



UNITED NATIONS
STATUTE

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-01-70-T
21-09-2007

(3341-3337)

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 21 September 2007

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-T

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**DECISION ON DEFENCE MOTION FOR SUBPOENA AND
TRANSFER OF DETAINED WITNESS SJA**

Office of the Prosecutor:

Mr William T. Egbe
Mr Sulaiman Khan
Ms Veronic Wright
Mr Patrick Gabaake
Mr Disengi Mugoyo
Ms Amina Ibrahim

Counsel for the Defence:

Ms Aïcha Condé
Ms Allison Turner

[Signature]

INTRODUCTION

1. The trial against Emmanuel Rukundo commenced on 15 November 2006. The Prosecution closed its case on 12 March 2007. The Defence commenced its case on 9 July 2007.
2. On 5 September 2007, the Defence filed the present motion¹ confidentially, requesting the Chamber to issue a subpoena to compel Witness SJA to testify before the Chamber. The Defence further requests the Chamber to issue an order pursuant to Rule 90bis of the Rules of Procedure and Evidence to transfer Witness SJA, who is presently detained in Rwanda, to the Tribunal to facilitate his testimony. In support of its Motion, the Defence provides, by way of Annexes, its requests for authorisation to meet the detained witness in Rwanda and the related permission from the Rwandan authorities. On 10 September 2007, the Prosecution filed its confidential response, opposing the Defence request in its entirety.²

DELIBERATIONS

(i) Request for Subpoena under Rule 54:

3. Pursuant to Rule 54, a Judge or a Chamber may, at the request of either party or *proprio motu*, issue subpoenas as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. According to the Tribunal's jurisprudence, the applicant seeking a subpoena must make a certain evidentiary showing of the need for a subpoena. A subpoena order to compel the attendance may be issued in particular cases where the requesting party shows that it has made reasonable attempts to obtain the voluntary cooperation of the witness, and that the witness's testimony can materially assist its case with respect to clearly identified issues in the trial. A subpoena may also be issued when information sought cannot reasonably be obtained elsewhere and the witness's testimony is in the interests of the conduct and fairness of the trial.³ Further, subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of criminal sanctions.⁴
4. The Defence submits that it has made reasonable efforts to secure the voluntary cooperation of Witness SJA, who has expressed his refusal to testify.⁵ The Defence further

¹ Requête aux fins de citation à comparaître du témoin SJA et de transfert d'un témoin détenu, filed by the Defence on 5 September 2007 (Defence Motion).

² Prosecution's Confidential Response to the Defence Confidential Motion for a Subpoena against Witness SJA and for the Transfer of a Detained Witness, filed on 10 September 2007 (Prosecution Response).

³ See *Prosecutor v. Krstić*, Case No.IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004 (*Halilović* Decision), para. 6; *Prosecutor v. Ndimubiyimana et al.*, Case No. ICTR-00-56-T, Decision on the Prosecutor's Motion for Subpoena (TC), 6 October 2006, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena (TC), 11 September 2006, para. 7; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on a Request for Subpoena for Major Jacques Ntut (TC), 14 July 2006, para. 2; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, paras. 9-10; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for Subpoenas (TC), 4 May 2005, para. 2; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK32, DK39, DK51, DK52, DK311 and DM24 (TC), 26 April 2005, para. 3.

⁴ *Prosecutor v. Brđjanin and Talić*, Case No.IT-99-36-AR73.9, Decision on Interlocutory Appeal (AC), 11 December 2002, para. 31; *Halilović* Decision (AC), para. 6.

⁵ Defence Motion, paras. 6-8.

submits that Witness SJA would provide material testimony on the allegations against the Accused relating to the abduction of Mrs. Rudahunga and her children,⁶ and that it was not possible to find another source for such testimony without further delay.⁷ The Prosecution submits that the Defence has not provided reasons for the witness's refusal to testify and has not shown what attempts were made to obtain his voluntary testimony.⁸ The Prosecution also states that the Defence has not shown that the witness in question has important information that is crucial to the case,⁹ and submits that the Defence had earlier claimed that it had replacement witnesses on this issue.¹⁰

5. The Chamber notes from the Defence submissions and the summary in the Pre-Defence Brief that Witness SJA will testify on facts relating to the abduction of Mrs. Rudahunga and her children from the Saint-Joseph College. The Chamber finds the expected testimony of the witness material to the allegations contained in the Indictment in paragraphs 10(iii), 22 and 25(iii) that the Accused brought soldiers to the Saint-Joseph College who later killed Mrs. Rudahunga and abducted her two children, and therefore relevant to the case.

6. The Chamber however notes, from the information provided, that the Defence has met the witness on one occasion recently where he had allegedly expressed his refusal to testify. The Defence also claims that it cannot make any further missions to Rwanda to convince the witness to testify due to the paucity of time left in the case, and that there is no guarantee of his agreement to testify. The Defence has not indicated if it has made any further efforts to convince the witness to testify. The Chamber is not satisfied that the reluctance allegedly expressed by the witness met only on one occasion justifies the use of coercive measures. Further, the Chamber recalls that orders for subpoenas are usually issued as a last resort, and is not convinced that similar evidence would not be available through other witnesses since the Defence had indicated, in its correspondence of 26 July 2007¹¹, that it had other witnesses to testify on this issue. The Chamber therefore denies the Defence request for subpoena for Witness SJA.

(ii) Request for Transfer Order under Rule 90bis:

7. The Defence submits that Witness SJA is detained in a Rwandan prison, and requests the Chamber to issue a transfer order pursuant to Rule 90bis to permit him to testify before the Chamber. The Defence states that the presence of the witness would not be required for criminal proceedings in Rwanda and his transfer would not prolong his detention.¹² The Prosecution submits that the Defence has not provided any prior verification from the Rwandan authorities that the conditions of Rule 90bis are satisfied.¹³

8. The Chamber finds that the request for transfer of Witness SJA can only be considered once the request for subpoena is successful. However, the Chamber notes that the Defence has provided inadequate documentation for this request as well. The Chamber recalls that Rule 90bis(B) requires the Chamber to issue a transfer order, upon prior verification, that i) the presence of a detained witness is not required for criminal proceedings

⁶ Defence Motion, paras. 9-12.

⁷ Defence Motion, paras. 15-17.

⁸ Prosecution Response, para. 9.

⁹ Prosecution Response, para. 10.

¹⁰ Prosecution Response, para. 13.

¹¹ Confidential Correspondence from Lead Counsel for the Accused to the Prosecutor (also copied to the Chamber), 26 July 2007.

¹² Defence Motion, paras. 18, 20.


¹³ Prosecution Response, para. 6.


in the country of detention, and that ii) the transfer to the seat of the Tribunal will not extend his detention.¹⁴ The Chamber further notes that, in the Tribunal's practice, such prior verification requires communication of the request to and confirmation by the relevant Rwandan authorities.¹⁵ The Chamber however does not find in the annexes to the motion any documentation which shows that a request has been made to the Rwandan authorities for the transfer of the detained witness nor any indication from the Rwandan authorities that the conditions of Rule 90bis are satisfied. Therefore, in the absence of the appropriate documentation supporting the Defence request under Rule 90bis, the Chamber denies the Defence request for the transfer of detained Witness SJA.


FOR THE ABOVE REASONS, THE CHAMBER

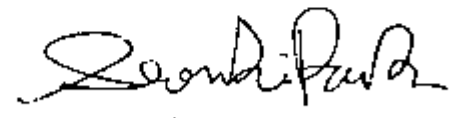
DENIES the Defence Motion in its entirety.

Arusha, 21 September 2007


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


[Seal of the Tribunal]


Seon Ki Park
Judge

¹⁴ *Proyecto Mutu* Order for the Transfer of a Detained Witness (TC), 27 June 2007, paras. 4-6; *Prosecutor v Bizimungu et al.*, Case No. ICTR-99-50-1, Order for Transfer of Detained Witnesses from Rwanda (TC), 4 September 2007 (*Bizimungu* Decision), paras. 3-4; *Prosecutor v Karemera et al.*, Case No. 98-44-1, Order for Temporary Transfer of Prosecution Witnesses from Rwanda (TC), 4 September 2007 (*Karemera* Decision), para.3.

¹⁵ See *Bizimungu* Decision (TC), para. 4; *Karemera* Decision (TC), paras. 4-5.