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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Affaire n° ICTR-98-44-T

ENGLISH

Original: FRENCH

Before: Andrésia Vaz, presiding
Florence Rita Arrey
Flavia Lattanzi

Registry: Adama Dieng

Date: 17 February 2004

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THE PROSECUTOR

v.

ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA and
ANDRÉ RWAMAKUBA

**DECISION ON THE REQUEST FOR CERTIFICATION TO APPEAL
THE DECISION ON THE DEFENCE MOTION FOR SUBPOENA TO
WITNESS G RENDERED ON 20 OCTOBER 2003**

Rule 73 (B) of the Rules of Procedure and Evidence

Defence for the Accused:
Peter Robinson

Defence for the Co-Accused:
Dior Diagne
Charles Roach and Frédéric Weyl
David Hooper and Andreas O'Shea

Office of the Prosecutor:
Don Webster
Dior Fall
Ifeoma Ojemeni
Simone Monasebien
Holo Makwaia
Tamara Cummings-John
Ayo Fadugba
Sunkarie Ballah-Conteh

CIII04-024 (E)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”),

SITTING III, composed of Judge Andréia Vaz, presiding, Judge Florence Rita Arrey and Judge Flavia Lattanzi (“the Chamber”),

BEING SEIZED of an application entitled *Request for Certification to Appeal Decision on the Defence Motion for Subpoena to Witness G*, filed by the Defence for the Accused Nzirorera on 27 October 2003 (“the Motion”, “the Defence” and “the Accused”),

NOTING that the Prosecutor did not file a response to the Request within the five-day time limit stipulated under Rule 73 (E) of the Rules of Procedure and Evidence (“the Rules”) and that he did not request additional time before expiration of the time limit,

RECALLING the following decisions rendered in the present case:

- (i) *Decision on the Defence Motion for Interview With Witness G* of 27 June 2003, in which the Chamber granted the Defence leave to interview Witness G (“the witness”), whom the Defence considers to be in possession of certain exculpatory information, prior to his appearance and subject to his consent;
- (ii) *Decision on the Defence Motion for Subpoena to Witness G* of 20 October 2003, in which the Chamber considered that it could not issue

an order to the Witness, who had in the meantime declined to be interviewed by the Defence, to consent to such a interview (“ the Decision of 20 October 2003”);

RECALLING that, in the Decision of 20 October 2003, the Chamber refused to issue an order to the witness to consent to an interview with the Defence prior to his testimony in the instant case, on the grounds that the Accused was subject to special protective measures, and that given his refusal, and the fact that the Chamber was not satisfied that if such an order were issued to the witness, the Defence would obtain from him information that it could not elicit during cross-examination,

CONSIDERING Rule 73(B) of the Rules, which establishes two cumulative tests in respect of requests for certification to appeal decisions rendered under Rule 73 of the Rules:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

DECIDES solely on the basis of the Defence's brief, filed in support of its request for certification to appeal the Decision of 20 October 2003, in accordance with Rule 73 (A) of the Rules.

Submissions of the Defence

1. The Defence submits that the Decision of 20 October 2003 violates the principle of equality of arms, by preventing it from obtaining from the witness, prior to his appearance, exculpatory evidence which the Defence was hoping to revisit during its cross-examination of other Prosecution witnesses. The Defence further submits that because of the Chamber's decision, it would not have the necessary facts on which to cross-examine the witness during his appearance, which will render the cross-examination all the more lengthy and difficult. The Defence underscores in this regard that the Chamber's decision not to have the witness appear in person, but be examined by video conference, has heightened the prejudice caused.¹ The Defence avers, moreover, that the 20 October 2003 Decision runs counter to the two decisions rendered by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.² Lastly, the Defence submits that if the matter is not resolved forthwith by the Appeals Chamber, the proceedings will suffer, in the event that the Appeals Chamber quashes the Trial Chamber's Decision of 20 October 2003. The Defence concludes that certification must be granted, because the two tests stipulated under Rule 73 (B) have been met.

Deliberations

2. The Defence alleges that Witness G has exculpatory information, and that the Trial Chamber's decision prevents the Defence from obtaining that information, in disregard of the equality of arms. In this regard, the Defence sets great store by the witness's testimony for the Prosecution under the pseudonym X in *The Prosecutor v. Nahimana et al.* A reading of the relevant transcripts, including those of 19 February 2002, shows that the former *Interahamwe* testified in the case in question that on 9 April 1994, the Accused instructed himself and others at the *Hôtel des Diplomates* in Kigali, to stop the massacres in Kigali and to remove the corpses from the streets. From this perspective, the allegation somehow loses its exculpatory nature. Witness

¹ The Defence refers in "Decision on Prosecutor's Motion for Special Protective Measures for Witnesses G and T (...)", rendered in the instant case on 20 October 2003.

² The Defence refers to the following decisions: ICTY (AC), *Prosecutor v. Milan Mrskic*, IT-95-12/AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposing party, 30 July 2003 ("Mrskic Decision of the ICTY Appeals Chamber") and ICTY (AC) *Prosecutor v. Radislav Krstic*, IT-98-33-A, Decision on Application for subpoenas, 1 July 2003 ("the ICTY Appeals Chamber Decision")
CIII04-024 (E)

X, in fact, explained shortly afterwards that these directives had been given in connection with the visit by foreign delegations to the capital. The witness further testified that "They [meaning the Accused Nzirorera, Mugenzi and Karemera] did not want the killings to end." He again stated that "They had done that simply because; they did that because of the international community, which was beginning to get into Kigali." He however testified that the massacres resumed subsequently in Kigali.³

3. The exculpatory nature of the evidence given by Witness G during his appearance in *The Prosecutor v. Nahimana et al.* is not obvious from a reading of the transcripts. For this reason, the Chamber does not find that the Decision of 20 October 2003 is likely to affect the fairness of the proceedings or their outcome.

4. In the Decision of 20 October 2003, the Trial Chamber did not categorically rule out the issuance of an order to Witness G to consent to a preliminary examination by the Defence prior to his appearance. Therefore, contrary to the Defence's arguments, the decision does not run counter to the *Mrksic* decision rendered by the ICTY Appeals Chamber in a similar matter.

5. The Chamber, however, denied the request in the specific case of Witness G, because it found, to paraphrase the decision of the ICTY Appeals Chamber in *Krstic*, that the Defence had not established "that it is at least reasonably likely that an order would produce the degree of cooperation needed for the defence to interview the witness".⁴ It is in the light of this reasoning that paragraph 22 of the Decision of 20 October in which the Chamber recalls the finding should be read:

"Further, the Chamber notes that Witness G has specifically and categorically refused to meet Defence counsel in this or any other case. This raises questions as to what practical benefit would be derived from the issuance of a subpoena to a non-cooperative witness. In light of Witness G's refusal to meet with the Defence, the Chamber is not satisfied that a subpoena would result in any information being divulged which cannot be gleaned from cross-examination of the witness."

6. Contrary to the Defence's submissions, the ICTY Appeals Chamber's Decision in *Krstic* rather reinforces the reasoning behind the Trial Chamber's rejection of the Defence request.

7. In view of the foregoing, the Defence has neither established that the Decision of 20 October 2003 is likely to seriously undermine the fairness of the trial or its

³ See transcript of the hearing of 19 February 2002 in *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, particularly pp. 77 to 105 (cross-examination in closed session). See also cross-examination of Witness X by the Defence for the Accused Ferdinand Nahimana, T, 25 February 2002 pp. 28 and 29 (closed session), and cross-examination of Witness A by the Defence for the Accused Jean-Bosco Barayagwiza, T, 26 February 2002, pp. 48 to 51 (open session).

⁴ See *Krstic* Decision, ICTY Appeals Chamber, para. 17
CIII04-024 (E)

outcome, nor that the immediate resolution of the issue by the Appeals Chamber could effectively advance the proceedings.

8. The Chamber is not satisfied either by the argument that since Witness G will give his testimony by simultaneous audio-video link, the decision of 20 October 2003 could affect the fairness of the proceedings. The Chamber will hear Witness G's entire testimony by simultaneous audio-video link. The equality of arms is, therefore, respected. The Defence has not established that the Decision of 20 October 2003 is likely to seriously affect the fairness of the trial.

9. Insofar as the Defence has not established that Witness G could reasonably be expected to cooperate pursuant to the order sought to be issued, the Chamber is not satisfied by the Defence's arguments on the consequences of the 20 October 2003 Decision on the duration of the upcoming cross-examination of Witness G. The Defence has failed to establish that the Decision of 20 October 2003 is likely to seriously affect the speedy conduct of the trial.

10. Consequently, the request for certification must be denied.

**FOR THE FOREGOING REASONS,
THE CHAMBER
DENIES** the request for certification to appeal the Decision of 20 October 2003.

Arusha, 17 February 2003

[Signed]	[Signed]	[Signed]
Andrésia Vaz Presiding Judge	Flavia Lattanzi Judge	Florence Rita Arrey Judge

[Seal of the Tribunal]
