

ICTR-98-44-T
12-7-2006
(27075 - 27070)

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2006/7



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 12 July 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

JUDICIAL RECORDS ARCHIVES
2006 JUL 12 P 5:08

Case No. ICTR-98-44-T

**DECISION ON NZIRORERA'S EX PARTE MOTION FOR ORDER FOR
INTERVIEW OF DEFENCE WITNESSES NZ1, NZ2 and NZ3**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Don Webster
Iain Morley
Gilles Lahaie
Alayne Frankson-Wallace
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Wey

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbè

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INTRODUCTION

1. The trial in this case started on 19 September 2005. Seven Prosecution witnesses have been heard so far. Joseph Nzirorera now moves, pursuant to Article 28 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence for the Chamber to issue a subpoena to prospective Defence Witnesses NZ1, NZ2 and NZ3 to meet with his Counsel and to the State where they are located to cooperate in facilitating such meetings because the witnesses have refused to meet with his Counsel on their own volition.¹

2. The Prosecution objects to Joseph Nzirorera's applications on the basis that all of the relevant information concerning the merits has been filed *ex parte*. It requests that the motions be denied, or in the alternative, that the Chamber order the disclosure of the *ex parte* information and allow the Prosecution five days to further respond to the disclosed information.

3. To support his applications, Joseph Nzirorera filed *ex parte* annexures including the identifying information of the prospective witnesses, an account of the facts to which the witnesses could testify and that could be material to his defence, and documents showing the unwillingness of the witnesses to meet with Nzirorera's Counsel. The *ex parte* filing regarding Witness DNZ1 was however inadvertently disclosed by the Registry to the Prosecution.² As a result of an additional Motion filed by Nzirorera, the Chamber decided to deal with the *ex parte* character of the confidential annex and the remedies sought by the Defence when it rules on the merits of the Defence motion regarding Defence Witness NZ1.³

4. Furthermore, on 31 May 2006, the Chamber considered that, due to the particular circumstances of the case, the Registrar's assistance was required to determine the willingness of Witness DNZ1 to participate in this trial.⁴ As a result, the Registrar submitted that "no contact could be made directly with the witness as his Counsel has peremptorily asserted that his client was unwilling to cooperate with the Tribunal".⁵

¹ See: Joseph Nzirorera's *Ex Parte* Motion For Order For Interview of Defence Witness NZ1 filed on 23 January 2006, and Joseph Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witnesses NZ2 and NZ3, filed on 13 March 2006.

² *Prosecutor v. Edouard Karemera, Mathieu Ngrumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-1 ("Karemera *et al.*"), Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential *Ex Parte* Defence Filing and for Stay of Proceedings (TC), 1 February 2006.

³ T. 22 February 2006, p. 10.

⁴ *Karemera et al.*, Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1 (TC), 31 May 2006

5. The Chamber is now ready to rule on the Prosecution's request for disclosure of *ex parte* filings and the Defence's application for subpoena prospective witnesses

DISCUSSION

Ex Parte Filings of Defence Annexes

6. Applications may be filed *ex parte* when they are necessary in the interests of justice, that is, where the disclosure to the other party in the proceedings of the information conveyed by the application would be likely to prejudice unfairly either the applicant or some person involved in or related to that application.⁶

7. Under the specific circumstances of the case, the Chamber considers that the disclosure of the identity of prospective Defence Witness DNZ1 could have prejudiced unfairly Joseph Nzirorera since it could have affected the right of the Accused to prepare his defence. This *ex parte* filing should therefore not have been disclosed to the Prosecution. However, since, as discussed hereinafter, a subpoena directed to prospective Witness DNZ1 is not warranted in the present case, the Chamber does not find that the Accused suffered any prejudice and that any remedy is therefore needed.

8. The situation regarding prospective witnesses DNZ2 and DNZ3 is different since they are protected Prosecution witnesses in other proceedings before this Tribunal.⁷ According to the relevant protective orders which remain applicable even if these witnesses have already testified, the Defence must give reasonable notice to the Prosecution of its intention to contact these witnesses.⁸ The Defence filing indicating the identifying information of

⁵ *Karemera et al.*, Registrar's Submission under Rule 33(B) of the Rules on Chamber's on Chamber's Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1, filed on 23 June 2006.

⁶ *Karemera et al.*, Decision on Defence Motion For Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion (TC), 30 May 2006.

⁷ According to Joseph Nzirorera's application.

⁸ See for DNZ2, *Prosecutor v. Kabiligi and Ntabakuze*, Case No. ICTR-97-34-I, Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses (TC), 19 May 2000:

[...] Written request, on reasonable notice to the Prosecution, to the Trial Chamber of a Judge thereof, to contact the Witness or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such Protected Person or the parents or guardian of such person if that person under the age of 18 years, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.

For DNZ3, see: *Prosecutor v. Ndindiliyimana et al.*, Order for Protective Measures for Witnesses (TC), 12 July 2001, f)

[...] for all potential prosecution witnesses residing in Rwanda
(f) the Accused or Defence Counsel make a written request to the Trial Chamber, on reasonable notice to the Prosecution, to contact any of these witnesses whose identity is known to the Defence or any relative of such person. At the direction of the Trial Chamber and with the consent of such person, or the parents or

prospective witnesses DNZ2 and DNZ3 should therefore have been disclosed to the Prosecution. In light of the ruling below, the Chamber does not consider that additional time is required for the Prosecution to file further reply to the Defence Motion.

Applications for Subpoena of Prospective Defence Witnesses

9. Rule 54 of the Rules permits the issuance of "orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". This Rule encompasses the Chamber's power to require a prospective witness to attend at a nominated place and time in order to be interviewed when the requesting party shows that (i) it has made reasonable attempts to obtain the voluntary cooperation of the witness, (ii) the witness' testimony can materially assist its case and (iii) the witness' testimony must be necessary and appropriate for the conduct and the fairness of the trial.⁹

10. According to this Tribunal's jurisprudence, a subpoena order however is not to be issued lightly. When deciding whether the applicant has met the evidentiary threshold, the Chamber may also consider whether the information the applicant seeks to elicit through the use of subpoena is obtainable through other means.¹⁰ The Appeals Chamber furthermore held that that a subpoena should be issued if "it is at least reasonably likely that an order would produce the degree of cooperation needed for the defence to interview the witness."¹¹

11. In the present case, the Chamber is satisfied that the Defence has made reasonable attempts to obtain the voluntary cooperation of prospective Witnesses DNZ1, DNZ2 and DNZ3.

guardian of such person if that person under the age of 18 years, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.

⁹ *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para 10; *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of a Subpoena (AC), 21 June 2004; *Prosecutor v. Bagosora et al.*, Case No. 98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana.(TC), 23 June 2004; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for Subpoenas (TC), 4 May 2005; *Prosecutor v. André Rwamakuba* Case No. ICTR-98-44C-T, Decision on Confidential *Ex Parte* Motion for Subpoenas Directed to Defence Witnesses (TC), 20 January 2006.

¹⁰ *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 6.

¹¹ *Id.* at para. 17.

12. The Chamber has carefully reviewed the nature and the scope of the information that could be given by these witnesses. The Chamber is not convinced that the information that Witness DNZ1 could provide according to Joseph Nzirorera could not be obtained through other means and is therefore necessary for the conduct and the fairness of this trial. In addition, in light of the Registrar's submissions that the witness is firmly unwilling to cooperate with the Tribunal,¹² it is unlikely that a subpoena will produce the degree of cooperation needed for the Defence Counsel for Nzirorera to interview this witness. There is therefore no ground for issuing a subpoena with respect to prospective Witness DNZ1.

13. Joseph Nzirorera believes that Defence Witnesses DNZ2 and DNZ3 could provide rebuttal evidence to some Prosecution evidence, because they were said to be present at a certain meeting chaired by Nzirorera but they did not mention it in prior statements. Nzirorera submits that these witnesses could confirm they never attended this meeting as alleged by a Prosecution witness. According to the Accused, when the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness but has a reasonable belief that the witness can materially assist in the preparation of its case, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.¹³

14. In the Chamber's view, the mere omission of a meeting in a statement does not necessarily imply that these witnesses did not attend it. Furthermore, even if these witnesses confirm that they did not attend this meeting, Nzirorera does not show how such evidence could materially assist in the preparation of his case. At the utmost, it could provide foundation to impeach a Prosecution witness but could not provide evidence that Nzirorera did not attend the meeting. The Chamber also notes that other persons were said to be present at this meeting.¹⁴ Prospective Witnesses DNZ 2 and DNZ 3 are therefore not the only potential source of information. Again, a subpoena should not be issued lightly and must be balanced with the interests of justice. In light of the above-mentioned, the Chamber does not find that a subpoena for prospective Witnesses DNZ 2 and DNZ 3 is warranted.

¹² *Karemera et al.*, Registrar's Submission under Rule 33(B) of the Rules on Chamber's on Chamber's Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1, filed on 23 June 2006.

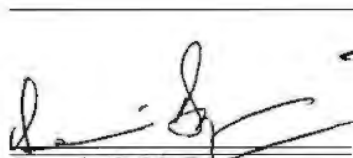
¹³ The Defence relies on *Prosecutor v. Bagosora et al.*, Case No. 98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana.(TC), 23 June 2004.

¹⁴ See Exh. DNZ 86.

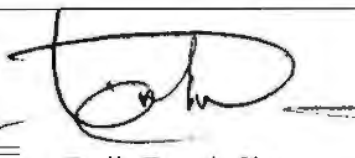
FOR THE ABOVE REASONS, THE CHAMBER

- I. **GRANTS** in part the Prosecution's application for disclosure of the *ex parte* annex to the Defence Motion to subpoena DNZ2 and DNZ3, and accordingly
- II. **ORDERS** the Defence for Nzirorera to disclose to the Prosecution the identity of prospective Defence Witnesses DNZ2 and DNZ3,
- III. **DENIES** Joseph Nzirorera's Motions in their entirety

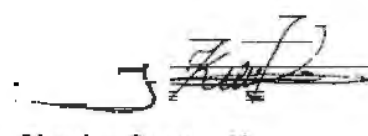
Arusha, 12 July 2006, done in English:



 Dennis C. M. Byron
 Presiding



 Emile Francis Short
 Judge



 Gberdao Gustave Kam
 Judge

