



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
12-01-2010
(49281-49278)

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HM

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 12 January 2010

THE PROSECUTOR

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

JUDICIAL RECORDS ARCHIVES
RECEIVED

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**DECISION ON JOSEPH NZIRORERA'S MOTION TO SUBPOENA MICHEL
BAGARAGAZA FOR AN INTERVIEW**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecution:
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Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
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Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

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INTRODUCTION

1. On 7 December 2009, Joseph Nzirorera filed a motion seeking the Chamber to order a subpoena to Michel Bagaragaza for an interview.¹ The Prosecution opposes the Motion.²

DELIBERATIONS

2. 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, and encompasses the Chamber's power to require a prospective witness to be present at a nominated place and time in order to be interviewed.³ In order for the Chamber to grant a request for subpoena to interview a prospective witness, the requesting party must demonstrate that (1) it has made reasonable attempts to obtain the voluntary cooperation of the witness, (2) the witness' testimony can materially assist its case, and (3) the witness' testimony must be necessary and appropriate for the conduct and the fairness of the trial.⁴

3. However, according to this Tribunal's jurisprudence, 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.⁵ The Appeals Chamber in the *Halilović* case further 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."⁶

4. Joseph Nzirorera submits that he has made several attempts to meet with Michel Bagaragaza directly as well as through Lead Counsel for Bagaragaza but that he was unsuccessful.⁷ On 19 November 2009, the Chamber received notice from the Registry that Lead Counsel for Bagaragaza indicated that his client did not consent to meet with Lead

¹ Joseph Nzirorera's Motion to Subpoena Michel Bagaragaza for Interview ("Motion"), filed on 7 December 2009.

² Prosecutor's Response to Joseph Nzirorera's Motion to Subpoena Michel Bagaragaza for Interview ("Response"), filed on 11 December 2009.

³ *Prosecutor v. Édouard Karemera, Matthieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Decision on Nzirorera's Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006, para. 9.

⁴ *Idem.*

⁵ *Ibid.*, para. 10.

⁶ *Idem.*

⁷ Motion, para. 4.

Counsel for Nzirorera.⁸ However, the Chamber notes that in two filings dated 16 August 2006 and 25 June 2008, Nzirorera expressly acknowledges that his Defence Team had met with Bagaragaza,⁹ which contradicts the present submissions stating that Nzirorera Defence was unsuccessful meeting with Bagaragaza. Consequently, the Chamber concludes that Nzirorera's Defence Team has already met with Bagaragaza.

5. The Chamber, because of the contradictions in Joseph Nzirorera's submissions regarding his knowledge of the contents of the possible testimony of Michel Bagaragaza, finds that Nzirorera has not demonstrated whether further interviewing Bagaragaza can materially assist Nzirorera's case with respect to the following issues: MRND Rally in Gisenyi in October 1993, that military officers never spoke at MRND-rallies, the contents of speeches by MRND officials at MRND rallies, the fundraising at Hotel Rebero, the meeting at Hotel Méridien, and the existence of a plan, before 6 April 1994, to exterminate Tutsis.

6. Furthermore, the Chamber finds that the interview of Michel Bagaragaza is not necessary and appropriate. Nzirorera has not explained why the testimony at issue could only be given by Bagaragaza. Nzirorera has in fact listed several other witnesses who have testified or will testify as to the allegations enumerated in the preceding paragraph in his Pre-Defence brief.¹⁰ As such, Joseph Nzirorera has not demonstrated that the information sought by the subpoena is unavailable through other means.

7. Joseph Nzirorera submits that an interview with Michel Bagaragaza is necessary in order to assess whether Michel Bagaragaza will damage his case.¹¹ The Chamber finds that Nzirorera has not demonstrated that an interview of Bagaragaza is necessary in order to determine whether Bagaragaza will not harm Nzirorera's case with false testimony. The Chamber considers that Joseph Nzirorera has not provided any basis for the allegation of false testimony from Bagaragaza. The Chamber further notes that, because Nzirorera, in the documents filed in relation to his Pre-Defence brief in December 2008, included a summary

⁸ E-mail correspondence from Lead Counsel for Michel Bagaragaza to Defence Counsel and Detention Management Section on 19 November 2009.

⁹ Joseph Nzirorera's Motion for Reconsideration of Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE, filed on 16 August 2006, para. 12 ("Before he became a prosecution witness, Witness ADE had been interviewed by the defence team of Mr. Nzirorera, which intended to call him as defence witness."); Reply Brief: Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza, filed on 25 June 2008, paras. 6-7. Paragraph 6 of this document makes reference to the previous filing of 16 August 2006.

¹⁰ See Pre-Defence Brief, dated 8 December 2008 and filed on 10 December 2008.


¹¹ Motion, para. 16.

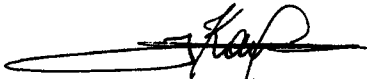
of the intended testimony of Bagaragaza whom he had listed as a witness¹² and because Bagaragaza then testified in the *Zigiranyirazo* case and made a guilty plea which was accepted by this Tribunal,¹³ Nzirorera already has the means to determine whether calling Bagaragaza as a witness would harm his case.

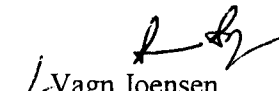
FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's motion to subpoena Michel Bagaragaza for an interview.

Arusha, 12 January 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge

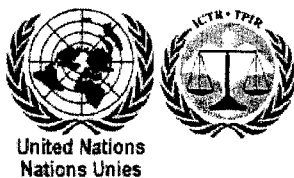

Vagn Joensen
Judge

[Seal of the Tribunal]



¹² Joseph Nzirorera's Confidential Witness List and Summary of Testimony, dated 8 December 2008 and filed on 10 December 2008, pp. 85-86.

¹³ *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgement, 17 November 2009, especially paras. 2, 12 and 36.



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Dates:	Transmitted: <i>12/01/2010</i>		Document's date: <i>12/01/2010</i>	
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