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ICTR-98-44-T
20-2-2008
(34010 - 34005)

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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
Vagn Joensen

Registrar: Adama Dieng

Date: 19 February 2008

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS ARCHIVES
2008 FEB 20 10 47 07

**DECISION ON JOSEPH NZIRORERA'S MOTIONS FOR SUBPOENA TO LÉON
MUGESERA AND PRESIDENT PAUL KAGAME**

Rule 54 of the Rules of Procedure and Evidence

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INTRODUCTION

1. The seventh trial session in this case is scheduled to begin on 10 March 2008, with the opening of the Defence case.¹ The Defence for Karemera will be the first to call witnesses.²
2. On 25 January 2008, the Defence for Nzirorera moved the Chamber to issue a subpoena to Léon Mugesera and allow him to testify by video-link.³ Though not opposing the issuance of the subpoena *per se*, the Prosecution requests that Léon Mugesera be heard in Arusha.⁴
3. On 28 January 2008, the Defence for Nzirorera also moved the Chamber to issue a subpoena to the President of Rwanda, Paul Kagame, directing him to submit to an interview.⁵ The Prosecution opposes the motion, arguing that the President's testimony on the assassinations of President Habyarimana, Emmanuel Gapyisi, and Félicien Gatabazi is irrelevant to and unnecessary for the Defence case.⁶ The Defence for Nzirorera replies that while the President Kagame's testimony may not be determinative of whether the Accused are guilty of the charges in the indictment, it is certainly relevant and necessary.⁷

DELIBERATIONS

Applicable Law

4. Under Rule 54 of the Rules of Procedure and Evidence ("Rules"), a Trial Chamber may issue such subpoenas as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. When moving the Chamber to do so, the requesting party must demonstrate that: (1) reasonable attempts to obtain the voluntary cooperation of the witness have been made; (2) the witness has information which can materially assist the

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera* ("Karemera et al"), Case No. ICTR-98-44, Décision relative à la requête d'Édouard Karemera en prorogation de délai pour soumettre les informations et documents requis par l'Article 73 ter du Règlement (TC), 18 January 2008.

² *Karemera et al*, Scheduling Order (TC), 7 December 2007.

³ Joseph Nzirorera's Motion for Subpoena to Léon Mugesera, filed 25 January 2008 ("Nzirorera's Mugesera Motion").

⁴ Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Léon Mugesera, filed 30 January 2008 ("Prosecutor's Mugesera Response").

⁵ Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed 28 January 2008 ("Nzirorera's Kagame Motion").

⁶ Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed 4 February 2008 ("Prosecutor's Kagame Response").

⁷ Reply Brief: Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed 7 February 2008 ("Nzirorera's Kagame Reply").

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applicant in respect of clearly identified issues relevant to the trial; and (3) the witness' testimony is necessary and appropriate for the conduct and fairness of the trial.⁸

5. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive and coercive mechanism of the subpoena is not abused.⁹ The use of subpoenas as a judicial power to compel must be balanced with the need to serve the overall interests of the criminal process.¹⁰

Motion to Subpoena Léon Mugesera

6. In the present case, the Defence for Nzirorera submits that on 5 January 2008, he met with Léon Mugesera in Québec City, Canada, for approximately seven hours. The Defence for Nzirorera provides a detailed account of the information obtained during the interview, their relevance to issues in Joseph Nzirorera's trial, and Léon Mugesera's refusal to testify before the Tribunal. The Prosecution objects to the Defence for Nzirorera having submitted a personal declaration to this effect in lieu of a declaration by Léon Mugesera himself.

7. The Trial Chambers of the Tribunal have previously accepted sworn affidavits from defence counsel where no other means of relaying information obtained from a witness or demonstrating that a witness refuses to testify was available.¹¹ While it is ideal to have more objective forms of demonstration, such as copies of letters or emails (as provided by the Defence for Nzirorera in its motion to subpoena President Kagame) or signed witness statements, the Chamber recognizes that this is not always possible.

⁸ See e.g. *Karemura et al.*, Decision on the Defence Motion for Issuance of Subpoena to Witness T (TC) 8 February 2006, para. 4; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for a Subpoena for Witness SHB (TC), 7 February 2005, para. 3; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nzeiyunwa ("Bagosora et al.")*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4; *The Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7 ("Halilovic Decision").

⁹ Halilovic Decision, para. 6; *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, Prosper Mugiraneza ("Bizimungu et al.")*, Case No. ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka's Request for a Subpoena (TC), dated 26 September 2007, para. 4 ("Bizimungu Decision"); *The Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005, para. 35 ("Milosevic Decision"); *Bagosora et al.*, Decision on Request for a Subpoena for Major Jacques Biot (TC), 14 July 2006, para. 2 ("Bagosora Decision").

¹⁰ Halilovic Decision, para. 10.

¹¹ See e.g. *Bizimungu et al.*, Decision on Prosper Mugiraneza's Request for a Subpoena (TC), 23 January 2008; see also *Bizimungu Decision*.

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8. The Defence for Nzirorera declares "under penalty of perjury"¹² that Léon Mugesera was asked if he would testify at Joseph Nzirorera's trial, and that he refused to do so because he believes the Tribunal to be an illegitimate court. The Defence for Nzirorera only shows that it attempted once to persuade Léon Mugesera to come to testify. The Chamber finds that this is not sufficient to conclude that all reasonable attempts have been made.

9. Although the Chamber is satisfied that the testimony of Léon Mugesera could materially assist Joseph Nzirorera in the presentation of his defence in connection with the issues set out in his Motion,¹³ the Chamber is not satisfied that Nzirorera has adequately shown that all reasonable steps have been taken to obtain the voluntary cooperation of the witness.

10. Given that the subpoena is requested for 2 December 2008, the Chamber finds that the Defence for Nzirorera has ample time to make additional reasonable efforts to gain Léon Mugesera's voluntary cooperation.

11. The motion for subpoena to Léon Mugesera falls to be rejected. The request for video-link testimony is therefore moot.

Motion to Subpoena President Paul Kagame

12. The Defence for Nzirorera provides a detailed account of the efforts it has made to obtain President Kagame's voluntary cooperation.¹⁴ Annex "A" of the Motion is a copy of a letter sent on 2 September 2003 requesting that President Kagame testify about Rwandan Patriotic Front ("RPF") activities leading up to and including the assassination of President Habyarimana. According to the Defence for Nzirorera, a response to this letter was never received. Annex "B" of the Motion is a copy of a letter sent over four years later requesting to meet with President Kagame. This request was formally refused by the Rwandan Ministry of Justice in a letter dated 25 January 2008, a copy of which is provided at Annex "C" of the motion. Based on this, the Chamber finds that the Defence for Nzirorera has demonstrated that it has made reasonable attempts to obtain the voluntary cooperation of the witness.

¹² Nzirorera's Mugesera Motion, Annex "A".

¹³ Joseph Nzirorera explains that he expects Léon Mugesera's testimony to directly contradict the testimony of Prosecution Witnesses ZF, UB, AWD, and GOB on the following issues: an alleged meeting with Léon Mugesera, Joseph Nzirorera, and others at Butotori camp to plan the Tutsi extermination; Léon Mugesera's speeches and attendance at MRND meetings and rallies; whether MRND officials helped Léon Mugesera hide and flee Rwanda; Léon Mugesera's alleged membership of a secret organization; Léon Mugesera's participation to a plan to exterminate the Tutsi.

¹⁴ Nzirorera's Kagame Motion, paras. 10-13 and Annexes "A", "B", and "C".

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13. In considering whether the prospective testimony will materially assist the applicant, it is not enough that the information requested may be "helpful or convenient" for one of the parties: it must be of substantial or considerable assistance to the Accused in relation to a clearly identified issue that is relevant to the trial.¹⁵ In this regard, the Chamber must consider the specificity with which the prospective testimony is identified and whether the information can be obtained by other means.¹⁶ The requesting party must also demonstrate a reasonable basis for the belief that the prospective witness is likely to give the information sought.¹⁷

14. The Defence for Nzirorera submits that the Prosecution's case has included evidence that the MRND was responsible for the assassinations of MDR Party Leader Emmanuel Gapyisi and PSD Party Leader Félicien Gatabazi, and that the Indictment against Joseph Nzirorera makes specific mention of the assassination of President Habyarimana, alleging that immediately after that assassination, the Accused moved to execute the destruction of Rwanda's Tutsi population. The Defence for Nzirorera argues that evidence that the RPF was responsible for these political assassinations would be relevant to refute such evidence and the allegation that these acts were part of Joseph Nzirorera's joint criminal enterprise to destroy the Tutsi. The Defence for Nzirorera also argues that it knows of no person other than President Kagame who can provide direct and conclusive evidence on these issues.¹⁸

15. The Indictment does not allege that the Accused were responsible for the assassinations of Emmanuel Gapyisi, Félicien Gatabazi or President Habyarimana. The question of who is responsible for those assassinations is not a clearly defined issue in this case. Further, as this Chamber has already indicated, proof of possible RPF responsibility for the assassination of President Habyarimana will not impact on the liability of the Accused for the crimes for which they have been indicted.¹⁹ Therefore, evidence that the assassinations of President Habyarimana, Emmanuel Gapyisi and Félicien Gatabazi were committed by the RPF will not materially assist the Defence in this case.

16. The motion to subpoena President Paul Kagame therefore falls to be rejected.

¹⁵ Bizimungu Decision, para. 5; Milošević Decision, para. 39; Bagosora Decision, para. 2; *The Prosecutor v. Martić*, Case No. IT-95-11, Decision on the Prosecution's Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena (TC), 16 September 2005, para. 12.

¹⁶ Halilović Decision, paras. 7; Bizimungu Decision, para.5; Milošević Decision, paras. 36 & 40; Bagosora Decision, para. 2.

¹⁷ Halilović Decision, para. 6.

¹⁸ Nzirorera's Kagame Reply, para. 16.

¹⁹ *Karemera et al.*, Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du gouvernement français (TC), 23 February 2005.


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FOR THESE REASONS, THE CHAMBER


DENIES both Motions in their entirety.

Arusha, 19 February 2008, done in English.



Dennis C. M. Byron

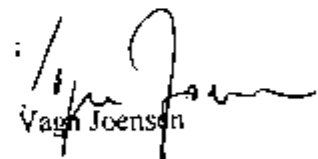
Presiding Judge


With the consent and on behalf of

Gberdao Gustave Kam

Judge
(Absent during signature)

[Seal of the Tribunal]



Vaughn Joensen

Judge