



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  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 21 April 2008

**THE PROSECUTOR**

v.

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

**DECISION ON JOSEPH NZIRORERA'S REQUEST FOR ADMISSIONS OR  
MOTION TO ORDER INTERVIEWS OF OTP INVESTIGATORS AND  
INTERPRETERS**

*Rule 54 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. During the presentation of the Prosecution's case, Witnesses ANU, BTH and GBU refuted part of their statements that were recorded by Office of the Prosecutor ("OTP") investigators and certified by OTP interpreters.
2. On 11 February 2008, Joseph Nzirorera filed a motion pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules") moving the Chamber to order the Prosecution to facilitate interviews with ten investigators and interpreters listed in the Motion, unless the Prosecution admits that Witnesses ANU, BTH and GBU testified falsely.<sup>1</sup> In its response, the Prosecution declined the requested admissions, opposed the Motion, and added that only one of the ten listed persons, investigator Michael Penda, was still in the service of the OTP.<sup>2</sup>
3. Thus, in his reply Joseph Nzirorera limited his request to Michael Penda.<sup>3</sup> Subsequently, however, Nzirorera learned that, contrary to the Prosecution's representation, interpreter Jean-Pierre Boneza still worked for the OTP. On 28 February 2008, Joseph Nzirorera requested that the Prosecution file a corrigendum to its response.
4. By 14 March 2008, the Prosecution still had not issued a corrigendum, and Joseph Nzirorera filed a supplement to his original motion imploring the Prosecution to do so, and requesting that the Chamber order the Prosecution to pay the cost of filing that supplement.<sup>4</sup> In its response to the supplement, the Prosecution finally admitted that Jean-Pierre Boneza worked for the OTP, and opposed Nzirorera's motion for sanctions. It also stated that Richard Kayonga, who was mentioned in the original motion, still worked for the OTP.<sup>5</sup> Nzirorera then filed a second supplement to inform the Chamber that Richard Kayonga actually did not work for the OTP, and requested that the Chamber order the Prosecution to also pay the costs of the second supplement due to this second misrepresentation.<sup>6</sup>

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<sup>1</sup> Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters, filed on 11 February 2008 ("Nzirorera's Motion").

<sup>2</sup> Prosecutor's Response to Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters, filed on 18 February 2008 ("Prosecutor's Response").

<sup>3</sup> Reply Brief: Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters, filed on 20 February, 2008 ("Nzirorera's Reply").

<sup>4</sup> Supplement to Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters, filed on 14 March 2008.

<sup>5</sup> Prosecutor's Response to Supplement to Nzirorera's Request for Admissions or Motion to Interview OTP Investigators and Interpreters, filed on 17 March 2008.

<sup>6</sup> Second Supplement to Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters, filed on 19 March 2008.

5. The Chamber will now rule on: (1) Joseph Nzirorera's request to interview Michael Penda and Jean-Pierre Boneza, while considering the rest of his original motion moot; and (2) his request for sanctions against the Prosecution.

## DELIBERATIONS

### Ordering interviews

6. Joseph Nzirorera moves to interview Michael Penda about his interview with ANU, and Jean-Pierre Boneza about the interview with GBU, with a view to calling them as defence witnesses.

7. Under Rule 54, a Trial Chamber may issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This Rule grants a Chamber the power to require a prospective witness to attend at a nominated place and time in order to be interviewed. According to the jurisprudence of the Tribunal, a party who requests that a witness be subpoenaed must show 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 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.<sup>7</sup>

8. If a party moves to interview OTP investigators in order to *challenge* the recorded statements of other witnesses, further requirements apply.<sup>8</sup> However, the Chamber notes that Joseph Nzirorera's aim by requesting to interview Prosecution staff is not to challenge the statement-taking process; rather, he wishes to validate it and thus impeach Prosecution witnesses.

9. The Prosecution first contends that Joseph Nzirorera relies on the jurisprudence for the issuance of subpoenas under Rule 54 to support his motion to order the interviews of Michael Penda and Jean-Pierre Boneza, and that this reliance is misplaced. Although Joseph Nzirorera cites jurisprudence from the International Criminal Tribunal for the

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<sup>7</sup> See e.g. *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, (Karemera et al.)*, Case No. ICTR-98-44-T, Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3 (TC), 12 July 2006, para. 9.

<sup>8</sup> "Any challenge to the integrity of the statement-taking process should be underpinned by a *prima facie* showing of misfeasance. A witness's denial of the content of a statement or the assertion that the witness said something different from what is recorded in the statement, cannot, by itself, provide justification for allowing the challenging party to interview and/or summon to testify the recorder or interviewer." *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses (TC), 6 July 2006, para. 15.

Former Yugoslavia ("ICTY"), which establishes a Chamber's power to compel interviews in the context of a motion for a subpoena, the Chamber finds that he is setting forth the accurate principle that Rule 54 permits a Chamber to compel interviews *generally*, as long as it finds that the three-pronged test mentioned above has been satisfied. Accordingly, the Chamber finds that Joseph Nzirorera has not misplaced his reliance on jurisprudence specific to the issuance of subpoenas.

10. The Prosecution also contends that the actual test for determining whether to compel the interviews of Michael Penda and Jean-Pierre Boneza is found in an earlier decision by the Chamber concerning the disclosure of exculpatory information, and that the motion should be denied because it does not satisfy this test.<sup>9</sup> The Chamber disagrees because that decision was premised on alleged Rule 68(A) disclosure violations concerning the names and addresses of OTP staff, and the request for interviews in the instant motion is premised on Rule 54.

11. The Chamber will now evaluate Joseph Nzirorera's motion under the proper Rule 54 test for ordering interviews. Regarding the first prong of the Rule 54 test, it is undisputed that an interview with a member of the Prosecutor's staff requires the Prosecutor's permission.<sup>10</sup> It is also undisputed that Joseph Nzirorera has requested the Prosecutor in writing to facilitate interviews with Michael Penda and Jean-Pierre Boneza, and that he has declined to grant his permission.<sup>11</sup> Thus, the Chamber is satisfied that Joseph Nzirorera has made reasonable attempts to obtain the voluntary cooperation of the witnesses.

12. As to the second prong, Joseph Nzirorera submits that the testimony of Michael Penda and Jean-Pierre Boneza will materially assist his case because it will prove that ANU and GBU testified falsely, and that the inconsistency between their statements and testimony is not due to lapse of time, language difficulties, misinterpretation or mistranscription, or trauma.<sup>12</sup> Regarding the third prong, Joseph Nzirorera submits that Michael Penda and Jean-Pierre Boneza's testimony is necessary for the fairness of the trial because ANU and GBU's credibility is crucial to the Chamber's findings on whether

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<sup>9</sup> The Prosecution claims that the correct test is found in: *Prosecutor v. Protais Zigiranyirazo*, Case No. 2001-73-T, Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses (TC), 6 July 2006, para. 16.

<sup>10</sup> Prosecutor's Response, para. 6.

<sup>11</sup> Nzirorera's Motion, paras. 7-8.

<sup>12</sup> Nzirorera's Motion, para. 20.

Joseph Nzirorera is responsible for Tutsi killings in Mukingo commune, which is a major allegation against him.<sup>13</sup>

13. The Chamber notes that paragraph 62 of the Indictment alleges that Joseph Nzirorera is responsible for attacks by the Interahamwe/Amahindure against the Tutsi population in Ruhengeri *prefecture*,<sup>14</sup> and that paragraph 62.6 alleges that the training of the Amahindure commenced prior to April 1994.<sup>15</sup> Witness ANU contradicted this portion of the Indictment in his statement recorded on 10 June 1999 by Michael Penda and another investigator, which bears his apparent signature. In that statement, ANU asserted that the training of the Amahindure in Mukingo commune commenced *after* 6 April 1994. However, at his cross-examination on 18 June 2007, ANU testified in accordance with the Indictment and refuted having made the statement in question, claiming that someone else had added his signature to the document.<sup>16</sup> The Chamber is satisfied that Michael Penda's anticipated testimony concerns a clearly identified issue relevant to the trial

14. The Chamber also notes that witness GBU testified that his statement taken on 20 February 2003 was not read back to him before he signed it, despite the certificate provided by Jean-Pierre Boneza. However, Joseph Nzirorera does not allege that a clearly identified issue relevant to the trial would be affected by Jean-Pierre Boneza's testimony. The mere assertion that GBU's testimony demonstrates that he is not a reliable witness does not suffice.

15. Furthermore, the Chamber is not satisfied that the testimony of Michael Penda and Jean-Pierre Boneza can materially assist Joseph Nzirorera's case, or that their testimony is necessary and appropriate for the conduct and fairness of the trial. ANU's statement of 10 June 1999, apart from his disputed signature, bears the signatures of the two OTP investigators and the OTP interpreter. Similarly, GBU's statement of 20 February 2003 bears his signature along with that of the OTP interpreter. The Chamber finds that this constitutes a presumption that: (1) what was recorded on 10 June 1999 was ANU's statement, and that the signature is his own; and (2) that GBU's statement was read back to him before he signed it.

16. Because the Prosecution has not challenged the statement-taking process in question, it is not *necessary* for Joseph Nzirorera to call the investigator to testify that he

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<sup>13</sup> Nzirorera's Motion, para. 18.

<sup>14</sup> Amended Indictment, 24 August 2005, para. 62.

<sup>15</sup> Id. at para. 62.6.

<sup>16</sup> T. 17 Jun. 2007, p. 21.

complied with the rules. Furthermore, whether the inconsistencies between the statements in question and ANU's and GBU's testimony are due to a misunderstanding at the time of the statement-taking, a slip of memory, or a deliberate lie is for the Chamber to evaluate at the end of the trial based on its impression of the witnesses' entire testimony, the Parties' submissions, and other evidence. The Chamber is not convinced that the testimony of the investigator or interpreter will be of any material assistance to the Chamber in that process.

### **Sanctions**

17. Under Rule 46 (A), a Chamber may, after a warning, impose sanctions against a Counsel if, in its opinion, his conduct obstructs the proceedings or is otherwise contrary to the interests of justice.

18. The Chamber has previously stated that disciplinary sanctions can be applied even if no material prejudice or deliberate breach of the Prosecution's obligations has been established, if a pattern of continuous lack of diligence exists, which amounts to an obstruction of the proceedings, or is contrary to the interests of justice.<sup>17</sup>

19. The Prosecution's representations are presumed to be made in good faith. Therefore, the Chamber finds it disturbing that the Prosecution in the present case has made an inaccurate representation concerning one of its own staff members. Furthermore, the corrigendum of the inaccurate information was only made after Joseph Nzirorera filed a formal request to that effect, and even then it contained another similar inaccurate representation. The Prosecution's behaviour has caused a delay in the delivery of this decision, and resulted in further fees incurred by the Defence.

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<sup>17</sup> *Karemera, et al.*, Decision on Joseph Nzirorera's Seventeenth Notice of Disclosure Violations and Motion for Remedial and Punitive Damages (TC), 20 February 2008, para. 22.

20. However, the Chamber does not find the sanction suggested by Nzirorera, involving transfer of funds between ICTR budgets, to be an appropriate reaction. Further, taking into account that no prejudice to the Defence is at issue, the Chamber does not find sufficient grounds to order any sanctions against the Prosecution, but reiterates its dissatisfaction with the lack of diligence which the Prosecution has recurrently shown in response to requests by the Defence.

**FOR THESE REASONS, THE CHAMBER**

**DENIES** the Motion in its entirety.

Arusha, 21 April 2008, done in English.

Dennis C. M. Byron

Presiding Judge

Gberdao Gustave Kam

Judge

Vagn Joensen

Judge

[Seal of the Tribunal]