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TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 14 September 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
UNICTR
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**DECISION ON DEFENCE MOTION ASKING THE TRIAL CHAMBER TO
REQUEST THE PRESIDENT TO REPORT THE MATTER OF THE REPUBLIC
OF TOGO'S REFUSAL TO COOPERATE TO THE SECURITY COUNCIL**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Motion Asking the Trial Chamber to Request the President to Report the Matter of Togo’s Refusal to Cooperate to the Security Council (*Article 28 of the Statute of the Tribunal; Rule 7 bis of the Rules of Procedure and Evidence*)”, filed confidentially on 8 August 2011 (the “Defence Motion”);

CONSIDERING the “Additional Submissions to the Defence Motion Asking the Trial Chamber to Request the President to Report the Matter of Togo’s Refusal to Cooperate to the Security Council (*Article 28 of the Statute of the Tribunal; Rule 7 bis of the Rules of Procedure and Evidence*)”, filed confidentially on 19 August 2011 (the “Defence Additional Submissions”);

NOTING that the Prosecution did not file a Response;

CONSIDERING also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Article 28 of the Statute and Rules 7 *bis* and 73 of the Rules.

INTRODUCTION

1. On 7 October 2010, the Defence filed confidentially a “Defence Extremely Urgent Motion Requesting an Order Directed at the Republic of Togo (pursuant to Article 28 of the Statute)” (“original Defence Motion”), in which it requested the Chamber to issue an Order requesting the Republic of Togo’s cooperation and assistance in facilitating a meeting between the Defence and a potential witness, a Togolese national.
2. The Chamber granted the original Defence Motion in a Decision on 23 November 2010 (“Togo Decision”).¹
3. On 8 August 2011, the Defence filed confidentially the present Motion.

¹ Decision on Defence Motion Requesting an Order directed at the Togolese Republic (TC), 23 November 2010.



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SUBMISSIONS

4. The Defence submits that Togo has failed to facilitate a meeting with the potential witness, in contravention of the Togo Decision, and prays that the Chamber request the President to report Togo's refusal to cooperate to the Security Council pursuant to Rule 7 *bis* of the Rules.²

5. The Defence submits that Togo is in non-compliance with its obligations under Article 28 of the Tribunal's Statute, failing to facilitate a meeting between the Defence and a potential witness pursuant to the Togo Decision. The Togo Decision was transmitted to the Togolese authorities through a *Note Verbale* sent by the Tribunal's External Relations and Strategic Planning Section (ERSPS) on 25 November 2010, but the Togolese authorities did not acknowledge receipt thereof. The Registrar in his letter dated 31 January 2011, and the ERSPS Chief in his email dated 1 February 2011, explained to the Togolese authorities that their non-compliance could be reported. On 21 February 2011, the Togolese authorities responded by reiterating their previous willingness to cooperate, making reference to their letters of 16 July 2010 and 10 August 2010. The Defence submits, however, that these letters were never sent to the Registrar or the Defence prior to 21 February 2011.³

6. The Registrar sent a *Note Verbale* on 25 February 2011 informing the Togolese authorities of the arrival of the Defence team on 23 March 2011. On 15 March 2011, the Togolese authorities sent a *Note Verbale* informing the Defence Team that this meeting could not be held since the potential witness was on a mission in another country.⁴

7. On 23 March 2011, the Registrar transmitted a *Note Verbale* to the Togolese authorities advising them that the Defence team was ready to meet with the individual at any time, and asked the authorities to provide dates when such meeting could be held. No response from the Togolese authorities has been received.⁵

8. Citing the ICTY Appeals Chamber's Decision in the *Blaškić* case, the Defence submits that the failure of a State to fulfil its obligation to cooperate with the Tribunal could be reported to the Security Council. The Defence further notes that the ICTY President had in fact reported several instances of non-cooperation to the Security Council. The Defence recalls that before this Tribunal, the *Nzabonimana* Trial Chamber referred a situation of non-compliance by France to the President. The President, however, decided not to report the matter to the Security Council absent a categorical finding by the *Nzabonimana* Trial Chamber of non-cooperation by France. The *Nzabonimana* Trial Chamber went on issue a Decision with a categorical finding of non-compliance and referred the matter back to the President.⁶

² See generally, Defence Motion, paras. 1-22.

³ *Id.*

⁴ *Id.*, paras. 19-20.

⁵ *Id.*, para. 21.

⁶ *Id.*, paras. 28-30, 41-43, citing *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment 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 ("*Blaškić* Appeals Decision"), para.26; *The Prosecutor v. Callixte Nzabonimana*, Case

9. The Defence contends that a mere reiteration of the Togo Decision, as was done in other cases before the Tribunal concerning apparent non-compliance of States with the Tribunal, would not be a satisfactory remedy given the stage of the proceedings and the consequent urgency of a meeting with the Togolese national. The Defence therefore prays that the Chamber request the President to report Togo's non-compliance to the Security Council.

10. The Defence filed Additional Submissions to the Defence Motion on 19 August 2011, informing the Chamber that it received correspondence on 15 August 2011 revealing that the individual had returned to Togo at the end of March 2011. The Defence stresses that the Togolese authorities never indicated that the individual would be back in the country around a week after the Defence team was in Lomé on 23 and 24 March 2011. The Togolese authorities merely advised the Defence team that the individual was away on mission, without indicating his expected return.⁷

DELIBERATIONS

11. As a preliminary matter, the Chamber notes that the Defence filed its Additional Submissions on 19 August 2011, 11 days after the Defence Motion was filed. While the Chamber has repeatedly pointed out that it will not consider submissions filed beyond those allowed by the Rules,⁸ the Chamber notes that the correspondence referred to therein was received only on 15 August 2011, or seven days after the Defence Motion was filed. Moreover, the Prosecution did not file a Response to the Defence Motion, and therefore the Defence had no opportunity to incorporate references to the correspondence in a Reply. The Chamber has therefore taken into account the Additional Submissions in reaching this Decision.

12. 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:

No. ICTR-98-44D-T ("*Nzabonimana*"), 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 (TC), 13 November 2009, paras. 34-40; *Nzabonimana*, Decision on Referral by Trial Chamber of the Matter of French Cooperation with the Tribunal to the President pursuant to Rule 54 (Office of the President), 3 February 2010, para. 7.

⁷ Defence Additional Submissions, para. 12, Annex B.

⁸ Decision on Defence Motion for Inspection of Materials in the Prosecution's Custody (TC), 29 August 2011, para. 27; Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of these Written Statements by a Presiding Officer (TC), 11 April 2011, para. 18; Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009 (TC), 15 October 2010, para. 20; Decision on Defence Motion for Second Reconsideration of Witness Protective Measures, 15 July 2010 (TC), para. 15.

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- (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 Criminal Tribunal for Rwanda

13. The Chamber recalls that the ICTY Appeals Chamber in *Blaškić* held that Article 28 of the Statute is binding on States,⁹ and that the failure of a State to cooperate with its obligations under Article 28 could be reported to the Security Council.¹⁰

14. 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 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.¹¹

15. The Chamber recalls that following the *Nzabonimana* Trial Decision of 4 March 2010, wherein that Trial Chamber made a categorical finding of non-compliance by France and requested the President to report the matter to the Security Council, the same Trial Chamber rescinded this Decision in an Order dated 23 April 2010. The *Nzabonimana* Trial Chamber noted France’s cooperation following its 4 March 2010 Decision.¹²

16. The Chamber notes that the original Defence Motion was filed after several unsuccessful attempts related to the present Defence Motion.¹³ The Chamber finds that the Togolese Authorities have failed to facilitate a meeting between the Defence and the Togolese national.

⁹ *Blaškić* Appeals Decision, para.26.

¹⁰ *Id.*, para. 33.

¹¹ *Nzabonimana*, 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 (TC), 19 October 2009 (“*Nzabonimana* Trial Decision of 19 October 2009”), para, 11; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T (“*Karemera et al.*”), Decision on Defence Motion to Report Government of Rwanda To United Nations Security Council (TC), 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; *Blaškić* Appeals Decision, para. 35; *Karemera et al.*, Decision on The Nzirorera Defence Motion To Report Government of Benin to United Nations Security Council (TC), 19 March 2004, para. 7.

¹² *Nzabonimana*, Order Requesting the President of the Tribunal to Rescind the Decision of 4 March 2010 (TC), 23 April 2010, paras. 18-20.

¹³ Defence Motion, Annexes 1, 3, 4, 6, 7.; Original Defence Motion, Annex 5.

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17. The Chamber recalls that Rule 7 *bis* provides the Chamber with a discretionary power to request the President to report any State's non-compliance with the Tribunal to the Security Council. The Chamber considers that requesting the President to refer a State violation of Article 28 to the Security Council is a remedy of last resort.¹⁴

18. The Chamber acknowledges that the Togolese authorities have repeatedly professed their willingness to comply with the Togo Decision¹⁵. It would be preferable, however, if the Togolese authorities were more prompt and precise with their replies to Defence correspondence. The Chamber considers that Togo's failure to fully comply with the Togo Decision may not be deliberate, in bad faith or is intended to impede the fair and expeditious conduct of proceedings. The Chamber does not believe at this stage that the circumstances warrant a request to the President to report Togo to the Security Council.

19. The Chamber nonetheless respectfully requests the Togolese authorities to facilitate and ensure the Defence is able to meet the Togolese National as soon as possible, considering that the Chamber expects to conclude the evidence phase by the end of October 2011.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion;

RESPECTFULLY REQUESTS the Togolese authorities to facilitate and ensure that the Defence is able to meet with the Togolese national as soon as possible; and

DIRECTS the Registry to immediately translate and transmit this Decision to the relevant authorities of the Republic of Togo.

Arusha, 14 September 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa



Mparany Rajohnson
Judge

¹⁴ *Nzabonimana* Trial Decision of 19 October 2009, para. 17.

¹⁵ Defence Motion, paras. 17, 19, Annex 4; Original Defence Motion, Annex 5.