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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

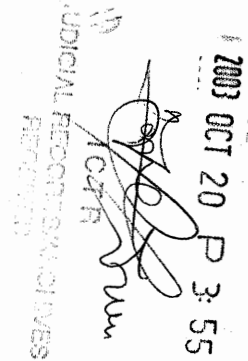
Original: English

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q. C., Presiding
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 20 October 2003



THE PROSECUTOR

v.

JOSEPH NZIRORERA *et al.*

Case No. ICTR-98-44-I

DECISION ON THE DEFENCE MOTION FOR SUBPOENA TO WITNESS G

Defence Counsel
Peter Robinson and Dior Diagne
Didier Skornicki and John Traversi
David Hooper and Andreas O'Shea
Charles Roach and Frédéric Weyl

Office of the Prosecutor:
Don Webster
Dior Fall
Ifeoma Ojemeni
Simone Monasebian
Holo Makwaia
Tamara Cummings-John

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”)

SITTING as Trial Chamber III composed of Judges Lloyd G. Williams, Q. C., Presiding, Andrézia Vaz and Khalida Rachid Khan (“Chamber”);

BEING SEISED of the Defence “Motion for Subpoena to Witness G,” filed on 11 August 2003 by Defence Counsel for the Accused, Joseph Nzirorera (“Motion”);

CONSIDERING the “Prosecutor’s Response to the Defence Motion for *Subpoena* to Witness G,” filed on 8 September 2003 (“Response”);

CONSIDERING further the “Reply to Prosecutor’s Response to Motion for Subpoena to Witness G,” by the Defence for Accused Nzirorera filed on 10 September 2003;

RECALLING the “Decision on the Defence Motion for Interview with Witness G” rendered in the present case on 27 June 2003, in which the Chamber granted the Defence Motion for Interview with Witness G subject to the his consent to such an interview;

REVIEWS the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence (“Rules”).

Submission of the Parties

Defence Motion

1. Defence Counsel for Joseph Nzirorera moves, pursuant to Rule 54, for the issuance of a subpoena compelling Witness G to appear for a pre-trial interview, following communication from THE Witness and Victims support Section informing Counsel that the Witness has categorically refused to meet with the Defence.”

2. According to the Defence:

(i) Witness G “has exculpatory evidence showing that Mr. Nzirorera tried to stop the killing in April 1994,” and his interview would “likely lead to more details which would allow Mr. Nzirorera to corroborate this exculpatory information and perhaps locate additional witnesses to these events and others;”¹

(ii) Witness G has been interviewed 26 times by *inter alia* Prosecution investigators;²

¹ Para 12. *See also* Motion to Interview Witness G (25 September 2002) at para 10.

² Referring to Prosecutor v. Nahimana *et.al.*, ICTR-99-52-Tr.of 20 February 2002 p. 7.



3. The Defence further argues that having benefited from the "largesse of the Tribunal" for his cooperation, it would be grossly unfair to allow the Witness to be "free of the compulsion" authorised by Rule 54.³

4. The Defence submission is based on the two recent decisions by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Prosecutor v. Mrksic*⁴ and *Prosecutor v. Krstic*⁵.

Prosecutor's Response

5. The Prosecution concedes that Rule 54 does indeed afford the Tribunal with the power to issue a subpoena to a person to give evidence as a witness, but points out that such power is an "incidental or ancillary jurisdiction conferred by the Tribunal's Statute over individuals other than those whom the International Tribunal may prosecute or try."⁶

6. The Prosecution states that the *Mrksic* case, which the Accused relies upon, does not address the circumstances under which a Chamber should issue a subpoena to witnesses of the opposing party. Indeed, in *Mrksic*, the Appeals Chamber was not deliberating on a party's motion for the issuance of a subpoena.

7. The Prosecution further submits that the facts in *Krstic* also differ significantly from that of the Accused in the present motion, in that in *Krstic* the appellant was seeking to interview a witness with a view to tendering that person's evidence on appeal in light of the statement made by that witness to the Prosecutor after the trial.⁷

8. The Prosecutor does not in principle object to the Accused's request to interview certain witnesses, but calls for the Chamber's attention to Witness G's special circumstances which led to the Witness being relocated and placed in a national witness protection programme, and that the threat to his security has been linked to the Accused Nzirorera.⁸

³ Para 13

⁴ *Prosecutor v. Mrksic*, IT-95-12/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003. The Appeals Chamber held that "witnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview him." Further that "if the Prosecution or the Defence wishes to compel an unwilling person to submit to a pre-trial interview, then it must seek the assistance of the Chamber pursuant to Rule 54... [as] only subpoenas and other orders by the Tribunal have a legally binding effect..."

⁵ *Prosecutor v. Krstic*, IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003.. The Appeals Chamber stated that Rule 54 "clearly includes the possibility of a subpoena being issued requiring a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial." See at para 10.

⁶ Appeal Chamber's Judgement in *Prosecutor v. Blaskic*, IT-95-14-A, Judgement on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997; reiterated in the *Krstic Case*, *ibid*.

⁷ Para 5

⁸ The Prosecutor states that he is in possession of a *Memorandum* by persons allegedly acting on behalf of the Accused threatening the safety and security of Witness G. This *Memorandum*, which was left for

9. Having been placed in this programme, the Prosecutor has himself had very limited access to the witness because of the strict constraints imposed by the host country.⁹

10. The Prosecutor argues that the Defence will have "ample opportunity" to explore the substance of Witness G's evidence when the latter appears before the Chamber as a prosecution witness, not only during the course of cross-examination but also in advance of the Defence case.¹⁰

11. The Prosecutor submits that notwithstanding the legitimate forensic purpose of the present Motion as set out by the Defence, it would be contrary to the interest of justice for a subpoena to be issued to compel the Witness to attend a pre-trial interview in spite of his refusal.

12. The Prosecution therefore prays that the Motion be denied.

Defence Reply to the Prosecutor's Response

13. The Defence argues that the Prosecutor's contention that the Defence will have ample opportunity to elicit information from the Witness at cross-examination, can be made for every prosecution witness. The Defence submits that such a ruling would stand contrary to the principle of equality of arms and the right to a fair trial.¹¹

14. Moreover, the Prosecution has had exclusive access to Witness G which has resulted in the 26 hours of recorded interviews, and "an unknown number of...unrecorded interviews" which the Prosecution can use to learn facts which helps in conducting further investigation, and in questioning and locating other witnesses and documents.¹²

15. Absent a subpoena, the Defence has no access to the Witness and is therefore at a "huge disadvantage."¹³

16. The Defence finds the Prosecution's submission on Accused Nzirorera being responsible for the threats to the safety and security of Witness G shocking. The Accused categorically denies having made any such threats or indeed being aware of the same. The Defence further notes that not only was the Accused in custody at the

Witness G at his hotel on 2 April 1999, was submitted to Trial Chamber I *in camera* in support of the Prosecutor's application for special protective measures for Witness G during the "Media Trial".

⁹ Para 9

¹⁰ Para 6.

¹¹ The Defence cites *Prosecutor v. Tadic*, IT-94-1-A, Judgement (AC), 15 July 1999 at para. 52, in which the Appeals Chamber stated that the equality of arms principle requires that "the Prosecution and the Defence... be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."

¹² Para 6 Defence Reply to the Prosecutor's Response

¹³ *Ibid.*

time of the alleged Memorandum, Witness G's well-being is in fact in the Accused's interest for the "important evidence" that the witness has.

17. In light of the above, the Defence requests that all information relating to these threats be disclosed pursuant to Rules 66 (B) and 68, as it is relevant to the witness' "motives and biases when testifying and material to the preparation of the defence."¹⁴

18. The Defence also draws the Chamber's attention to the Prosecutor's failure to disclose any of the twenty-six pre-recorded statements as well as eight other recorded statements to a foreign government in violation of the Chamber's Order of 8 August 2003 and the requirement of Rule 66(A)(ii).¹⁵ It is submitted, that the Prosecutor's failure to disclose makes the need for a pre-trial interview all the more necessary.

19. The Defence also contends that the placement of a Witness in a protection programme cannot be used by the Prosecution to deny access to the Witness, so that the Accused does not have access to the individuals and/or information he needs to conduct his investigation and prepare for trial.

Deliberations

20. The Chamber agrees that it does have the power to compel a witness to cooperate pursuant to Rule 54, as submitted by the Defence and conceded by the Prosecutor.

21. The facts of the present application however can, and indeed must, be distinguished from that which faced the Appeals Chamber in *Krstic*. Witness G is the subject not only of a witness protection programme, which has him placed in a different jurisdiction, but also of special protective measures granted by this Trial Chamber on grounds of security and the unique and sensitive circumstances of the witness.¹⁶ To expose such a witness would compromise the very protection that has been afforded him.

22. Further, the Chamber notes that Witness G has specifically and categorically refused to meet Defence counsel in this or any other case. This raises questions as to what practical benefit would be derived from the issuance of a subpoena to a non-cooperative witness. In light of Witness G's refusal to meet with the Defence, the Chamber is not satisfied that a subpoena would result in any information being divulged which cannot be gleaned from cross-examination of the witness.

¹⁴ See paras 14, 15 and 16, *ibid*.

¹⁵ See in the present case Decision on Motion by the Defence for Nzirorera for Disclosure of Witness Statements, (TC) 8 August 2003

¹⁶ See in the present case Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence Motion for Immediate Disclosure (TC), 20 October 2003

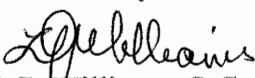
23. With regard to the Prosecutor's failure to disclose pursuant to the Chamber's aforementioned Order and the requirement of Rule 66(A)(ii), the Chamber draws the attention of the Parties to its more recent Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures rendered on 20 October 2003.

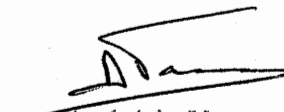
FOR THE ABOVE REASONS,


THE CHAMBER,

DISMISSES the Defence Motion for Subpoena to Witness G.

Arusha 20 October 2003


Lloyd G. Williams, Q.C.
Judge, Presiding


Andréia Vaz
Judge


Khalida Rachid Khan
Judge

[Seal of the Tribunal]

