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10-2-2009  
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2873  
2009



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 10 February 2009

**THE PROSECUTOR**

v.

**Léonidas NSHOGOZA**

**Case No. ICTR-07-91-T**

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**DECISION ON THE DEFENCE'S URGENT MOTION FOR A SUBPOENA TO  
MS. LORETTA LYNCH**

*Rule 54 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Paul Ng'arua  
Abdoulaye Seye  
Dennis Mabura  
Marie Ka

**For the Accused:**

Allison Turner

2009

## INTRODUCTION

1. On 3 February 2009, the Defence filed an urgent request to subpoena Ms. Loretta Lynch to appear before the Chamber as a witness.<sup>1</sup> As Special Counsel for the Prosecution, Ms. Lynch investigated potential false testimony in the *Kamuhanda* proceedings.<sup>2</sup> For this reason, the Defence submits that Ms. Lynch has unique knowledge about the alleged subornation of Prosecution Witnesses GAA and GEX by the Accused as well as Witness GAA's credibility.
2. On 6 February 2009, the Prosecution filed a response opposing the Motion and requesting that appropriate sanctions be imposed.<sup>3</sup>

## DISCUSSION

### *Law on Subpoena*

3. Rule 54 of the Rules of Procedure and Evidence ("Rules") empowers the Chamber to issue a subpoena where "necessary for the purposes of an investigation or for the preparation or conduct of the trial".
4. According to the Tribunal's jurisprudence, a subpoena shall only be issued where (i) reasonable, but unsuccessful attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial; and (iii) the witness's testimony is necessary and appropriate for the conduct and fairness of the trial.<sup>4</sup> To satisfy these requirements, the applicant must present information about factors such as, among others, "the position held by the prospective witness in relation to the events in question."<sup>5</sup>
5. Subpoenas are not issued lightly, and it is not enough that the information of the requested witness may be helpful or convenient for one party.<sup>6</sup> Nor is it enough that a subpoena would help to discover whether the witness has any information which may assist the moving party.<sup>7</sup> The information of the requested witness must be of substantial or

<sup>1</sup> *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, Urgent Defence Request for a Subpoena to Ms. Loretta E. Lynch (Rule 54 of R.P.E.), 3 February 2009 ("Motion").

<sup>2</sup> *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision, 19 May 2005.

<sup>3</sup> *Nshogoza*, Prosecutor's Response to 'Urgent Defence Request for a Subpoena to Ms. Loretta E. Lynch (Rule 54 of ICTR R.P.E)', 6 February 2009 ("Prosecutor's Response").

<sup>4</sup> *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Subpoena, 19 January 2009, ("Karemera Decision") para. 3; *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Request for a Subpoena, 26 September 2007, ("Bizimungu Decision") para. 4; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Subpoena, 19 October 2006, para. 2; *Bagosora et al.*, Decision on Request for Subpoena, 6 October 2006, para. 3; *Karemera et al.*, Decision on Motion for Issuance of Subpoena, 8 February 2006, para.4.

<sup>5</sup> *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, ("Halilovic Decision") para. 6.

<sup>6</sup> *Karemera Decision* para. 4; *Bizimungu Decision*, para. 5; *Halilovic Decision*, para. 7.

<sup>7</sup> *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para.11.

considerable assistance. In determining whether the prospective witness's testimony is of substantial or considerable assistance, the Chamber considers the specificity with which the prospective testimony is identified.<sup>8</sup>

*Should the Chamber issue a subpoena?*

(i) *Reasonable attempts to obtain the voluntary cooperation of the witness*

6. The Defence has made four attempts to obtain the cooperation of Ms. Lynch by contacting her via facsimile and email since November 2008 to ask her to testify as a Defence witness.<sup>9</sup> However, the Defence received no response. Accordingly, the Chamber considers that the Defence has adequately shown that it has not been able to obtain the voluntary cooperation of Ms. Lynch despite its reasonable efforts.

(ii) *The witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial*

7. The Defence submits that Ms. Lynch's testimony is highly relevant to two issues at the heart of these proceedings: (i) whether Witnesses GAA and GEX were suborned by the Accused; and (ii) the reliability of Witness GAA as a witness in the current proceedings.<sup>10</sup> In support of its submissions, the Defence refers to a recording of an extract of an interview of Witness GAA by Ms. Lynch dated 29 September 2005, as part of her investigations regarding the *Kamuhanda* proceedings. The Defence submits that the interview extract shows that Witness GAA made no admission of having lied in the *Kamuhanda* proceedings, and "in no way inculpat[es]" the Accused.

8. The Chamber considers that the Defence has not shown that Ms. Lynch would have information which can materially assist in determining whether the Accused suborned Witnesses GAA and GEX. Ms. Lynch was not present when Witnesses GAA and GEX met the Accused and, therefore, would only be in a position to testify on what the witnesses she interviewed told her. While, according to the Defence, Witness GAA did not admit to having lied in the *Kamuhanda* proceedings, and does not inculcate the Accused in the recorded extract of the 29 September 2005 interview, the Chamber does not consider that this supports the Defence position that Ms. Lynch would have information which would materially assist the Chamber in determining whether Witnesses GAA and GEX were suborned by the Accused. Nor does it materially assist with regard to the issue of Witness GAA's credibility.<sup>11</sup>

9. Accordingly, the Chamber finds that the Defence has not shown that Ms. Lynch has information which can materially assist the Chamber in respect of clearly identified issues relevant to this trial. In view of this finding, the Chamber need not proceed to consider whether Ms. Lynch's testimony is necessary and appropriate for the conduct and fairness of the trial.

<sup>8</sup> *Karemera* Decision, para. 4; *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Application for Interview and testimony of Blair and Schroeder, 9 December 2005, para. 36.

<sup>9</sup> See Motion, Annexures A-D.

<sup>10</sup> Motion, para. 11.

<sup>11</sup> The Chamber notes that Witness GAA has since pleaded guilty to having provided false testimony in the *Kamuhanda* proceedings. *The Prosecutor v. GAA*, Case No. ICTR-2007-90-R77-T, Judgement, 4 December 2007.

*Matters not subject to disclosure under Rule 70 (A)*

10. In addition, the Chamber recalls that Rule 70 (A) provides for the non-disclosure of reports prepared by the Prosecutor, his assistants or representatives in connection with the investigation or preparation of a case.<sup>12</sup> The Chamber notes that, as stated in its Decision of 22 December 2008, any memoranda or reports prepared by Ms. Lynch in the conduct of the investigations ordered by the Appeals Chamber in the *Kamuhanda* proceedings, provided the materials are not exculpatory, are exempt from disclosure pursuant to Rule 70 (A).<sup>13</sup>

*Prosecution request for sanctions*

11. The Prosecution submits that the Defence “failed to give any cogent reason to justify the exceptional measure of ordering the subpoena of Special Counsel Lynch, a (former) agent or representative of the Prosecutor.” The Prosecution further submits that Defence Counsel’s contacts with Special Counsel were “improper and an impermissible attempt to circumvent rulings of the of the Appeals Chamber and this Trial Chamber, that any report, memoranda, and correspondences between the Special Counsel and the Prosecutor fall within the ambit of Rule 70 of the Rules.”<sup>14</sup>

12. While the Defence has not met the criteria for issuing a subpoena, the Chamber does not accept the Prosecution submission that Defence Counsel’s attempts to contact Ms. Lynch were “improper and impermissible” warranting sanctions. The Chamber notes that Defence Counsel first attempted to contact Ms. Lynch prior to the Chamber’s Decision of 22 December 2008.<sup>15</sup> Though Defence Counsel made further attempts to contact Ms. Lynch after the Chamber’s Decision of 22 December 2008,<sup>16</sup> such conduct was not in breach of any order

<sup>12</sup> Rule 70 (A) states: “Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.”

<sup>13</sup> *Nshogoza*, Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008, paras. 36, 38 (The Chamber found that the Defence failed to demonstrate (i) that the materials sought were in the custody or control of the Prosecution, and (ii) that they were *prima facie* exculpatory). See also *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Decision on Jean de Dieu’s Request Related to Prosecution Disclosure and Special Investigation, para. 7; *Procureur c. Ferdinand Nahimana et al.*, Décision Relative à la Requête de L’Appellant Hassan Ngeze Concernant la Communication du Rapport De L’Avocat Général Chargé de L’Enquête sur les Allégations d’Entrave au Cours de la Justice, Case No. ICTR-99-52-A, 23 February 2006, para. 16; The Special Counsel conducted investigations into possible contempt and perjury for both the *Nahimana* and *Kamuhanda* proceedings. See also *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Motions Relating to the Applicant Hassan Ngeze’s and the Prosecutor’s Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EG (AC), para. 14; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Vidoje Blagojević’s Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, 13 June 2003, p. 6: “Rule 70 (A) aims to protect work product from disclosure, as it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party”. See also *Eliézer Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 30 and footnote 2.

<sup>14</sup> Prosecutor’s Response, para. 2.

<sup>15</sup> Motion, para. 6. The Defence first attempted to contact Ms. Lynch on 18 November 2008. See Motion, Annexure A. The second attempt was on 17 December 2008. See Motion, Annexure B.

<sup>16</sup> Motion, paras. 8-9 and Annexures C and D.

of the Chamber, nor was it a violation of Rule 70. Accordingly, the Chamber does not consider it warranted to impose sanctions on the Defence.

**FOR THESE REASONS**, the Chamber

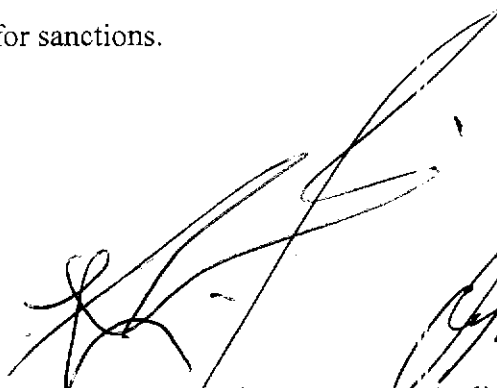
**DENIES** the Defence Motion; and

**DENIES** the Prosecution Request for sanctions.

Arusha, 10 February 2009

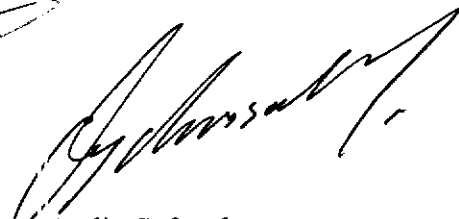


Kh. Lida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge

[Seal of the Tribunal]



Aydin Sefa Akay  
Judge

