



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
27-11-2009
(2743-2736)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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AM

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 27 November 2009

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON THE PROSECUTOR'S MOTION FOR RECONSIDERATION,
AND/OR CERTIFICATION OF THE DECISION RENDERED ON 29 OCTOBER
2009 CONCERNING DISCLOSURE OF GACACA AND JUDICIAL MATERIAL
RELATING TO PROSECUTION WITNESSES**

Rule 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

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INTRODUCTION

1. On 5 November 2009, the Prosecution filed a Motion¹ pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules") for reconsideration, and/or certification to appeal the Trial Chamber's Decision of 29 October 2009 relating to disclosure of Gacaca and judicial material ("Impugned Decision").²
2. On 10 November 2009, the Defence filed its Response to the Motion.³ The Prosecution did not file a Reply.

SUBMISSIONS OF THE PARTIES

Prosecution Submissions

3. In its Motion, the Prosecution requests that the Trial Chamber grant certification to appeal the Impugned Decision⁴ arguing that the Impugned Decision expands the Prosecution's disclosure obligations in a manner which is neither provided for in the rules nor in the jurisprudence of the Tribunal.⁵ The Prosecution contends that this expansion is unfair and unnecessary, that it would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution may materially advance the proceedings.⁶ In the alternative, the Prosecution seeks reconsideration of the Impugned Decision, arguing that the Impugned Decision constitutes an abuse of the Trial Chamber's authority because it creates, in its implementation, a new disclosure regime which results in an injustice.⁷
4. The Prosecution also notes that in the Impugned Decision the Trial Chamber acknowledged that (i) the Prosecution did not violate its disclosure obligation, and

¹ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Motion for Reconsideration, and/or Certification of the Decision Rendered on 29 October 2009 Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses, 5 November 2009, ("Motion").

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, 29 October 2009 ("Impugned Decision")(TC).

³ *Prosecutor v. Callixte Nzabonimana*, Case ICTR-98-44D-T, Nzabonimana's Response to Prosecutor's Motion for Reconsideration, and/or Certification of the Decision Rendered on 29 October 2009 Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses, 10 November 2009, ("Response").

⁴ Motion, para. B.1.

⁵ Motion, para. B.1.

⁶ Motion, para. B.1.

⁷ Motion, paras. B.1-2.

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(ii) that the Defence has the obligation to conduct its defence and that it did not exercise due diligence in obtaining the relevant judicial records on its own. The Prosecution submits that the Impugned Decision was based on ICTR practice,⁸ and further argues that it has no obligation to obtain judicial records, including Rule 68 material. It also contends that the Trial Chamber's order is based on the incorrect assumption that the "Prosecutor is in a better position than the Defence" to obtain information from the Rwandan authorities,⁹ when in some instances Defence teams have obtained such information more quickly than the Prosecution.¹⁰ In *Seromba*, for instance, the Defence requested disclosure of files from the Prosecution but obtained the relevant files on its own before the Prosecution,¹¹ and that the same was true in *Kajelijeli*.¹²

5. The Prosecution contends that the Trial Chamber is in fact asking it to initiate further investigations and interviews of witnesses on behalf of the Defence.¹³ The Prosecution argues that such an order creates an unfair, costly, time consuming, unreasonable and unnecessary burden on it.¹⁴ The Prosecution submits that it is forced to do the work of the Defence which inevitably affects the fair and expeditious conduct of the proceedings.¹⁵

Defence Submissions

6. The Defence submits that the Prosecution has misunderstood the scope of the Trial Chamber's order.¹⁶ The Defence states that in the Impugned Decision the Trial Chamber noted the Prosecution's offer to assist the Defence in obtaining judicial material related to its witnesses.¹⁷ The Defence further argues that the order directing the Prosecutor to obtain signed questionnaires from Prosecution witnesses does not constitute the creation of a "new disclosure regime."¹⁸ The Defence asserts that the Prosecution's current practice is to disregard any material which may assist the

⁸ Motion, paras. D.1-2.

⁹ Motion, paras. D.3-4.

¹⁰ Motion, para. D. 5.

¹¹ Motion, para. D. 5.

¹² Motion, para. D. 5.

¹³ Motion, paras. D. 6.

¹⁴ Motion, para. D. 10.

¹⁵ Motion, paras. D. 7-8.

¹⁶ Motion, para. 8.

¹⁷ Response, para. 8, quoting paragraph.32 of the Impugned Decision.

¹⁸ Response, para. 8.

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Defence and the Trial Chamber in assessing the credibility of its witnesses.¹⁹ The Defence rejects the Prosecution's reliance on the Trial Chamber's finding that the Defence did not exercise due diligence in attempting to obtain information on its own. In an annex to its Response, the Defence submits copies of letters to the Witness and Victims Support Section ("WVSS"), dated 24 September 2009 and 5 October 2009, in which the Defence expressed a sense of urgency to WVSS and asked it to initiate meetings with Prosecution witnesses to assess their willingness to meet with the Defence, before the start of trial. The Defence therefore requests that the Trial Chamber deny the Prosecution Motion in its entirety.²⁰

DELIBERATIONS

Applicable Law

The Standard for Reconsidering a Decision and Certification of Leave to Appeal

7. The Trial Chamber recalls the standard for reconsideration as set out by the Appeals Chamber in the *Nahimana*: "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."²¹

8. The Trial Chamber reiterated the established standard for reconsideration in its Decision dated 13 November 2009.²² It noted that for a motion for reconsideration to succeed, the moving party must demonstrate that (i) a new fact has been discovered that was not previously known to the Chamber at the time of issuance of the original Decision, (ii) there has been a material change in circumstances since the issuance of the original Decision; or (iii) there is reason to believe that the impugned Decision

¹⁹ Response, para. 8.

²⁰ Response, para. 31.

²¹ *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.

²² *Prosecutor v. Callixte Nzabonimana*, Case 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, 13 November 2009, ("Reconsideration Decision"), paras. 21, referring to Karemera et al. Decision on Prosecution Motion for Reconsideration of the Decision on Prospective Experts Guichaoua, Nowrojee and Des Forges, or for Certification (TC), 16 November 2007, para. 3, *Karemera et al.*, 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.;

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was erroneous or constituted an abuse of power by the Trial Chamber, resulting in an injustice thereby warranting exceptional remedy of reconsideration.²³ Thus, it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.²⁴

9. The Trial Chamber also reiterated the established standard for leave to appeal in its Reconsideration Decision²⁵ noting that it may grant certification of leave to appeal pursuant to Rule 73(B), 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 if, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁶

10. 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.²⁷ Even where both factors are present, certification is not automatic, but

²³ *Karemera et al.*, Decision on Prosecution Motion for Reconsideration of the Decision on Prospective Experts Guichaoua, Nowrojee and Des Forges, or for Certification (TC), 16 November 2007, para. 3, *Karemera et al.*, 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*, *Karemera et al.*, 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.

²⁴ *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.

²⁵ Reconsideration Decision, paras. 22-23

²⁶ Reconsideration Decision, paras. 22-23.

²⁷ *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.

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at the discretion of the Trial Chamber,²⁸ and certification remains an exceptional measure.²⁹

The Impugned Decision

11. The most relevant sections of the Impugned Decision read as follows:

"...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 CNAAC 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.³⁰

[The Trial Chamber]... 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.³¹

The Prosecution's Request for Reconsideration

12. The Prosecution contends that the Impugned Decision established a new disclosure regime which may open the floodgates to other Defence requests for similar decisions resulting in an injustice.³² In support of its position, the Prosecution refers to the Appeals Chamber Decision in *Rutaganda*.³³

13. The Trial Chamber recalls that the Appeals Chamber in *Rutaganda* stated that the Prosecution has no obligation to obtain judicial material related to its witnesses from

²⁸ *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; *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.

²⁹ *See* Reconsideration Decision, para. 23, referring to *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 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.

³⁰ Impugned Decision, para. 32.

³¹ Impugned Decision, Disposition, point IV.

³² Motion, paras. D. 6-7.

³³ Motion, para. 3.

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Rwanda³⁴ but noted, without disapproval, that the Prosecution has made such inquiries of its own accord in some cases, and that these voluntary efforts did not expand the nature of its disclosure obligations.³⁵ The Appeals Chamber also observed, without disapproval, that “many Trial Chambers, in the exercise of their discretion, have requested the Prosecution to assist the defence in order to obtain such material in the interests of facilitating the trial proceedings.”³⁶

14. In the Impugned Decision the Trial Chamber recalled 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.”³⁷ The Trial Chamber further notes that on an earlier occasion at a Status Conference held by the Pre-Trial Chamber on 1 October 2009, the Prosecution offered to assist the Defence in obtaining such material.³⁸ Thus in making its determination, the Trial Chamber relied on the Prosecution’s offers to assist in obtaining judicial records as well as the practice that has developed at the Tribunal. As the Trial Chamber made its Decision based on these specific circumstances, it is not satisfied that the Prosecution has established that the Impugned Decision creates a new disclosure regime resulting in an injustice.³⁹

15. Therefore, the Trial Chamber considers that the Prosecution has failed to demonstrate that the Trial Chamber’s directive constitutes an abuse of process. As the Prosecution has failed to adduce any new fact or circumstance or other error in law warranting the reconsideration of the Impugned Decision, the Trial Chamber further concludes that the Prosecutor’s Motion does not warrant the exceptional remedy of reconsideration of the Impugned Decision.

³⁴ *Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 (“*Rutaganda Decision*”)(AC), para. 137, referring to *Kajelijeli* Appeal Judgement, para. 263.

³⁵ *Rutaganda Decision*, para. 45.

³⁶ *Rutaganda Decision*, para. 46.

³⁷ Impugned Decision, paras. 31-32, *see also* Pre-Trial Conference, T. 15. October 2009, p. 22.

³⁸ T.1 October 2009, p. 14 (English).

³⁹ Impugned Decision, paras. 30-31, where the Trial Chamber quoting the *Simba Decision* observed 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 interest of justice,” *Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, Decision on Matters Related to Witness KDD’s Judicial Dossier (TC), 24 November 2003.

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The Prosecution's Request for Leave to Appeal

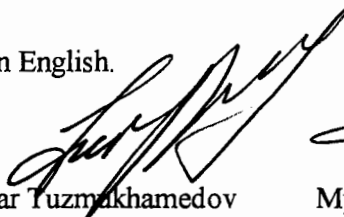
16. The Prosecution submits that in the Impugned Decision the Trial Chamber expanded its disclosure obligation which is unfair as it significantly affects the fair and expeditious conduct of the proceedings and that, an immediate resolution of this issue may materially advance the proceedings.⁴⁰ The Trial Chamber has already concluded that the Impugned Decision did not create a new disclosure regime.
17. The Prosecution also contends that the issue it seeks leave to appeal significantly affects the fair and expeditious conduct of proceedings as "... the Prosecutor of late has found himself doing half of what the Defence was supposed to be doing in preparation of his [sic] case."⁴¹ The Trial Chamber considers that the Prosecution has failed to substantiate this allegation, and that it has not established that the Impugned Decision has created an unfair burden on it.
18. The Trial Chamber is therefore not satisfied that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Moreover, the Trial Chamber does not believe that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER
DENIES** the Prosecution Motion in its entirety

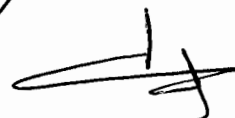
Arusha, 27 November 2009, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
ICTR Judge



Mparany Rajohnson
Judge



⁴⁰ Motion, para. . B.1.

⁴¹ Motion, para.8.

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