



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44D-1  
19-10-2009  
(2160-2154)

2160  
AM

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Solomy Balungi Bossa, Presiding  
Mparany Rajohnson  
Bakhtiyar Tuzmukhamedov

**Registrar:** Adama Dieng

**Date:** 19 October 2009

JUDICIAL RECORDS/ARCHIVES  
2009 OCT 19 11:41:52

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**

*Case No. ICTR-98-44D-T*

**DECISION ON NZABONIMANA'S MOTION ASKING THE CHAMBER TO  
REQUEST THE PRESIDENT TO REPORT THE MATTER OF FRANCE'S  
REFUSAL TO COOPERATE TO THE SECURITY COUNCIL**  
*(Article 28 of the Statute of the Tribunal; Rules 7 bis, 19, 33 B) and 54 of the Rules of  
Procedure and Evidence)*

**Office of the Prosecution**  
Paul Ng'arua  
Memory Maposa  
Marie Ka

**Defence Counsel for Callixte Nzabonimana**  
Vincent Courcelle-Labrousse  
Philippe Larochelle

83

## INTRODUCTION

1. On 19 June 2009, the Defence for the Accused Nzabonimana filed an Urgent Motion,<sup>1</sup> pursuant to Article 28 of the Statute of the International Criminal Court for Rwanda (hereinafter "Statute"), asking the Pre-Trial Chamber to issue an order requesting France's cooperation in obtaining information regarding the location of the Accused between 7 and 11 April 1994 thereby enabling the Accused to prepare his Defence and contradict certain allegations made by the Prosecution concerning this period.
2. On 2 July 2009, the Pre-Trial Chamber issued a Decision requesting enhanced cooperation from the Government of France.<sup>2</sup> In its Decision, the Pre-Trial Chamber acknowledged the relevance of some of the information sought by the Defence, and granted the Motion in part.<sup>3</sup> In particular, the Pre-Trial Chamber ordered that France provide all necessary assistance to the Defence to obtain i) a list of all persons who sought refuge at the French Embassy in Kigali between 7 and 11 April 2004; ii) a list of personnel working at the French Embassy in Kigali between 7 and 11 April 1994; iii) and that the French government authorises these persons to meet with the Nzabonimana Defence and offer any assistance regarding the whereabouts of the Accused between 7 and 11 April 1994.<sup>4</sup> In its Decision, the Pre-Trial Chamber offered to keep any identifying information confidential.<sup>5</sup>
3. On 1 October 2009, the Nzabonimana Defence filed this Motion<sup>6</sup> stating that it was not satisfied with information provided by the Government of France in response to a Decision issued by the Pre-Trial Chamber on 2 July 2009, and requesting that the Chamber reports France's refusal to cooperate to the Security Council pursuant to Rule 7 bis of the Rules of Procedure and Evidence (hereinafter "Rule 7 bis").

<sup>1</sup> *Prosecution v. Nzabonimana*, Case No. TPIR 98-44D-I, Urgent Motion of Defendant Nzabonimana Requesting an Order Directed at France, 19 June 2009 (hereinafter "Urgent Motion").

<sup>2</sup> *Procureur c. Nzabonimana*, Case No. TPIR 98-44D-PT, Décision Sur la Requête Urgente de Callixte Nzabonimana Demandant à la Chambre d'Ordonner à la France Coopération et Assistance, 2 juillet 2009 (hereinafter "2 July Decision").

<sup>3</sup> 2 July Decision, para. 6.

<sup>4</sup> 2 July Decision, Trial Chamber Orders.

<sup>5</sup> 2 July Decision, Trial Chamber Orders.

<sup>6</sup> *Prosecution v. Nzabonimana*, Case No. TPIR 98-44D-T, Nzabonimana's Motion Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council (Article 28 of the Statute of the Tribunal; Rules 7 bis, 19, 33B) and 54 of the Rules of Procedure and Evidence), 1 October 2009 (hereinafter "October Motion").

4. The Defence also submits that France has not taken any steps to comply with the Pre-Trial Chamber's 2 July Decision requesting cooperation and assistance, and that France has therefore failed to comply with Article 28 of the Statute.<sup>7</sup> Noting that the Pre-Trial Chamber concluded that the information sought was relevant to the preparation of the alibi of the Accused,<sup>8</sup> the Defence stresses that France's failure to comply with its obligations is impeding the right of the Accused to a full and effective defence and a fair trial.<sup>9</sup> It further submits that the refusal of France to cooperate jeopardizes the scheduling of the trial.<sup>10</sup> In conclusion, the Defence asks the Chamber, pursuant to Rule 7bis, to request that the President of the Tribunal to report the non-compliance to the Security Council.<sup>11</sup>
5. The Defence appended to the Motion the response from the French Embassy in Tanzania to the Registrar of the Tribunal regarding the Pre-Trial Chamber's request for assistance.<sup>12</sup> In its Response, the French Government stated that on 29 January 2009 it had provided to the Registrar information regarding distinguished Rwandan individuals who had sought refuge at the Embassy based on three diplomatic telegrams from the French Embassy in Kigali dated 7, 9 and 11 April 1994.<sup>13</sup> The French Government also submitted that it did not have an exhaustive or systematic list of all persons who had sought refuge at the Embassy between 7 and 11 April 1994 as the refugees were able to enter and leave the Embassy at will.<sup>14</sup> Finally, the Government of France stated that neither its Ambassador in Kigali in April 1994, Jean-Michel Marlaud, nor any other official working at the French Embassy at the time, would be able to provide any further information of assistance to the Defence.<sup>15</sup>
6. On 6 October 2009, the Prosecution filed a Response to the Motion indicating that it had no submissions to make.<sup>16</sup>

<sup>7</sup> October Motion, para. 16.

<sup>8</sup> Ibid, para. 6.

<sup>9</sup> Ibid, para. 7.

<sup>10</sup> Ibid, para. 8.

<sup>11</sup> Ibid, para. 14-16.

<sup>12</sup> Lettre de l'Ambassade de France en Tanzanie, No. 540/TPIR, adressée au Greffe du Tribunal Pénal International pour le Rwanda, 15 septembre 2009 (hereinafter "Response").

<sup>13</sup> Response, point 1.

<sup>14</sup> Response, point 3.

<sup>15</sup> Response, point 4.

<sup>16</sup> *Prosecution v. Nzabonimana*, Case No. TPIR 98-44D-T, Prosecutor's Response to Nzabonimana's Motion Nzabonimana's Motion Asking the Trial Chamber to Request the President to Report the Matter of France's

*The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T

7. On 13 October 2009, the Defence filed additional information about a parallel request before French judicial authorities also seeking cooperation from the Government of France.<sup>17</sup>

### DELIBERATIONS

9. Article 28 of the Statute of the Tribunal ("the Statute") on Cooperation and Judicial Assistance reads as follows:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

10. The Trial Chamber recalls that the Appeals Chamber of the ICTY in *Prosecutor v. Blaskic* held that Article 28 of the Statute is binding on states,<sup>18</sup> and that the failure of a State to cooperate with its obligations under Article 28 could be reported to the Security Council.<sup>19</sup>

---

Refusal to Cooperate to the Security (Article 28 of the Statute of the Tribunal; Rules 7 bis, 19, 33B) and 54 of the Rules of Procedure and Evidence), 6 October 2009.

<sup>17</sup> *Procureur c. Nzabonimana*, Case No. TPIR 98-44D-T, Mémoire Additionnel à la Requête de Callixte Nzabonimana aux Fins de Report par la Chambre au Président du Tribunal du Refus de Coopération de la France (Article 28 du Statut et 7 bis, 19, 33 B et 54 du Règlement de Preuve et de Procédure), 13 octobre 2009.

<sup>18</sup> *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement on the Request of The Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 26 (internal citations omitted): "26. [...] This obligation is laid down in Article 29 and restated in paragraph 4 of Security Council resolution 827 (1993). Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies). [...] Article 29 imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*"..."

<sup>19</sup> *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement on the Request of The Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 33 (internal citations omitted): "33. [...] It is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State, under the conditions provided for in Chapter VII of the United Nations Charter. However, the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It also has the power to report this judicial finding to the Security Council.

*The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T

11. Rule 7bis (A) states that “where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council”. Rule 7 bis provides a Chamber with discretionary power to decide whether to request the President to report any State’s failure to cooperate with the Tribunal to the Security Council.<sup>20</sup>
12. The Trial Chamber notes that beginning in January 2009, the Defence, independently and/or through the Registry, made several requests to the French authorities related to the instant Motion.<sup>21</sup>
13. The Trial Chamber observes that in response to the first request in January 2009 from the Defence for assistance, the French authorities responded fully and completely providing a series of diplomatic telegrams suggesting that the Accused was at the French Embassy on 7, 9 and 11 April 1994.<sup>22</sup> It further responded in part in May 2009 to a second request from the Defence for answers from the French authorities regarding the diplomatic telegrams and matters pertaining to refugees at the Embassy in 1994. It did not however

---

The power to make this judicial finding is an inherent power: the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded.”

<sup>20</sup> *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera And André Rwamakuba*, Case No. ICTR-98-44-T, Decision On Defence Motion to Report Government of Rwanda To United Nations Security Council (*Rule 7bis of the Rules of Procedure and Evidence*), 2 October 2006, para. 4; citing *Karemera et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66(C) of the Rules (TC), 15 February 2006, para. 12; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 35; *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera And André Rwamakuba*, Case No. ICTR-98-44-T, 19 March 2004, Decision on The Nzirorera Defence Motion To Report Government of Benin To United Nations Security Council, para. 7.

<sup>21</sup> See Lettre de Maître Vincent Courcelle-Labrousse, N/Ref. 20080274 –VCL/RC, adressée à Monsieur Bernard Kouchner, Ministre des Affaires Etrangères, Affaire: Callixte Nzabonimana, Tribunal Pénal International pour le Rwanda, 19 janvier 2009; Note Verbale, No. ICTR/IOR/ERSPS/01/09/08-RD, du Cabinet du Greffier du Tribunal adressée à l’Ambassade de France en Tanzanie, 20 janvier 2009; Annex A to Urgent Motion, Lettre de Maître Vincent Courcelle-Labrousse, N/Ref. 20080274 –VCL/RC, adressée à Monsieur Bernard Kouchner, Ministre des Affaires Etrangères, Affaire: Callixte Nzabonimana, Tribunal Pénal International pour le Rwanda, 4 mai 2009; Annex A to Urgent Motion, Note verbale du Cabinet du Greffier, Ref. No. ICTR/IOR/ERSPS/05/09/11-RD, adressée à l’Ambassade de France à Dar Es Salaam, 7 mai 2009.

<sup>22</sup> Télécopie de M. Jacques Champagne de Labriolle, Ambassadeur de France en Tanzanie adressée à M. Adama Dieng, Greffier du Tribunal Pénal International pour le Rwanda, 29 janvier 2009; Annexes : Note verbale No. 66/TPIR concernant la transmission des extraits diplomatiques en date des 7, 9, et 11 avril 1994 portant sur les personnes réfugiées à l’Ambassade de France à Kigali, 29 janvier 2009; Télégrammes diplomatiques, Objet : Personnalités réfugiées à l’Ambassade de France, 7, 9 et 11 avril 1994.

respond to the Defence request to ask further questions to officials of the French Embassy working in Kigali in April 1994 regarding these issues.<sup>23</sup>

14. On September 15<sup>th</sup> 2009, the French Embassy in Tanzania sent a letter to the Registrar in response to the Pre-Trial Chamber's 2 July Decision. The Trial Chamber notes that, in its response, the Government of France gives assurances of its willingness to comply with its obligations under the Statute.<sup>24</sup> However, the Chamber is not satisfied that the Government of France, in its September response to the Registrar, complied fully with the request for assistance made by the Pre-Trial Chamber in its 2 July Decision. Indeed, it notes that much of the French government's response to the Decision is a reiteration of the information it provided to the Defence in May 2009.
15. In particular, with regard to the Pre-Trial Chamber's first request, the French authorities noted that lists of persons who sought refuge at the French Embassy were established as the persons arrived at the Embassy in Kigali during the relevant time period but that such lists were neither systematic nor exhaustive. However, the Government provided no assistance in obtaining such lists, nor did the Government state clearly whether it currently has such lists in its possession. With regard to the Pre-Trial Chamber's second request in the aforementioned Decision, the Government failed to provide assistance in obtaining the list of personnel working at the Embassy stating instead that these officials have no information that could be of assistance to the Defence.
16. The Chamber recalls that the Pre-Trial Chamber has already considered that the Defence has shown good cause for seeking the information requested.<sup>25</sup> The Trial Chamber notes that the Pre-Trial Chamber's 2 July Decision is binding on France.<sup>26</sup>
17. The Chamber considers this matter urgent as the trial in this case is scheduled to commence on 9 November 2009.

<sup>23</sup> See Annex B to Urgent Motion, Lettre de l'Ambassade de France en Tanzanie, Ref. No. 274/TPIR, adressée au Greffe du Tribunal, 19 mai 2009.

<sup>24</sup> Response, para. 2.

<sup>25</sup> 2 July Decision, paras. 6-9.

<sup>26</sup> See *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement on the Request of The Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, paras. 26 and 33.

18. The Trial Chamber recalls that Rule 7 *bis* allowing a Chamber to report any State's failure to cooperate or assist the Tribunal to the Security Council is discretionary rather than mandatory. The Trial Chamber considers that referral of a State to the Security Council for non-compliance with Article 28 is a remedy of last resort. Given the Government of France's prior cooperation in the instant case, the Trial Chamber is not prepared at this stage to conclude that its failure to fully comply with the 2 July Decision is deliberate, in bad faith, or is intended to impede the fair and expeditious conduct of proceedings. Therefore the Trial Chamber does not consider that the present circumstances warrant a referral to the Security Council.

**FOR THESE REASONS, THE CHAMBER**

**RESPECTFULLY REQUESTS** the Government of France, by 9 November 2009, to:

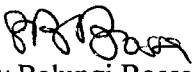
A) Confirm to the Registrar of the Tribunal that the Government of France has in its possession lists of persons who sought refuge at the French Embassy in Kigali between 7 and 11 April 1994; and further confirm that if it has such lists it will avail them to the Registrar, and if not, explain why.

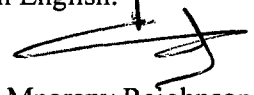
B) Provide the Registrar with a copy of the list of personnel working at the French Embassy in Kigali between 7 and 11 April 1994.

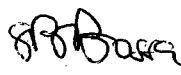
**DENIES** the Motion to request the President to report the matter of France's refusal to cooperate to the Security Council;

**DIRECTS** the Registry to immediately transmit this Decision to the relevant authorities of the Republic of France.

Arusha, 19 October 2009, done in English.

  
Solomy Balungi Bossa  
Presiding Judge

  
Mparany Rajohnson  
Judge

  
(Read and approved)  
Bakhtiyar Tuzmukhamedov  
Judge  
(Absent at the time of  
signature)

[Seal of the Tribunal]

