



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-44-T
8-3-2004
(9871-9867)

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Suuf

TRIAL CHAMBER III

Before: Judge Andréia Vaz, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registry: Adama Dieng

Date filed: 24 November 2003

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ICTR

PROSECUTOR

v.

JOSEPH NZIRORERA AND OTHERS

Case No. ICTR-98-44-I

**DECISION ON DEFENCE MOTION FOR AN ORDER TO THE
PROSECUTION WITNESSES TO PRODUCE, AT THEIR APPEARANCE,
THEIR DIARIES AND OTHER WRITTEN MATERIALS FROM 1992 TO 1994
AND THEIR STATEMENTS MADE BEFORE THE
RWANDAN JUDICIAL AUTHORITIES
Rules 54 and 73 of the Rules of Procedure and Evidence**

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

Defence for the Accused:
Peter Robinson and Dior Diagne

Defence for the Co-Accused:
Didier Skornicki and John Traversi
Charles Roach and Frédéric Weyl
David Hooper and Andreas O'Shea

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”)

SITTING as Trial Chamber III composed of Judge Andrézia Vaz, presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (“the Chamber”),

BEING SEIZED of the motion entitled “*Motion to Obtain Diaries and Prior Statements of Witnesses*”, filed on 10 November 2003 by the Defence for Joseph Nzirorera (“the Motion”, “the Defence” and “the Accused”) pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“the Rules”),

NOTING that the Prosecution has not filed any response to the Motion within the five days stipulated in Rule 73(E) of the Rules,

RULES solely on the basis of the Defence brief pursuant to Rule 73(A) of the Rules.

Applicable provision

1. Rule 54 of the Rules states that, “*at the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for an investigation or for the preparation or conduct of the trial.*”

Submissions by the Defence

2. On the basis of the aforementioned Rule 54, and on the basis of a case-law related to this provision that establishes, according to the Defence, the Chambers’ authority to issue orders as may be necessary to the witnesses,¹ the Defence requests that the Chamber issue an order for the production by the Prosecution witnesses, at their appearance, of:
 - (i) Their diaries, if they kept any, insofar as they are related to the events which took place from 1992 to 1994 in Rwanda;
 - (ii) All other documents written by them, insofar as they are related to the same events;
 - (iii) Copies of their statements, including their confessions, as received by the Rwandan judicial authorities.

¹ The Defence cites the following decisions: ICTY, Appeals Chamber, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, “Decision on Application for Subpoenas”, 1 July 2003, (“the Krstic Decision of 1 July 2003”) and, in the instant case, the *Decision on the Defence Motion for Subpoena to Witness G*, 20 October 2003. Rule 54 of the ICTY’s Rules is similar, in its French version, to Rule 54 of this Tribunal’s Rules. It reads as follows: “*À la demande d’une des parties ou de sa propre initiative, un juge ou une Chambre de première instance peut délivrer les ordonnances, citations à comparaître, assignations, mandats et ordres de transfert nécessaires aux fins de l’enquête, de la préparation ou de la conduite du procès.*” The English versions of the two provisions are identical.

3. The Defence adds that these materials, if they exist, are necessary for its preparation for the cross-examination of the witnesses in question, and that the statements and confessions referred to in paragraph 2(ii) [sic] above have exculpatory value within the meaning of Rule 68 of the Rules.²
4. The Defence claims that there are indications that some witnesses possess some of the documents referred to in paragraphs 2(i) and 2(ii) above. It points out that Witness GGF told the investigators that he had kept a diary covering the events mentioned in his deposition.³ In addition, it submits that Witness GBE stated, during his testimony in the *Kajelijeli* Case, referring to his interview with Prosecution investigators, that he had taken notes, but that he had left his notebook in his house that day.⁴ Finally, it notes that it met Witness Omar Serushago on 28 October 2003 and that, during the interview, Serushago regularly consulted a notebook containing handwritten notes.
5. As regards the Prosecution witness statements taken by the Rwandan judicial authorities, the Defence points out that it has made every effort to obtain them from the latter, but to no avail.⁵ It adds that those witnesses probably have copies of their case files at home, and that in that case, it would be proper to ask the Prosecution to remind them to bring those statements when they appear. The Defence adds that such has been the practice in the past.

DELIBERATION

6. Rule 54 of the Rules gives the Chambers a general authority to issue orders that they deem appropriate, *inter alia*, for the conduct of the trial. The orders in question may concern individuals acting privately, and in particular witnesses or potential witnesses, as shown by the reference to summonses among the orders expressly referred to.⁶ Rule 54 does not restrict the subject-

² Rule 68 of the Rules, which is entitled “*Disclosure of Exculpatory Evidence*”, reads as follows: “*The Prosecutor shall, as soon as practicable, disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.*”

³ The Defence cites GGF’s previous statement dated 26 September 2002.

⁴ The Defence cites the court transcript of 9 July 2001 in *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T.

⁵ The Defence refers to the following motions which it brought before the Chamber and in which it alleges that the Rwandan authorities do not respond to its requests regarding, *inter alia*, the production of Prosecution witness statements taken in Rwanda during internal judicial proceedings: “*Motion for Request for Cooperation to Government of Rwanda*”, filed on 25 September 2002; “*Motion for Order to Show Cause: Government of Rwanda*”, filed on 24 February 2003; “*Motion to Report Government of Rwanda to United Nations Security Council*”, filed on 5 September 2003; “*Motion for Second Report for Cooperation: Government of Rwanda*”, filed on 31 October 2003.

⁶ Several subpoenas were issued by the Tribunal’s Trial Chambers. See, *inter alia*, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a motion to subpoena a witness, 19 November 1997; *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Decision on the Defence Ex-Parte Motion for the Issuing of a Subpoena to a Defence Witness and Request for an Order to be Issued to the Republic of Rwanda, 5 November 2002. See also, in terms of principle, *The*

matter of the orders that the Chambers may issue; accordingly, the Chamber may, if it deems it appropriate, issue an order to individuals to produce documents, insofar as they are acting privately.⁷ However, the Chamber cannot grant a motion for the issuance of an order under Rule 54 if the requesting party has demonstrated a legitimate legal ground therefor.⁸

7. In the present instance, the Chamber finds that the Defence has not established a legitimate legal ground warranting the issuing of the orders referred to paragraphs 2(i) and 2(ii) above, given the excessively general scope of these requests, both in terms of the documents referred to and of the targeted category of persons, namely, all the Prosecution witnesses.
8. As regards the copies of statements by Prosecution witnesses allegedly taken by the Rwandan authorities during judicial proceedings against them, the Chamber recalls that it finds these materials, referred to in paragraph 2(iii) above, to be potentially exculpatory within the meaning of Rule 68 of the Rules.⁹ It notes, moreover, that the Tribunal's Trial Chamber I, then seized of the instant case, had on 25 October 2002 sought the Rwandan Government's cooperation regarding certain requests made by the Defence for production of documents, comprising Prosecution witness statements and confessions taken during internal judicial proceedings.¹⁰ Given the potentially exculpatory nature of these materials, there is cause to further ask the Prosecution, pursuant to Rule 54 of the Rules, to make all efforts to obtain from the Rwandan authorities, or from the Prosecution witnesses, the production of the documents in question as soon as practicable before their appearance.
9. As regards the specific requests concerning Witnesses GGF, GBE and Omar Serushago, the Chamber believes that the Defence has presented reasonable grounds for believing that the witnesses possess the written documents referred to in paragraph 4 above. Furthermore, the Chamber finds that those written materials could prove useful in the cross-examination of the witnesses by the Defence. However, the Defence has not demonstrated that before seizing the Chamber, it has deployed sufficient efforts to obtain the materials

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure, 20 October 2000, para. 23 and, in the instant case, the *Decision on the Defence Motion for Subpoena to Witness G* of 20 October 2003 cited by the Defence.

⁷ As regards the general principle of the Chambers' authority to issue binding orders to persons acting privately other than those whom they can prosecute and try, see, *mutatis mutandis*, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, rendered on 29 October 1997 by the Appeals Chamber of ICTY in *Prosecutor v. Tihomir Blaskic* (Case No. IT-95-14-AR 108 bis), para. 48. Among the orders that ICTY can issue to a physical person acting privately, the Appeals Chamber, expressly cited, for instance, the orders or injunctions for the production of documents. *Ibid.*, para. 55(ii).

⁸ As regards the notion of "legitimate legal grounds" that must be established by the party applying for the issuing of an order pursuant to Rule 54 of the Rules, see, *mutatis mutandis*: ICTY, Appeals Chamber, *Krstic* Decision of 1 July 2003, para. 10.

⁹ These statements being part of the witnesses' criminal record. See, in this regard, para. 19 of the *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* rendered on 7 October 2003.

¹⁰ In a decision entitled: *Request for Cooperation to Government of Rwanda*.

in question by itself, or through the Prosecution, or that those efforts have been to no avail. The Chamber notes in particular that the Defence does not state that it has asked Mr. Serushago, or the Prosecution, if it could consult the notebook referred to in paragraph 4 above or obtain a copy thereof. There is cause, therefore, to deny the orders for production of documents requested in respect of Witnesses GGF, GBE and Omar Serushago.

FOR THESE REASONS,

THE CHAMBER

- I. **INSTRUCTS** the Prosecution to make every effort to obtain from the Rwandan authorities, or from the Prosecution witnesses themselves, as soon as practicable prior to their appearance before the Tribunal, copies of the Prosecution witness statements that were allegedly taken by the Rwandan authorities during judicial proceedings against them, and **INSTRUCTS** the Prosecution to disclose copies to the Defence for the Accused upon receipt of those items;
- II. **DENIES** the Motion in all other respects.

Arusha, 24 November 2003

[Signed]
Andrésia Vaz
Presiding

[Signed]
Flavia Lattanzi
Judge

[Signed]
Florence Rita Arrey
Judge

[Seal of the Tribunal]
