



UNITED NATIONS
NATIONS UNIES

102-98-44-T
10-2-2009
(44777-44771)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 10 February 2009

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

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Joseph Nzirorera

**DECISION ON JOSEPH NZIRORERA'S MOTIONS TO SUBPOENA WITNESSES
G AND AWD FOR INTERVIEW**

Rule 54 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 11 September 2008,¹ the Chamber found that the Prosecution violated its disclosure obligations under Rule 68(A) of the Rules of Procedure and Evidence because it did not disclose certain statements² by Witness ALL-42 in the *Bagosora* trial to Joseph Nzirorera. As a remedy for this violation, the Chamber stated that, upon a showing of good cause, Nzirorera was entitled to recall the Prosecution witnesses, which he was not able to cross-examine fully due to the missing exculpatory evidence from ALL-42.³

2. On 26 September 2008, Joseph Nzirorera moved the Chamber to issue a subpoena to Witness G for an interview, based on his assertion that G was one of the witnesses that was not cross-examined fully due to the missing exculpatory evidence from ALL-42.⁴ The Prosecution opposed that motion in its entirety.⁵ On 14 January 2009, Nzirorera filed supplemental submissions to the G Motion,⁶ and the Prosecution responded.⁷

3. On 15 October 2008, Joseph Nzirorera moved the Chamber to issue a subpoena to Witness AWD for interview, based on his assertion that AWD was also one of the witnesses that was not cross-examined fully due to the missing exculpatory evidence from ALL-42.⁸ The Prosecution opposed the AWD motion in its entirety.⁹

DELIBERATIONS

Standard for Issuing a Subpoena for Interview

4. Rule 54 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

¹ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, (“*Karemera et. al.*”), Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008.

² The statements at issue concern: (1) the RPF’s alleged control over Robert Kajuga, Pheneas Ruhumuliza, and Jean-Pierre Turatsinze; and (2) Prosecution Witness G’s alleged employment with the RPF.

³ *Karemera et. al.*, Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 32.

⁴ Joseph Nzirorera’s Motion to Subpoena Witness G for Interview, filed on 26 September 2008, (“G Motion”); Reply Brief: Joseph Nzirorera’s Motion to Subpoena Witness G for Interview, filed on 2 October 2008, (“G Reply”).

⁵ Prosecutor’s Response to Joseph Nzirorera’s Motion to Subpoena Witness G for Interview, filed on 30 September 2008. (“Prosecution Response to G Motion”).

⁶ Supplemental Submissions: Joseph Nzirorera’s Motion to Subpoena Witness G for Interview, filed on 14 January 2009, (“Supplemental Submission”).

⁷ Prosecutor’s Response to Joseph Nzirorera’s Supplemental Submissions: Joseph Nzirorera’s Motion to Subpoena Witness G for Interview, filed on 19 January 2009.

⁸ Joseph Nzirorera’s Motion to Subpoena Witness AWD for Interview, filed on 15 October 2008, (“AWD Motion”); Reply Brief: Joseph Nzirorera’s Motion to Subpoena Witness AWD for Interview, filed on 21 October 2008.

⁹ Prosecutor’s Response to Joseph Nzirorera’s Motion to Subpoena Witness AWD for Interview, filed on 20 October 2008.

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conduct of the trial, and encompasses the Chamber's power to require a prospective witness to attend at a nominated place and time in order to be interviewed.¹⁰ In order to receive a subpoena to interview a prospective witness, the requesting party must show that: (1) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (2) the witness's testimony can materially assist its case; and (3) the witness's testimony must be necessary and appropriate for the conduct and the fairness of the trial.¹¹

5. According to this Tribunal's jurisprudence however, a subpoena order 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.¹²

G Motion

6. The Chamber finds that Joseph Nzirorera has made reasonable attempts to obtain the voluntary cooperation of Witness G because he has attempted to contact him several times without success.¹³ Witness G eventually informed WVSS that he officially refused to meet with Nzirorera's Counsel.¹⁴

7. The Chamber also finds that G's testimony can materially assist Joseph Nzirorera's case because Nzirorera intends to cross-examine G on the fact that ALL-42 stated that G was working for the RPF during the time that G was an officer for the National Committee of the Interahamwe. Moreover, the Chamber has already ruled that, if G was indeed working for the RPF, that information would be relevant to his credibility.¹⁵

8. Finally, the Chamber finds that an interview of G by Joseph Nzirorera is necessary and appropriate for the conduct and fairness of the trial because it would be difficult for Nzirorera to decide whether to move to recall G without knowing what he will say about the allegation that he was working for the RPF. This approach comports with the jurisprudence of the *Krstic* Appeals Chamber, which has stated that: "...in a situation where the defence is

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

¹¹ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse 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.

¹² *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.

¹³ G Motion, para. 6.

¹⁴ Annexure, Prosecution Response to G Motion.

¹⁵ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 11.

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unaware of the precise nature of the evidence which a prospective witness can give and where the defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the defence to...force the witness to give evidence 'cold' in court without knowing first what he will say."¹⁶

9. However, the Prosecution asserts that the Chamber should deny Joseph Nzirorera's motion for subpoena to interview G because Nzirorera simply intends to use this subpoena as an unfair trial tactic to prepare a more effective cross-examination.¹⁷ In support of this proposition, the Prosecution cites the following language from a decision by the *Halilović* Appeals Chamber:

"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. Where the information the Defence seeks *before trial* from the opposing party's witness will, in any event, be presented at trial during that witness's examination-in-chief, there is no need to resort to a subpoena...In entertaining a request for a subpoena, a Trial Chamber is therefore entitled to take into account the fact that a witness whom a party seeks to subpoena is scheduled to testify during the trial, and to refuse the request where its sole rationale is to prepare for a more effective cross-examination."¹⁸ (Emphasis added.)

10. The Chamber notes that the *Halilović* Decision does not set forth a categorical rule, which states that all subpoenas to interview a potential witness should be denied if they assist the movant to prepare his cross-examination of that witness. Rather, the language at issue provides a narrowly-tailored rule, which states that a subpoena for an interview shall not be issued if a party intends to use the interview as a way of hearing the substance of a witness's examination-in-chief *before* he presents it.

11. Because Joseph Nzirorera is considering *recalling* G for *further* cross-examination, it is evident that the examination will not take place "before trial." G has already given his examination-in-chief; accordingly, the Chamber finds the language from the *Halilović* Decision set forth by the Prosecution to be distinguishable and inapposite.

12. Furthermore, the Chamber reminds the Prosecution that Joseph Nzirorera is considering whether to recall G under a remedy for the Prosecution's failure to disclose

¹⁶ *Prosecutor v. Krstić*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 1 July 2003, para. 8.

¹⁷ Prosecution Response to G Motion, para. 4.

¹⁸ *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 10, ("*Halilović* Decision").

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exculpatory evidence.¹⁹ This is a situation that the Prosecution brought upon itself due to its consistent disclosure violations, and where the Chamber finds it entirely appropriate to permit Nzirorera to interview the witnesses in question first.²⁰ Thus, a subpoena to interview G does not give Nzirorera an unfair advantage when preparing G's cross-examination.

13. Finally, the Prosecution proposes two alternative means for satisfying Joseph Nzirorera's request for a subpoena to interview G: (1) the Prosecution can independently attempt to meet with G to explain to him how and why additional questioning by the parties outside of the courtroom may assist them in determining whether he should be recalled; or (2) the Chamber could simply recall G for further examination on a very limited set of issues, which Nzirorera would outline in a follow-up application demonstrating good cause.²¹

14. The Chamber notes that Joseph Nzirorera has agreed to the Prosecution's offer to contact G and attempt to persuade him to meet with Nzirorera's Counsel.²² Nonetheless, in the event that the Prosecution is unsuccessful, Nzirorera asserts that the Chamber should issue the subpoena compelling G to submit to an interview with his Counsel.²³

15. Considering Joseph Nzirorera's acceptance of the Prosecution's offer to contact G, the Chamber first orders the Prosecution to pursue this option. If the Prosecution is unsuccessful in contacting G and persuading him to meet with Nzirorera's Counsel, the Chamber, upon notice of this fact, will grant Nzirorera's G Motion, and issue a subpoena for an interview of G. The Chamber disregards the Prosecution's second proposed solution because it does not find that the Prosecution has the right to suggest limitations to an already established remedy, which was granted to Nzirorera in response to the Prosecution's repeated disclosure violations.

Supplemental Submission

16. In his supplemental submission, Joseph Nzirorera claims that the Prosecution disclosed to him an interview it conducted with G in the *Setako* case, which allegedly contains several matters that appear to be inconsistent with G's testimony during Nzirorera's trial.²⁴ Nzirorera contends that these inconsistencies may evidence a desire by G to

¹⁹ *Karemera et. al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 32.

²⁰ *Karemera et. al.*, Decision on Joseph Nzirorera's Motions for Request for Cooperation to a State: Interviews of Witness Colonel Frank Claeys and Witness T, 25 November 2008, para. 14.

²¹ Prosecution Response to G Motion, paras. 5-6.

²² G Reply, para. 4.

²³ G Reply, para. 5.

²⁴ Supplemental Submission, para. 5.

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incriminate OTP's targets in exchange for payments he received by the Prosecution over a ten-year period.²⁵ Nzirorera further contends that the report of the interview contains other inconsistencies, which relate to his case, such as the fact that he went to Gitega on 9 April 1994; that the Interahamwe already had firearms by 9 April 1994; and that the *Interahamwe* no longer had an office in MRND headquarters in 1993 when Nzirorera became Secretary General.²⁶

17. The Chamber reminds Joseph Nzirorera that the remedial measure to recall Prosecution Witnesses, which was granted to him on 11 September 2008, is strictly limited to Prosecution witnesses, who he was not able to cross-examine fully *due to the missing exculpatory evidence from ALL-42*.²⁷ The new information that Nzirorera raises in his supplemental submissions does not relate to missing exculpatory evidence from ALL-42. Therefore, the Chamber will not consider that information in its deliberations here, nor will it permit Nzirorera to question G on the content of the supplemental submission, if it grants him the right to recall G for further cross-examination.

AWD Motion

18. The Chamber finds that Joseph Nzirorera has made reasonable attempts to obtain the voluntary cooperation of Witness AWD because he has officially refused to meet with Nzirorera's Counsel.²⁸ The Chamber also finds that AWD's testimony can materially assist Joseph Nzirorera's case because Nzirorera intends to cross-examine AWD on ALL-42's statement that AWD was working for the RPF while he was Nzirorera's subordinate.²⁹

19. Additionally, for the reasons stated above in its deliberations on the G Motion, the Chamber finds that an interview of AWD by Joseph Nzirorera is necessary and appropriate for the conduct and fairness of the trial because it would be difficult for Nzirorera to decide whether to move to recall AWD without knowing what he will say about the allegation that he was working for the RPF.

20. The Prosecution reiterates the same argument, based on the *Halilović* Decision, which it set forth in its response to Joseph Nzirorera's G Motion. For the reasons stated above in its deliberations on the G Motion, the Chamber dismisses that argument.

²⁵ *Ibid.*

²⁶ Supplemental Submission, para. 6.

²⁷ *Karemera et. al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 32.

²⁸ Annex "A", Nzirorera's AWD Motion.

²⁹ Nzirorera's AWD Motion, para. 8.

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21. The Prosecution also asserts that Joseph Nzirorera should not be allowed to interview AWD before recalling him because Nzirorera had ample opportunity to develop his cross-examination of AWD at the time AWD testified. The Chamber considers that this cannot be possible because it has already determined that Nzirorera's cross-examination of AWD was severely hampered at that time by the Prosecution's failure to disclose the exculpatory statements made by ALL-42.

22. Accordingly, the Chamber grants Joseph Nzirorera's motion to subpoena AWD for an interview.

FOR THESE REASONS, THE CHAMBER

- I. **ORDERS** the Prosecution to contact Witness G, and attempt to persuade him to agree to an interview with Joseph Nzirorera's Counsel. If such efforts are deemed unsuccessful, the Chamber, upon notice of this fact, will grant Nzirorera's motion to subpoena Witness G for an interview.
- II. **GRANTS** Nzirorera's motion to subpoena Witness AWD for an interview.

Arusha, 10 February 2009, done in English.

Denis C. M. Byron

Presiding Judge

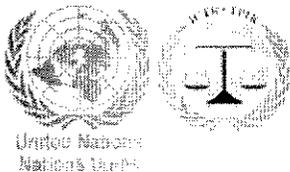
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I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

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No. of Pages:	7	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
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