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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: 13 November 2009

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THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON NZABONIMANA'S MOTION FOR STAY OF PROCEEDINGS;
RECONSIDERATION AND/OR CERTIFICATION OF DECISION RENDERED ON 29
OCTOBER 2009; AND RECONSIDERATION AND/OR CERTIFICATION OF THE
DECISION RENDERED ON 30 OCTOBER 2009**
Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecution
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Defence Counsel for Callixte Nzabonimana
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INTRODUCTION

1. On 19 October 2009, the Trial Chamber issued a 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 ("19 October Decision").¹
2. On 29 October 2009, the Trial Chamber filed a Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses ("First Impugned Decision").²
3. On 30 October 2009, the Trial Chamber filed a Decision on Defence Motion for the Postponement of the Start of the Trial ("Second Impugned Decision").³
4. On 2 November 2009, the Defence filed one consolidated Motion⁴ making three requests; 1) that the Trial Chamber stay proceedings in the instant case until France cooperates with the International Criminal Tribunal for Rwanda ("the Tribunal");⁵ 2) that the Trial Chamber reconsider or certify to appeal its 29 October 2009 Decision on the Defence Motion for access to the prior judicial records of Prosecution witnesses;⁶ and 3) that the Trial Chamber reconsider or certify to appeal its 30 October 2009 Decision on the Defence Motion for the Postponement of the Start of Trial.⁷ On 3 November 2009, the Defence filed separate Annexes D-1 and D-2 to its Motion.⁸
5. On 4 November 2009, the Prosecution filed a Response opposing the Defence Motion.⁹
6. On 5 November 2009, the Defence filed a Reply to the Prosecutor's Response.¹⁰

¹ *Prosecution v. Callixte Nzabonimana*, Case No. TPIR 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), 19 October 2009.

² *Prosecutor v. Callixte Nzabonimana*, Case 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*), 29 October 2009.

³ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for the Postponement of the Start of the Trial, 30 October 2009.

⁴ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, "1. Nzabonimana's Motion for Stay of Proceedings and for Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council; 2. Motion For Reconsideration, and/or Certification of Decision Rendered on 29 October 2009 for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses ; and 3. Motion for Reconsideration, and/or Certification of the Decision Rendered on 30 October 2009 on Nzabonimana's Motion for the Postponement of the Start of Trial (Rule 73(B) of the Rules of Procedure and Evidence ("RPE") ("Defence Motion").

⁵ Defence Motion, paras. 4, 12-42.

⁶ Defence Motion, paras. 43-80.

⁷ Defence Motion, paras. 81-146.

⁸ Annex D-1: Statement Filip Reyntjens on behalf of Callixte Nzabonimana and Annex D-2: Curriculum Vitae of Filip Reyntjens to the Motion, 3 November 2009 ("Annexes to the Defence Motion").

⁹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to 1. Nzabonimana's Motion for Stay of Proceedings and for Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council; 2. Motion For Reconsideration, and/or Certification of Decision Rendered on 29 October 2009 for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses ; and 3. Motion for Reconsideration, and/or Certification of the Decision Rendered on 30 October 2009 on Nzabonimana's Motion for the Postponement of the Start of Trial ("Prosecution Response").

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7. On 9 November 2009, the Trial Chamber delivered its Oral Decision on this Motion. Herein, the Trial Chamber delivers its reasoned decision in writing.

Submissions of the parties

Request regarding Cooperation of France

8. With regard to its first request, the Defence asks that the Trial Chamber suspend the proceedings,¹¹ pending proper resolution of France's cooperation with the Tribunal. The Defence stresses that France's failure to cooperate with the Tribunal has meant that it has not been able to conduct its investigations in France¹² and that it has not been able to obtain material refuting the Prosecution's allegations concerning the period between 7 and 11 April 1994.¹³ The Defence submits that this matter prevents the Accused from confronting Prosecution witnesses who may testify about this period.¹⁴ The Defence states that it has previously indicated that it intends to rely on an alibi defence for this period.¹⁵ The Defence requests that the Chamber prohibit the Prosecution from leading any evidence from witnesses about this period until the matter of French cooperation has been resolved.¹⁶ The Defence further requests that the Trial Chamber ask the President of the Tribunal to report France's non-cooperation to the Security Council, pursuant to Rule 7bis.¹⁷
9. In its Response, the Prosecution submits that the issues raised by the Defence have already been dealt with by the Trial Chamber.¹⁸ The Prosecution further submits that the Chamber ruled correctly on the Defence motion for the Postponement of trial and that France's non-cooperation does not warrant a stay of proceedings.¹⁹
10. In its Reply, the Defence submits that the Motion "[...] for stay rests *primo* on the fact that the Defence is seeking reconsideration and/or certification of the start date of trial [...]"²⁰ The Defence adds that the misconduct of the Governments of France and Rwanda is significant and affects fair trial rights.²¹ In Annex E of the Reply, the Defence has adjoined a note from its lead investigator about his investigations in France.²² The Defence argues that as France has a permanent seat on the United Nations Security Council, it can only blame itself if trials at the Tribunal are drawn out.²³

¹⁰ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence's Reply to Prosecutor's Response to 1. Nzabonimana's Motion for Stay of Proceedings and for Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperation to the Security Council; 2. Motion for Reconsideration, and/or Certification of Decision Rendered on 29 October 2009 for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses; and 3. Motion for Reconsideration, and/or Certification of the Decision Rendered on 30 October 2009 on Nzabonimana's Motion for the Postponement of the Start of Trial ("Defence Reply").

¹¹ Defence Motion, paras. 4, 6 and 42.

¹² Defence Motion, para. 4.

¹³ Defence Motion, para. 32.

¹⁴ Defence Motion, para. 25.

¹⁵ Defence Motion, para. 12.

¹⁶ Defence Motion, para. 25.

¹⁷ Defence Motion, paras. 27, 35-38, 41.

¹⁸ Prosecution Response, paras. I.B). 1-2.

¹⁹ Prosecution Response, paras. I.B). 3-6.

²⁰ Defence Reply, para. 13.

²¹ Defence Reply, para. 15.

²² Defence Reply, paras. 20-21, Annex E.

²³ Defence Reply, para. 22.

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Request regarding Prosecution disclosure issues

11. In its second request,²⁴ the Defence requests that the Trial Chamber reconsider the First Impugned Decision and/or grant certification to appeal this Decision on prior judicial records.²⁵ In support of its application, the Defence contends that it is bringing new information to the attention of the Trial Chamber regarding Prosecution violations of its disclosure obligations, specifically in relation to Prosecution disclosure of material relating to Witness CNAC.²⁶ The Defence also submits that the Trial Chamber's Decision affects the fair and expeditious conduct of proceedings, and that Appeals Chamber review of the Decision would materially advance the proceedings.²⁷
12. In its Response, the Prosecution recalls the jurisprudence on Reconsideration²⁸ and Rules 66(A)(ii) and 68.²⁹ The Prosecution submits that the material it disclosed on 23 October 2009 relating to Prosecution Witness CNAC is neither a witness statement under Rule 66(A)(ii) nor exculpatory material under Rule 68.³⁰ The Prosecution denies that it was aware that Witness CNAC was originally called as a witness under the pseudonym ALY in *Karemera* and denies that the witness was ever called in that case.³¹ The Prosecution stresses the jurisprudence on Certification to appeal³² and argues that the Defence has not satisfied the relevant criteria.³³
13. Citing *Karemera*, the Defence alleges in its Reply that the Prosecution has misstated the law with regard to its Rule 68 disclosure obligations.³⁴ It adds that staying proceedings would allow both the Prosecution and Defence to obtain the prior judicial histories of their witnesses.³⁵

Request regarding postponement of trial

14. The Defence also requests that the Trial Chamber reconsider and/or grant certification to appeal the Second Impugned Decision regarding the start date of the trial.³⁶ In support of its application for Reconsideration, the Defence appended two documents to the Motion which it contends constitute new facts. The first is a report from the lead Defence Investigator cataloguing difficulties he has faced in persuading potential witnesses to testify for the Defence.³⁷ The second is a report by Filip Reyntjens, Professor of Law and Politics at the University of Antwerp, Belgium, regarding the Human Rights situation in Rwanda.³⁸ This second report was filed by the Defence on 3 November 2009.

²⁴ Defence Motion, paras. 43 and 48-53 as for the request for Reconsideration; paras. 44-47 and 54-80 as for the request for Certification of appeal.

²⁵ Defence Motion, paras. 48 and 54 and fol.

²⁶ Defence Motion, paras. 48-53.

²⁷ Defence Motion, para. 54.

²⁸ Prosecution Response, paras. II.A).1-5.

²⁹ Prosecution Response, paras. II.B).14-18.

³⁰ Prosecution Response, paras. II.B).19-20.

³¹ Prosecution Response, para. 24.

³² Prosecution Response, paras. II.A). 6-10.

³³ Prosecution Response, para. II. B) 26.

³⁴ Defence Reply, paras. 26-35.

³⁵ Defence Reply, para. 24.

³⁶ Defence Motion, paras. 86-146.

³⁷ Annex A to the Defence Motion: Rapport de Mr. Fernand Batard, Enquêteur, adressé à Maîtres Vincent Courcelle-Labrousse et Philippe Laroche, daté du 31 Octobre 2009.

³⁸ Annex D-1: Statement Filip Reyntjens on behalf of Callixte Nzabonimana, 3 November 2009.

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15. To convince the Trial Chamber to grant certification to appeal the Trial Chamber's Second Impugned Decision, the Defence argues that the issue of the start date of the trial significantly affects fair and expeditious conduct of proceedings, and that an immediate resolution by the Appeals Chamber will materially advance the proceedings.³⁹
16. The Defence avers that "the arguments raised in the three proceedings mentioned above are closely linked, and concern the fundamental right of the accused to a fair trial."⁴⁰
17. In its Response, the Prosecution submits that the facts presented by the Defence do not constitute "new information"⁴¹ within the meaning of the jurisprudence regarding Reconsideration. It also responded to seven contentions raised by the Defence.⁴² Referring to its previous arguments, the Prosecution alleges that the Defence has failed to demonstrate how that certification to appeal would materially advance proceedings.⁴³
18. In its Reply, the Defence reiterates many of the substantive arguments it made in its Motion. It makes no new submissions with regards to its request for certification to appeal the Second Impugned Decision.

DELIBERATIONS

Applicable Law: Reconsideration

19. In the *Nahimana* case the Appeals Chamber held that "the Appeals Chamber has an inherent discretionary power to reconsider a previous interlocutory decision, for example, if a clear error of reasoning has been demonstrated or if it is necessary to do so in order to prevent an injustice;"⁴⁴
20. Trial Chambers at the Tribunal have also recognised their inherent power to reconsider their own decisions.⁴⁵ In *Nshogoza*, the Trial Chamber held "[t]hough reconsideration is not expressly provided for in the Statute or the Rules, the Trial Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did

³⁹ Defence Motion, paras. 140-146.

⁴⁰ Defence Motion, para. 1.

⁴¹ Prosecution Response, para. III.A).33.

⁴² Prosecution Response, para. III.A).34 (political reasons dictating the date of trial); paras 35-36 (size and complexity of the Amended Indictment); para. 37 (conditions under which the Defence are operating in Rwanda); paras. 38-39 (principle of equality of arms); para. 40 (the Prosecution's disclosure obligations); paras. 41-42 (delays in translation of disclosed material); paras. 43-44 (position of the French authorities).

⁴³ Prosecution Response, para. III.B). 45.

⁴⁴ *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005.

⁴⁵ See for example, *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting With Defence Witness (TC), 11 October 2005, para. 8; *Karemera et al.* Decision on Motion to Vacate Sanctions (TC), 23 February 2005, para. 9; See also *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-AR72, Decision on Motion for Review or Reconsideration (AC), 12 September 2000; *Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva ("Bagosora et al.")*, Case No. ICTR-98-41-A, Decision on Interlocutory Appeal from refusal to Reconsider Decisions relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction" (AC), 2 May 2002, para. 10; See also *The Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić ("Mucić et al.")*, Case No. IT-96-21-A, Decision on Hazim Delić's Emergency Motion to Reconsider Denial of Request of Provisional Release (AC), 1 June 1999, para. 4.

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not exist at the time of the original decision, or where the decision was erroneous and has caused prejudice or injustice to a party.”⁴⁶

21. In *Karemera*, the Trial Chamber noted that reconsideration is an exceptional measure available only in particular circumstances such as (i) when a new fact has been discovered that was not previously known to the Chamber, (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision, or (iii) where a party shows an error of law or the Chamber abused its discretion, and an injustice has been occasioned.”⁴⁷ Thus, it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁴⁸

Applicable Law: Certification of Appeal pursuant to Rule 73(B)

22. Rule 73(B) of the Rules of procedure and Evidence (hereinafter “the Rules”) provides that:

“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.”

23. Thus, in order to grant certification for appeal of one of its Decisions, a Trial Chamber must find: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.⁴⁹ Even where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber,⁵⁰ and certification remains an exceptional measure.⁵¹

⁴⁶ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification to Appeal the Chamber’s Oral Decision of 9 February 2009 Denying an Adjournment of The Proceedings, 18 February 2009, para.4.

⁴⁷ *Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (Rule 73 of the Rules of Procedure and Evidence), 29 August 2005, para. 8.; see *inter alia*, *Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, *Rules 69 and 75 of the Rules of Procedure and Evidence*, 31 October 2005, para. 3; *Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-T, Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, Rules 90 and 92bis of the Rules of Procedure and Evidence, 28 September 2007, para. 10 (internal citations omitted).

⁴⁸ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification to Appeal the Chamber’s Oral Decision of 9 February 2009 Denying an Adjournment of The Proceedings, 18 February 2009, para.4; See *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, 10 October 2003, para 6.

⁴⁹ *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 16; citing *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2.

⁵⁰ *Prosecutor v. Augustin Ngirabatware*, Case no. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 17; See *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

⁵¹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-NZ, Decision on Joseph Nizorera’s Application for Certification to Appeal Decision on the 24th Rule 66 Violation, 20 May 2009, para. 2; see also *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber’s Decision

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24. In interpreting Rule 73 (C), Trial Chambers have held that “[t]he correctness of the decision is a matter for the Appeals Chamber. Trial Chambers need not consider the merits of the impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 73 (B) have been met. However, the Trial Chamber can revisit the substance of the impugned decision to the extent that this is done within the context of determining whether the Rule 73 (B) criteria are met. Arguments which were not advanced in the original motion cannot form the basis for certification to appeal. Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.”⁵²
25. A Trial Chamber may grant certification to appeal a decision in its entirety, or limit the certification to one or more specific issues in the decision.⁵³

Preliminary Matters

26. Rule 73 (C) states that “Requests for certifications shall be filed within seven days of the filing of the impugned decision....” The Impugned Decision was filed on 30 October 2009, and the Defence filed the instant Motion on 2 November 2009. That same day, the Trial Chamber issued filing deadlines, including a 4 November 2009 deadline for the Prosecution Response, and a 6 November 2009 deadline for the Defence Reply. The Defence did not submit Annex D of its Motion until 4 November 2009. Moreover, it attached Annex E of its Motion to its Reply dated 6 November 2009. Thus, the Prosecution did not have an opportunity to respond to these Annexes to the Defence Motion. However, as of 9 November 2009 when the Trial Chamber rendered its Oral Decision, the Prosecution had not requested an extension of time to respond to Annexes D and E of the Defence Motion.

Stay of proceedings based on France’s refusal to cooperate

27. The Defence refers to the Trial Chamber’s Decision of 19 October 2009 on Cooperation with France, and to the response of the French authorities dated 28 October 2009, in which the French Government provided the names of six French officials working at the French Embassy in Kigali in 1994.⁵⁴ The Defence contends that there were more than six persons working at the Embassy at the time.⁵⁵

on Defence Urgent Motion for a Subpoena to Ms. Loretta Lynch, 19 February 2009, para. 4 (citation omitted); in *Prosecutor v. Augustin Ndirabatware*, Case no. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 17.

⁵² *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification to Appeal the Chamber’s Oral Decision of 9 February 2009 Denying an Adjournment of the Proceedings (Rules 54, 66, 68, 73, and 77 of the Rules of Procedure and Evidence), 18 February 2009, para. 7 (internal citations omitted); *See inter alia*, *Prosecutor v. Augustin Ndirabatware*, Case No. ICTR-99-54-PT, Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009, para. 18; *see also*, *Prosecutor v. Augustin Ndirabatware*, Case no. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 18.

⁵³ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, 11 March 2009, Decision on Defence Motion For Certification To Appeal The Chamber’s Decision Denying a One Week Postponement of the Defence Case, 11 March 2009, para. 7; citing *Karemera et al*, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 3; *see also* *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification to Appeal the Chamber’s Oral Decision of 9 February 2009 Denying an Adjournment of The Proceedings, 18 February 2009, para.8.

⁵⁴ Defence Motion, paras. 26, 30 and 40.

⁵⁵ Defence Motion, paras. 30-31.

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28. The Defence submits that it has not been able to conduct investigations in France due to obstruction on the part of the French authorities,⁵⁶ and adds that “[t]he matter of France’s refusal to disclose exculpatory material to the Accused exposes a fundamental flaw of this Tribunal, and its incapacity to insure fair trials to its accused.”⁵⁷ The Defence reiterates arguments made in earlier motions about the numerous allegations contained in the Indictment referring to the period 7-11 April 1994,⁵⁸ and emphasises again that the Defence cannot prepare the alibi of the Accused for that period without the cooperation of the Government of France.⁵⁹
29. The Defence further submits that a Trial Chamber has the inherent power to insure that the right of the accused to a fair trial be respected⁶⁰ and, that these matters warrant a stay of proceedings pending their resolution.⁶¹
30. Thus, the Defence requests that the Trial Chamber stay the proceedings in the instant case until France cooperates with the Directives of the Trial Chamber.⁶² It also asks that the Trial Chamber prevent Prosecution witnesses from leading any evidence relating to the dates 7-11 April 1994, until such time as the Defence has been provided with the information necessary to properly cross examine such witnesses.⁶³
31. Finally, the Defence reiterates its earlier request that the Trial Chamber ask that the President of the Tribunal report the matter of France’s Refusal to Cooperate to the Security Council.⁶⁴
32. In its Response, referring to the Second Impugned Decision, the Prosecution contends that the postponement of the trial is not justified on the basis of the failure of the Government of France to cooperate with the Tribunal.⁶⁵ Further the Prosecution notes that if the Defence later obtains information that contradicts the evidence of Prosecution witnesses, the Defence may use that information later in the proceedings.⁶⁶
33. In its Reply, the Defence submits that the Motion “[...] for stay rests *primo* on the fact that the Defence is seeking reconsideration and/or certification of the start date of trial [...]”⁶⁷ The Defence adds that the misconduct of the Governments of France and Rwanda is significant and affects fair trial rights.⁶⁸
34. The Trial Chamber recalls that in its Decision dated 19 October 2009, the Trial Chamber requested the following from the French authorities:

⁵⁶ Defence Motion, para. 4.

⁵⁷ Defence Motion, para. 10.

⁵⁸ Defence Motion, paras. 14-24: the Defence refers to allegations mentioned in paragraphs 40-43, 49-50, 15-17 of the Indictment.

⁵⁹ Defence Motion, para. 12.

⁶⁰ Defence Motion, para. 5.

⁶¹ Defence Motion, paras. 4.C, 6 and 42.

⁶² Defence Motion, para. 4.

⁶³ Defence Motion, para. 25. The Defence specifically refers to Prosecution Witnesses CNAF, CNAI, CNAO, CNAP, CNAQ, CNAX, CNAY.

⁶⁴ Defence Motion, paras. 41-42.

⁶⁵ Prosecution Response, paras. 3, 5-7.

⁶⁶ Prosecution Response, para. 8.

⁶⁷ Defence Reply, para. 13.

⁶⁸ Defence Reply, para. 15.

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

35. With respect to the list of refugees, the French Embassy responded by referring to its prior communications in the instant case, and added: "With regard to the list of persons who took refuge at the French Embassy in Kigali between the 7th and 11th of April...the French authorities respectfully confirm to the Registrar of the ICTR that they cannot go beyond their prior communications [on this issue]..."⁶⁹

36. With regard to the list of personnel working at the French Embassy in Kigali during the same period, the French Embassy wrote that "with respect to the list of officially accredited personnel working at the French Embassy in Kigali ...the French authorities are honoured to transmit to the Registrar the relevant extract of the diplomatic and consular yearbook, 1994 edition."⁷⁰ Appended is an extract naming six persons: The Ambassador, the Second Secretary, an accountant, a defence attaché, a commercial attaché, and a cultural attaché.⁷¹

37. The Trial Chamber concludes that in its response of the 28th of October, the French authorities have not responded to the Trial Chamber's first request regarding lists of refugees. The Trial Chamber observes that the French Embassy has responded to its second request, at least in part. However, it notes that the French Response refers to "officially accredited persons" working at the French Embassy in Kigali. It is not clear whether this refers to all persons working at the French Embassy during the relevant period. The Trial Chamber's 19 October 2009 request clearly refers to all personnel working at the Embassy, not only diplomats.

38. The Trial Chamber recalls that the Pre-Trial Chamber noted that the Defence had shown good cause for seeking the information requested.⁷²

39. The Trial Chamber notes that while there has been in a positive evolution in the responses of the French authorities, the 28 October 2009 communication does not adequately respond to the questions posed by the Trial Chamber in its 19 October 2009 Decision. The Trial Chamber concludes, however, that issuing a stay of proceedings is not justified on the basis of this problem for the reasons provided in the Trial Chamber's 30 October Decision. Therefore the Trial Chamber will not reconsider the Second Impugned Decision on the basis of France's response dated 28 October 2009. Nor does the Trial Chamber agree that

⁶⁹ Unsigned letter from French Embassy in Tanzania to the Registrar of the ICTR, No. 652/TPIR, dated 28 October 2009 ("French Response of 28 October"); Unofficial translation of para 1 which states in French: S'agissant de listes des personnes réfugiées à l'Ambassade de France à Kigali entre le 7 et le 11 Avril 1994...[l]es autorités françaises confirment respectueusement au Greffe du TPIR qu'elles n'estiment pas possible d'aller au-delà de ces communications..."

⁷⁰ French Response of 28 October, para. 2. Unofficial translation of "S'agissant de la liste du personnel officiellement accrédité travaillant à l'Ambassade de France à Kigali, les autorités françaises ont l'honneur de transmettre au greffe du TPIR l'extrait pertinent de l'annuaire diplomatique et consulaire de la République Française, édition 1994."

⁷¹ Annex to French Response of 28 October.

⁷² 19 October Decision, para. 16.

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postponing the testimony of certain prosecution witnesses is an appropriate remedy, as the Trial Chamber may invoke other remedies such as the recall of Prosecution witnesses.

40. However, the Trial Chamber also concludes that it has exhausted its powers in seeking the information requested. It will therefore refer the matter to the President of the Tribunal.

Reconsideration and/or certification to Appeal the Trial Chamber's First Impugned Decision

Reconsideration of the Decision

41. In its Motion, the Defence seeks reconsideration of the Trial Chamber's First Impugned Decision, on the basis of a new fact not known to the Chamber when it rendered its decision.⁷³ The Defence submits that the disclosure on 23 October 2009 of a CD-Rom containing material relating to Prosecution witness CNAC⁷⁴ constitutes a new fact because it contains prior statements of the Accused that should have been disclosed 60 days before the start of trial pursuant to Rule 66(A)(ii).⁷⁵ The Defence also condemns the Prosecution's classification of the material as Rule 66(B) material rather than Rule 66(A)(ii) material.⁷⁶ Finally, the Defence criticises the late disclosure of potentially exculpatory evidence by the Prosecution.⁷⁷
42. The Defence therefore requests that the Trial Chamber order the Prosecution to reveal the provenance of each document disclosed to the Defence on 23 October 2009 and the date on which the document came into the possession of the Prosecution.⁷⁸
43. The Defence further asks that the Trial Chamber reconsider its Decision to ask the Prosecution to obtain completed questionnaires from its witnesses only for those witnesses who have not agreed to meet with the Defence.⁷⁹ The Defence also requests that the Trial Chamber reconsider its First Impugned Decision with respect to its finding that the Prosecution has not breached its disclosure obligations.⁸⁰
44. In its Response, the Prosecution argues that it properly filed the 23 October materials under Rule 66(B). It refers to an interpretation of Rule 66(A)(ii) in *Nshogoza* stating that this rule applies to "account[s] of a person's knowledge of a crime which has been recorded during the course of an investigation into that crime."⁸¹ The Prosecution adds that the material disclosed does not fall under Rule 66(A)(ii) because the documents do not refer to Witness CNAC's knowledge of a crime which has been recorded during the course of an investigation into the crime.⁸² The Prosecution suggests that if the Defence has been disadvantaged, the Prosecution can reschedule the testimony of Witness CNAC for the fifth week of trial.⁸³

⁷³ Defence Motion, paras. 43 and 48.

⁷⁴ Prosecution Witness CNAC: pseudonym ALY in the *Karamera et al.* case.

⁷⁵ Defence Motion, paras. 48-49.

⁷⁶ Defence Motion, para. 50.

⁷⁷ Defence Motion, para. 4.b.

⁷⁸ Defence Motion, para. 52.

⁷⁹ Defence Motion, para. 53.

⁸⁰ Defence Motion, paras. 51-53.

⁸¹ Prosecution Response, para. 15.

⁸² Prosecution Response, paras. 15 and 19.

⁸³ Prosecution Response, paras. II.B). 24-25.

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45. In its Reply, the Defence reiterates its argument that the Prosecution has misinterpreted its Rule 68 disclosure obligations. The Defence again contends that the Prosecution has an obligation to seek exculpatory material once it has been made aware of its existence by the Defence, or in some other manner.⁸⁴ Finally, the Defence argues that it has been materially prejudiced by late Prosecution disclosures, in particular with regard to the late disclosure of documents relating to Prosecution Witnesses CNA A and CNAC, asserting that it has been unable to conduct investigations about information that arose in that late disclosure.⁸⁵ Citing national jurisprudence, the Defence concludes that the Prosecution's late disclosure breach the fair trial rights of the Accused.⁸⁶
46. The Trial Chamber recalls that in the First Impugned Decision it reasoned that "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. Thus, the Trial Chamber finds that the Defence has not established that the Prosecution violated its obligations pursuant to Rule 68 (A)."⁸⁷ The Trial Chamber finds no reason to reconsider its findings with regard to the Prosecution's Rule 68(A) obligations.
47. With regard to Rule 66(A)(ii), the Trial Chamber recalls that its 29 October 2009 Decision was based on the Prosecution's denial that it had such material in its custody or under its control.⁸⁸
48. The Prosecution concedes that the information it disclosed on 23 October 2009 relating to Prosecution Witness CNAC has been in its possession for some time but argues that it constitutes Rule 66(B) material, and therefore that it has not violated its disclosure obligations.⁸⁹ The Trial Chamber has reviewed the material and concludes that the disclosure includes "statements" of Prosecution witness CNAC within the meaning of Rule 66(A)(ii).⁹⁰ Thus, the material should have been disclosed to the Defence at least 60 days before the start of trial. Therefore, the Trial Chamber considers that the 23 October 2009 disclosure represents a new fact that was not known to the Trial Chamber when it filed the First Impugned Decision. However, as this new fact only pertains to a small section of that Decision. Therefore, the Trial Chamber will not reconsider the Decision in its entirety, but only that section pertaining to the disclosure of material relating to Prosecution Witness CNAC.
49. In its Reply, the Defence states that it is not alleging that the Prosecution has been acting in "bad faith", but simply that it has been negligent.⁹¹ The Prosecution refers to its failure to

⁸⁴ Defence Reply, paras. 26-32.

⁸⁵ Defence Reply, para. 43.

⁸⁶ Defence Reply, paras. 44-46.

⁸⁷ *Prosecutor v. Callixte Nzabonimana*, Case ICTR-98-44D-T, First impugned Decision, para. 25.

⁸⁸ First Impugned Decision, para. 22.

⁸⁹ Prosecution Response, para. 24.

⁹⁰ *Procureur c. Edouard Karemera et al. Affaire No. ICTR-98-44-T*, Décision relative à la requête *ex parte* du procureur aux fins d'être autorisé à communiquer le témoignage du témoin CEA à la défense en l'affaire No. ICTR-98-42-T (*Articles 54 et 66 du Règlement de procédure et de preuve*), 29 janvier 2004, paras. 7 et 8 : « 7. La Chambre considère qu'elle a compétence pour ordonner au Greffier de mettre à la disposition du Procureur des comptes rendus d'audience correspondants au témoignage du témoin CEA devant cette Chambre les 4 et 5 décembre 2003, en application de l'article 54 du Règlement. La Chambre d' Appel dans l'affaire *Aleksovski* avait d'ailleurs rendu une décision dans ce sens. 8. La Chambre est d'avis que les comptes rendus d'audition d'un témoin constituent des déclarations de témoins au sens de l' Article 66 A) ii) du Règlement et à ce titre font partie de l'obligation de communication qui incombe au Procureur. » (citations internes omises).

⁹¹ Defence Reply, para. 37.

disclose this material earlier as an “inadvertent error.”⁹² While the Trial Chamber recognises that inadvertent errors may take place in the course of a long and complex case, it considers the Prosecution’s repeated references to the documents as Rule 66(B) rather than Rule 66(A)(ii) material to be deliberately misleading.

50. Turning to an appropriate remedy for the late disclosure, the Trial Chamber concludes that postponing the testimony of Witness CNAC until the week of 9-14 December 2009 will provide the Defence with sufficient time to properly prepare the cross-examination of the witness, and instructs the Prosecution to adjust its witness order of appearance in this regard.
51. In response to the Defence request that the Trial Chamber order the Prosecution to obtain completed questionnaires for all its witnesses, the Trial Chamber refers to its reasoning in its First Impugned Decision and rejects the request. The Trial Chamber does not consider that that the Defence has established a basis for reconsideration of the first Impugned Decision. As the Trial Chamber has made a decision with regard to the Prosecution’s 23 October 2009 disclosure, it does not consider it necessary to ask the Prosecution to provide information about the provenance of each document disclosed on 23 October 2009 nor the date on which the material came into its possession.

Certification of Appeal pursuant to Rule 73(B) of the First Impugned Decision

52. The Trial Chamber has reconsidered the relevant section of the First Impugned Decision in paragraphs 49 to 51 above.
53. The Defence argues, however, that all issues addressed in the Decision significantly affect the fair and expeditious conduct of the proceedings, and that an immediate resolution of the issue will materially advance the proceedings.⁹³ Specifically, it submits that the Decision “... forces the Defence to proceed without the full knowledge or even the possession of the exculpatory material relating to Nzabonimana’s case.”⁹⁴ In addition, the Defence contends that the Trial Chamber committed errors of law in the First Impugned Decision with regard to the Prosecution’s obligation pursuant to Rule 68.⁹⁵ The Defence adds that witness testimony “will reveal further judicial information which the Prosecutor has failed to pursue, following its disclosure obligations under Rules 66 and 68”.⁹⁶
54. The Prosecution responds that the Defence contention did not meet the criteria for Certification of appeal.⁹⁷ Further the Prosecution submits that the start of the trial on 9 November 2009 does not prevent the Defence from seeking judicial material during the proceedings.⁹⁸ The Prosecution also contends that it was unaware of the existence of such material relating to Witnesses CNA and CNAC.⁹⁹
55. The Trial Chamber considers that the Defence arguments about Prosecution disclosure issues to be generally speculative. The Trial Chamber will continue to address alleged disclosure failures as the Defence establishes them, and determine appropriate remedies.

⁹² Prosecution Response, para. 24.

⁹³ Defence Motion, paras. 54, 79-80.

⁹⁴ Defence Motion, para. 60.

⁹⁵ Defence Motion, paras. 64-69.

⁹⁶ Defence Motion, paras. 79-80.

⁹⁷ Prosecution Response, para. 26.

⁹⁸ Prosecution Response, para. 27.

⁹⁹ Prosecution Response, para. 28-30.

However, the Trial Chamber finds that granting certification to Appeal the First Impugned Decision would not significantly affect the fair and expeditious conduct of the Trial. Nor would an immediate resolution from the Appeals Chamber materially advance the proceedings. Therefore, the Trial Chamber denies certification to appeal the First Impugned Decision.

The Second Impugned Decision Denying Postponement of the Start of Trial

Reconsideration of the Decision

56. The Defence requests that the Trial Chamber reconsider the Second Impugned Decision on the following grounds: The Trial Chamber did not consider the Defence's reply to the Prosecutor's Response dated 27 October 2009, as it concluded that the Reply was filed out of time. The Defence submits that Rule 73(E) does not bar the filing of submissions after a five day deadline.¹⁰⁰ The Defence concludes that the Trial Chamber failure to consider its Reply constituted both "an error of law AND an abuse of its discretion."¹⁰¹ The Defence asks that the Chamber Reconsider the Second Impugned Decision and consider the Defence Reply.¹⁰²
57. The Defence has appended two documents to its instant Motion. The first is a report from the lead Defence investigator in which he explains difficulties he has faced in conducting investigations and obtaining the consent of potential witnesses to testify at Trial.¹⁰³ The second is a report by Filip Reyntjens, Professor of Law and Politics about the human rights situation in Rwanda.¹⁰⁴ The Defence contends that these two reports include new facts which the Trial Chamber was not in a position to consider when it issued the Second Impugned Decision.
58. The Prosecution responds that the Trial Chamber addressed the difficulties faced by the Defence in carrying out its investigation in the Second Impugned Decision.¹⁰⁵
59. In response to the Defence submission that the Reply it filed to its 14 October 2009 Motion was not filed out of to time, the Trial Chamber considers that the Defence has not established a reason for reconsidering its second Impugned Decision on this matter.
60. The Trial Chamber has reviewed the documents appended to the instant Motion. It observes that they consist solely of material buttressing arguments that the Defence made in its 14 October 2009 Motion¹⁰⁶ requesting postponement in the start of trial based on the political climate in Rwanda. The Trial Chamber further notes that all the information in these new Annexes was available to the Defence when it filed its first Motion on Postponement. Moreover, the Trial Chamber addressed concerns about the Rwandan political climate in paragraph 28 of the Second Impugned Decision. The Trial Chamber further observes that neither in the instant Motion nor its first Motion has the Defence indicated when it would be

¹⁰⁰ Defence Motion, para. 91.

¹⁰¹ Defence Motion, para. 92.

¹⁰² Defence Motion, para. 92.

¹⁰³ Annex A to the Defence Motion: Rapport de Mr. Fernand Batard, Enquêteur, adressé à Maîtres Vincent Courcelle-Labrousse et Philippe Larochelle, daté du 31 Octobre 2009.

¹⁰⁴ Annex D-1: Statement Filip Reyntjens on behalf of Callixte Nzabonimana, 3 November 2009.

¹⁰⁵ Prosecution Response, para. 37.

¹⁰⁶ Procureur c. Callixte Nzabonimana, Case No. ICTR-98-44D-T, Requête de la Défense aux Fins de Report de l'Ouverture du Procès de Callixte Nzabonimana, 14 octobre 2009.

prepared to start trial. The Trial Chamber therefore concludes that the Defence has advanced no new facts which were not previously known to the Chamber, nor have new circumstances arisen that affect the premise of the Second Impugned Decision.¹⁰⁷ The Defence has not argued that the Trial Chamber made an error of law nor has it persuaded the Trial Chamber that it abused its discretion. The Trial Chamber rejects Defence arguments that an injustice has been occasioned by the Second Impugned Decision. Thus, the Trial Chamber denies the Defence request for reconsideration of that Decision.

Certification to Appeal the Second Impugned Decision

61. The Defence has requested that the Trial Chamber either reconsider the Second Impugned Decision or grant certification to appeal the Decision pursuant to Rule 73(B).¹⁰⁸ The Defence submits that the issue of the commencement of trial on 9 November 2009 significantly affects the fair and expeditious conduct of the proceedings.¹⁰⁹ In particular, the Second Impugned Decision violates the right of the Accused to a fair trial because the Accused has not had adequate time to conduct his investigations and will not be in a position to properly cross-examine Prosecution witnesses.¹¹⁰ The Defence further contends that an immediate resolution of the issue will materially advance the proceedings and "that the matters raised in this motion concern questions regarding the fundamental fairness of these proceedings, which should be resolved before the Tribunal closes (next year) rather than after."¹¹¹
62. The Prosecution responds that the Defence has failed to demonstrate how referring the impugned Decision to the Appeals Chamber would materially advance the proceedings.¹¹²
63. In its reply, the Defence contends that it has provided ample evidence of the difficulties it has faced in conducting its investigations, and reiterates some of these problems.¹¹³
64. As the Trial Chamber has determined that there are other appropriate remedies for all the issues raised by the Defence, the Trial Chamber is not satisfied that the Second impugned decisions involve an issue which would significantly affect the fair and expeditious conduct of the proceedings, or outcome of the trial.

¹⁰⁷ *Prosecutor v. Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003; *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Decision on Ngeze's Motion for reconsideration of the Decision Denying an Extension of Page Limits His Appellant Brief (AC), 11 March 2004, p. 2.

¹⁰⁸ Defence Motion, paras. 138-139.

¹⁰⁹ Defence Motion, paras. 141-143.

¹¹⁰ Defence Motion, para. 142.

¹¹¹ Defence Motion, paras. 144-146.

¹¹² Prosecution Response, paras. 6-10, 31-45.

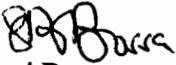
¹¹³ Defence Reply, paras. 49-57.

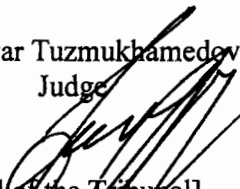
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FOR THESE REASONS, THE CHAMBER

- I. GRANTS** the Defence Motion in part in the following respects:
 - a) The Defence Motion to refer the matter of French cooperation with the Tribunal to the President, pursuant to Rule 54; and
 - b) The Defence Motion to Reconsider its First impugned Decision with respect to the Prosecution's compliance with Rule 66(A)(ii) as it applies to Witness CNAC;
- II. ORDERS** the Prosecution to re-schedule the testimony of Witness CNAC until the last week of the Prosecution's case;
- III. DENIES** the Defence Motion in all other respects.

Arusha, 13 November 2009, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tuzmukhamedov
Judge

Mparany Rajohnson
Judge
