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ICTR-98-44-T
11-12-2009
(48798-48794)
International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

48798

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IN TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date Filed: 11 December 2009

The PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
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**PROSECUTOR'S RESPONSE TO JOSEPH NZIRORERA'S MOTION TO
SUBPOENA MICHEL BAGARAGAZA FOR INTERVIEW**

For the Prosecutor:

Mr. Don Webster
Mr. Saidou N'Dow
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze
Mr. Eric Husketh

For the Accused:

Ms. Dior Diagne and Mr. Moussa Félix Sow for *Édouard Karemera*
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for *Mathieu Ngirumpatse*
Mr. Peter Robinson and Patrick Nimy Mayidika Ngimbi for *Joseph Nzirorera*

Overview

1. On 7 December 2009, Mr. Nzirorera filed his *Motion to Subpoena Michel Bagaragaza for Interview*. He requests the Chamber to subpoena Michel Bagaragaza to submit to an interview by his Lead Counsel Peter Robinson. Mr. Nzirorera asserts that Mr. Bagaragaza, who is currently on his list of witnesses, has refused to be interviewed or indeed to testify on his behalf.¹
2. The Prosecution hereby files his response in which he opposes Mr. Nzirorera's request for a Subpoena of Mr. Bagaragaza.

Prosecutor's Submission on Application for Subpoena of Prospective Defence Witness Michel Bagaragaza.

3. Rule 54 of the Rules 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". Case law indicates that the Chamber may exercise its discretion to subpoena a prospective witness when the requesting party shows that: (i) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist its case; and (iii) the witness's testimony is necessary and appropriate for the conduct and the fairness of the trial.² 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.³
4. The Prosecutor respectfully submits that Mr. Nzirorera has not met the evidentiary burden faced by a party wishing to obtain an order to compel someone to be interviewed by that party.
5. The Appeals Chamber in *Halilovic* identified certain criteria to be taken into consideration in making a determination on the materiality of the anticipated evidence. In making this showing,

¹ Joseph Nzirorera's Motion to Subpoena Michel Bagaragaza for Interview, 7 December 2009.

² *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, Para. 10,11; *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of a Subpoena (AC), 21 June 2004 (*Halilovic* Decision) Para. 6; *Prosecutor v. Bagosora et al.*, Case No. 98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana.(TC), 23 June 2004; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for Subpoenas (TC), 4 May 2005; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Confidential Ex Parte Motion for Subpoenas Directed to Defence Witnesses (TC), 20 January 2006.

³ *Halilovic* Decision, Para. 7.

the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relationship the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or to learn about those events, and any statements the witness made to the Prosecution or others in relation to them.⁴

6. Given the factors to be taken into consideration when making a determination of materiality, the Prosecutor acknowledges that Mr. Bagaragaza's testimony may bear upon some relevant issues in this trial. However, Mr. Nzirorera has not established that the witness' testimony is necessary and appropriate for the conduct and the fairness of the proceedings such as to warrant the *ultimus remedium* of a subpoena.

7. The Prosecutor asserts that the Chamber may and should also consider that the information that Mr. Nzirorera seeks to elicit through the use of a subpoena is obtainable through other means.⁵ Mr. Nzirorera has indicated that he intends to call a substantial number of witnesses to testify about MRND rallies in general. There are at least eight other witnesses besides Michel Bagaragaza on Mr. Nzirorera's list who are being called to refute Prosecution testimony about the rally in Gisenyi during October 1993, including allegations about Mr. Bagosora and Mr. Nsengiyumva's role during that rally. Mr. Nzirorera anticipates calling at least three other witnesses to refute Prosecution testimony about fundraising events at the Hotel Rebero and also three additional witnesses to testify regarding alleged meetings between Nzirorera and the Interahamwe at the Meridien Hotel. Additionally, Mr. Nzirorera seeks to call a multitude of witnesses to testify about the creation and activities of the Interahamwe throughout the territory of Rwanda.

8. Considering that a subpoena should not be issued lightly, the Prosecutor asserts that Mr. Nzirorera has not established the overall necessity of Michel Bagaragaza's testimony.⁶

⁴ *Ibid.* Para. 6

⁵ It has been established that "in deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means". *Halilovic* Decision, Para. 7; See also, Decision on Joseph Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses, NZ1, NZ2 and NZ3, 12 July 2006, Para. 10

⁶ *Prosecutor v. Bagosora et al.*, Case No. 98-41-T, Decision on Request for a Subpoena, 11 September 2006, Para. 5. See also *Halilovic* Decision, at Para. 6: "Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".

9. Furthermore, Mr. Nzirorera claims that he has made several attempts over the past year to interview Mr. Bagaragaza. He states in his submission that he has had several discussions with Mr. Bagaragaza's Lead Counsel in which he has requested to interview his client. Mr. Nzirorera has, however, not attached any evidence of these discussions between himself and Mr. Geert Alexander Knoops, Mr. Bagaragaza's Attorney, nor has he included evidence of Mr. Bagaragaza's refusal to meet with him.

10. More pertinent, however, is the fact that Mr. Nzirorera states that he has never spoken with Mr. Bagaragaza and is unable to assess the liabilities of calling him as a witness, hence the necessity of the subpoena. However, Mr. Nzirorera has neglected to mention that he has in fact on occasion met with the subject of his motion. By his own admission, in two separate motions, Mr. Nzirorera states that: "before he became a Prosecution witness (Michel Bagaragaza, witness ADE) had been interviewed by the defence team of Mr. Nzirorera, which intended to call him as a defence witness".⁷ Surely Counsel for Mr. Nzirorera would have assessed the usefulness of Mr. Bagaragaza's testimony as a defence witness at that stage.

11. The Prosecutor asserts that this situation does not fall within the category of situations anticipated by the Appeals Chamber in *Krstic* when it observed that it would not be skilful of Defence counsel to seek to subpoena a witness to give testimony at trial without first knowing what the witness would say.⁸ In addition to having already met with the witness in the past, Mr. Bagaragaza has testified in open court before this Tribunal and the transcripts of that testimony are available to Mr. Nzirorera.⁹ The Prosecutor submits that this is not a situation where the Defence is unaware of the precise nature of the evidence that this prospective witness can give. The transcripts of the witness' testimony from the *Zigiranyirazo* case can assist Mr. Nzirorera to make a determination of the witness' anticipated testimony where he to be called as a witness for the defence.

⁷ Reply Brief: Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza, 25 June 2008, Para.6, see also Joseph Nzirorera's Motion for Reconsideration of Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE, 16 August 2006, Paras. 11-12

⁸ *Prosecutor v. Krstic*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, Para. 8

⁹ *Prosecutor v. Zigiranyirazo*, T. 13,15 June 2006 and T. 28, 29,30 November 2006

12. Mr. Nzirorera further states that Mr. Bagaragaza may wish to maintain favour with the Prosecutor on matters such as where he will serve the remainder of his sentence and whether he can obtain early release. The Prosecutor must point out that Mr. Bagaragaza was convicted and sentenced on 5 November 2009. Where he serves his sentence and indeed whether he becomes eligible for early release is not a matter for the Prosecutor, but for the authorities of the Tribunal. Such issues have no bearing on Mr. Bagaragaza's anticipated testimony.

13. The Prosecutor respectfully submits that Nzirorera has not discharged his burden to show why an order from this Chamber should be issued to make Michel Bagaragaza available for an interview by his Counsel.

WHEREFORE, the Prosecution requests that Mr. Nzirorera's motion be denied.

Respectfully submitted.

Dated in Arusha, this 11th day of December 2009

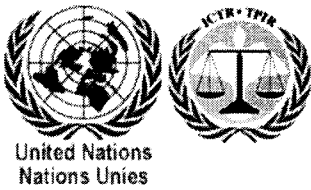
For the Prosecutor:



Don Webster
Senior Trial Attorney



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Assistant Appeals Counsel



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Dates:	Transmitted: 11 December 2009		Document's date: 11 December 2009	
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