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ICTR-01-73-T  
21-3-2007  
(6463-6461)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

CHIFFRE

OR: ENG

Before: Judge Inés Mónica Weinberg de Rocca, Presiding  
Judge Khalida Rachid Khan  
Judge Lee Gacemba Muthoga

Registrar: Adama Dieng

Date: 20 March 2007

**THE PROSECUTOR**

v.

**Protais ZIGIRANYIRAZO**

Case No. ICTR-2001-73-T

**DECISION ON THE URGENT AND CONFIDENTIAL DEFENCE MOTION  
REQUESTING RECONSIDERATION OF THE 1 MARCH 2007 RULING  
REFUSING A SUBPOENA FOR WITNESS JPER3**

**Office of the Prosecutor:**  
Wallace Kapaya  
Charity Kagwi-Ndungu  
Silver Ntukamazina  
Gina Butler  
Iskandar Ismail  
Jane Mukangira

**Defence Counsel:**  
John Philpot  
Peter Zaduk

JUDICIAL RECORDS ARCHIVES  
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## INTRODUCTION

1. On 1 March 2007, the Chamber rendered a Decision refusing an application by the Defence to subpoena Witness JPER3.<sup>1</sup> The Defence now moves for reconsideration of the Decision of 1 March 2007.<sup>2</sup> The Prosecutor responded on 20 March 2007.<sup>3</sup>

## DELIBERATIONS

### *Reconsideration*

2. The jurisprudence of the Tribunal states that a Chamber can reconsider its own Decision (i) when a new *fact has been discovered* that was not previously known to the Chamber, (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision; or (iii) where a party has successfully shown an error of law or that the Chamber has abused its discretion, and this led to an injustice.<sup>4</sup>

3. The test is not cumulative. Only one of the three factors needs to be met to trigger the reconsideration of a previous decision. In its submissions, the Defence contends that all three of these factors are satisfied in that there are now new facts not previously available to the Chamber, a change of circumstances and an error in the application of the law by the Chamber.

4. The Defence further submits that the circumstances of this witness has changed significantly in that he wishes to waive the anonymity aspect of the protective measures afforded to him, and to testify in open session. This was not the case when the Defence first filed its motion requesting that this witness be subpoenaed.

5. Given that the Chamber's Impugned Decision was rendered on the premise that there was a breach of the protective measures order in respect of this witness, making the witness' situation even more vulnerable than it initially was and compounding his concerns, the Chamber finds that the premise of its initial Decision in respect of Witness JPER3 is no longer valid.

6. Accordingly, the first two limbs of the reconsideration test have been met

### *Subpoena*

7. As stated in the Impugned Decision, Rule 54 of the Rules affords the Chamber the power to issue "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".

<sup>1</sup> "Extremely Confidential Decision On The Defence Motions For Subpoenas Of Three Protected Witnesses, 1 March 2007" (the "Decision of 1 March 2007" or "Impugned Decision").

<sup>2</sup> "Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing A Subpoena for Witness JPER3", 15 March 2007 (the "Motion").

<sup>3</sup> "Prosecutor's Response to the Defence Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing A Subpoena for Witness JPER3", 20 March 2007.

<sup>4</sup> See, e.g., Decision on the Prosecutor's Motion for Reconsideration of the *Otao* Decision Excluding Evidence on the Meeting of 27 November 1992, or for Certification to Appeal the Same, 31 January 2006, para. 5; *Prosecutor v. Karamera et al.*, Decision on Joseph Nzururwa's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Moving Meeting with Defence Witness, 11 October 2005, para. 8; *Prosecutor v. Karamera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8.

8. An application for a subpoena must contain a showing that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial. The Appeals Chamber in *Lubiano* has emphasised and cautioned that "subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".

9. The witness in the instant application is an individual who, according to the Defence has concerns as to his reputation in the community he resides in and is willing to testify only if ordered by the Chamber so as not to appear to be cooperating voluntarily with the Defence. 10. The Defence has made reasonable, and indeed repeated, attempts to obtain the voluntary cooperation of witness JFR3. Based on the Defence submissions as to the ambit of this witness's testimony, witness JFR3's testimony can materially impact upon the Accused's defence and is therefore necessary and appropriate for the conduct and fairness of the proceedings.

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Defence Motion;

**ORDERS** the Registrar to prepare a subpoena in accordance with this decision, addressed to the witness designated by the pseudonym JFR3;

**ORDERS** the Registrar to communicate the subpoena to the aforementioned witness by the most practicable means, which may include communication of the subpoena to the Government of Rwanda, for the purpose of service on the witness;

**REQUESTS** the Government of Rwanda to serve it on the addressee as soon as practicable, and to provide any other assistance that may be requested by the Registry to facilitate the witness's attendance as soon as practicable, during the course of this session.

Arusha, 20 March 2007

*Ines Mencia Weirberg-de Jager* Presiding Judge  
*Khathida Rachid Khan* Judge  
*Lee Macaigua Mubumba* Judge



(Seal of the Tribunal)

*Prosecutor v. Karamara et al.*, Decision on Nzirwe's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (ICJ, 12 July 2006, para. 9; *Prosecutor v. Karamara et al.*, Decision on Application for Subpoenas (ACT), 1 July 2003, para. 10; *Prosecutor v. Mubumba et al.*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (ICTY, 9 December 2005, para. 36); *Prosecutor v. Lubiano*, Case No. 11-01-48-AR73, Decision on the Issuance of Subpoenas (AT), 21 June 2004, para. 7.

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Date: 21 March 2007 Case Name / Affaire: The Prosecutor vs. Protais ZIGIRANYIRAZO
Case No / Affaire No.: ICTR-01-73-T

- To: A: [ ] TC1 Judge E. Mose, President; Judge J. R. Reddy; Judge S. A. Egorov; Judge F. Lattanzi (Mpambara); Judge F. R. Arrey (Kareru); SLO; C. Gosnell, Co-ordinator
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[X] TC3 Judge I. M. Weinberg de Roca (Zigiranyirazo); Judge K. R. Khan; Judge D. C. M. Byron; Judge F. Lattanzi (Banda & Rutundo); Judge L. G. Muthoga (Zigiranyirazo); Judge F. R. Arrey (Rutundo); Judge E. F. Short (Karemura et al.); Judge K. Hökberg (Seromba & Rwahukuba); Judge G. G. Kam (Seromba, Karemura et al.); E. O'Donnell, SLO; C. Denis, Co-ordinator; H. Gogo, Co-ordinator (Seromba); P. Mathiam; C. Rassi; M. Knowlan; J. Greenspoon; P. Mathiam; S. Ummathnan; K. Ardau; C. Duffy; N. Ferraro; M. I. Mbadanga

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