



ICTR-00-55C-T
6-11-2011
8983-8977

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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Am

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 6 December 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON DEFENCE MOTION FOR VARIANCE OF WITNESS PROTECTIVE
MEASURES AND INTERNATIONAL COOPERATION OF THE GOVERNMENT
OF CANADA**

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INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses, with an additional witness heard on 6 September 2011. The Prosecution completed its rebuttal case on 8 September 2011, after having called 3 witnesses. The Defence completed its rejoinder case on 21 September, after having called four witnesses.

2. On 7 March 2011, the Defence team of the Accused, Ildéphonse Nizeyimana, (“Defence” and “the Accused” respectively) filed a motion asking the Chamber to request the government of Canada to produce immigration materials with respect to three witnesses who testified under the pseudonyms BXF, BZC and ZBJ.¹ The Defence asserted that the three witnesses had provided information to immigration authorities in Canada regarding events relevant to accusations against the Accused.² The Defence submitted that it attempted to obtain the relevant materials but was unsuccessful, as it was not authorized to provide the supporting information requested by Canadian authorities due to protective measures in place for the three witnesses.³ Finally, the Defence explained that it filed the First Confidential Motion *ex parte* to avoid making available to the Office of the Prosecutor (“Prosecution”) confidential and privileged information regarding the orientation of current investigations relating to the Accused’s defence.⁴

3. On 9 March 2011, the Chamber issued an order requesting that the Defence specify which immigration documents it required from the immigration files of the three witnesses.⁵

4. On 10 March 2011, the Defence filed a descriptive list of the immigration documents it seeks to obtain, noting that “[t]here may be documents which are unknown to the Accused” and that it would thus request “all remaining documents” in the immigration files which were not specified in its list.⁶

¹ Confidential and Extremely Urgent *Ex Parte* Defence Motion Motion [sic] for Judicial Cooperation with Canada (confidential and *ex parte*) (“First Confidential Motion”), 7 March 2011, paras. 2, 8.

² See First Confidential Motion, paras. 9-12.

³ First Confidential Motion, paras. 13-19.

⁴ First Confidential Motion, para. 22.

⁵ Order Regarding Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada (confidential and *ex parte*) (TC), 9 March 2011, p. 2.

⁶ *Ex Parte* List of Immigration Documents Requested (*ex parte*), 10 March 2011, para. 2.

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5. On 14 March 2011, the Chamber granted the Defence Motion in part, and requested assistance from the Canadian government in obtaining the documents sought by the Defence.⁷

6. On 21 April 2011, the Canadian Department of Foreign Affairs and International Trade (“Canadian Government”) responded that it could not, pursuant to Canadian law, transmit the requested documents to the Defence without first obtaining the information specified in their letter.⁸ More specifically, the Canadian Government requested that the Defence provide (1) clarification as to where the Defence obtained information that the records may contain a summary of incidents that give rise to charges against Mr. Nizeyimana, (2) information as to how the Defence knows that the three individuals identified in the request sought refugee status in Canada, (3) an explanation as to how the requested materials are relevant to the case, (4) an explanation as to how the three individuals are involved in the incidents giving rise to the charges and (5) a summary of the allegations against Mr. Nizeyimana.⁹ The Canadian Government further stated that it never received an answer from the Defence to any of the questions posed.¹⁰

7. On 16 May 2011, the Defence filed a Second Confidential Motion requesting judicial cooperation from Canada in light of the communication obtained from the Canadian Government.¹¹ The Defence submitted that it could not provide the Canadian Government with the information it seeks without violating the existing protective measures.¹² The Defence further argued that the Canadian Government cannot refuse to transmit the documents to the Defence, save for “exceptional circumstances” such as “national security interests”, since the government is not in a position to “substitute their assessment about the relevance of the information sought to that of the Trial Chamber.”¹³

⁷ Decision on Ildelphonse Nizeyimana’s *Ex Parte* Motion for Judicial Cooperation with Canada (confidential and *ex parte*) (TC)(“14 March Decision”), 14 March 2011.

⁸ Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada (“Second Confidential Motion”), 16 May 2011, Annexure 1.

⁹ Second Confidential Motion, Annexure 1, p. 14.

¹⁰ *Ibid.*

¹¹ Second Confidential Motion, para. 20.

¹² Second Confidential Motion, para. 15.

¹³ Second Confidential Motion, para. 16.

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8. On 20 May 2011, the Chamber denied the Second Confidential Motion and directed the Defence to provide the information sought by the Canadian Government in “general terms”.¹⁴

9. On 24 May 2011, the Defence filed a motion for reconsideration of the Impugned Decision.¹⁵ The Defence submitted that the Chamber misunderstood the nature of its Second Confidential Motion and reiterated that it would be in violation of the protective measures in place for the three Prosecution witnesses if it provided the information sought by the Canadian Government.¹⁶ The Defence therefore requested that the Chamber reconsider its Impugned Decision and that it reiterate its request to the Canadian Government to provide the documents in question.¹⁷ The Defence finally reiterated that it filed the Motion for Reconsideration *ex parte*, as the issue “deals with Defence investigations which do not involve the Prosecution.”¹⁸

10. On 26 May 2011, the Chamber overturned the Impugned Decision.¹⁹ The Chamber further noted that the Defence request would only be possible if the protective measures currently in place for the three Prosecution witnesses were varied to include the Canadian Government.²⁰ The Chamber therefore directed the Defence to re-file its submission, *inter partes*, requesting a variance of the protective measures, including the justifications for the variance.²¹

11. On 6 June 2011, the Defence filed a motion requesting a variance of the protective measures for Prosecution Witnesses BXF, BZC and ZBJ.²² The Defence first submitted that it did not consider a variance of protective measures to be appropriate where a State is bound to comply with the Tribunal’s orders pursuant to Article 28 of the Statute of the Tribunal.²³ Alternatively, the Defence submitted that the conditioning by the Canadian Government of

¹⁴ Decision on Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada (“Impugned Decision”) (TC), 20 May 2011.

¹⁵ Defence Motion for Reconsideration of Decision on Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada (“Motion for Reconsideration”), 24 May 2011.

¹⁶ Motion for Reconsideration, paras. 13-15.

¹⁷ Motion for Reconsideration, p. 5.

¹⁸ Motion for Reconsideration, para. 21.

¹⁹ Decision on Defence Motion for Reconsideration of Decision on Second Confidential and Extremely Urgent *Ex Parte* Defence Motion for Judicial Cooperation with Canada (“Decision on Motion for Reconsideration”), 26 May 2011.

²⁰ Decision on Motion for Reconsideration, para. 12.

²¹ Decision on Motion for Reconsideration, para. 16.

²² Nizeyimana Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada (“Motion”), 6 June 2011.

²³ Motion, paras. 19-22.

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the disclosure of the immigration documents on obtaining information covered by protective measures constitutes a “new circumstance” justifying a variance of the protective measures.²⁴

12. On 13 June 2011, the Prosecution filed its response, submitting that the attempt by the Defence to gain access to the Prosecution witnesses’ files at this stage of the proceedings was “ill placed”.²⁵ The Prosecution noted that all three witnesses refused to consent to a variance of their protective measures.²⁶ Moreover, the Prosecution did not concede that the majority of documents requested by the Defence are prior statements by the witnesses, and therefore considered the majority of the documents requested to be irrelevant and overbroad given the narrow scope to which the material pertains.²⁷ Lastly, the Prosecution submitted that if the Chamber were to vary the protective measures in place, the Defence should “specify the factual relevance of each document sought”.²⁸

13. The Defence did not file a reply.

14. On 22 June 2011 the Chamber granted the Defence motion for variance of the protective measures for witnesses BXF, BZC and ZBJ for purposes of disclosing the information requested to the Canadian Government and its agents.²⁹

15. On 23 November 2011, the Defence filed a motion requesting the Trial Chamber to request the President to refer Canada to the Security Council for failure to cooperate with the Chamber’s decisions to assist the Defence in obtaining the documents it seeks.³⁰

16. On 29 November 2011, the Prosecution filed its response, submitting that the Defence motion is premature and has not demonstrated whether (1) the government of Canadian Government is in receipt of the request and follow-up, (2) the Registry has communicated with Canada via the preferred diplomatic avenues and (3) all communication avenues have been exhausted.³¹

²⁴ Motion, para. 24.

²⁵ Prosecutor’s Response to Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada (“Response”), 13 June 2011, para. 24.

²⁶ Response, para. 27.

²⁷ Response, paras. 28-34.

²⁸ Response, para. 35.

²⁹ Decision on Nizeyimana Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada, 23 June 2011.

³⁰ Nizeyimana Defence Motion for the Trial Chamber to Request the President to Refer Canada’s Refusal to the Security Council (“Security Council Motion”), 24 November 2011.

³¹ Prosecutor’s Response to Defence Motion for the Trial Chamber to Request the President to Refer Canada’s Refusal to the Security Council, 29 November 2011, paras. 6-7.

DELIBERATIONS

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Article 28 of the Statute of the Tribunal

17. Article 28(2) of the Statute of the Tribunal (“Statute”) requires States to comply without undue delay with any requests for assistance or an order issued by the Trial Chamber. Rule 7bis of the Rules of Procedure and Evidence (“Rules”) provides for the discretionary power of a Trial Chamber to request the President to report a case of failure to comply with the cooperation obligation to the Security Council. The requirement for granting a request under Rule 7bis is that, except in cases to which Rules 11, 13, 59 or 61 applies, the Chamber has satisfied itself of the non-compliance of a State with its obligations under Article 28 of the Statute.

18. Whether or not to request the President to report a State’s failure to cooperate with the Tribunal to the Security Council is a matter that lies within the discretion of the Chamber.³² 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.³³

19. The Chamber notes that the Canadian Government has professed their willingness to comply with the Chamber’s decisions.³⁴ The Chamber does note, however, that the Canadian Government has thus far not assisted the Defence following the Chamber’s decision rendered in September 2011. Notwithstanding, the Chamber does not believe that the circumstances warrant a request to the President to report Canada to the Security Council at this stage. The Chamber reminds the Canadian Government of its obligation pursuant to Resolutions 955 and 1165 and Article 28(2) to cooperate without undue delay with the Tribunal’s request for assistance. The Chamber further notes the urgency of the matter in light of the oral arguments, which are to commence on 7 December 2011, and strongly urges the Canadian

³² *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-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 (TC), 19 October 2009 (“*Nzabonimana* Trial Decision of 19 October 2009”), para. 11; *The 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. 11; *The 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; *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.

³³ *Nzabonimana* Trial Decision of 19 October 2009, para. 18.

³⁴ See Second Motion, Annexure I.

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Government to assist the Defence on an expedited basis. Failure to do so may result in the Trial Chamber requesting the President to report the matter to the Security Council.

FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion;

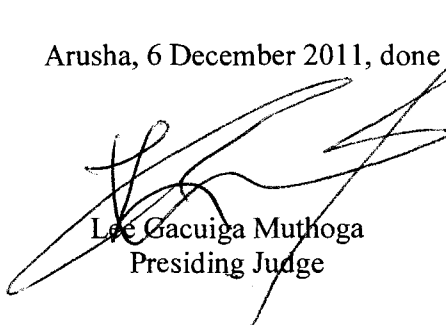
URGENTLY REQUESTS the Canadian Government to assist the Defence team for Ildéphonse Nizeyimana in accessing the immigration documents requested;

INVITES the Registry to inform the Chamber of the communications it has had with the Canadian Government to date;

DIRECTS the Registry to immediately transmit this Decision to the Canadian Government; and

DIRECTS the Registry to report back to the Chamber on the implementation of this Decision within 3 days after the filing of this Decision.

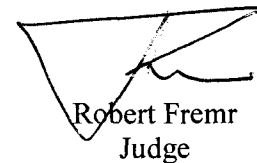
Arusha, 6 December 2011, done in English.



Lee Gacuiga Muthoga
Presiding Judge



Seon Ki Park
Judge



Robert Fremr
Judge

[Seal of the Tribunal]

