



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44-T  
22-2-2010  
(50408-50404)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

50408  
2010  
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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 22 February 2010

**THE PROSECUTOR**

v.

**Édouard KAREMERA**  
**Matthieu NGIRUMPATSE**  
**Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

JUDICIAL  
RECORDS ARCHIVES

2010 FEB 22 (P. 3: 37)

*Joseph Nzirorera*

**DECISION ON JOSEPH NZIRORERA'S MOTION TO SUBPOENA PAUL  
RUSESABAGINA**

*Rule 54 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. On 20 January 2009, the Chamber granted Joseph Nzirorera's motion to have the testimony of Paul Rusesabagina taken by video-link.<sup>1</sup> On 25 January 2010, Joseph Nzirorera filed a motion seeking that a subpoena be issued pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules") compelling the appearance of Paul Rusesabagina at the scheduled video-link testimony.<sup>2</sup> The Prosecution opposes the Motion.<sup>3</sup>

## DELIBERATIONS

2. As a preliminary matter, the Chamber notes that this motion was filed under public cover while the Prosecution filed its response confidentially. The Chamber recalls that, as a matter of transparency, it has requested the parties to file motions publicly to the extent possible, and to attach any confidential material in an annex, which would remain confidential.<sup>4</sup> The Prosecution does not justify any reason for a confidential filing. The Chamber also notes that the Decision of 20 January 2009 and the submissions leading to it were filed under confidential cover at the request of Joseph Nzirorera. Taking into account that Nzirorera now makes explicit reference to the Decision of 20 January 2009, and to the situation of the witness, and after a review of the concerned filings, the Chamber considers that the Decision of 20 January 2009 and the submissions thereto as well as the Prosecution's response to the present motion should be re-filed as public documents.

3. Rule 54 of the Rules permits the issuance of subpoenas as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. The requesting party must demonstrate that: (i) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist its case; and (iii) the witness's testimony must be necessary and appropriate for the conduct and the fairness of the trial.<sup>5</sup> Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.<sup>6</sup>

<sup>1</sup> *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("Karemera et al."), Decision on Joseph Nzirorera's Motion for Testimony by Video-Link: Paul Rusesabagina (TC) (confidential) ("Decision of 20 January 2009"), 20 January 2009.

<sup>2</sup> Joseph Nzirorera's Motion for Subpoena [sic] Paul Rusesabagina, filed on 25 January 2010 ("Motion").

<sup>3</sup> Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Paul Rusesabagina, filed on 1 February 2010 ("Response").

<sup>4</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Public Filing of Decision (TC), 27 November 2008.

<sup>5</sup> *Karemera et al.*, Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3 (TC) ("Decision of 12 July 2006"), 12 July 2006, para. 9.

<sup>6</sup> *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9 ("*Brđanin and Talić*"), Decision on Interlocutory Appeal (AC), 11 December 2002 ("Decision on Interlocutory Appeal"), para. 31.

As such, the moving party must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful.<sup>7</sup>

4. Furthermore, an applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena.<sup>8</sup> In particular, the applicant must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial.<sup>9</sup> A subpoena becomes "necessary" for the purposes of Rule 54 where a legitimate forensic purpose has been shown.<sup>10</sup> In deciding whether an applicant has met the evidentiary threshold, the Trial Chamber may properly consider whether the information sought through the use of subpoena is necessary for the preparation of an applicant's case, to ensure a fair and informed trial, and whether it is obtainable through other means.<sup>11</sup>

5. Where the prospective witness has previously been uncooperative with the defence, such a course would obviously be adopted only if the Judge or Trial Chamber considered that it was reasonably likely that there would be cooperation if such an order were made.<sup>12</sup> This is not a determination which the defence may safely make for itself.<sup>13</sup> The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused.<sup>14</sup>

6. Joseph Nzirorera asserts that: (i) he has made reasonable attempts to obtain Paul Rusesabagina's testimony by voluntary means but his attempts have failed; (ii) the testimony sought is material and necessary to his defence as it will contradict the testimony of Prosecution Witnesses UB, ALG and HH; and (iii) it is likely that Rusesabagina will be cooperative if a subpoena is issued.<sup>15</sup>

<sup>7</sup> *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

<sup>8</sup> *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A ("Krstić"), Decision on Application for Subpoenas (AC), 1 July 2003 ("Decision on Application for Subpoenas"), para. 10.

<sup>9</sup> *The Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73 ("Halilović"), Decision on the Issuance of Subpoenas (AC), 21 June 2004 ("Decision on the Issuance of Subpoenas"), para. 6; *Krstić*, Decision on Application for Subpoenas, paras. 10, 11.

<sup>10</sup> *Krstić*, Decision on Application for Subpoenas, para. 10.

<sup>11</sup> *Krstić*, Decision on Application for Subpoenas, paras. 10-12; *Brđanin and Talić*, Decision on Interlocutory Appeal, paras. 48-50.

<sup>12</sup> *Krstić*, Decision on Application for Subpoenas, para. 11.

<sup>13</sup> *Ibid.* at para. 12.

<sup>14</sup> *Brđanin and Talić*, Decision on Interlocutory Appeal, para. 31; *Halilović*, Decision on the Issuance of Subpoenas, para. 6; *The Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5, Reasons for Decision on Urgent Motion for the Issuance of Subpoena to Amicus Curiae Prosecutor (TC), 3 February 2009, para. 11.

<sup>15</sup> Motion, para. 30.

7. The Chamber recalls that when it granted Joseph Nzirorera's Motion for video-link, it took into consideration Paul Rusesabagina's unwillingness to testify in Arusha.<sup>16</sup> The Chamber is satisfied that Nzirorera's counsel and the Witnesses and Victims Support Section ("WVSS") have attempted to obtain Rusesabagina's voluntarily cooperation to testify by video-link by way of e-mail and telephone, and that these attempts have been unsuccessful.

8. Joseph Nzirorera argues that Paul Rusesabagina's testimony is material because Rusesabagina will testify that weapons were not distributed to *Interahamwe* at the Hôtel Diplomate during the time he was present at the hotel from 9 April through 12 April 1994. Nzirorera asserts this testimony will directly contradict the testimony of Prosecution Witnesses UB, ALG and HH who testified that weapons were "openly distributed to *Interahamwe* at the [Hôtel Diplomate]...at the direction of the accused."<sup>17</sup> The Chamber has previously acknowledged that Rusesabagina's testimony was sufficiently important to merit testimony via video-link<sup>18</sup>, and must now determine if the proposed testimony is important enough to require the issuance of a subpoena. Having reviewed the testimony of Prosecution Witnesses UB, ALG and HH, the Chamber considers that Rusesabagina's testimony is material to Joseph Nzirorera's defence in that it may provide evidence that weapons were not distributed at the Hôtel Diplomate.

9. However, the Chamber finds that Paul Rusesabagina's testimony is not a necessity to ensure that Joseph Nzirorera receives a fair and informed trial as the information is cumulative and obtainable through other means. Nzirorera has stated his intention to testify concerning the events in question as well as his intent to call at least six other witnesses, including Georges Rutaganda, to rebut testimony provided by Prosecution witnesses concerning the alleged distribution of weapons at the Hôtel Diplomate.<sup>19</sup> Moreover, Witness 46 and Augustin Bizimingu have already testified concerning the events in-dispute.

10. Finally, it does not appear that Paul Rusesabagina is reasonably likely to cooperate with the Defence even if a subpoena is issued. This is especially true given the Chamber's decision of 20 January 2010 and the fact that it has been brought to Rusesabagina's attention that the Defence is seeking the issuance of a subpoena in an attempt to compel his testimony and he has not reacted. Rusesabagina is well-informed that his testimony is sought by Joseph Nzirorera. It has now been more than six weeks since the first telephone message was left for him and his failure to respond to

<sup>16</sup> Motion, paras. 5-15.

<sup>17</sup> Motion, para. 21.

<sup>18</sup> Decision of 20 January 2009, para. 4.

<sup>19</sup> Nzirorera's Pre-Defence Brief, 8 December 2008, paras. 730-735.

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this message and all subsequent messages and emails cannot reasonably be attributed to the fact that he is a busy person. Consequently, it is unlikely that the service of a subpoena would produce compliance.<sup>20</sup> Finally, even if Paul Rusesabagina were to comply and appear at the designated location to testify by video-link without the need for a contempt order, the Chamber does not find it reasonably likely that he would cooperate and provide meaningful testimony.

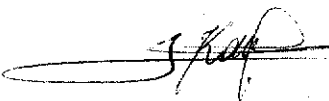
**FOR THESE REASONS, THE CHAMBER**

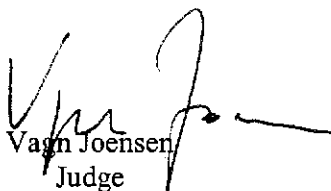
**DENIES** Joseph Nzirorera's Motion to Subpoena Paul Rusesabagina.

**REQUESTS** the Registry to refile the Prosecution's response to the present motion as well as the Chamber's Decision of 20 January 2009 and the submissions thereto as public documents.

Arusha, 22 February 2010, done in English.

  
Denis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

[Seal of the Tribunal]

