



UNITED NATIONS
NATIONS UNIES

ICR-01-68-T
17-01-2011
(2630-2627)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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A

OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 17 January 2011

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

**DECISION ON DEFENCE MOTION FOR THE TRANSFER OF DETAINED
WITNESSES**

(Pursuant to Rules 54 and 90bis of the Rules of Procedure and Evidence)

Office of the Prosecutor:

Holo Makwaia, Senior Appeals Counsel
Althea Alexis-Windsor, Appeals Counsel
Segun Jegede, Trial Attorney
Lansana Dumbuya, Case Manager

Counsel for the Defence

Bharat B. Chadha, Lead Counsel
Wilfred Ngunjiri Nderitu, Co Counsel
Tharcisse Gatarama, Legal Assistant
Marie-Pier Barbeau, Legal Assistant

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1. On 31 December 2010, the Defence filed a Motion requesting that the Trial Chamber order the transfer of two detained defence witnesses (GK1 and MB1) to the United Nations Detention Facility in Arusha, Tanzania pursuant to Rules 54 and 90*bis* of the Rules of Procedure and Evidence (“Rules”).¹
2. On 13 January 2011, the Prosecution filed a “Response” to the Defence Motion for the transfer of detained witnesses.²
3. In its Motion, the Defence submits that it has received informal assurances that the two witnesses are not required for any criminal proceedings in Mali or Rwanda,³ and adds that in accordance with the requirements of Rule 90*bis*, their transfer will not extend the period of their detentions.⁴

DELIBERATIONS

Applicable Law

4. Pursuant to Rule 90*bis* (A), “any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.” Rule 90*bis* (B) requires prior verification of two conditions for such an order:
 - a. The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
 - b. Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

¹ *Prosecutor v Grégoire Ndahimana*, Case No. ICTR-01-68, Ndahimana Defence Strictly Confidential Motion for the Transfer of Detained Witnesses (“Motion”), 31 December 2010.

² *Prosecutor v Grégoire Ndahimana*, Case No. ICTR-01-68, Prosecution’s Response to Defence Motion for the Transfer of detained witnesses, 13 January 2011 (“Response”).

³ Motion para. 10.

⁴ Motion para. 11.

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5. The *Akayesu* Trial Chamber held that "...the conditions stipulated in Rule 90bis are *sine qua non* and that if they are not complied with, the requested transfer order cannot, consequently, be issued."⁵ Other trial chambers have similarly held that "issuing an order without the verifications imposed by Rule 90bis (B)" are "counterproductive to the Tribunal's Diplomatic procedures."⁶

Preliminary Matter

6. The Defence filed the instant Motion on 31 December 2010. The Prosecution Response was not filed until 13 January 2011, and the Prosecution failed to show good cause for the delay. The Trial Chamber further notes that in its Response, the Prosecution states that it is responding to a Defence Motion filed on 24 August 2010 (*sic*),⁷ and expresses no view as to whether or not the Defence has complied with Rule 90 bis. Thus, the Trial Chamber will not consider the Response, both on the basis of the late filing, and because the purpose of the Prosecution filing is wholly unclear.

Defence Compliance with Rule 90bis

7. The Trial Chamber observes that while the Defence purports to have read and understood Rule 90 bis (B) and the attendant jurisprudence,⁸ it has not attached to its Motion any correspondence from:
- i. The Rwandan Ministry of Justice affirming that Defence Witness GKI is available to testify before the Tribunal in compliance with the requirements of Rule 90bis (B);
 - ii. The State of Mali with respect to the availability of Defence Witness MB1 to testify before the Tribunal in compliance with the requirements of the Rule.

⁵ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Decision on Defence Motion for the Transfer, Appearance, and Protection of Thirteen Detained Witnesses (TC), 9 March 1998, p. 3.

⁶ *Prosecutor v Nzabonimana* Case No. ICTR-98-44D-PT, Decision on Motion for Transfer of Witnesses and other Issues Relating to the preparation of Trial, 24 August 2009, para 7 citing *Prosecutor v Bizimungu et al.*, Case No. ICTR-99-50-T Decision on Motion of Jerome-Clement Bicamumpaka for the Transfer of Detained Witnesses LD-1 from Rwanda, 23 January 2008, para. 7.

⁷ Response, para. 1.

⁸ Motion, paras. 5-6, 8-9.


8. Instead, the Defence claims in its Motion that it has "...received informal assurances that these witnesses are not required for any criminal proceedings in Mali and Rwanda during the period these witnesses are sought to be present at the Tribunal as Defence witnesses. Furthermore... it is submitted that the transfer of the witnesses will not extend their period of detention."⁹ This effort by the Defence to substitute vaguely worded personal assurances for official documentation in a matter involving judicial cooperation between states is amateurish and unacceptable.

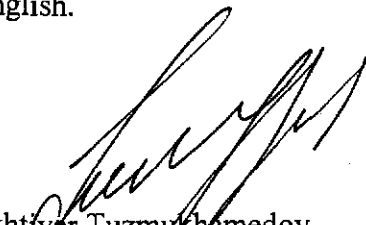

9. The Trial Chamber concludes that the Defence has not satisfied the requirements of Rule 90*bis*.

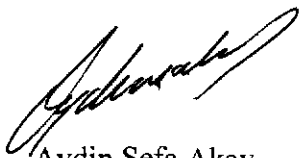
FOR THESE REASONS, THE CHAMBER

Denies the Motion.

Arusha, 17 January 2011, done in English.


Florence Rita Arrey
Presiding Judge


Bakhtiyar Tuzmukhamedov
Judge



Aydin Sefa Akay
Judge

⁹ Motion, paras. 10-11.