



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 29 October 2009

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON CALLIXTE NZABONIMANA'S MOTION FOR AN ORDER
CONCERNING DISCLOSURE OF GACACA AND JUDICIAL MATERIAL
RELATING TO PROSECUTION WITNESSES**

Rules 66, 68 and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:

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Defence Counsel

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Philippe Larochelle, Co-Counsel

INTRODUCTION

1. On 13 October 2009, the Defence filed a Motion requesting the Chamber to compel the Prosecution to disclose the Gacaca and judicial materials of Prosecution witnesses pursuant to Rules 66 and 68 of the Rules of Procedure and Evidence ("Rules"). To facilitate the communication of that information, the Defence also requested that each Prosecution witness complete a sample statement detailing the Gacaca and regular cases in which such witnesses may have been involved.¹
2. On 19 October 2009, the Prosecution responded to the Defence Motion.²
3. On 26 October 2009, the Defence replied to the Prosecution's Response.³

Procedural History

4. In its 13 February 2009 Decision granting protective measures to Prosecution witnesses, the Pre-Trial Chamber (PTC) stated i) that the Defence would have to make a written request to the Chamber before contacting any potential Prosecution witnesses, and ii) that if such a request were granted by the Chamber, the Prosecution should undertake all necessary arrangements to facilitate the interviews.⁴
5. On 27 July 2009, the Defence filed a Motion requesting permission to meet with Prosecution witnesses, stating that such interviews were necessary to "obtain, *inter alia*, the references of the cases in which the Prosecut[ion] witnesses have testified or have been accused in Rwanda".⁵ On 24 August 2009, the Chamber granted the Defence Motion and

¹ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Motion of Defendant Nzabonimana for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses, 13 October 2009 ("Motion").

² Prosecutor's Response to Motion of Defendant Nzabonimana For An Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses, 19 October 2009 ("Response").

³ Nzabonimana's Reply to Prosecutor Response to Motion of Defendant Nzabonimana for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses, 26 October 2009 ("Reply").

⁴ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-I, Interim Order on Protective Measures for Prosecution Witnesses (PTC), 13 February 2009 ("Order for Protective Measure").

⁵ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-I, Nzabonimana's Motion for the Interview of Prosecutor's Protected Witnesses and for Clarification Regarding the Scope of the "Interim Order Regarding Protective Measures for Prosecution Witnesses," filed on 27 July 2009 ("27 July Motion"), paras 3-5. The Defence reiterated in the 1 October 2009 Status Conference that it wanted to meet with Prosecution witnesses in order to gather more information about their judicial history in Rwanda. T. 1 October 2009, p. 13 (English).

requested that WVSS contact the Prosecution witnesses to seek their consent to meetings with members of the Defence Team.⁶

6. At a Status Conference held by the Pre-Trial Chamber on 1 October 2009 ("1 October Status Conference"), the Prosecution stated that it would provide the Gacaca records of Prosecution Witness CNAA to the Defence as soon as it received them from Rwanda, as well as "any other Gacaca document with respect to the witnesses [it] needs to see."⁷

7. On 10 October 2009, WVSS informed the parties that 13 Prosecution witnesses had agreed to meet with members of the Defence team, while 10 witnesses had refused.⁸ At the 15 October 2009 Pre-Trial Conference, the Defence again expressed difficulty in obtaining the Rwandan Gacaca or prior judicial records of Prosecution witnesses. The Prosecution indicated to the Presiding Judge, that it did not have in its possession these Gacaca or judicial records, however at the urging of the Trial Chamber, the Prosecution expressed its willingness to assist the Defence in acquiring the Gacaca or judicial records of its witnesses.⁹

Submissions of the Parties

8. In the instant Motion, the Defence requests that the Prosecution disclose to the Defence the judicial information of its witnesses pursuant to the order made by the Pre-Trial Chamber during the Status Conference of 1 October 2009.¹⁰ In addition, the Defence requests the Prosecution, in conjunction with WVSS, to obtain from each Prosecution witness a signed statement prepared by the Defence regarding their prior judicial history in Rwanda in order to subsequently obtain judicial material from the Rwandan authorities.¹¹

9. The Defence submits that it requires these documents to properly prepare for the cross-examination of Prosecution witnesses.¹² It further contends that it is currently trying to obtain relevant Gacaca and judicial proceedings material relating to Prosecution witnesses.¹³

⁶ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-I, Decision on Motion to Interview Prosecution Witnesses, 24 August 2009 ("24 August Decision").

⁷ T. 1 October 2009, p. 14 (English).

⁸ Witness and Victims Support Section, Certificate of Acknowledgement of Receipt of Information, effecting the PTC Order of 24 August 2009.

⁹ Pre-Trial Conference, T. 15 October 2009, p. 22.

¹⁰ Motion, para. 3, referring to Status Conference, T. October 1 2009, p.32 (French)/p. 26 (English).

¹¹ Motion, para. 22; *see* Annex A to the Motion.

¹² Motion, para. 19; Letter from Defence for Nzabonimana to the National Service of Gacaca jurisdictions, Subject: Request for Information, 22 September 2009; Letter from Defence for Nzabonimana to the Registry of the International Criminal Tribunal for Rwanda, Subject: Demande de coopération au Rwanda/ Transmission d'une correspondance adressée au National Service of Gacaca jurisdictions du Rwanda, 23 Septembre 2009 ; Lettre du Service National des Juridictions Gacaca, 3 Octobre 2009.

¹³ Motion, para.1.

Further, it notes that some Prosecution witnesses have refused to meet with the Defence.¹⁴ The Defence avers that this refusal by Prosecution witnesses frustrates the Defence's efforts to obtain information from them systematically.¹⁵ The Defence therefore requests the Prosecution to disclose the Gacaca and judicial records of the Prosecution witnesses as prescribed by Rules 66(A) (ii), 66(B) and 68(A).¹⁶

10. In its Response, the Prosecution denies having in its possession, control or custody the unidentified Gacaca records sought by the Defence,¹⁷ and states that the Defence Motion is moot in view of the fact that the Defence and WVSS are in the process of making arrangements to interview Prosecution witnesses to obtain the same information.¹⁸

11. In its Reply, the Defence again notes that it is seeking compliance with the Pre-Trial Chamber's order of 1 October 2009.¹⁹ In addition, it submits that the Prosecution's position in refusing to provide the information in question is difficult to understand given that the provision of such information would be more systematic, efficient and would avoid further delay.²⁰ The Defence claims that the Prosecution's refusal to cooperate is obstructing the Defence's access to a considerable amount of material to which it is entitled and which it has been trying to obtain for months.²¹ The Defence submits that the information sought by the Defence is clearly identified and meets the criteria set forth in Rules 66(A) (ii), 66(B) and 68(A).²² Further, the Defence considers the Prosecution's failure to admit being in custody and control of judicial information concerning its own witnesses' credibility to be surprising.²³

DELIBERATIONS

Preliminary Matter: Status Conference-1 October 2009

12. As a preliminary matter, with regards to the Defence submission that the during the 1 October Status Conference the Pre-Trial Chamber ordered the Prosecution to disclose judicial

¹⁴ *Karemera et al.*, Decision on Motion to Interview Prosecution Witnesses (TC), 24 August 2009.

¹⁵ Motion, para. 21.

¹⁶ Motion, para. 4.

¹⁷ Response, para.4.

¹⁸ Response, para.3 (v).

¹⁹ Reply, paras. 1-4.

²⁰ Reply, paras. 8 and 12.

²¹ Reply, para. 10.

²² Reply, paras. 14 and 15.

²³ Reply, paras. 16.

material pertaining to its witnesses to the Defence, the Trial Chamber observes that there was a significant translation error during that Status Conference.

13. The French version of the Transcript reads: “...*En d’autres termes, nous donnons au Procureur l’ordre de communiquer a la Defence les informations concernant ces temoins, ce qui permettrait a la Defence de les exploiter si, bien sur, les temoins sont en mesure de fournir ces pieces.*”²⁴ The English version states: “In fact in another case we ordered the Prosecutor to produce a written document signed by the witnesses, answering those specific questions so that Defence counsel had a signed statement from the witnesses indicating the existence of judicial records...”²⁵

14. As the Presiding Judge conducted the Status Conference in English, the Trial Chamber considers that the English version is the correct one and that the Presiding Judge was referring to an order issued to the Prosecution in another case and not in the instant case. While the Trial Chamber considers that the translation error might have resulted in a misunderstanding on the part of the Defence, it notes that soon after these words were spoken the Defence referred to its understanding that the President had ordered that the Prosecutor disclose all judicial records to the Defence, to which the Presiding Judge responded: “That was not the order of the Court. That was not the order of the Court. The Court order—prepared an order to facilitate you to interview the witnesses.”²⁶ The French translation of that second exchange is accurate.”²⁷

15. Thus, the Trial Chamber finds that the Pre-Trial Chamber did not order the Prosecution to disclose the prior judicial records of its witnesses at the 1 October Status Conference

Applicable Law

16. Article 19 (1) of the Statute of the International Criminal Tribunal for Rwanda (“Statute”) states that “[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

17. Rule 66 provides that subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defence:

²⁴ Status Conference, 1 October 2009, p. 32 (French).

²⁵ Status Conference, 1 October 2009, p. 26 (English)

²⁶ Status Conference, 1 October 2009, p. 27 (English).

²⁷ Status Conference, 1 October 2009, p. 33 (French).

[...]

(ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

(B) At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

18. Rule 68(A) provides that the Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

Rules 66(A) (ii), 66 (B) and 68(A), and the custody and control of materials

19. The Trial Chamber notes that there is substantial jurisprudence relating to the disclosure obligations of the parties. In particular, it recalls the general principle applicable to disclosure: "something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)."²⁸

²⁸ *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Josph Nzirorera's Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 6. See also, *Karemera et al.*, Decision on Disclosure of Witness Reconfirmation Statements (TC), 23 February 2005, paras. 6 and 7. See also, *Prosecutor v. Kayishema*, Case No. ICTR-95-I-T, Decision on preliminary motion filed by Defence (TC), 6 November 1996, *ICTR Report 1995-1997*, pp. 298-300; *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions and Disclosure (TC), 20 October 2000, *ICTR Report 2000*, p. 2364 and seq., par. 38 (emphasis added); *Karemera et al.*, Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures (TC), 20 October 2003, paras. 5 and 9; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, par. 35.

20. Rule 66(A) (ii) requires the Prosecution to disclose to the defence copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial, no later than 60 days before the date set for trial.²⁹

21. The Trial Chamber recalls that in *Nyiramasuhuko et al.*, the Trial Chamber held that Rule 66(A) (ii) does not distinguish between statements taken by the Prosecutor and those taken by national authorities in the course of other judicial proceedings involving a witness.³⁰ However, the Prosecutor is presumed to discharge his obligations under Rule 66(A) (ii) in good faith.³¹

22. The Prosecution denies having such material in its custody or under its control.³² The Trial Chamber thus concludes that the Defence has not established that the Prosecution has violated its disclosure obligations pursuant to Rule 66(A) (ii).

23. With regards to Rule 66(B), the Defence has not shown that it made a specific request to the Prosecution to allow it to inspect any documents material to its case. Nevertheless, given that the Prosecution has stated that it does not have records relating to the prior judicial histories of its witnesses in its custody or under its control, the Trial Chamber considers not only that the Defence has failed to establish that the Prosecution has violated its disclosure obligations under Rule 66 (B) but that this Rule is not applicable in the circumstances of this Motion.

24. The Trial Chamber observes that the prior judicial records of witnesses may be exculpatory and may affect the credibility of Prosecution evidence and could therefore fall under Rule 68(A). In *Karemera et al.* the Trial Chamber held that if an accused wishes to show that the Prosecution was in breach of its disclosure obligation, he or she would be obliged to (1) identify specifically the materials sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested was in the custody

²⁹ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T (“*Karemera et al.*”), Decision on Joseph Nzirorera’s Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and other Measures, 29 November 2007, paras. 19-20.

³⁰ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda, and all other Documents or Information Pertaining to the Judicial Proceedings in their respect, 18 September 2001, para. 6.

³¹ *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 8, *see also* para. 6: “something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)”.

³² Response, para. 3.i.

or under the control of the Prosecution.³³ In *Blaskic*, the Appeals Chamber held more specifically that in order to allege a breach of Rule 68, the Defence must first establish that the evidence was in the possession of the Prosecution.³⁴ Further, the Trial Chamber recalls that in *Bagilishema*, the Trial Chamber held that the Prosecution's disclosure obligations under the Statute and the Rules did not extend to pursuing every possible avenue of investigation into a witness's credibility on behalf of the Defence.³⁵

25. In the instant Motion, the Defence has not established that the material sought is in the possession of the Prosecution. Indeed, in its Response to the Motion, the Prosecution states that it does not have such material in its custody or under its control.³⁶ Thus, the Trial Chamber finds that the Defence has not established that the Prosecution violated its obligations pursuant to Rule 68 (A).

Value of the materials sought

26. The Trial Chamber recalls the Appeals Chamber finding in *Akayesu* that prior statements constitute an important tool for assessing the credibility of a witness.³⁷ It is clear that Gacaca or prior judicial material: i) may include prior statements made by witnesses, ii) may be material to the preparation of the Defence, and /or iii) may be of an exculpatory nature or that they may affect the credibility of Prosecution evidence. Indeed, in *Nchamihigo* the Trial Chamber stated that "Trial Chambers have concluded that disclosure of judicial records is not merely for the benefit of the preparation of the Defence but it is also required to assist the Trial Chamber in its assessment of witness credibility pursuant to Rule 90(G) of the Rules."³⁸

³³ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, paras. 5-6.

³⁴ See *Prosecutor v. Blaskić*, Case No. IT-95-14-A, ("*Blaskic*") Appeal Judgment, para. 268. See also, *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 5-6; see also *Bagosora et al.*, Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004, para. 5; *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Karemera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 11; Aloys Simba, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004, para. 8.

³⁵ *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 6.

³⁶ Response, para. 3.i.

³⁷ *Prosecutor v. Akayesu*, Appeals Chamber Judgment, 1 June 2001, para. 169.

³⁸ *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Order For Judicial Records, 12 October 2006, para. 3; citing *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-A, ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence (AC), 8 September 2004, paras. 47-52.

Defence efforts to obtain the material

27. The Trial Chamber recalls that the Defence has an obligation to conduct its own research.³⁹ Having reviewed the history of the case to date, the Trial Chamber concludes that it is not satisfied that the Defence exercised sufficient diligence in attempting to obtain this information on its own and in an expeditious manner. Although the Prosecution disclosed the identities of its witnesses on 13 July 2009,⁴⁰ the Defence did not send its *Note Verbale* to Rwanda asking for the judicial records of these witnesses until 22 September 2009.⁴¹ Moreover, in the instant Motion, the Defence asks that the Trial Chamber order the Prosecution to distribute the proposed questionnaire about the judicial histories to all its witnesses,⁴² although the Defence could distribute the questionnaire itself to the 13 Prosecution witnesses it has obtained permission to meet with. Finally, as of the Pre-Trial Conference held on 15 October 2009, the Defence had not yet contacted the Prosecution to arrange meetings with the 13 Prosecution witnesses who consented to meeting the Defence.⁴³

28. Therefore, the Trial Chamber concludes that the Prosecution should provide the questionnaires provided by the Defence only to those Prosecution witnesses who have not consented to contact with the Defence.⁴⁴

ICTR practice with regard to the material sought

29. Although the Trial Chamber is not satisfied that the Defence pursued all available avenues in order to obtain this material in an expeditious manner, the Chamber considers that the information sought by the Defence is material to the preparation of the Defence case. The Chamber further believes that the Prosecution is in a better position than the Defence to

³⁹ *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 24 November 2003.

⁴⁰ 27 July Motion, para. 2.

⁴¹ Motion, para. 19, footnote 18; *See also* Letter from Defence for Nzabonimana to the National Service of Gacaca jurisdictions, Subject: Request for Information, 22 September 2009; Letter from Defence for Nzabonimana to the Registry of the International Criminal Tribunal for Rwanda, Subject: Demande de coopération au Rwanda/ Transmission d'une correspondance adressée au National Service of Gacaca jurisdictions du Rwanda, 23 Septembre 2009; Lettre du Service National des Juridictions Gacaca, 3 Octobre 2009.

⁴² Motion, Remedies Sought.

⁴³ Pre-Trial Conference, Transcript of 15 October 2009, p..XX

⁴⁴ Prosecution Witnesses CNAA, CNAC, CNAL, CNAE, CNAP, CNAQ, CNAV, CNBT, CNAR, and CNBF.

obtain Gacaca or judicial records for its witnesses, particularly in relation to previous statements made by Prosecution witnesses before the Rwandan Authorities.⁴⁵

30. Indeed, the Chamber recalls that a practice has developed at the ICTR of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically Rwandan judicial records of Prosecution witnesses, in the interests of justice.⁴⁶

31. The Trial Chamber further recalls that at the 15 October 2009 Pre-Trial Conference, the Prosecution expressed its willingness to assist the Defence in obtaining prior judicial and Gacaca records of its witnesses.⁴⁷

Conclusion

32. In its Motion, the Defence specifically requests that the Trial Chamber order the Prosecution to obtain from its witnesses signed statements regarding their prior judicial histories. The Trial Chamber has concluded that this is only appropriate for those Prosecution witnesses who have not agreed to meet with the Defence. In addition, given that the Prosecution has offered its assistance in obtaining such prior records, and in view of the Prosecution's success in obtaining this information for detained Prosecution Witnesses CNAA and CNAC, as well as in other cases, the Trial Chamber believes that Prosecution efforts to obtain the prior judicial records of its witnesses may be fruitful. The Trial Chamber therefore urges the Prosecution to assist the Defence in this matter where it is able to do so.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

- I. GRANTS** the Defence Motion, in part.
- II. ORDERS** the Prosecution to ensure that the following Prosecution witnesses respond to the questionnaire proposed by the Defence in its Motion by 9 November 2009: Witnesses CNAA, CNAC, CNAL, CNAE, CNAP, CNAQ, CNAV, CNBT, CNAR, and CNBF.
- III. ORDERS** the Prosecution to transmit the responses to the Defence as it receives them.

⁴⁵ *The Prosecutor v. Casimir Bizimungu et Al*, Case No. Ictr-99-50-T, Decision on Motion of Accused Bicumupaka for Disclosure of Exculpatory Evidence, 23 April 2004, para. 9. See also, *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Order For Judicial Records, 12 October 2006, para. 6.

⁴⁶ *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 24 November 2003.

⁴⁷ Pre-Trial Conference, T. 15 October 2009, p. 22.

- IV. **DIRECTS** the Prosecution to use its best efforts to obtain and disclose to the Defence, where it is able to assist, all Gacaca and prior judicial records pertaining to all witnesses on the Prosecution's Witness List.
- V. **DIRECTS** the Registrar to take the necessary measures to address the discrepancies cited in this Decision between the French and English versions of the Transcript of the 1 October 2009 Status Conference.

Arusha, 29 October 2009, done in English.

Solomy Balungi Bossa
Presiding Judge

Bakhtiyar Tuzmukhamedov
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]