposition, to be premature.

2. The Chamber has been advised that a subpoena was served on Witness BT on 7 September 2004.

SUBMISSIONS

3. The Prosecution submits that the conditions prescribed in Rule 71 for ordering a deposition, that there be "exceptional circumstances" and that the deposition be "in the interests of justice", are satisfied. The exceptional circumstance is that, notwithstanding the mandatory nature of the subpoena, the witness continues to refuse to travel to Arusha to testify, citing fears that his testimony might lead to reprisals against his family. A deposition would be in the interests of justice because the witness's testimony is directly relevant to paragraphs in the Indictment of the Accused Bagosora, and of the joint Indictment of the Accused Kabiligi and Ntabakuze. Amongst other things, the witness is expected to testify on an alleged order given by the Accused Bagosora to military officers on the morning of 7 April concerning the execution of a plan.

4. The Prosecution proposes that the deposition take place in Belgium under the direction of a Belgian *juge d'instruction*, The Judge would show the prior witness statement to Witness BT, who would then confirm whether its contents are true and correct. Defence Counsel would be present, who could cross-examine the witness on the content of the statement. There would then be an opportunity for re-direct examination in which the Judge "would put questions to the witness at the request of the Prosecution". The deposition would be conducted in French and video-recorded, to save costs, and then later translated into English. As many Defence Counsel will be travelling home through Europe, holding a deposition in Belgium would not occasion great expense.

5. All four Defence teams oppose the motion. No exceptional circumstance has been established, for example, by an affidavit executed by the witness or other person who may attest to the witness's fear of testifying in Arusha. Even if genuinely held, that fear is hardly uncommon, much less exceptional. The very purpose of witness protection measures and of the Witness and Victims Support Section ("the WVSS") of the Registry is to assuage such

fears. Chambers have previously held that the mere reluctance of a witness to testify, grounded on fears and insecurity, is not an exceptional circumstance justifying a deposition. In any event, the basis of the witness's purported fear, that he or his family might suffer reprisals for his testimony, will not be diminished by holding a deposition rather than direct testimony before the Chamber. The appropriate response to a reluctant witness is to issue a subpoena, as has been done in the present case and, if the witness persists in refusing to testify, request coercive measures or sanctions by the state in which the witness resides.

6. The procedure suggested by the Prosecution is not in the interests of justice. Permitting the examination of the witness by deposition denies the Accused of their right to confront the witnesses against them. The proposed procedure, by which the witness would merely affirm that his written statement is true and correct, followed by cross-examination by the Defence, violates previous decisions of the Chamber which require that direct testimony be given orally unless Rule 92*bis* applies. In any event, the Prosecution has not established that Belgian law permits cross-examination at a deposition presided over by a Belgian *juge d'instruction*, as proposed. The Prosecution exaggerates the importance of Witness BT's testimony which merely repeats that of Witness Reyntjens. On the other hand, eyewitness testimony which incriminates an Accused is of such importance that it ought to be heard by the Chamber directly, which may then observe the witness's demeanour and pose questions. The Defence further argues that as the preparations for the Defence case are about to begin, many Defence Counsel may need to remain in Arusha for some period after the end of the current session. Holding a deposition in Belgium would, contrary to the Prosecution's submissions, occasion great expense. The proposal to hold the deposition exclusively in French would disadvantage English-speaking Defence counsel and might lead to inaccuracies in the event that the witness wishes to refer to Kinyarwanda words.

DELIBERATIONS

7. Rule 71 provides, in relevant part, that:

> (A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint for that purpose, a Presiding Officer.
>
> (B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the witness whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.
>
> ...
>
> (E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. He shall transmit the record to the Chamber.

The exceptional nature of depositions is underlined by Rule 90, "Testimony of Witnesses":

> (A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

The Trial Chamber is vested with a discretion to order a deposition only where there are exceptional circumstances *and* the deposition would be in the interests of justice.

8. The Chamber examines first whether "exceptional circumstances" exist, as required by Rule 71 (A), to justify the taking of a deposition. Past decisions of this Tribunal have recognized that physical infirmity caused by age or ill-health, which makes travel to the Tribunal difficult or impossible, may constitute an exceptional circumstance justifying the taking of a deposition.[1] The Prosecution here claims that the exceptional circumstance is the witness's refusal to testify at the Tribunal, notwithstanding the issuance of a subpoena, because of security fears. The Chamber observes that applications for depositions based exclusively on a witness's security concerns have been consistently denied. In so doing, Chambers have frequently emphasized that the applicant must exhaust all possible methods of reassuring and compelling the prospective witness to testify at the Tribunal, including by seeking special protective measures.[2] Chambers have, for example, granted more robust protective measures for witnesses who face particularly acute security problems such as, for example, permitting testimony to be given by audio-video transmission from a remote location.[3] Based on the information before it, the Chamber is not of the view that exceptional circumstances exist justifying the taking of a deposition of Witness BT.

9. Even assuming that exceptional circumstances were to exist, the Chamber is not persuaded that a deposition would be in the interests of justice. The content of the witness's testimony is, according to the Prosecution's submissions, highly incriminating and appears to be the only direct evidence of this event. The witness's credibility is, accordingly, of particular significance and should be tested before the Chamber, which can then directly observe the witness's demeanour.[4]

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[1] *Nahimana et al.*, Decision on the Defence Request to Hear the Evidence of Witness Y By Deposition (TC), 10 April 2003 ("Nahimana Decision"), para. 8 ("the witness is in poor health, as confirmed by a medical certificate. The Chamber accepts that he can manage a short flight but not a long travel to Arusha"); *Bagosora et al.*, Decision on Prosecutor's Motion for Deposition of Witness ON (TC), 5 December 2001, para. 12 ("The Chamber accepts that the advanced age, frailty, and poor health of a the witness constitute an exceptional circumstance"); *Simba*, Decision on the Defence's Extremely Urgent Motion for a Deposition (TC), 11 March 2004, para. 7 ("The rapidly deteriorating health of the witness, as attested by Defence Counsel and the witness himself, constitutes, in the present case, an exceptional circumstance justifying the taking of a deposition"); *Muvunyi et al.*, Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX (TC), 11 November 2003, para. 10 ("the Chamber considers that Witness QX's age [82 years old] coupled with his critical state of health, constitutes exceptional circumstances within the meaning of Rule 71").

[2] *Semanza*, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure (TC), 20 October 2000, para 27 ("The Tribunal provides protection to witnesses for purposes of having their testimony in court, not by deposition ... The [WVSS] exists exactly to assuage the fears of would-be witnesses, and it could bring the subjects of the sought depositions to the Tribunal"); *Simba*, Decision on Extremely Urgent Defence Motion for the Deposition of Alibi Witnesses (TC), 14 June 2004, para. 9 ("One witness has raised security concerns if s/he testifies before the Tribunal, as the proceedings are not closed, and his/her name will be revealed. However, these concerns would be addressed if protective measures were granted ... The security concerns raised do not explain why the witnesses could not come to Arusha as protected witnesses, whose identities would not be revealed to the public"); Nahimana Decision, para. 8 ("The Chamber notes that Witness Y is very concerned about his safety. In the case of Witness X, who held a similar view, the Chamber instructed the Registry (WVSS) to clarify whether that witness would be willing to testify in Arusha if particularly stringent security measures were adopted. The Chamber would have made a similar decision in relation to Witness Y if his reluctance to testify at the seat of the Tribunal had been based on security concerns only"); *Niyitegeka*, Decision on the Prosecutor's Amended Extremely Urgent Motion for the Deposition of a Detained Witness Pursuant to Rule 71 (TC), 4 October 2002 (*Niyitegeka* Decision), para. 5 ("the Chamber is not convinced that the Prosecution has exhausted all efforts to secure the attendance of the witness").

[3] *Nahimana et al.*, Decision on Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures (TC), 14 September 2001, para. 33; *Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003, para. 10. See generally *Tadić*, Decision on Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link (TC) 25 June 1996.

[4] *Niyitegeka* Decision, para. 5.

FOR THE ABOVE REASONS, THE CHAMBER 22004

DENIES the motion.

Arusha, 4 October 2004

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]