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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 4 June 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

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**DECISION ON THIRD URGENT DEFENCE MOTION REQUESTING AN ORDER
FOR COOPERATION DIRECTED AT FRANCE**
Pursuant to Article 28 of the Statute

Office of the Prosecution
Paul Ng'arua
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Defence Counsel for Callixte Nzabonimana
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INTRODUCTION

1. On 17 May 2010, the Defence filed a Motion pursuant to Article 28 of the Statute of the International Tribunal for Rwanda (“Statute”) for an order from the Trial Chamber (“Chamber”) to request the Government of France (“France”) to facilitate interviews with a number of French nationals, and other individuals, who were working at the French Embassy in Kigali in April 1994.¹

2. On 21 May 2010, the Prosecution filed its response opposing the Motion.²

3. On 26 May 2010, the Defence filed its reply.³

Submissions of the Parties

4. The Defence requests that the Chamber order France to a) provide information on whether French soldiers were present at Mount Ndiza or elsewhere in Nyakabanda *Commune*, Gitarama *Prefecture* between 6 April and 17 July 1994⁴; and, b) facilitate interviews with 31 individuals who worked at the French Embassy in Kigali between 7 and 11 April 1994, as identified by France in documents it disclosed on 16 March 2010.

5. Firstly, the Defence argues that since the parties are unable to agree on the significance of the France response of 16 March 2010 with respect to the presence of French troops at Mount Ndiza, France should be required to respond to further questions on the subject in order to eliminate any ambiguities.⁵ The Defence specifically requests that France respond to the following question: “Was a French contingent of around 60 soldiers ever present for a period of 4 days at Ndiza Mountain or elsewhere in Nyakabanda *Commune* between 6 April and 17 July 1994?”⁶ The Defence submits that this information directly impacts the credibility of Prosecution witness CNAL who asserted that such troops were present at Mount Ndiza.⁷

¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Urgent Third Motion of Callixte Nzabonimana Requesting an Order Directed at France, (“Motion”), 17 May 2010.

² *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Response to Urgent Third Motion of Callixte Nzabonimana Requesting an Order Directed at France, (“Motion”), 21 May 2010.

³ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence Reply to the Prosecutor’s Response to Urgent Third Motion of Callixte Nzabonimana Requesting an Order Directed at France, (“Motion”), 26 May 2010.

⁴ Motion, paras.7

⁵ Motion, para.8.

⁶ Motion, paras.11 & 21.

⁷ Motion, para. 12-13.

6. The Defence also requests that France facilitate interviews with French nationals and other individuals who worked at the French Embassy in Kigali between 7 and 11 April 1994.⁸ The Defence asserts that these individuals may be in a position to support the Accused's alibi.⁹

7. The Defence submits that following the receipt of the list of personnel working at the French Embassy between 7 and 11 April 1994, it sent a *Note Verbale* to the French authorities on 22 March 2010 requesting permission to interview these persons.¹⁰ It sent an email to the Registry on 14 April 2010 requesting that it follow up on this *Note Verbale*.¹¹ The Defence notes that on 10 May 2010, France sent a *Note Verbale* indicating that the former French Ambassador Jean-Michel Marlaud would be available for an interview with the Defence between 19 and 21 May 2010 but that the Defence would have to provide a list of questions in advance that would have to be pre-approved by French authorities prior to the interview.¹² On 12 May 2010, the Defence sent the French authorities a response indicating that both Lead Counsel and Co-Counsel for the Accused would be unavailable to interview Ambassador Marlaud on the dates proposed by France due to their commitments in the instant case.¹³ It requested that French authorities re-schedule the proposed interview to a date after the close of this trial session.¹⁴

8. With respect to the presence of French soldiers at Mount Ndiza, the Prosecution, in its response, contests the introduction of the phrase "or elsewhere in Nyakabanda Commune" by the Defence in its Motion.¹⁵ The Prosecution further recalls that it disagrees with the Defence's interpretation of the 16 March 2010 *Note Verbale* from France with respect to the presence of French troops at Mount Ndiza.¹⁶ According to the Prosecution, France has clearly responded that it could not find documents which confirm or deny the presence of French soldiers at Mount Ndiza, and that France should not be bound to impossibility.¹⁷

9. Regarding the Defence request that France facilitate interviews with personnel who worked at the French Embassy in Kigali in 1994, the Prosecution submits that due to the sheer numbers of persons to be interviewed, such an approach would result in a delay of the

⁸ Motion, paras. 22-23.

⁹ Motion, paras. 24-26.

¹⁰ Motion, para. 27.

¹¹ Motion, para. 28.

¹² Motion, para. 29.

¹³ Motion, para. 30.

¹⁴ Motion, para. 31.

¹⁵ Response, para. 4.

¹⁶ Response, para. 6.

¹⁷ Response, paras. 7-9.

proceedings.¹⁸ However, the Prosecution does not oppose the Defence's suggestion that specified persons might support the Accused's alibi, and therefore that the Defence should have the opportunity to meet with particular individuals.¹⁹ It proposes that to balance the interests of the Accused to a fair trial with the expeditious conduct of proceedings, the Defence should be directed to provide questionnaires to the proposed interviewees to determine "a) which persons are willing and able to meet with the Defence or testify for the Accused, and b) which persons recall seeing the Accused at the French Embassy in Kigali in April 1994 in order to establish whether they have the capacity to testify on his alibi."²⁰ In support of its submission, the Prosecution recalls that in an earlier Trial Chamber Decision filed on 29 October 2009, the Chamber directed the Prosecution to have their witnesses fill questionnaires regarding their judicial histories.²¹ The Prosecution suggests that the Chamber adopt a similar approach with respect to this present issue.

10. In its reply, the Defence reiterates its request that the Chamber assist it in seeking an unambiguous response from France on the presence of French soldiers at Mount Ndiza between April and July 1994.²²

11. The Defence opposes the Prosecution's suggestion that the personnel who worked at the French Embassy should be required to complete questionnaires²³ arguing that such an approach is not supported by the Rules or precedent.²⁴ It further contends that the issues resulting in the Trial Chamber's 29 October 2009 Decision directing the Prosecution to assist its witnesses in filling out questionnaires are not analogous to those raised in the instant Motion.²⁵

12. In conclusion, the Defence notes that it has already interviewed hundreds of potential witnesses and that the French authorities have well established rules governing the interview of French nationals.²⁶ It therefore expects no delays in conducting interviews of the 30 persons who allegedly worked at the French Embassy during the relevant period.²⁷

¹⁸ Response, paras. 10-11.

¹⁹ Response, para. 12.

²⁰ Response, paras. 13-18.

²¹ Response, paras. 15-16.

²² Response, paras. 11-12.

²³ Response, para. 23.

²⁴ Response, paras. 23,27.

²⁵ Response, para. 25.

²⁶ Response, para. 30.

²⁷ Response, para. 32. In its Motion, the Defence lists 30 names.

DELIBERATIONS

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Applicable Law

13. Pursuant to Article 28 of the Statute, [...] States shall cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. It further provides that States shall comply with any request for assistance or order issued by a Trial Chamber, including, *inter alia*, for the taking of testimony and production of evidence, without undue delay.²⁸

14. According to the jurisprudence of this Tribunal, the criteria to be satisfied by the party seeking an order for State cooperation under Article 28 of the Statute are: (i) the party seeking the material must specifically identify, to the extent possible, the material sought; (ii) the party must articulate its relevance to the trial; and (iii) the party must show that its efforts to obtain the documents have been unsuccessful.²⁹

Presence of French Soldiers on Mount Ndiza in Nyakabanda Commune ("Ndiza issue")

15. The Chamber considers that with respect the Ndiza issue, the Defence has identified the material or information sought with the requisite specificity. It requests that the Chamber ask France whether "a French contingent of around 60 soldiers was ever present for a period of 4 days at Ndiza Mountain or elsewhere in Nyakabanda Commune between 6 April and 17 July 1994."³⁰ At the outset, the Chamber rejects the addition of the words "or elsewhere in Nyakabanda Commune" as these words create a novel formulation never used by the Defence in prior submissions on this issue. The Chamber recalls that on 15 February 2010 the Defence filed a Motion requesting the Chamber's assistance in seeking the cooperation of France in disclosing information about the presence of French troops "...at Mount Ndiza in Nyakabanda Commune, of Gitarama Prefecture between April

²⁸ Statute of the Tribunal, Article 28 (2)(b).

²⁹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Requests for Disclosure of the Brugière Report and the Cooperation of France, 25 September 2006, para. 27 and fn. 16; *Prosecutor v. Bagosora*, ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004, para. 4; *See also Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005, para. 2. *See also Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997 (AC), 29 October 1997; *See also Prosecutor v. Bizimungu et al.*, (Augustin), Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006, para. 6; Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute, 13 February 2006, para. 6; Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of the Netherlands Pursuant to Article 28 of the Statute, 13 February 2006, para. 6.

³⁰ Motion, paras. 11 & 21.

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and July 1994.³¹ On 16 March 2010, the French government disclosed a number of documents to the Registry, and attached a *Note Verbale* in which it stated that "... despite thorough searches, the General Staff of the Armed Forces and the Directorate of Legal Affairs at the Ministry of Defence have found no documents attesting to the presence of the French Military at Mount Ndiza during the relevant period."³² Consequently, on 19 March 2010, the Chamber issued a Decision declaring the Defence Motion on that issue moot.³³

16. The Chamber observes that the Defence in the instant Motion has resurrected a matter that in the Chamber's opinion was disposed of by its 19 March 2010 Decision.³⁴ In reviving this issue, the Defence has not argued that the Chamber's understanding of the French submission on this issue was erroneous, nor has it made a *prima facie* case that the French response was misleading. The Chamber recalls that it has previously warned the Defence, in accordance with Rule 46 (A), about re-litigating matters once they have been adjudicated.³⁵ The Chamber notes that the recurrent litigation of adjudicated matters obstructs the proceedings and adversely impacts on the interests of justice, and will therefore impose sanctions on the Defence.

Interviews of personnel working at the French Embassy in Kigali between 7 and 11 April 1994

17. The Defence requests that the Chamber direct France to facilitate interviews with approximately 30 individuals France has identified as personnel who worked at the French Embassy in Kigali between 7 and 11 April 1994.³⁶ In its response, the Prosecution proposes that the Chamber direct the Defence to issue questionnaires to these potential witnesses to identify those who may possess information relevant to the alibi of the Accused.

18. The Chamber observes that the Defence has not explained why it requires that France facilitate interviews with the individuals who worked at the French Embassy in Kigali in April 1994. The Defence has not indicated that it made efforts to arrange such interviews on its own accord or that it has encountered obstacles in attempting to do so. While the Defence, in its reply,

³¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Second Urgent Motion of Nzabonimana Requesting Cooperation and Assistance from France, 15 February 2010.

³² Unofficial translation of *Note Verbale* from the French Embassy to the Registry received on 11 March 2010 "... les autorités française indiquent qu'en dépit de recherché approfondies, l'état-major des armées et la direction des affaires juridiques du ministère français de la Défense n'ont pu trouver aucun document attestant la présence de militaires français au mont Ndiza à la période considérée"

³³ *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.

³⁴ *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.

³⁵ *Prosecutor v. Callixte Nzabonimana*, Oral Ruling, T. 7 December 2009, pp. 1-2.

³⁶ Motion, paras. 22-23.

asserts that "...the French authorities have well established rules concerning interviews of French persons...",³⁷ it does not explain what they are or attach any document laying out the alleged procedures. Thus the Chamber considers that the Defence has not demonstrated its efforts to obtain the [information] have been unsuccessful.

19. With respect to the Defence request that the Trial Chamber direct France to facilitate a meeting with French Ambassador Jean-Michel Marlaud, the Chamber notes that there is an inconsistency between the Defence Motion and the Defence Reply. In its Motion, the Defence states that it was informed by the French government on 10 March 2010 that the Defence could meet with Ambassador Marlaud between 19 and 21 May 2010.³⁸ In its reply, the Defence asserts that the interview was scheduled to take place on 25 May 2010.³⁹ While this may be a mere clerical error, the Chamber is nevertheless perplexed by the failure of the Defence to pursue this opportunity offered by France to meet with Ambassador Marlaud. While it is not for the Chamber to direct the parties on the management of their case, the Chamber is aware that the Defence has a fully constituted team composed of a Lead Counsel, a Co-Counsel, investigators and a legal assistant. In the Chambers view, the Defence's failure to exercise prudence and avail a member of its team to conduct an interview with Ambassador Marlaud demonstrates a lack of diligence. Thus in the present circumstances, the Chamber does not consider it appropriate to intervene in this matter.

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety;

DENIES fees in respect of the portion of the Motion relating to the presence of French troops at Mount Ndiza in 1994;

DIRECTS the Registrar to deny fees for the portion of the Motion relating to the presence of French troops at Mount Ndiza in 1994.

Arusha, 4 June 2010, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmakhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]



³⁷ Reply, para. 30.

³⁸ Motion, para. 29.

³⁹ Reply, para.21.