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ICTR-98-44D-T  
25-11-2009  
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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:** 25 November 2009

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**

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

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**DECISION ON NZABONIMANA'S MOTION SEEKING RELIEF ON THE  
GROUND OF NON COMPLIANCE WITH THE RULES OR REGULATIONS OF  
THE TRIBUNAL**

*(Rules 5(A), 8 and 73(B) of the Rules of Procedure and Evidence ("RPE"))*

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

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

BB

## INTRODUCTION

1. 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 ("29 October 2009 Decision").<sup>1</sup>
2. On 30 October 2009, the Trial Chamber filed a Decision on Defence Motion for the Postponement of the Start of the Trial ("30 October 2009 Decision").<sup>2</sup>
3. On 9 November 2009, the Defence filed a Motion seeking relief in respect of the Prosecution's non-compliance with the Rules of Procedure and Evidence ("the Rules"), and Regulations of the Tribunal.<sup>3</sup>
4. On 11 November 2009, the Prosecution filed a Response to the Defence Motion.<sup>4</sup>
5. The Defence did not file a Reply.

### *Submissions of the parties*

6. In its Motion, the Defence seeks relief under Rule 5(B) of the Rules, arguing that the Prosecution has not complied with the Rules and Regulations of the Tribunal, and that this has resulted in prejudice to the Defence.<sup>5</sup> In particular, the Defence submits that the Prosecution violated Rules 5, 8, 66, 68, and several articles of the "Prosecutor's Regulation No.2 (1999),<sup>6</sup> Standards of Professional Conduct – Professional Counsel" ("Prosecutor's Regulation No. 2").<sup>7</sup>
7. The Defence provides the following examples of non-compliance with the Rules and Regulations:
  - a) Rule 8<sup>8</sup>: The Defence refers to a report of the Defence lead investigator, dated 31 October 2009, in which he alleges that proceedings have been instituted against the Accused before Rwanda Courts. Therefore, the Defence requests that the Trial Chamber order the Prosecution to seek all the material from the Gacaca courts in which Nzabonimana is currently accused of crimes relating to the Genocide of 1994, from Rwanda, pursuant to Article 28 of the Statute. The Defence alleges that until it has done so, the Prosecution is in violation of Rule 8;

<sup>1</sup> *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.

<sup>2</sup> *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.

<sup>3</sup> *Prosecution v. Callixte Nzabonimana*, Case No. TPIR 98-44D-T, Nzabonimana's Motion Seeking Relief on the Ground of Non Compliance with the Rules or Regulations of the Tribunal (Rules 5(A), 8 and 73(B) of the Rules of Procedure and Evidence ("RPE") ("Defence Motion").

<sup>4</sup> *Prosecution v. Callixte Nzabonimana*, Case No. TPIR 98-44D-T, Prosecutor's Response to Nzabonimana's of 9 November, Seeking Relief for Non-Compliance with the Rules or Regulations of the Tribunal (Rules 5(A), 8 and 73(B) of the Rules of Procedure and Evidence ("RPE") ("Prosecution Response").

<sup>5</sup> Defence Motion, para. 4.

<sup>6</sup> Prosecutor's Regulation No. 2 (1999) Standards of Professional Conduct - Prosecution Counsel, 14 September 1999.

<sup>7</sup> Defence Motion, Section 1. Applicable provisions.

<sup>8</sup> Defence Motion, paras. 10-13.

- b) Rule 66(A)(ii):<sup>9</sup> The Defence refers to the material disclosed under Rule 66(A)(ii) since 9 September 2009, and submits that the Prosecution has failed to comply with its disclosure obligations;<sup>10</sup>
- c) Rule 68(A) of the Rules:<sup>11</sup> The Defence submits that numerous Prosecution witnesses<sup>12</sup> have confirmed that they have prior judicial histories. The Defence contends that related records constitute exculpatory evidence within the meaning of Rule 68(A), which the Prosecution has failed to disclose;<sup>13</sup>
- d) Provision 2(a) of Prosecutor's Regulation No. 2:<sup>14</sup> The Defence argues that the failure of the Prosecution to secure exculpatory evidence, coupled with the fact that the Prosecution has prohibited the Defence from meeting with witnesses who have exculpatory evidence,<sup>15</sup> amounts to a breach of this provision. The Defence further notes that a number of witnesses, including Witness CNAD, have not yet informed WVSS whether they consent to meeting with the Defence;<sup>16</sup>
- e) Provision 2(c) of Prosecutor's Regulation:<sup>17</sup> Referring to the affidavit signed by Professor Reyntjens,<sup>18</sup> the Defence alleges that the Prosecution has failed to disassociate itself from the Rwandan authorities. The Defence submits that the conduct of the Prosecution clearly shows its unwillingness to comply with its disclosure obligations under Rule 68 and that it amounts to a breach of this provision;
- f) Provision 2(d) of Prosecutor's Regulation No. 2:<sup>19</sup> The Defence alleges that the Prosecution is in breach of this provision, because it has failed to comply with the Pre-Trial Chamber's Order, dated 1 October 2009, directing the Prosecution to provide information regarding the availability of Prosecution witnesses CNAO, CNBB and

<sup>9</sup> Defence Motion, paras. 14-25.

<sup>10</sup> See Defence Motion, para. 15: The Defence refers to material disclosed on 13 October (174 pages of Gacaca material concerning Prosecution Witness CNAO, mostly in Kinyarwanda), on 23 October and 3 November (material concerning Prosecution witness CNAC comprising 385 Kinyarwanda pages).

<sup>11</sup> Defence Motion, paras. 26-29.

<sup>12</sup> See Confidential Annex A to the Defence Motion: Gacaca/Judicial Proceedings Information of Prosecution Witnesses CNAO, CNAC, CNAE, CNAF, CNAI, CNAM, CNAP, CNAQ, CNAV, CNAZ, CNBF, CNBT and CNBU, 9 November 2009 ("Annex A to the Defence Motion").

<sup>13</sup> See Defence Motion, para. 15: The Defence refers to material disclosed on 13 October (174 pages of Gacaca material concerning Prosecution Witness CNAO, mostly in Kinyarwanda), on 23 October and 3 November (material concerning Prosecution witness CNAC comprising 385 Kinyarwanda pages).

<sup>14</sup> Defence Motion, paras. 30-39.

<sup>15</sup> Defence Motion, paras. 31-39: the Defence refers in particular to the prohibition to meet with Prosecution witnesses CNAD, CNAB and CNAO.

<sup>16</sup> Defence Motion, para. 35.

<sup>17</sup> Defence Motion, paras. 40-44.

<sup>18</sup> Annex D-1 Statement Filip Reyntjens on behalf of Callixte Nzabonimana, 3 November 2009, paragraph 59; 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 (Rule 73(B) of the Rules of Procedure and Evidence ("RPE")), 2 November 2009: "59. In my opinion, the judicial process at the ICTR is, in a number of cases, dependant on the judicial process in Rwanda, which is fundamentally unfair, for the reasons detailed above. This situation is heightened by the failure of the Prosecutor of the ICTR to acquire some form of independence and impartiality from the Rwandan authorities, as demonstrated by his failure to prosecute any RPF suspect so far."

<sup>19</sup> Defence Motion, paras. 45-47.

- CNBC to testify at trial.<sup>20</sup> The Defence stresses that it “must devote resources to countering the allegations of witnesses who may never appear before the Trial Chamber.”;<sup>21</sup>
- g) Provision 2(g) of Prosecutor’s Regulation No. 2:<sup>22</sup> The Defence submits that, by refusing to allow the Defence to meet with witness CNAO, and opposing its request to grant protective measures to this witness, the Prosecution “not only prohibits the Defence to fully prepare, but more importantly puts that witness in danger.”
8. The Defence concludes that taken together the various instances of wrongdoing on the part of the Prosecution amount to “an obstruction to the work of this Tribunal”, a breach of Provision 2(h) of the Prosecutor’s Regulation No. 2.<sup>23</sup> The Defence asserts that the Prosecution’s non-compliance compromises the right of the Accused to a fair trial.<sup>24</sup> The Defence therefore proposes that the Trial Chamber suspend the testimony of every Prosecution witness after examination-in-chief, “until a further session of this case when the Defence has had the opportunity to obtain and analyse the material which the Prosecutor has failed to disclose or has disclosed too late...”<sup>25</sup>
9. In its Response, the Prosecution alleges that issues relating to its disclosure obligations relating to the prior judicial records of its witnesses, pursuant to Rules 66 and 68, are moot.<sup>26</sup> The Prosecution cites the rules applicable to the disclosure of these records<sup>27</sup> and asks that the Trial Chamber dismiss the Defence Motion on this point.<sup>28</sup>
10. The Prosecution further submits that “the Defence’s submission of non-compliance with disclosure obligations under Rules 66 and 68 do not affect the effective cross-examination of witnesses.”<sup>29</sup> The Prosecution alleges that the Defence has failed to show that the failure to cross-examine immediately the witnesses would cause undue prejudice to the Accused.<sup>30</sup>
11. With respect to the alleged failure of the Prosecution to disclose witness questionnaires from, and secure meetings with Prosecution witnesses CNAL, CNAR, CNAD, CNAO, CNBB and CNBC, the Prosecution alleges that the Trial Chamber has already addressed these matters.<sup>31</sup> The Prosecution argues that its obligation to arrange meetings with the Defence is limited to the witnesses listed on the Prosecution’s list of witnesses and not to those whose names have been removed from the list.<sup>32</sup> The Prosecution submits that it has complied with the Chamber’s order dated 29 October 2009 asking it to obtain information from its witnesses about their prior judicial records, but concedes it has not been able to do so for Witnesses CNAL,<sup>33</sup> CNAO,<sup>34</sup> CNBB and CNBC.<sup>35</sup>

<sup>20</sup> Defence Motion, paras. 45-46.

<sup>21</sup> Defence Motion, para. 47.

<sup>22</sup> Defence Motion, paras. 48-52.

<sup>23</sup> Defence Motion, para. 53.

<sup>24</sup> Defence Motion, para. 57.

<sup>25</sup> Defence Motion, para. 59.

<sup>26</sup> Prosecution Response, para. B.2.

<sup>27</sup> Prosecution Response, paras. B.4-10.

<sup>28</sup> Prosecution Response, paras. B.4 and 11.

<sup>29</sup> Prosecution Response, para. B.12.

<sup>30</sup> Prosecution Response, paras. B.13-15.

<sup>31</sup> Prosecution Response, paras. B.17-18 and 21: the Prosecution refers to the Pre-Trial Chamber’s Decision dated 24 August 2009 and the Pre-Trial Chamber’s Decision dated 13 February 2009.

<sup>32</sup> Prosecution Response, paras. B.19-20: The Prosecution refers to Prosecution witnesses CNAR and CNAD.

<sup>33</sup> Prosecution Response, paras. B.22-23.

12. The Prosecution did not respond to the Defence arguments on the points concerning allegations of violations of Prosecutor's Regulation No. 2.

## DELIBERATIONS

### *Applicable Law - The Statute*

#### Article 28

13. Article 28 stipulates that:

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.

### *Applicable Law - Relevant Rules*

#### Rule 5

14. Rule 5 of the Rules provides that:

- (A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.
- (B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.
- (C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

15. In *Nyiramasuhuko*, the Trial Chamber stated that:

"Rule 5 sets forth three principles: First, the party must raise an objection on the ground of non-compliance with the Rule or Regulations at the earliest opportunity. Second, the alleged non-compliance must be proved and it must cause material prejudice to that party. Third, the relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness."<sup>36</sup>

<sup>34</sup> Prosecution Response, para. B.24: The Prosecution submits that the issue relating to Witness CNAO is pending before the Trial Chamber.

<sup>35</sup> Prosecution Response, para. B.25: The Prosecution submits that it is in position to provide information on these witnesses, as they are currently deemed fugitive witnesses.

<sup>36</sup> *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Decision for a Stay of Proceedings and Abuse of Process, 20 February 2004, para. 21; see *inter alia*, *Prosecutor v. Arsène Shalom Ntahobali*, Case No. 97-21-T (Joint Case No. ICTR-98-42-T), Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Witnesses, 19 January 2009, para. 21.

16. The Trial Chamber recalls that the first two tests are conjunctive.<sup>37</sup>

Rule 8

17. Rule 8 of the Rules stipulates that:

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 28 of the Statute.

Rule 46(A)

18. Rule 46(A) states that: "A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for the prosecution."

Rule 66(A)(ii)

19. Rule 66(A)(ii) provides that:

(A) The Prosecutor shall disclose to the Defence:

(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.

Rule 68(A)

20. Rule 68(A) stipulates that "[t]he 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."

Rule 77

21. Rule 77 provides that:

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber. [...]

*Applicable Law: Prosecutor's Regulation No. 2*

22. Prosecutor's Regulation No. 2 of 1999: Standards of Professional Conduct - Prosecution Counsel, Article 2, provides that:

<sup>37</sup> *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Decision for a Stay of Proceedings and Abuse of Process, 20 February 2004, para. 22.

2. In the conduct of investigations, and in the conduct of pre-trial and appellate proceedings, prosecution counsel will adopt the highest standards of professional conduct. The Prosecutor expects them, consistent always with the letter and the spirit of the relevant Statute and Rules of Procedures and Evidence, and the independence of the Prosecutor:

- a. to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused; [...]
- c. to be, and to appear to be, consistent, objective and independent, and avoid all conflicts of interest that might undermine the independence of the Prosecutor – in particular prosecution counsel shall not allow themselves to be influenced by national, ethnic, racial, religious or political considerations;
- d. to exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith; [...]
- g. to take any available measures, as required, to protect the privacy and ensure the safety of victims, witnesses and their families, to treat victims with compassion, and to make reasonable efforts to minimize inconvenience to witnesses;
- h. to assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused; [...]

23. Article 4 of this Regulation provides that:

Failure by prosecution counsel to observe the above standards will be dealt with by the Prosecutor, in the exercise of her discretion, and subject to the staff rules of the United Nations, apart from any sanctions that may exceptionally be imposed upon prosecution counsel pursuant to Rules 46 or 77 of the Rules of Procedure and Evidence of both Tribunals (or other provisions of the Statutes and Rules).

#### *Preliminary Matter*

24. The Trial Chamber observes that in the instant Motion, the Defence reiterates numerous arguments that it has made in previous motions and which have been addressed in previous Trial Chamber Decisions.<sup>38</sup> Where the Defence does not make a new submission, the Trial Chamber will not address the issue raised.

#### *Non-Compliance with Rule 8*

25. In a report to Defence Counsel dated 31 October 2009,<sup>39</sup> the Lead Investigator for the Defence refers to Gacaca proceedings in *Nyabikenke* Commune which took place on 24-25 October 2009. At these proceedings, a witness testified about the role of the Accused in an attack on the *Bureau Communal*. The investigator also states that Defence Witness RW-61 was convicted *in absentia* in the same Gacaca jurisdiction.<sup>40</sup> The Defence submits that as the Prosecution is now aware that proceedings are ongoing against the Accused in Rwanda,<sup>41</sup> the Trial Chamber should order the Prosecution to seek all material relating to these proceedings, pursuant to Article 28 of the Statute and Rule 8.<sup>42</sup>

<sup>38</sup> See *inter alia*, *Prosecutor v. Callixte Nzabonimana*, Case ICTR-98-44D-T, 29 October 2009 Decision; 30 October 2009 Decision.

<sup>39</sup> Defence Motion, para. 10.

<sup>40</sup> Defence Motion, para. 10.

<sup>41</sup> Defence Motion, para. 11.

<sup>42</sup> Defence Motion, para. 13.

26. The Prosecution submits that it has no obligation to disclose documents which are not in its possession or are not accessible to it, and affirms that it does not have the material sought by the Defence in its custody or under its control.<sup>43</sup>
27. The Trial Chamber observes that Rule 8 states that "...the Prosecutor...*may* request the State to forward to him all relevant information... (emphasis added)" It is therefore a permissive rather than a mandatory rule. In other words, there is no obligation on the Prosecution to seek the information referred to in Rule 8. The Trial Chamber notes that the Defence has not substantiated its allegation that there are ongoing proceedings against the Accused in Rwanda, for example by providing a copy of an Indictment. Moreover, it has not explained the relevance of the Gacaca conviction of potential Defence Witness RW-61. As the Defence has not established that the Prosecution has violated Rule 8, it will provide no relief pursuant to Rule 5.

*Prosecution Non-Compliance with Rule 66(A)(ii) and other disclosure issues*

28. The Defence alleges that the Prosecution failed to provide the Defence with information about the prior judicial records of Prosecution witnesses CNAL and CNAR, thereby violating the Trial Chamber's order of 29 October 2009.<sup>44</sup> The Defence adds that information it has recently received from the Prosecution reveals the existence of prior witness statements<sup>45</sup> which the Prosecution has a duty to obtain.<sup>46</sup>
29. In its Response, the Prosecution rejects the Defence contention that the Prosecution has failed to comply with its obligations under Rule 66(A)(ii),<sup>47</sup> and reiterates its understanding of its disclosure obligations.<sup>48</sup> The Prosecution submits that the Defence failed to show that the Prosecution's non-compliance with its disclosure obligations under Rules 66 and 68 would affect the effective cross-examination of witnesses.<sup>49</sup>
30. With respect to providing information about the prior judicial records of Prosecution witnesses, the Prosecution submits that its obligation is limited to obtaining information regarding those witnesses who are still listed on the Prosecution's list of witnesses.<sup>50</sup> Therefore, the Prosecution submits that it has no obligation to obtain this information from Witnesses CNAR and CNAD as they are no longer on the Prosecution witness list.<sup>51</sup> The Prosecution asserts that it has provided to the Defence all information required by the 29 October 2009 Decision with the exception of information relating to Witness CNAL whose information is forthcoming.<sup>52</sup> With respect to CNAO, the Prosecution notes that this is a special case and that related issues are pending before the Trial Chamber.<sup>53</sup> The Prosecution states that it can provide no information for Witnesses CNBB and CNBC as these witnesses are fugitives.<sup>54</sup>

<sup>43</sup> Prosecution Response, paras. B.5-6 and B.10.

<sup>44</sup> *Prosecutor v. Callixte Nzabonimana*, Case ICTR-98-44D-T, 29 October 2009 Decision.

<sup>45</sup> Defence Motion, paras. 17-20.

<sup>46</sup> Defence Motion, para. 24.

<sup>47</sup> Prosecution Response, para. 4.

<sup>48</sup> Prosecution Response, paras. 5-8.

<sup>49</sup> Prosecution Response, paras. 12-15.

<sup>50</sup> Prosecution Response, paras. B.19-20.

<sup>51</sup> Prosecution Response, paras. B.20-21.

<sup>52</sup> Prosecution Response, para. 23.

<sup>53</sup> Prosecution Response, para. 24.

<sup>54</sup> Prosecution Response, para. B.25: The Prosecution submits that it is in position to provide information on these witnesses, as they are currently deemed fugitive witnesses.



31. The Trial Chamber recalls that where the Defence has been able to establish that the Prosecution has violated its disclosure obligations—such as in the cases of Witnesses CNAА and CNAC<sup>55</sup>—the Trial Chamber has granted relief by postponing the testimonies of these witnesses in order to allow the Defence to properly prepare its cross-examinations.<sup>56</sup> Further, on 16 November 2009, the Trial Chamber issued a warning to the Prosecution following the late disclosure of a prior statement of Witness CNAF.<sup>57</sup> The Defence has not established further violations of Rule 66(A)(ii) in the instant Motion. Consequently the Trial Chamber finds no reason to consider alternate forms of relief at this stage.
32. With regard to information about the prior judicial records of Prosecution witnesses, the Trial Chamber recalls that in its 29 October 2009 Decision it ordered “the Prosecution to ensure that the following Prosecution witnesses respond to the questionnaires proposed by the Defence in its Motion by 9 November 2009: Witnesses CNAА, CNAC, CNAL, CNAE, CNAP, CNAQ, CNAV, CNBT, CNAR, and CNBF.” The Trial Chamber notes the Prosecution’s statement that CNAR is no longer on the Prosecution’s witness list. The Prosecution concedes that it has not yet provided the relevant information regarding Witness CNAL to the Defence. The Trial Chamber therefore directs the Prosecution to provide the information regarding Witness CNAL as soon as possible in order to avoid any delay in proceedings.
33. At the Pre-Trial Conference held on 15 October 2009 the Prosecution addressed the issue of two fugitive witnesses, CNBB and CNBC. Specifically it stated that it was: “keeping them on the list purely for technical purposes that if they are apprehended by the Rwanda authorities, they will be available to come to the seat of the Tribunal through that channel. If not, then they will be brought by our tracking team through our diplomatic means.”<sup>58</sup> In the instant Motion, the Prosecution argues that it can provide no information regarding the prior judicial histories of these witnesses as they remain fugitives.<sup>59</sup> The Trial Chamber observes that these witnesses are scheduled to testify during the week of 7-11 December 2009. Thus, the Trial Chamber orders the Prosecution to provide an update on these two witnesses by 30 November 2009.

#### *Prosecution Non-Compliance with Rule 68(A)*

34. The Defence alleges that most Prosecution witnesses have testified in prior judicial proceedings and that the related material may suggest the innocence of the accused, mitigate its guilt or affect the credibility of Prosecution evidence.<sup>60</sup> The Defence avers that the

<sup>55</sup> See *inter alia*, *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), 13 November 2009, paras. 46-51: the Trial Chamber decided to postpone the testimony of Witness CNAC until the week of 9-14 December 2009, and instructs the Prosecution to adjust its witness order of appearance in this regard.

<sup>56</sup> *Prosecutor v. Callixte Nzabonimana*, Case ICTR-98-44D-T, 29 October 2009 Decision, para. 32.

<sup>57</sup> Trial session, T. 16 November 2009, p. 28 (closed session): “...With regard to witness CNAF, the Trial Chamber considers that the Prosecution is in breach of its disclosure obligations regarding Rule 66(A)(ii). And we would like to warn them about this matter and we hope that this will not be repeated as it affects the smooth running of this session...”

<sup>58</sup> Pre-Trial Conference, T. 15 October 2009, p. 13.

<sup>59</sup> Prosecution Response, para. B.25.

<sup>60</sup> Defence Motion, para. 26, See Annex A to the Defence Motion.

Prosecution is aware of the existence of such material but has failed to obtain it thereby breaching its obligations pursuant to Rule 68(A).<sup>61</sup>

35. The Prosecution asserts that it has complied with its disclosure obligations under Rule 68 in good faith.<sup>62</sup> The Prosecution further contends that the Defence failed to demonstrate material prejudice to the Accused.<sup>63</sup>
36. The Trial Chamber recalls that it addressed this issue in its Decision on prior judicial records, dated 29 October 2009 Decision.<sup>64</sup> The Defence has provided no new facts or law that would alter the Trial Chamber's reasoning. Further in *Rutaganda*, the Appeals Chamber held that "the Prosecution has no obligation to obtain judicial material related to its witnesses from Rwanda."<sup>65</sup> Consequently, the Chamber finds that the Defence has not established that the Prosecution violated its disclosure obligations pursuant to Rule 68(A).

*Prosecution Non-Compliance with Provisions 2(a), 2(c), 2(d), 2(g) and 2(h) of the Prosecutor's Regulation No. 2*

37. The Trial Chamber observes that Prosecutor's Regulation No. 2 is an internal set of rules issued by the Office of the Prosecutor in 1999. Article 4 states clearly that it is the Prosecutor who will review allegations of misconduct unless a violation of the Rules is alleged. The Trial Chamber notes that the Defence has not alleged that the Prosecution violated Rules 46 and/or 77. Nevertheless, the Trial Chamber has reviewed the Defence submissions and finds that the Defence has not established that the Prosecution has violated either of these Rules.

**FOR THESE REASONS, THE CHAMBER**

- I. **REJECTS** the Defence Motion in its entirety;
- II. **INSTRUCTS** the Prosecution to communicate to the Defence, a questionnaire completed by Prosecution witness CNAL as soon as possible, as directed in its 29 October 2009 Decision;
- III. **ORDERS** the Prosecution to clarify the position with regard to witnesses CNBB and CNBC by Monday 30 November 2009.

<sup>61</sup> Defence Motion, paras. 28-29.

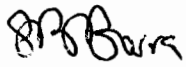
<sup>62</sup> Prosecution Response, para. B.9.

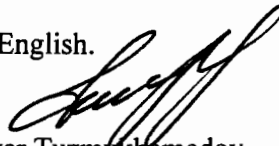
<sup>63</sup> Prosecution Response, para. B.14.

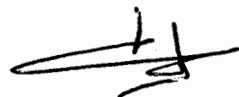
<sup>64</sup> 29 October Decision, para. 25: "In the instant Motion, the Defence has not established that the material sought is in the possession of the Prosecution. Indeed, in its Response to the Motion, the Prosecution states that it does not have such material in its custody or under its control. Thus, the Trial Chamber finds that the Defence has not established that the Prosecution violated its obligations pursuant to Rule 68 (A)." (internal citation omitted).

<sup>65</sup> *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006, para. 45 (internal citation omitted).

Arusha, 25 November 2009, done in English.

  
Solomy Balungi Bossa  
Presiding Judge

  
Bakhtiyar Tuzmukhamedov  
Judge

  
Mparany Rajohnson  
Judge

[Seal of the Tribunal]

