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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: 27 May 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

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**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
DECISION OF 23 APRIL 2010**

Rules 73(B) of the Rules of Procedure and Evidence

Office of the Prosecution

Paul Ng'arua
Memory Maposa
Simba Mawere
Diana Karanja
Marie Ka

Defence Counsel for Callixte Nzabonimana

Vincent Courcelle-Labrousse
Philippe Larochelle

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INTRODUCTION

1. On 4 March 2010, the Trial Chamber (“Chamber”) issued a Decision, pursuant to Rule 7 *bis* (“7 *bis* Decision”), requesting that the President of the Tribunal report the failure of the Government of France (“France”) to cooperate with the Tribunal in accordance with Article 28 of the Statute of the International Criminal Tribunal for Rwanda (“Statute”) to the Security Council.¹ On 16 March 2010, France transmitted a number of documents to the Registry of the Tribunal.² On 19 April 2010, the Trial Chamber requested the parties to make submissions with respect to these documents.³ On 23 and 24 April 2010 the Defence⁴ and Prosecution⁵ respectively filed their submissions. On 23 April 2010 the Chamber issued an Order rescinding its 7 *bis* Decision (“Impugned Decision”).⁶

2. On 27 April 2010, the Defence filed a Motion pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) requesting certification to appeal the Trial Chamber's Impugned Decision.⁷

3. On 3 May 2010, the Prosecution filed a response opposing the instant Motion.⁸

4. On 10 May 2010, the Defence filed its reply.⁹

¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France's Cooperation with the Tribunal, 4 March 2010 (“7 *bis* Decision”).

² Ambassade de France en Tanzanie, 16 Mars 2010, No. 140/TPIR (“16 March documents”).

³ Email sent to the Parties by Court Management Section on 19 March 2010.

⁴ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Submissions Concerning the Documents Received from France on 16 March 2010 (“Defence Submissions”), 23 March 2010.

⁵ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Defence Submissions Concerning the Documents Received from France on 16 March 2010, (“Prosecutor's Submissions”), 24 March 2010.

⁶ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Order requesting the President of the Tribunal to rescind the Decision of 4 March 2010, 23 April 2010 (“Impugned Decision”).

⁷ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Urgent Motion of Defendant Nzabonimana for Certification of the Trial Chamber's “Order Requesting the President of the Tribunal to Rescind the Decision of 4 March 2010 (“Motion”), 27 April 2010.

⁸ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Urgent Motion for Certification of the Trial Chamber's “Order Requesting the President of the Tribunal to Rescind the Decision of 4 March 2010 (“Response”), 3 May 2010.

⁹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence Reply to Prosecutor's Response to Nzabonimana's Urgent Motion for Certification of the Trial Chamber's “Order Requesting the President of the Tribunal to Rescind the Decision of 4 March 2010 (“Reply”), 10 May 2010.

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Submissions of the Parties

5. The Defence alleges that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial, and for which, [...] an immediate resolution may materially advance the proceedings.¹⁰

6. The Defence contends that the manner in which the Chamber arrives at the Impugned Decision is fundamentally unfair because it was simply instructed by the Chamber to make submissions on the new documents received from France on 16 March 2010, approximately three weeks before the commencement of its case.¹¹ The Defence states that it was not informed of the Chamber's intent to reconsider the *7 bis* Decision.¹² While the Defence does not challenge the Chamber's power to reconsider its decisions, it submits that this option should not preclude the parties from making arguments for or against such reconsideration.¹³ The Defence argues that the Chamber abused its discretion in acting on its own initiative without advising the parties,¹⁴ and concludes that the Chamber is not in a position to impartially adjudicate the matter at hand. It therefore suggests that the matter be scrutinized by the Appeals Chamber.¹⁵

7. Although the submission is unclear, the Chamber also understands that the Defence argues that the *7 bis* Decision had the effect of encouraging and facilitating France to cooperate with the Tribunal whereas the Impugned Decision has frustrated the cooperation process. The Defence further argues that the cumulative effect of a State's non-compliance pursuant to Article 28 and Rule *7 bis* is that that State shall be reported to the Security Council.¹⁶ The Defence alleges that since the issuance of the Impugned Decision, France's cooperation has ceased thus putting the Defence back at "square one." For example, the Defence submits that following the receipt of the 16 March 2010 documents, it requested France on 21 March 2010, for its assistance in arranging interviews with some of the persons included in the list of persons working at the French Embassy in Kigali in April 1994.¹⁷ According to the Defence, France has not responded to this request.¹⁸ The Defence argues that this renewed non-cooperation by France affects the fair and expeditious conduct of the proceedings.¹⁹

¹⁰ Motion, paras. 4-5.

¹¹ Motion, paras. 4, 12-19, 37.

¹² Motion, paras. 4, 12-19.

¹³ Motion, para. 13.

¹⁴ Motion, paras. 14, 18.

¹⁵ Motion, para. 5.

¹⁶ Motion, para. 42.

¹⁷ Motion, para. 22.

¹⁸ Motion, paras. 23, 25, 48-49

¹⁹ Motion, para. 20.

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8. The Defence avers that the Impugned Decision compromises the right of the accused to obtain the attendance of witnesses in his defence,²⁰ his right to adequate time to prepare his defence, and that it consequently prejudices the right of the accused to a fair trial.²¹ The Defence asserts that the right of the accused to a fair trial depends on the cooperation of France.²² It states that France's conduct does not enable the Defence to conduct its investigations in a reasonable time and to properly establish the alibi of the Accused.²³ The Defence therefore concludes that an immediate resolution of the issue would materially advance the proceedings.

9. In its response, the Prosecution submits that the Chamber acted within its powers in issuing the Impugned Decision,²⁴ noting that under Rule 54, a Judge or Trial Chamber may act on its own initiative or *proprio motu* to ensure the smooth conduct of the trial.²⁵ The Prosecution rejects the Defence argument that it was entitled to be informed of the Chambers intent to reconsider the 7 *bis* Decision.²⁶ The Prosecution submits that Rule 7 *bis* does not prevent the Chamber from reconsidering a prior decision where new circumstances arise.²⁷

10. The Prosecution recalls that the Chamber granted an opportunity to the parties to comment on the 16 March 2010 documents.²⁸ It notes that no further clarification was required from the Chamber.²⁹

11. The Prosecution believes that France has provided sufficient information to assist the Defence in supporting its alibi, and notes that the Defence has already called witnesses to support the alibi and scheduled others to appear.³⁰

12. Furthermore, the Prosecution cites *Karemera et al*³¹ to substantiate an additional submission that there is an exception to the Rule 7 *bis*, such as a State's reliance on the "security

²⁰ Motion, para. 29.

²¹ Motion, para. 29.

²² Motion, para. 62.

²³ Motion, paras, 50-61, 64.

²⁴ Response, para. 32.

²⁵ Response, paras. 34-35.

²⁶ Response, para. 36.

²⁷ Response, paras, 42-43, 45-46.

²⁸ Response, paras. 37-40, 43.

²⁹ Response, paras 41-42, 44.

³⁰ Response, paras. 59-62.

³¹ See Response, para. 75 citing *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, *Décision relative à la requête de la Défense aux fins de faire injonction au Département des operation de maintien de las paix des Nations Unies de produire certains documents (TC)*, (9 March 2004, para.

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interests” to relieve itself of its obligation under Article 28.³² The Prosecution argues that obligation encompassed in Article 28 is continuous and not absolute. Moreover France has complied and cannot be held to impossibility.³³

13. In its reply, the Defence reiterates its argument in its Motion. The Defence notes that it would have made different submissions³⁴ had it known that the purpose of the Chamber’s request for submissions was to reconsider its *7 bis* Decision³⁵ resulting in the contested Impugned Decision.

14. The Defence considers the Prosecution’s argument with respect to the “state security interests” to be irrelevant as France has never referred to security interests in refusing to provide information.³⁶

DELIBERATIONS

Applicable Law

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

“Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

16. Thus, in order to grant certification to appeal 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

18. Affirmed in *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, 15 February 2006, para. 11.

³² Response, para. 75.

³³ Response, paras. 76-79.

³⁴ Reply, paras. 9-10.

³⁵ Reply, para. 13..

³⁶ Reply, paras. 27-28.

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the proceedings.³⁷ Even where both factors are present, certification is not automatic, but at the discretion of the Trial Chamber,³⁸ and certification remains an exceptional measure.³⁹

Preliminary Matters

17. The Chamber notes that the Defence submissions raise certain matters which in the Chamber's opinion have already been adjudicated. Accordingly, it will not consider these submissions in the instant Decision. These matters include the admission into evidence of the 16 March 2010 documents,⁴⁰ the issue of the French troops at Mount Ndiza between April and July 1994,⁴¹ and Defence objections to the Trial Chamber's cap on the number of witnesses it may call.⁴² The Chamber is currently seized of a Defence Motion requesting reconsideration of the Trial Chamber's Decision of 16 April 2010 rejecting postponement of the commencement of the Defence case. The Trial Chamber will address this matter in a separate decision.⁴³

³⁷ *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.

³⁸ *Prosecutor v. Augustin Ngirabatware*, Case no. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 17; See *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

³⁹ *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 Ngirabatware*, Case no. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para. 17.

⁴⁰ The Defence states that on 31 March 2010, it requested follow-up information from French authorities regarding the new information received on 16 March 2010 in order to establish the reliability, provenance and authors of the documents provided by France on these documents. This request was predicated upon the Prosecutor's objection to the Defence request to the admission of these documents into evidence, Motion, paras.26-27; See *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for the Admission of Documentary Evidence, 7 May 2010.

⁴¹ The Defence alleges that unresolved cooperation matters with France such as the presence or not of French soldiers at Mount Ndiza, Nyakabanda Commune between April and July 1994, Motion, para. 28. See *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Second Urgent Motion Requesting Cooperation and Assistance from France, 19 March 2010.

⁴² The Defence alleges that France's continued failure to cooperate has caused prejudice to Nzabonimana's right to a fair trial, his right to adequate time to prepare his defence, the attendance of alibi witnesses and other factual witnesses since the defence has been limited to call 30 witnesses in its case, Motion, para. 44; See *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 7 May 2010.

⁴³ The Defence also notes that in its 8 April 2010 Decision, the Chamber declined to allow the postponement of the Defence case for two months in order to allow the defence conclude its investigations following the new information obtained from France on 16 March 2010, Motion, para. 21; *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion for Reconsideration of the "Decision on Nzabonimana's for the Reconsideration and/or Certification to Appeal the Decision of 8 April 2010, rendered on 16 April 2010.

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On Certification to Appeal the Impugned Decision

18. In support of its Motion, the Defence contends that the Impugned Decision affects the fair and expeditious conduct of the proceedings because it relieves France of its obligation to cooperate under Article 28 thus compromising the right of the accused to a fair trial, particularly his ability to secure the attendance of witnesses. The Defence further submits that its efforts to procure further assistance have been frustrated by France and therefore that an immediate resolution of the issue may materially advance the proceedings.

19. The Prosecution submits that the Defence has suffered no prejudice as France transmitted additional information to the Tribunal on 16 March in conformity with its obligations under Article 28.

20. The consistent jurisprudence of this Tribunal has established that the Trial Chamber need not address the merits of a parties' arguments when addressing an application for certification to appeal a prior decision, but rather assess whether the impugned decision involves an issue significantly affecting the fair and expeditious conduct of the proceedings or the outcome of the trial, or whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁴⁴

21. In the present instance, Defence reiterates that France's failure to cooperate has compromised its ability to call witnesses to support its alibi Defence. The Trial Chamber accepts that this issue may be related to the fair and expeditious conduct of proceedings. The Defence recalls that it has sought the cooperation of France since January 2009, and that both the Pre-Trial and Trial Chambers issued formal requests to France because France did not fully comply. The Chamber also accepts that the issue of France's cooperation with the Tribunal in accordance with Article 28 has been a recurrent one in this case. Furthermore, the Chamber observes that the Defence has brought this issue to the attention of not only to the Pre-Trial and Trial Chambers but

⁴⁴ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, at para. 5; *See, e.g., Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material (TC)", 4 February 2005, at para. 28. "The *Bizimungu* Chamber agreed that whether there was an error of law or abuse of discretion is not an issue to be considered by the Trial Chamber in its determination of a certification to appeal. It emphasized, however, that the word "significant" in the first prong of the Rule, intends the exclusion of minor or trivial issues that arise in the course of the trial; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence of the Defence (TC), 4 February 2005, at para. 11;

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also to the President.⁴⁵ It has additionally circumvented the rules and applied directly to the Appeals Chamber for redress.⁴⁶

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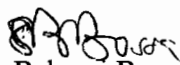
22. Given the attention attributed to the issue of France's cooperation, the Chamber considers that an immediate resolution by the Appeals Chamber may materially advance the proceedings.


23. Accordingly, the Chamber is satisfied that the requirements for granting certification to appeal as articulated in Rule 73 (B) are met in the instant Motion.

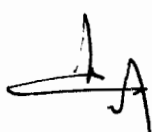
FOR THESE REASONS, THE TRIAL CHAMBER

GRANTS the Motion;

Arusha 27 May 2010, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tuzmukhamedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]



⁴⁵*Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Implementation of the Order of Trial Chamber III of 4 March 2010 and for Allowing the Defence to Make Submissions before the Security Council, 5 May 2010.

⁴⁶*Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for Leave to Appeal the Decision of the President of the International Tribunal for Rwanda "Decision on Nzabonimana's Motion for the Implementation of the Order of Trial Chamber III of 4 March 2010 and for Allowing the Defence to Make Submissions before the Security Council Dated 5 May 2010", 10 May 2010.