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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 29 January 2009

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**THE PROSECUTOR**

v.

**Édouard KAREMERA**  
**Mathieu NGIRUMPATSE**  
**Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

**DECISION ON JOSEPH NZIRORERA'S MOTIONS FOR SUBPOENA TO: FABIEN BUNANI, EUGENE MBARUSHIMANA, AND PASCAL NTAWUMENYUMUNSI**

*Rule 54 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. At the end of 2008, Joseph Nzirorera filed motions for subpoena to Fabien Bunani,<sup>1</sup> Eugene Mbarushimana,<sup>2</sup> and Pascal Ntawumenyumunsi<sup>3</sup> to appear before the Chamber and give testimony on his behalf. Initially, the Prosecution did not respond to the Bunani Motion, and left the resolution of the Mbarushimana and Ntawumenyumunsi Motions to the discretion of the Chamber.<sup>4</sup>

2. On 2 December 2008, the Chamber denied the motions because Joseph Nzirorera had not filed his witness list, and ordered him to file his witness list by 8 December 2008.<sup>5</sup> Because he has now filed his witness list, and Fabien Bunani, Eugene Mbarushimana, and Pascal Ntawumenyumunsi are on it, Nzirorera has submitted a second motion for subpoena for each witness on the same grounds as set forth in the original motions.<sup>6</sup> The Prosecution still defers to the discretion of the Chamber to decide whether the subpoenas are necessary.<sup>7</sup>

## DELIBERATIONS

### *Standard for Issuing a Subpoena*

3. Rule 54 of the Rules of Procedure and Evidence 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

<sup>1</sup> Joseph Nzirorera's Motion for Subpoena to Fabien Bunani, filed on 22 September 2008, ("Bunani Motion").

<sup>2</sup> Joseph Nzirorera's Motion for Subpoena to Eugene Mbarushimana, filed on 13 October 2008, ("Mbarushimana Motion"); Reply Brief: Joseph Nzirorera's Motion for Subpoena to Eugene Mbarushimana, filed on 21 October 2008.

<sup>3</sup> Joseph Nzirorera's Motion for Subpoena to Pascal Ntawumenyumunsi, filed on 17 November 2008, ("Ntawumenyumunsi Motion").

<sup>4</sup> Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Eugene Mbarushimana, filed on 20 October 2008; Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Pascal Ntawumenyumunsi, filed on 24 November 2008.

<sup>5</sup> *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("Karemera et al."), Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order for Extension of Time, Subpoenas, and Video-Link and on Prosecution Motion for an Order to Nzirorera to Reduce his Witness List, 2 December 2008, para. 16.

<sup>6</sup> Joseph Nzirorera's Second Motion for Subpoena to Fabien Bunani, filed on 10 December 2008; Joseph Nzirorera's Second Motion for Subpoena to Eugene Mbarushimana, filed on 10 December 2008; Joseph Nzirorera's Second Motion for Subpoena to Pascal Ntawumenyumunsi, filed on 10 December 2008; Reply Brief: Joseph Nzirorera's Second Motions for Subpoenas to Fabien Bunani, Eugene Mbarushimana, and Pascal Ntawumenyumunsi, filed on 17 December 2008.

<sup>7</sup> Prosecutor's Consolidated Response to Joseph Nzirorera's Motion for Subpoena to Eugene Mbarushimana, Pascal Ntawumenyumunsi and Fabien Bunani and to Joseph Nzirorera's Second Motion for Testimony by Video-Link: Paul Rusesabagina, filed on 15 December 2008.

materially assist its case and (iii) the witness' testimony must be necessary and appropriate for the conduct and the fairness of the trial.<sup>8</sup>

4. 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.<sup>9</sup> The Appeals Chamber in *Halilović* 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."<sup>10</sup>

#### ***Bunani Motion***

5. The Chamber finds that Joseph Nzirorera has made reasonable attempts to obtain the voluntary cooperation of Fabien Bunani because he has contacted or attempted to contact him nine times since early 2006 in order to convince him to come to Arusha to testify.<sup>11</sup> Bunani has refused to cooperate on every occasion.

6. The Chamber also finds that Fabien Bunani's testimony can materially assist Joseph Nzirorera's case because Nzirorera alleges that it would tend to contradict the allegations against him in paragraph 32.3 of the Indictment by contradicting the testimony of Witness UB. Additionally, the Chamber finds that Bunani's testimony is necessary and appropriate for the fairness and conduct of the trial because it appears that the allegations in paragraph 32.3 of the Indictment are a central allegation against Nzirorera, such that they have been the subject of testimony of three Prosecution witnesses.

7. However, the Chamber finds that Joseph Nzirorera has not demonstrated that the testimony sought by the subpoena is unavailable through other means. Paragraph 32.3 of the Indictment claims that Nzirorera attended a meeting with numerous Kigali *conseillers* and *Interahamwe*, which allegedly took place on 30 April 1994.<sup>12</sup> Nzirorera has not explained why the testimony at issue can only be given by Fabien Bunani, instead of one of the other numerous attendees at this alleged meeting. Accordingly, the Chamber denies Nzirorera's motion for subpoena to Bunani.

#### ***Mbarushimana Motion***

8. Although the Prosecution leaves the matter of issuing a subpoena for Eugene Mbarushimana to the discretion of the Chamber, it raises several points in its response that it urges the Chamber to consider. First, the Prosecution claims that Joseph Nzirorera has not

<sup>8</sup> *Prosecutor v. Édouard Karemera, Mathieu Ndirumutse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3, 12 July 2006, para. 9.

<sup>9</sup> *Karemera et al.*, Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3, 12 July 2006, para. 10.

<sup>10</sup> *Idem*

<sup>11</sup> Bunani Motion, paras. 5-12.

<sup>12</sup> Indictment, para. 32.3.

provided enough materials in support of any reasonable efforts he may have made to obtain Mbarushimana's cooperation. However, the Chamber notes that Nzirorera claims that Mbarushimana orally expressed his refusal to testify, and refused to respond to email communication. Moreover, Nzirorera attached the emails his Defence team sent to Mbarushimana in its efforts to obtain his cooperation as Annex "A" to his reply.

9. The Chamber finds that Joseph Nzirorera has made reasonable attempts to obtain the voluntary cooperation of Eugene Mbarushimana because he has scheduled numerous appointments with Mbarushimana for the purpose of securing his willingness to testify, which Mbarushimana has failed to attend.<sup>13</sup>

10. The Chamber finds that Eugene Mbarushimana's testimony can materially assist Nzirorera's case because Mbarushimana was the secretary of the *Interahamwe* National Committee, and Nzirorera claims that his testimony will directly refute the allegations in the Indictment that he and his co-Accused created the *Interahamwe* and trained them for the purpose of extermination of the Tutsis. The Chamber notes that Nzirorera also contends that Mbarushimana's testimony will refute the allegations that all three co-Accused in this case had control over the perpetrators of the killing and genocide.

11. Additionally, Joseph Nzirorera states that Eugene Mbarushimana's testimony will directly contradict the testimony of witness Ahmed Mbonyunkiza, who specifically stated that Mbarushimana attended MRND meetings in February 1992 at which the extermination of the Tutsis was allegedly discussed by Mathieu Ngirumpatse. Nzirorera also claims that Mbarushimana's testimony will contradict the testimony of Prosecution Witnesses G and T concerning the control exercised by the three co-Accused over the *Interahamwe* and those who were doing the killing.

12. Moreover, Joseph Nzirorera contends that Eugene Mbarushimana can provide evidence of his role, or lack thereof, in forming the *Interahamwe* and training them, and the efforts to stop the killing by asking *Interahamwe* leaders to travel around *secteurs* of Kigali after the massacres broke out. The Chamber is therefore amply satisfied that Mbarushimana's testimony can materially assist Nzirorera's case.

13. Further, because Joseph Nzirorera alleges that Eugene Mbarushimana was the secretary of the *Interahamwe* National Committee, the Chamber finds that his testimony is unique enough to not be available through other means. The Chamber concludes that it is reasonably likely that a subpoena would produce the degree of cooperation needed for Joseph Nzirorera to interview or examine Eugene Mbarushimana because it does not appear that he has stated that he would, under no circumstances, be willing to testify before the ICTR.<sup>14</sup> Accordingly, the Chamber grants Nzirorera's motion for subpoena to Mbarushimana.

<sup>13</sup> Mbarushimana Motion, paras. 5-9.

<sup>14</sup> In paragraph 12 of its "Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3", issued on 12 July 2006, the Chamber stated that a NZ1's firm unwillingness to cooperate with the Tribunal made it unlikely that a subpoena would produce the degree of cooperation needed for the movant to interview the witness.

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***Ntawumenyumunsi Motion***

14. The Chamber finds that Joseph Nzirorera has made reasonable attempts to obtain the voluntary cooperation of Pascal Ntawumenyumunsi because he has contacted or attempted to contact him three times since June 2008 in order to convince him to come to Arusha to testify, or at least sign a statement.<sup>15</sup> Ntawumenyumunsi refused to cooperate on every occasion.

15. Joseph Nzirorera asserts that Pascal Ntawumenyumunsi's testimony can materially assist his case because it will refute the testimony of Prosecution Witness XBM by contradicting: (1) XBM's claim that Ntawumenyumunsi was at an MRND rally at Umuganda Stadium in Gisenyi on October 1993, which is the subject of paragraph 25.2 of the Indictment; and (2) XBM's claim that Ntawumenyumunsi was at the Bikini Tam Tam Hotel in Gisenyi on 14 April 1994, and witnessed a meeting between Nzirorera and Colonel Nsengiyumva where Nzirorera asked Nsengiyumva about the fate of Bishop Wenceslas Kalibushi of Nyundo.

16. The Chamber finds that, even if Pascal Ntawumenyumunsi's contradiction of XBM's claim that Ntawumenyumunsi was at the Umuganda Stadium rally could be considered material to Nzirorera's case, Nzirorera has not demonstrated that the testimony sought by the subpoena is unavailable through other means. Paragraph 25.2 of the Indictment claims that thousands of people attended this rally.<sup>16</sup> Nzirorera has not explained why the testimony at issue can only be given by Ntawumenyumunsi, instead of one of the thousands of other attendees at this alleged meeting.

17. Moreover, the Chamber finds that, even if Pascal Ntawumenyumunsi's contradiction of XBM's claim that Ntawumenyumunsi witnessed the alleged meeting between Joseph Nzirorera and Colonel Nsengiyumva at the Bikini Tam Tam Hotel in Gisenyi can be considered material, Nzirorera has not demonstrated that the testimony sought by the subpoena is unavailable through other means. Because the meeting at the Bikini Tam Tam Hotel is not charged in the Indictment, Nzirorera concedes that this particular aspect of Ntawumenyumunsi's testimony is only material insofar as it may affect XBM's credibility. The Chamber notes that Nzirorera has not demonstrated that Ntawumenyumunsi is the only available witness that can call XBM's credibility into question. Accordingly, and taking into account that a subpoena is an exceptional measure, which is not to be issued lightly, the Chamber denies Nzirorera's motion for a subpoena to Ntawumenyumunsi.

18. The Chamber notes that Joseph Nzirorera has filed separate "second" motions for each of the witnesses at issue, despite the fact that they could have easily been consolidated into one motion. The Chamber reiterates its disapproval of piecemeal motions that are

<sup>15</sup> Ntawumenyumunsi Motion, paras. 6-8.

<sup>16</sup> Indictment, para. 25.2.

unnecessarily burdensome to Court Management Services, and to the parties in the case.<sup>17</sup> Accordingly, the Chamber orders that the fees paid to Nzirorera's Counsel for these motions shall not exceed those payable for one consolidated motion.

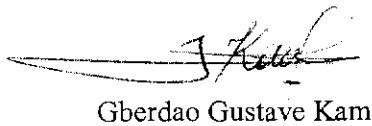
**FOR THESE REASONS, THE CHAMBER**

- I. **GRANTS** Joseph Nzirorera's motions for subpoena to Eugene Mbarushimana; and
- II. **DENIES** his motions for subpoena to Fabien Bunani and Pascal Ntawumenyumunsi; and
- III. **ORDERS** the Registry not to pay Nzirorera's Counsel any fees for the three "second" motions for the witnesses at issue, which would exceed those fees payable for one consolidated motion.

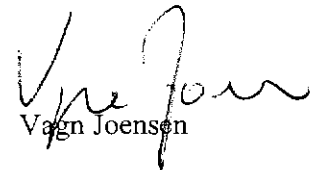
Arusha, 29 January 2009, done in English.

  
Denis C. M. Byron

Presiding Judge

  
Gberdao Gustave Kam

Judge

  
Vagn Joensen

Judge



<sup>17</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order for Extension of Time, Subpoenas, and Video-Link and on Prosecution Motion for an Order to Nzirorera to Reduce his Witness List, 2 December 2008, para. 21.