



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T 2747
02-12-2009
(2747-2744) Ivan
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: 2 December 2009

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

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**DECISION ON THE DEFENCE MOTION REQUESTING THE CHAMBER TO
ALLOW NZABONIMANA TO PRESENT SUBMISSIONS TO THE PRESIDENT OF
THE ICTR AND THE SECURITY COUNCIL ON THE MATTER OF FRANCE'S
REFUSAL TO COOPERATE WITH THE ICTR AND TO CLARIFY THE
DECISION OF 13 NOVEMBER 2009 (Articles 20 and 28 of the Statute of the Tribunal;
Rules 7bis, 19, 33B) and 54 of the Rules of Procedure and Evidence)**

Office of the Prosecution:

Paul Ng'arua
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Ndeye Marie Ka

Defence Counsel

Vincent Courcelle-Labrousse, Lead Counsel
Philippe Larochelle, Co-Counsel

88

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.¹
2. On 13 November 2009, the Trial Chamber issued a Decision² on a Defence Motion requesting a Stay of Proceedings, and Reconsideration and/or Certification to appeal the Trial Chamber's Decisions of 29 October 2009³ and 30 October 2009⁴ ("13 November 2009 Decision").
3. On 17 November 2009, the Defence filed a Motion seeking clarification of the remedy ordered by the Trial Chamber in its 13 November 2009 Decision, and asking that the Trial Chamber grant leave to the Defence to present submissions to the President of the International Criminal Tribunal for Rwanda ("the President of the Tribunal") and the Security Council of the United Nations ("the Security Council") with respect to "France's failure to cooperate with the ICTR."⁵
4. On 18 November 2009, the Trial Chamber's Legal Officer sent a Memorandum to the President of the Tribunal informing him that the Trial Chamber was not satisfied that the French authorities had adequately responded to two judicial requests for enhanced cooperation with the Tribunal.⁶
5. On 23 November 2009 one day later than the deadline prescribed by Rule 73(E) of the Rules of Procedure and Evidence ("the Rules"), the Prosecution filed a Response to the Defence Motion, stating that it had no submissions to make.⁷

¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Motion Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council, (Article 28 of the Statute of the Tribunal; Rules 7 bis, 19, 33 B) and 54 of the Rules of Procedure and Evidence), 19 October 2009.

² *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.

³ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses (*Rules 66, 68 and 73 of the Rules of Procedure and Evidence*), 29 October 2009.

⁴ *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.

⁵ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Motion Requesting the Chamber to Allow Nzabonimana to Present Submissions to the President of the ICTR and the Security Council on the Matter of France's Refusal to Cooperate with the ICTR and to Clarify the Decision of 13 November 2009 (Articles 20 and 28 of the Statute of the Tribunal; Rules 7 bis, 19, 33(B) and 54 of the Rules of Procedure and Evidence), 17 November 2009.

⁶ Memorandum from *Nzabonimana* Chambers Legal Officer to the President of the Tribunal, Subject: *Nzabonimana*: Referral to the President of the Tribunal of the matter of French cooperation pursuant to Rule 54 of the Rules, 18 November 2009 ("Letter to the President").

⁷ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Defence Motion Requesting the Chamber to Allow Nzabonimana to Present Submissions to the President of the ICTR and the Security Council on the Matter of France's Refusal to Cooperate with the ICTR and to Clarify the Decision of 13 November 2009 (Articles 20 and 28 of the Statute of the Tribunal; Rules 7 bis, 19, 33(B) and 54 of the Rules of Procedure and Evidence), 23 November 2009.

2745

Defence Submissions

6. In its Motion, the Defence asks the Trial Chamber to clarify whether it referred the issue of French cooperation pursuant to Article 28 of the Statute of the International Criminal Tribunal for Rwanda ("the Statute") to the President of the Tribunal pursuant to Rule 54 or Rule 7bis.⁸ In addition, the Defence requests that the Trial Chamber grant leave to make submissions to the President of the Tribunal and the Security Council regarding France's failure to fulfil its obligations of cooperation pursuant to the two Chambers' orders.⁹
7. The Defence explains that it would like to address the President of the Tribunal and the Security Council directly as it considers that France's failure to cooperate gravely affects the right of the Accused to a fair trial.¹⁰ The Defence submits that it would be contrary to the rule of *audi alteram partem* that a matter directly affecting the defence of the Accused be decided without affording him the opportunity to be heard.¹¹ The Defence adds that it must make submissions to these authorities in order to provide, *inter alia*, an explanation of the judicial Decision of the French *Conseil d'État* dated 21 October 2009, and a summary of its efforts to obtain the relevant information.¹²

DELIBERATIONS

Preliminary matter

8. The Trial Chamber recalls Rule 73(E), and notes that the Prosecution Response was filed on 23 November 2009, six days after the filing of the Defence Motion. The Response was therefore filed out of time.

Clarification of point I(A) in the Disposition of 13 November 2009 Decision

9. The Trial Chamber recalls that in its 13 November 2009 Decision it decided "to refer the matter of French cooperation with the Tribunal to the President, pursuant to Rule 54..."¹³

Defence request to make submissions to the President of the Tribunal and the Security Council

10. The Trial Chamber has brought the matter of France's cooperation to the attention of the President of the Tribunal, as requested by the Defence. In doing so, it recalls that it provided a summary of the procedural history of all the communications on this issue.¹⁴ The Defence has cited no rule or jurisprudence supporting its request to address the

⁸ Defence Motion, paras 19, 21-24.

⁹ Defence Motion, paras. 20, 25-29.

¹⁰ Defence Motion, para. 25.

¹¹ Defence Motion, para. 26.

¹² Defence Motion, para. 29.

¹³ 13 November 2009 Decision, Disposition I (A); See also Letter to the President stating that the Trial Chamber "considers a Rule 7bis recommendation to be an extraordinary measure...the Trial Chamber had decided to refer the matter to you for your consideration while leaving the remedy at your discretion", 18 November 2009.

¹⁴ Annex to Letter to the President: Summary of the Procedural History.

88

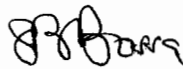
2744

President of the Tribunal and/or the Security Council directly, in the circumstances of this case. The Trial Chamber considers that, in essence, the Defence is asking the Trial Chamber to reconsider its 13 November 2009 Decision on this matter. The Trial Chamber recalls that reconsideration is an exceptional measure. It notes that the Defence has submitted no new facts or circumstances, nor has it suggested that the Trial Chamber committed an error of law or abused its discretion.¹⁵ The Trial Chamber thus finds no reason to reconsider, and/or expand on, the remedies it held to be appropriate in its 13 November 2009 Decision.

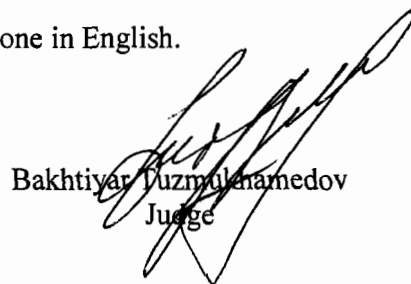
FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion in its entirety.

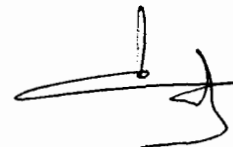
Arusha, 2 December 2009, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Duzmukhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]



¹⁵ *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.