



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
sitting pursuant to Rule 15 bis (F) of the Rules of Procedure and Evidence

Registrar: Adama Dieng

Date: 10 May 2007

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T**

**DECISION ON DEFENCE MOTION FOR SUBPOENAS TO PROSECUTION
WITNESSES**

Rules 15 bis (F), 54 and 98 of the Rules of Evidence and Procedure

Office of the Prosecutor:
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Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. The trial in this case started on 19 September 2005 before a composition of the Trial Chamber composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. On 19 January 2007, Judge Short decided to withdraw from the case.

2. Under Rule 15 *bis* (D) of the Rules of Procedure and Evidence, the remaining Judges decided on the continuation of the proceedings with a substitute judge.¹ On 20 April 2007, the Appeals Chamber affirmed that Decision.²

3. Meanwhile, on 1 March 2007, the Defence for Nzirorera filed a Motion requesting that the Chamber issue subpoenas to Prosecution Witnesses AMB, ANU, AWD, AWE, FH, KVG and XXQ, directing the witnesses to submit to an interview at a time and place to be specified by the Defence and the Witness and Victim Support Section (“WVSS”).³

DISCUSSION

Preliminary Issue

4. The Defence for Nzirorera requests that the Motion be referred by the remaining Judges to Trial Chamber III so as to avoid any delay in the event the trial is continued with a substitute Judge.⁴

5. Since the filing of the Motion, Judge Vagn Joensen was appointed by the Secretary-General as an *ad litem* judge to form part of the bench in the present case.⁵ However, according to Rule 15 *bis* (D), he may only join the bench after he has certified that he has familiarised himself with the record of the proceedings.

6. On the other hand, the President of the Tribunal previously authorized the Chamber, composed of Judges Byron and Kam, to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge, in accordance with Rule 15 *bis* (F).⁶ The “absence of the substitute judge” covers the time until when Judge Joensen will have certified that he is familiar with the records of the proceedings and therefore joined the bench.

¹ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera* (“Karemera *et al.*”), Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007.

² *Karemera et al.*, Decision on Appeals Pursuant to Rule 15 *bis* (D) (AC), 20 April 2007.

³ Joseph Nzirorera’s Motion for Subpoenas to Prosecution Witnesses, filed on 1 March 2007 (“Defence Motion”). See also, Prosecutor’s Response to Joseph Nzirorera’s Motion for Subpoenas to Prosecution Witnesses, filed on 6 March 2007 (“Prosecution Response”) and Reply Brief: Joseph Nzirorera’s Motion for Subpoenas to Prosecution Witnesses, filed on 12 March 2007 (“Defence Reply”).

⁴ Defence Motion, fn 1.

⁵ Judge Joensen was sworn in on 2 May 2007.

⁶ See Rules of Procedure and Evidence, Rule 15 *bis* (F); and Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

7. This Chamber has previously held that the authorization to conduct routine matters under Rule 15 *bis* (F) is not limited to the sole act of making public a decision which has already been deliberated by three Judges and that the rule according to which decisions should be taken by three Judges is not absolute.⁷ Thus far, the Chamber has delivered a number of decisions under Rule 15 *bis* (F) of the Rules, including one instance where the Defence for Nzirorera did not dispute the power of the remaining Judges to do so.⁸

8. The Chamber has granted the Defence for Nzirorera certification to appeal whether the remaining Judges were without authority to deliberate and render a Decision pursuant to its Rule 15 *bis* (F) authorization.⁹ This appeal is still pending.

9. While the scope of the authorization to conduct routine matters pursuant to Rule 15 *bis* (F) remains an issue which is relevant to this and other decisions rendered by the Chamber, the Chamber is of the view that the Defence Motion falls within the category of routine matters that can be dealt with in the absence of one of its members. The Chamber is also persuaded that the interests of justice require it to render an immediate decision on the Defence Motion in view of ensuring the fair and expeditious conduct of the proceedings in the forthcoming trial session to which the Defence Motion relates. Should the Appeals Chamber lay out standards and principles in the interpretation of the phrase “to conduct routine matters”, the Chamber will then determine whether reconsideration of the decisions rendered pursuant to its Rule 15 *bis* (F), including this Decision, is warranted in light of these standards and principles.

10. The Defence request to refer the matter to another composition of Trial Chamber III falls therefore to be rejected.

On the Merits

11. Under Rule 54 of Rules,¹⁰ a Trial Chamber has the power to issue a subpoena to “require a prospective witness to attend at a nominated place and time in order to be

⁷ *Karemera et al.*, Decision on Prosecution’s Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA (TC), 22 March 2007, paras. 7-12.

⁸ *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007; see Joseph Nzirorera’s Interlocutory Appeal on “Witness Proofing”, filed on 19 March 2007.

⁹ *Karemera et al.*, Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK (TC), 4 April 2007.

¹⁰ Rule 54 of the Rules provides as follows: “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 the purposes of an investigation or for the preparation or conduct of the trial.”

interviewed by the Defence where that attendance is necessary for the preparation or conduct of the trial”¹¹ so as to ensure that the trial is informed and fair.¹²

12. The Defence for Nzirorera submits that subpoenas compelling Prosecution witnesses AMB, ANU, AWD, AWE, FH, KVG, and XXQ to meet with the Defence are necessary so that the Defence may obtain the prior statements and judgements of these witnesses. It explains that it has sought to meet these witnesses through WVSS and that WVSS has confirmed that these witnesses have refused to meet with the Defence.¹³ The Defence for Nzirorera moreover contends that it has exhausted all other options available to it to obtain the prior Rwandan statements and judgements of these Prosecution witnesses.¹⁴

13. As emphasized by the Appeals Chamber in *Halilovic*, orders for subpoenas should be issued in moderation: “Being a mechanism of judicial compulsion, backed up by the threat and the power of criminal sanctions for non-compliance, the subpoena is a weapon which must be used sparingly. While a Trial Chamber should not hesitate to resort to this instrument where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the presentation of an effective defence, it should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics.”¹⁵

14. In the present case, the Chamber is of the view that a less intrusive alternative to the issuance of a subpoena remains open to it.

15. Indeed, a practice has developed, subject to considerations of the interests of justice, of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically Rwandan judicial records of Prosecution witnesses.¹⁶ In these situations, Trial Chambers have acted *proprio motu* under Rule 98 of the Rules, to order the Prosecution to use its best efforts in order to obtain the relevant judicial dossier.¹⁷ Under Rule 54 of the

¹¹ *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10 (“*Krstic* Decision”).

¹² *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7 (“*Halilovic* Decision”).

¹³ Defence Motion, para. 6. See Annex B to Defence Motion: WVSS, Status of Prosecution Witnesses selected to be met and interviewed by Defence Counsel Mr. Peter Robinson for Nzirorera Trial.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Halilovic* Decision, para. 10.

¹⁶ See for instance, *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, paras. 7-8; *Prosecutor v. François Karera*, Case No. ICTR-01-74-T, Decision on Defence Motion for Additional Disclosure (TC), 1 September 2006, paras. 5-7.

¹⁷ Rule 98 reads as follows: “Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance”. See for instance, *Prosecutor v. Theoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva* (“*Bagosora et al.*”), Case No. ICTR-98-41-T, Decision on Defence Motion for Additional Disclosure (TC), 1 September 2006, para. 5; *Prosecutor v. Aloys*

Rules, the Chamber may also issue orders as may be necessary for the conduct of the trial. Trial Chambers have resorted to these provisions, for instance, when the information could be considered as material for the preparation of the Defence case or to determine the credibility of Prosecution witnesses.¹⁸

16. The Chamber recalls that it previously denied a motion filed by the Defence for Nzirorera seeking an order for the Prosecution to contact the witnesses for whom prior statements judgements had not been obtained and to obtain from these witnesses the specific information required by the Rwandan government to produce the documents. At that time, it was found that the Defence had failed to demonstrate that it had made reasonable efforts to contact the Prosecution witnesses itself in order to obtain the information sought.¹⁹

17. The circumstances have however changed since this Decision as the Defence for Nzirorera has now demonstrated that it has undertaken reasonable efforts to meet the witnesses itself. As a result, the Chamber is of the view that there has been a material change in circumstances since it made its original Decision, one which warrants the exceptional remedy of reconsideration.²⁰

18. Under these new circumstances, the Chamber finds warranted to use its power under Rules 54 and 98 of the Rules to require the intervention of the Prosecution to obtain and disclose information concerning the prior statements and judgements of Prosecution Witnesses AMB, ANU, AWD, AWE, FH, KVG, and XXQ.

FOR THOSE REASONS, THE CHAMBER

I. DENIES the Defence for Nzirorera's Motion to issue subpoena to Prosecution witnesses;

II. ORDERS the Prosecution to use its best efforts in order to provide, as soon as possible, the Defence with information about the prior statements and judgements of Prosecution Witnesses AMB, ANU, AWD, AWE, FH, KVG and XXQ, and to the extent

Simba ("Simba"), Case No. ICTR-2001-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para. 10.

¹⁸ *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, paras. 7-8.

¹⁹ *Karemera et al.*, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda (TC), 27 November 2006, paras. 13-14.

²⁰ *Karemera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure (TC), 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness (TC), 11 October 2005, para. 8 (see also sources cited therein)

possible, should the Prosecution become in possession or custody of these documents, to disclose them to the Defence.

III. DIRECTS the Prosecution to report back to the Chamber and the Defence on its compliance with the Order II by 1 June 2007.

Arusha, 10 May 2007, done in English.

Dennis C. M. Byron

Presiding Judge

Gberdao Gustave Kam

Judge

[Seal of the Tribunal]