



UNITED NATIONS
NATIONS UNIES

ICTR-07-91-T
28-07-2009
(4444 - 4439)

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**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: 28 July 2009

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

2009 JUL 28 12:32
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**DECISION ON DEFENCE REQUEST FOR ORDER FOR COOPERATION OF THE
REPUBLIC OF RWANDA AND THE UNITED REPUBLIC OF TANZANIA**

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Marie Ka

For the Accused:

Allison Turner

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INTRODUCTION

1. On 2 July 2009, this Trial Chamber handed down an oral summary of its judgement against Léonidas Nshogoza,¹ who had been charged with two Counts of Contempt of the Tribunal (Counts 1 and 2) and two Counts of Attempt to Commit Acts Punishable as Contempt of the Tribunal (Counts 3 and 4).² Mr. Nshogoza was found guilty of Contempt of the Tribunal pursuant to Count 1 and was sentenced to ten months imprisonment.³ He was acquitted of the remaining three Counts.⁴

2. On 6 July 2009, the Defence filed an urgent, *ex parte* and strictly confidential request for certain orders to be made to the Republic of Rwanda and the United Republic of Tanzania.⁵ The Defence submits that Mr. Nshogoza fears for his safety while he is seeking asylum as, among other things, he suspects that Tanzania will deport him to Rwanda where he allegedly faces persecution and harassment.

3. The Defence asks the Chamber to: (i) issue a request to the Rwandan Government to withdraw the alleged charges against Mr. Nshogoza, pursuant to his functional immunity and the principle of *non bis in idem*; (ii) confirm that the arrest warrant issued against Mr. Nshogoza by the ICTR has been withdrawn or annulled; (iii) confirm that INTERPOL no longer recognizes the international arrest warrant; and (iv) request the Tanzanian Government not to arrest, detain, deport or otherwise interfere with Mr. Nshogoza's liberty.⁶

DISCUSSION

Preliminary Matter: Confidential and Ex Parte Filing

4. The Chamber wishes to express its concern about the confidential and *ex parte* filing of this Motion. The transparency of the proceedings is served by the public filing of documents. The present Motion is filed "strictly confidential" and *ex parte* because, according to the Defence, it contains "highly sensitive information that, in the wrong hands, can lead to additional persecution and further endanger Léonidas Nshogoza and members of his family".⁷ Neither the highly sensitive information nor the parties who allegedly are a threat to the safety of Mr. Nshogoza and his family are expressly identified.

5. The Chamber considers that confidential filings should be reserved for exceptional circumstances, such as where the protection of a witness is at stake.⁸ With regard to the *ex parte* status of the filing, the Chamber notes that, as discussed by the Trial Chamber in the case of *The Prosecutor v. Édouard Karemera et al.*:

¹ T. 2 July 2009. See also Judgement, 7 July 2009, which was the authoritative written version of the judgement.

² See Indictment, 7 January 2008.

³ See Judgement, 7 July 2009, para. 233.

⁴ See Judgement, 7 July 2009, paras. 202, 211.

⁵ Urgent Ex Parte and Strictly Confidential Defence Request for Order for Cooperation of the Republic of Rwanda and the United Republic of Tanzania," filed 6 July 2009 ("Defence Request").

⁶ Defence Request, para. 2.

⁷ Defence Request, para. 3.

⁸ See e.g., *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, Decision on the Transfer of Detained Witnesses (TC), 22 September 2005, para 4; *Prosecutor v. Karemera et al.*, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 13.

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[A]s a general rule, applications must be filed *inter partes*. The fundamental principle is that 'ex parte proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.' This Chamber has also held that the principle of *audi alteram partem* requires that filings be disclosed to the opposing party, absent a compelling reason not to do so.⁹

The Chamber considers the reasoning of the *Karemera et al.* Trial Chamber to be persuasive.

6. In the present case, the Defence has failed to identify any highly sensitive or confidential information contained in the Motion or the accompanying Annexes, and the Chamber does not find any confidential information to be contained therein.

7. With regard to the *ex parte* status of the filing, the Chamber notes that the Defence does not support its assertion that disclosure of the present Motion to unidentified parties ("the wrong hands") might prejudice Mr. Nshogoza or members of his family in any. The Chamber finds that the Defence has therefore failed to adequately support the *ex parte* filing of the Motion. Though the Chamber could refuse to consider the Motion on the basis of this finding, the Chamber has determined that the interests of justice and judicial economy favour considering the Motion at this time and that it need not hear from the Prosecution or any third party in order to determine the issues before it.

8. The Chamber considers that the confidentiality and the *ex parte* status of the Motion should be lifted, and it should be reclassified as a public document and circulated to the relevant parties.

Order to Rwanda to Withdraw Charges

9. The Defence requests the Chamber to order Rwanda to withdraw charges that it alleges are pending against Mr. Nshogoza. However, while the Defence requests the order "pursuant to Article 28",¹⁰ it does not demonstrate how Article 28 empowers the Chamber to make such an order. The Chamber notes that while this article has been held to apply to the "entire trial process", including certain rights of an accused,¹¹ it has not been extended to a request unrelated to the "investigation and prosecution" of somebody before the Tribunal, issued after the close of the trial. It certainly does not extend to empowering the Chamber to order a State to cease an investigation or prosecution of someone alleged to have committed crimes under a domestic criminal justice system.

⁹ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion, 30 May 2006, para. 3 (internal citations omitted).

¹⁰ Defence Request, para. 21.

¹¹ *Prosecutor v. Bagosora*, IT-98-41-T, Decision on Kabiligi Motion for Cooperation of the Government of France and Subpoena of Former Officers, para. 2.



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10. The Defence also alleges that the Rwandan proceedings violate Article 9 of the ICTR Statute (*non bis in idem*),¹² arguing that Mr. Nshogoza faces pending charges for the same allegations now adjudicated.¹³ The Chamber recalls that the principle of *non bis in idem* is a long-standing general principle of law applicable in international tribunals and domestic jurisdictions, and recognised as such by international instruments as well as national legislations. However, Article 9 of the ICTR Statute refers to the *non bis in idem* principle specifically in connection to “acts constituting serious violations of international humanitarian law [...], for which he or she has already been tried by the International Tribunal for Rwanda”. Mr. Nshogoza was tried and convicted by this Chamber for contempt of the Tribunal. He was not tried and convicted for serious violations of international humanitarian law, as provided for in Article 9. Consequently, the terms of Article 9 do not provide sufficient basis for this Chamber to exercise jurisdiction to order Rwanda to withdraw the charges on the basis of that provision. The Chamber may, of course and in passing, express a general expectation that any judiciary should respect general principles of law recognised by modern nations, notwithstanding the particular language of Article 9. But it would be presumptuous to suppose that Article 9 has given this Chamber a general warrant to issue directives to Rwanda or its judiciary to respect general principles of law.

11. Given the non-applicability of Articles 9 and 28 to the current circumstances, the Chamber considers that it does not have the jurisdiction to issue an order to Rwanda as requested by the Defence.

12. In any case, the information before the Chamber is insufficient to show that Rwanda is currently seeking to exercise its criminal jurisdiction over Mr. Nshogoza in respect of the same crimes for which he had been tried and convicted before this Tribunal. Indeed, the materials filed by the Defence would appear to suggest that some of the allegations indicated against him in Rwanda do not relate to charges of contempt of this Tribunal for which Mr. Nshogoza was convicted by this Chamber.¹⁴ The Chamber therefore considers the Defence request to be premature and based on speculation. As it has previously noted, the Chamber will not engage in speculation regarding the intentions of the Rwandan authorities.¹⁵

13. The Chamber therefore denies the Defence request to issue an order to the Rwandan authorities.

Order to Tanzania to Refrain from Deporting Mr. Nshogoza

14. The Defence also asks the Chamber to request the Tanzanian authorities to refrain from arresting, detaining, deporting or otherwise interfering with Mr. Nshogoza’s liberty, alleging that they are hostile to his presence in Tanzania. As with the Defence submissions regarding the Rwandan criminal charges, the Chamber does not consider that it has the jurisdiction to make the requested orders pursuant to Article 28. The Chamber notes the Appeals Chamber decision in *Ntagerura*, wherein it was found that the Chamber did not have

¹² Defence Request, para. 7.

¹³ Defence Request, paras. 13-14.

¹⁴ Defence Request, para. 5 (see footnote 5), paras. 16-17 and Annexure B, paras. 18-19 and Annexure C.

¹⁵ See Decision on Defence Judicial and Administrative Application for Deferral in Favour of the ICTR, 5 November 2008, para. 29.

the ability to direct States to accept the appellant in that case to remain in their territory.¹⁶ The Chamber considers the Defence's request here to be analogous to the situation in *Ntagerura*, in that the Defence is asking the Chamber to order Tanzania to allow Mr. Nshogoza to remain in its territory. Thus, the Defence request is denied.

15. Furthermore, the Defence submissions are entirely speculative as there is no information before the Chamber to suggest that the Tanzanian authorities intend to arrest, detain, deport or otherwise interfere with Mr. Nshogoza's liberty. Thus, regardless of whether or not the Chamber has the power to make an order as requested, the Defence's request must fail.

Alleged Persecution in Rwanda

16. The Chamber also notes the Defence's submissions in relation to the alleged persecution Mr. Nshogoza faces in Rwanda.¹⁷ As noted above, there is no information before the Chamber to suggest that Mr. Nshogoza is to be transported to Rwanda. Therefore, the Chamber need not consider these submissions.

Status of the Arrest Warrant and INTERPOL

17. In regard to the Defence's request for confirmation that the international arrest warrant against Mr. Nshogoza is no longer of any force or effect, and that INTERPOL no longer recognizes it as executable, the Chamber considers these requests to be ill-conceived. The Chamber notes that the Defence has advanced no legal basis by which the Chamber can speak on behalf of INTERPOL and that nothing in the ICTR Statute or Rules of Procedure and Evidence empowers the Chamber to do so. Thus this Defence request must also fail.

18. Additionally, by its express terms, the arrest warrant was issued on the basis of the Tribunal Indictment confirmed against Mr. Nshogoza on 4 January 2008.¹⁸ Mr. Nshogoza surrendered to the Tribunal on 8 February 2008 and was prosecuted on the basis of that Indictment. The ICTR arrest warrant issued in relation to this case, therefore, ceased to be of any effect following Mr. Nshogoza's surrender into ICTR custody. For the same reasons, the Chamber does not see any basis to request an opinion from INTERPOL on this matter.

¹⁶ *In Re. Andre Ntagerura*, Decision on Motion to Appeal the President's Decision of 31 March 2005 and the Decision of the Trial Chamber III of 15 May 2008, 18 November 2008, para. 19.

¹⁷ Defence Request, paras 5, 9-11, 15-20.

¹⁸ Warrant of Arrest and Order for Transfer and Detention Addressed to All States, 28 January 2008; Confirmation of the Indictment and Witness Protection Orders, 4 January 2008.



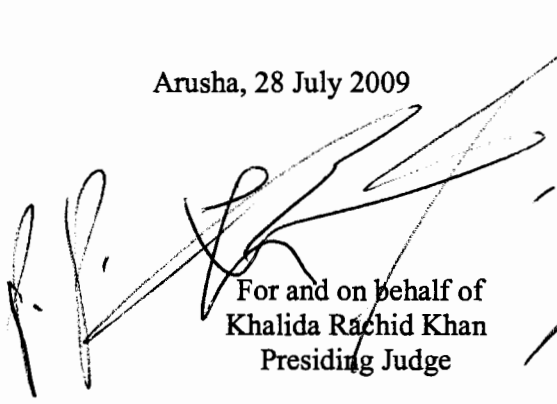
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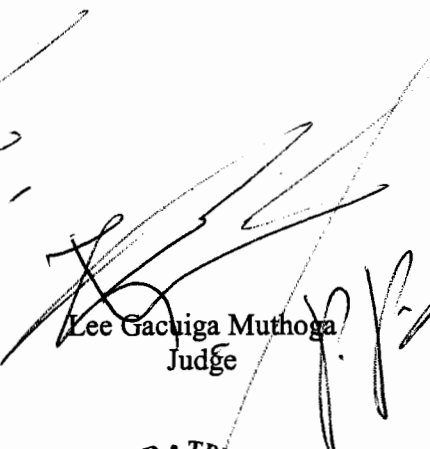
FOR THESE REASONS, the Chamber

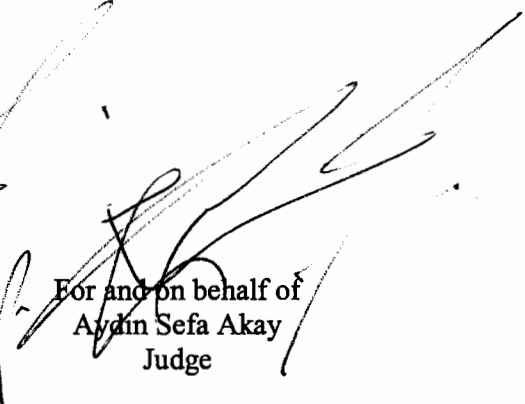
DENIES the Motion;

ORDERS that the confidentiality and the *ex parte* status of the Motion be lifted by the Registrar,
and that it be circulated to all relevant parties.

Arusha, 28 July 2009


For and on behalf of
Khalida Rachid Khan
Presiding Judge


Lee Gacwiga Muthoga
Judge


For and on behalf of
Aydin Sefa Akay
Judge

[Seal of the Tribunal]

