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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3115
AM

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 4 March 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS ARCHIVES
2010 MAR -4 P.11:35

**DECISION ON DEFENCE MOTION TO RECONSIDER PRIOR TRIAL CHAMBER
DECISIONS ON FRANCE'S COOPERATION WITH THE TRIBUNAL**

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INTRODUCTION

1. On 15 February 2010, the Defence filed a Motion¹ in which it asked the Trial Chamber to reconsider prior Decisions of the Chamber relating to the cooperation of the Government of France ("France") with the Trial Chamber pursuant to Article 28 of the Statute of the International Criminal Tribunal for Rwanda ("Article 28"). In particular, it asked the Trial Chamber to reconsider its Decision of 13 November 2009 in which it held that it would not invoke Rule 7 *bis* of the Rules of Procedure and Evidence ("Rule 7 *bis*").
2. On 17 February 2010, the Prosecution filed a Response opposing the Motion in its entirety.²
3. The Defence filed its Reply on 22 February 2010.³

Procedural History

4. On 19 January 2009, the Defence asked France to provide copies of diplomatic telegrams sent by the French Embassy in Kigali between 7-11 April 1994 to the Ministry of Foreign Affairs in Paris, listing the names of key Rwandan individuals who had sought refuge at the Embassy.⁴
5. On 29 January 2009, France provided extracts from a series of diplomatic telegrams stating that the Accused was at the French Embassy on 7, 9 and 11 April 1994.⁵ In May 2009, it also responded in part to a second request from the

¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Extremely Urgent Motion for Reconsideration of the Decision on Nzabonimana's Motion on Stay of Proceedings, Reconsideration and/or Certification of Decision Rendered on 29 October 2009; and Reconsideration and/or Certification of Decision Rendered on 30 October 2009, 13 November 2009, 10 February 2010 ("Motion").

² *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Extremely Urgent Motion for Reconsideration of the Decision on Nzabonimana's Motion on Stay of Proceedings, Reconsideration and/or Certification of Decision Rendered on 29 October 2009; and Reconsideration and/or Certification of Decision Rendered on 30 October 2009, 13 November 2009, 17 February 2010 ("Response").

³ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Reply to Prosecutor's Response to Nzabonimana's Urgent Motion for Reconsideration of 13 November Decision, 22 February 2010 ("Reply").

⁴ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-PT, Urgent Motion of Defendant Nzabonimana Requesting an Order Directed at France, 19 June 2009 ((19 June Motion"), Annex A.

⁵ Télécopie de M. Jacques Champagne de Labriolle, Ambassadeur de France en Tanzanie adressée à M. Adama Dieng, Greffier du Tribunal Pénal International pour le Rwanda, 29 janvier 2009 ; Annexes : Note verbale No. 66/TPIR concernant la transmission des extraits diplomatiques en date des 7, 9, et 11 avril 1994 portant sur les

Defence for answers from France regarding the diplomatic telegrams and matters pertaining to refugees at its Embassy in 1994. In this correspondence, it noted that refugees at the Embassy during this period were able to enter and leave the Embassy at will, and that authorities did not keep records of their movements.⁶ France did not, however, respond to the Defence request to ask further questions to officials of the French Embassy working in Kigali in April 1994 regarding these issues.⁷

6. On 19 June 2009, the Defence filed an Urgent Motion,⁸ pursuant to Article 28, asking the Pre-Trial Chamber to issue an order requesting France's cooperation in obtaining information regarding the location of the Accused between 7 and 11 April 1994, thereby enabling the Accused to prepare his Defence and contradict certain allegations made by the Prosecution concerning this period.
7. On 2 July 2009, the Pre-Trial Chamber issued a Decision asking France to provide all necessary assistance 1) so that the Nzabonimana Defence might obtain a list of all persons who took refuge at the French Embassy in Kigali between 7 and 11 April 1994 together with their dates of their registration at the Embassy, 2) so that the Defence might obtain a list of personnel working at the French Embassy in Kigali between 7 and 11 April 1994; and 3) authorise personnel working at the French Embassy between 7 and 11 April 1994 to meet with Defence Counsel to discuss the whereabouts of the Accused between 7 and 11 April 1994.⁹
8. France responded to the Pre-Trial Chamber's Decision on 15 September 2009 referring to information they had provided prior to the Pre-Trial Chamber's 2 July

personnes réfugiées à l'Ambassade de France à Kigali, 29 janvier 2009; Télégrammes diplomatiques, Objet : Personnalités réfugiées à l'Ambassade de France, 7, 9 et 11 avril 1994 ("April 1994 telegrams").

⁶ *Prosecutor v Callixte Nzabonimana*, ICTR-98-44-D-I, Urgent Motion of Defendant Nzabonimana requesting an order directed at France, 19 June 2009, Annex B.

⁷ See Annex B to Urgent Motion, Lettre de l'Ambassade de France en Tanzanie, Ref. No. 274/TPIR, adressée au Greffe du Tribunal, 19 mai 2009.

⁸ *Prosecution v. Nzabonimana*, Case No. TPIR 98-44D-I, Urgent Motion of Defendant Nzabonimana Requesting an Order Directed at France, 19 June 2009 (hereinafter "Urgent Motion").

⁹ Unofficial Translation of Disposition: *Procureur c. Callixte Nzabonimana*, Case No. TPIR 98-44D-PT, Décision Sur la Requête Urgente de Callixte Nzabonimana Demandant à la Chambre d'Ordonner à la France Coopération et Assistance, 2 juillet 2009 ("2 July Decision").

Decision.¹⁰ In response, the Defence filed a Motion stating that the response was unsatisfactory.¹¹ On 19 October 2009 the Trial Chamber issued a Decision¹² in which it stated: “the Chamber is not satisfied that the Government of France, in its September response to the Registrar, complied fully with the request for assistance made by the Pre-Trial Chamber in its 2 July Decision. Indeed, it notes that much of France’s response to the Decision is a reiteration of the information it provided to the Defence in May 2009.”¹³ In the Disposition, the Trial Chamber issued a new request to France, asking that by 9 November 2009 it:

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

9. France responded through the Registrar on 28 October 2009.¹⁴ The Defence again filed a Motion in which, *inter alia*, it criticized the French Response.¹⁵ In its Decision on that Motion, the Trial Chamber concluded that while there had “been a positive evolution in the responses of the French authorities, the 28 October 2009 communication [did] not adequately respond to the questions posed by the Trial Chamber in its 19 October 2009 Decision.”¹⁶ In particular, the Trial Chamber noted that

¹⁰ Lettre de l’Ambassade de France en Tanzanie, No. 540/TPIR, adressée au Greffe du Tribunal Pénal International pour le Rwanda, 15 Septembre 2009.

¹¹ *Prosecution v. Callixte Nzabonimana*, Case No. TPIR 98-44D-T, 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, 33B) and 54 of the Rules of Procedure and Evidence), 1 October 2009.

¹² *Prosecutor 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 (“19 October Decision”).

¹³ 19 October Decision, para. 14.

¹⁴ Annex to French Response of 28 October: Annuaire Diplomatique et Consulaire de la République Française, 1994, Tome XCI, naming six persons: The Ambassador, the Second Secretary, an accountant, a defence attaché, a commercial attaché, and a cultural attaché.

¹⁵ *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.

¹⁶ *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

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.¹⁷

The Trial Chamber concluded that it had exhausted the remedies available to it, and would referred the matter to the President of the Tribunal, pursuant to Rule 54.¹⁸

10. On 20 November 2009, the Registry sent a *Note Verbale* to France, on behalf of the President, reiterating the requests of the Trial Chamber, and attaching a copy of the 13 November Decision.¹⁹

11. The Tribunal has received no response to this query.

12. On 3 February 2010, the President of the Tribunal issued a Decision regarding the Trial Chamber's referral, pursuant to Rule 54, of the issue of French Cooperation with the Tribunal.²⁰ In that Decision, he found that he did not have the authority to

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")), 13 November 2009 ("13 November Decision"), para. 39.

¹⁷ 13 November Decision, para. 37.

¹⁸ 13 November Decision, para. 40 and Disposition.

¹⁹ Note Verbale. Office of the Registrar to Monsieur Jacques Champagne de Labriolle, Ambassadeur de France, 20 November 2009, Ref: ICTR/IOR/ERSPS/11/09/312-RD ("Registrar's 20 November *Note Verbale*"). In the Note Verbale the Registry asked France for

- a. for a copy of a full list of persons who took refuge at the French Embassy in Kigali between 7 and 11 April 1994;
- b. to confirm that the lists are available and will be provided to the Registrar, or explain why the lists can not be provided, if not;
- c. for a copy of the full list of personnel working at the French Embassy between 7 and 11 April 1994;
- d. In the event that the information cannot be provided as soon as possible, an explanation for the failure to provide the information would be deeply appreciated (Unofficial translation from the French original).

²⁰ Denis CM Byron, President of the Tribunal, Decision on Referral by Trial Chamber of the Matter of French Cooperation with the Tribunal to the President Pursuant to Rule 54, 3 February 2010 ("President's Decision").

address the matter unless he was clearly instructed to do so by the Trial Chamber pursuant to Rule 7 *bis* rather than Rule 54.²¹

13. On 15 February 2009, the Defence filed the instant Motion asking the Trial Chamber to reconsider its previous decisions in respect of the cooperation of France, and asking the Trial Chamber to invoke Rule 7 *bis* and bring the matter to the attention of the Security Council. In the Motion, the Defence asserts that it has received no further cooperation from France regarding its inquiries.²²

SUBMISSIONS OF THE PARTIES

Defence Motion

14. The Defence submits that the President of the Tribunal could not consider the Trial Chamber's 13 November Decision as the Trial Chamber did not make a formal request pursuant to Rule 7 *bis* (A).²³ It requests reconsideration of the Decision not to invoke Rule 7 *bis* (A), arguing that the President's Decision of 3 February 2010 constitutes a new circumstance.²⁴
15. The Defence submits that the President in his Decision found that the Trial Chamber had erred in law in invoking Rule 54 rather than Rule 7 *bis*, in response to a state's violation of its obligations under Article 28.²⁵ The President found that "[h]e had no authority under the Rules to refer the matter of cooperation with France to the Security Council or to take other steps to address the matter."²⁶
16. The Defence reiterates that in its 13 November 2009 Decision the Trial Chamber made a factual finding that France did not fully comply with the Defence request

²¹ President's Decision, paras 6-9 and Disposition.

²² Motion, para. 20.

²³ Motion, para. 1; *see also Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D- T, Decision on Referral By Trial Chamber of the Matter of French Cooperation with the Tribunal to the President Pursuant to Rule 54, 3 February 2010 ("President's Decision").

²⁴ Motion, paras. 16, 21, 23.

²⁵ Motion, para.16.

²⁶ Motion para. 18; *See also Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D- T, President's Decision, the Disposition.

under Article 28,²⁷ and argues that upon making such a finding the Trial Chamber was “constrained to” invoke Rule 7 *bis*.²⁸

Prosecution Response

17. With respect to the Defence request to reconsider the Trial Chamber’s 29 October Decision, the Prosecution requests the dismissal of the Defence Motion for want of relevance as the issues raised in that Motion have been conclusively adjudicated.²⁹

18. The Prosecution contests the Defence assertion that the Trial Chamber is ‘constrained to refer the matter to the President under Rule 7 *bis* (A)’ upon a finding that a state has not complied with Article 28, arguing that Rule 7 *bis* (A) is discretionary and not mandatory.³⁰

19. The Prosecution submits that the Chamber did not make a finding of complete non-compliance by France.³¹ Indeed, in its Decisions of 19 October, 30 October and 13 November 2009, the Trial Chamber found that there had been partial compliance by France.³² The Trial Chamber declined to report the matter to the Security Council because the remedy in Rule 7 *bis* (A) was an extreme remedy of last resort which was not warranted in the current circumstances.³³

20. The Prosecution believes that the Defence interpretation of the President’s Decision-- that the Chamber erred in law in acting pursuant to Rule 54 instead of Rule 7 *bis*—is incorrect.³⁴

21. In respect of the Defence submission that it is “fatally” unable to adequately prepare and present its defence of alibi, the Prosecution states that the jurisprudence of the Tribunal has affirmed that the Defendant is presumed to

²⁷ Motion, para. 20.

²⁸ Motion, paras 15, 19 and 23.

²⁹ Response, paras 21-24.

³⁰ Response, paras 25, 27, 29.

³¹ Response, para. 30.

³² Response, para. 31.

³³ Response, paras 31, 32, 47.

³⁴ Response, paras. 34, 35, 38.

know his alibi.³⁵ The Tribunal jurisprudence is now established that the Defence merely needs to raise a reasonable doubt that the Accused was in a position to commit the crime with which he is charged.³⁶

22. The Prosecution contends that should the Defence Motion be granted the issue could perpetuate indefinitely since France has said that it is unable to provide further information because refugees at the Kigali Embassy during this period were free to come and leave at will, rendering impossible any reliable or systematic form or record keeping. Hence, granting the Motion would prevent the expeditious delivery of justice in accordance with Article 19.³⁷

Defence Reply

23. The Defence clarifies that its current Motion does not seek for the reconsideration of the 29 October and 30 October 2009 Decisions but that it seeks reconsideration of the 13 November 2009 Decision with respect to its findings on France's non-compliance with its obligations under Article 28.³⁸

24. The Defence contends that it is seeking the information from France to support its defence that the Accused was at the French embassy between 7 and 11 April 1994.³⁹

25. The Defence also contests the Prosecution's assertion that Rule 7 *bis* is a remedy only available in extraordinary circumstances,⁴⁰ and argues that the current circumstances warrants a 7 *bis* referral.⁴¹

³⁵ Response, paras. 49, 50, 54.

³⁶ Response, 54.

³⁷ Response, para. 55.

³⁸ Reply, paras. 2, 10.

³⁹ Reply, para. 13.

⁴⁰ Reply, paras 13, 16, 17.

⁴¹ Reply, para. 19.

DELIBERATIONS

Applicable Law

Reconsideration

26. The Appeals Chamber in *Nahimana* 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.”⁴²

27. Trial Chambers at the Tribunal have also recognised their inherent power to reconsider their own decisions.⁴³ In *Karemera*, for example, 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.⁴⁴ Thus, it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁴⁵

⁴² *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.

⁴³ 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, Gratién 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.

⁴⁴ *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).

⁴⁵ *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.

Article 28

28. Article 28 of the Statute on Cooperation and Judicial Assistance reads as follows:

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.

29. The Trial Chamber recalls that the Appeals Chamber of the ICTY in *Prosecutor v. Blaškić* held that the obligation of States to co-operate with the International Tribunal and to provide judicial assistance constitutes an obligation *erga omnes partes*,⁴⁶ and that the failure of a State to fulfil that obligation could be reported to the Security Council.⁴⁷

Rule 7 bis

30. Rule 7bis (A) states that "where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council". Rule 7 bis

⁴⁶ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement on the Request of The Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 26 (internal citations omitted): "26. [...] This obligation is laid down in Article 29 and restated in paragraph 4 of Security Council resolution 827 (1993). Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies). [...] Article 29 imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*"..."

⁴⁷ *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement on the Request of The Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 33 (internal citations omitted): "33. [...] It is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State, under the conditions provided for in Chapter VII of the United Nations Charter. However, the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It also has the power to report this judicial finding to the Security Council.

The power to make this judicial finding is an inherent power: the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded."

provides a Chamber with discretionary power to decide whether to request the President to report any State's failure to cooperate with the Tribunal to the Security Council.⁴⁸

31. The Trial Chamber recalls that the Appeals Chamber in *Blaškić* held that "as a matter of policy and in order to foster good relations with States, . . . cooperative processes should wherever possible be used, . . . they should be used first, and . . . resort to mandatory compliance powers expressly given by Article 29(2) should be reserved for cases in which they are really necessary."⁴³

Preliminary Matter

32. The Trial Chamber considers that although the Defence Motion is misleadingly titled, it is clear from the body of the Motion that it is only requesting reconsideration of the Trial Chamber's prior Decisions with respect to the matter of France's compliance with its obligations pursuant to Article 28.

Reconsideration of the 13 November Decision

33. In its 13 November Decision, the Trial Chamber, while granting the Defence Motion in part, concluded: "that it has exhausted its powers in seeking the information requested"⁴⁹ from France, and referred the matter to the President of the Tribunal. However, at that juncture, it explicitly stopped short of invoking Article 7 *bis* of the Rules of Procedure and Evidence. The President has now addressed the issue, requesting that the Registrar on his behalf to follow up on the Chambers' earlier requests.⁵⁰

⁴⁸ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera And André Rwamakuba*, Case No. ICTR-98-44-T, Decision On Defence Motion to Report Government of Rwanda To United Nations Security Council (*Rule 7bis of the Rules of Procedure and Evidence*), 2 October 2006, para. 4; citing *Karemera et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66(C) of the Rules (TC), 15 February 2006, para. 12; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 35; *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera And André Rwamakuba*, Case No. ICTR-98-44-T, 19 March 2004, Decision on The Nzirorera Defence Motion To Report Government of Benin To United Nations Security Council, para. 7.

⁴⁹ 13 November Decision, para. 40.

⁵⁰ Registrar's 20 November *Note Verbale*.

34. The Trial Chamber considers that what the Defence perceives to be new facts or circumstances do not meet the standard set out by *Karamera* for reconsideration of the 13 November Decision. The Defence has not demonstrated an error of law nor has it shown that the Trial Chamber abused its discretion resulting in an injustice. Thus, the Trial Chamber will not reconsider the Impugned Decision on that basis.

35. However, the Trial Chamber recalls that while France initially provided relevant information indicating that the Accused was present at the French Embassy in Kigali on 7, 9 and 11 April 1994, and then supplied general information regarding the presence of refugees at the Embassy, it has failed to make available the more specific details requested by the Chambers in this case.

The Relevance of the Information Sought

36. The Trial Chamber concurs with the assessment of the Pre-Trial Chamber in its 2 July Decision⁵¹ that the Defence has shown good cause for the information requested in order to support the defence of alibi.

Is France's Compliance with the Request Satisfactory

37. The Trial Chamber recalls that while in its 13 November Decision it noted a positive evolution in the responses provided by France,⁵² it nevertheless noted that France had not responded to the request made in its 19 October Decision regarding lists of persons who sought refuge at the French Embassy between 7-11 April 1994, and provided no explanation for this failure to respond.

38. The Trial Chamber further notes that telegrams provided by France to Defence teams and the Tribunal appear to contain redacted lists of refugees at the embassy in Kigali during the relevant period.⁵³ In addition, France has made a prior statement that "lists of refugees were established as the refugees arrived."⁵⁴ While

⁵¹ See 19 October Decision, para. 16 citing 2 July decision, paras. 6-9.

⁵² 13 November Decision 2009.

⁵³ April 1994 telegrams ("unofficial translation").

⁵⁴ Document from the French Embassy in Tanzania to the Registrar of the Tribunal, ref number: 540/TPIR, 16 September 2009.

perhaps not exhaustive, the Trial Chamber infers that at least partial lists remain in existence and have not been provided in compliance with the Tribunal's requests.

39. In addition, as noted in its 13 November Decision, the Trial Chamber believes that the list of personnel working at the French Embassy in Kigali in April 1994, submitted by France on 28 October 2009, may be incomplete.
40. Therefore, the Trial Chamber believes that France may have in its possession information that could be critical for the pursuit of justice in this trial. Until France explicitly declares that it does not have such information in its possession, or explains with specificity why it cannot provide this information to the Tribunal, the Trial Chamber has no choice but to find that the Government of France has not complied with its obligations under Article 28 of the Statute.
41. The Trial Chamber further recalls that the French *Conseil D'Etat*, based on Defence submissions, held that it did not have jurisdiction to compel the French authorities to provide the information sought by the Defence citing the primacy of the Tribunal over national courts pursuant to Article 8 (2) of the Statute.⁵⁵

The Trial Chamber and Cooperative Processes

42. The Trial Chamber further recalls that the Pre-Trial and Trial Chambers have both addressed requests for information to the French authorities regarding persons, both refugees and Embassy personnel, at the French Embassy in Kigali for the period between 7 and 11 April 1994. In its 13 November Decision, the Trial Chamber sought the assistance of the President of the Tribunal with respect to this matter.⁵⁶ The Registrar then sent a letter, at the President's request, reiterating the Chambers' requests for information.⁵⁷ The Tribunal has received no response.
43. Given the failure of France to co-operate with and provide judicial assistance to the Tribunal in this matter, the Trial Chamber finds that a Rule 7 *bis* referral is

⁵⁵ *Conseil D'Etat* de la République Française statuant au contentieux, Decision no. 332584, 19 Octobre 2009.

⁵⁶ 13 November Decision, para. 40 and Disposition.

⁵⁷ Registrar's 20 November *Note Verbale*

appropriate in the current circumstances as “a remedy of last resort.”⁵⁸ Therefore, the Trial Chamber concludes that it has no choice but to request that the President report the matter of France’s non-compliance with the Tribunal to the Security Council pursuant to Rule 7 *bis*. The Trial Chamber stresses that the non-cooperation is not wide-ranging but refers only to the continuing failure of France to provide the information requested in its Decisions of 19 October and 13 November as reiterated by the Registrar in his 20 November *Note Verbale*.

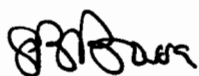
FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

I. DENIES the Motion; and

II. REQUESTS that the President of the Tribunal report the matter of the failure of the Government of France to comply with its obligations pursuant to Article 28 of the Statute and Rule 7 *bis* of the Rules of Procedure and Evidence as explicated in this Decision;

III. DIRECTS the Registry to transmit a copy of this Decision to the President for his attention and action.

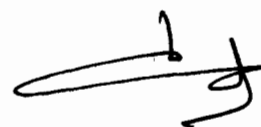
Arusha, 4 March 2010, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]



⁵⁸ 19 October Decision, para. 18. See also the Appeals Chamber Decision in *Prosecutor v. Blaškić*, Judgement on the Request of the Government of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 31 [A]s a matter of policy and in order to foster good relations with States, . . . cooperative processes should wherever possible be used, . . . they should be used first, and . . . resort to mandatory compliance powers expressly given by Article 29(2) should be reserved for cases in which they are really necessary.