

372/H



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

CH

ICTR-98-44D-AR7bis

20 September 2010

{372/H – 360/H}

IN THE APPEALS CHAMBER

Before:

Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz
Judge Carmel Agius

ICTR Appeals Chamber

Date: 20th September 2010

Action: R. Tumbir

Copied To: Concerned Judges,

Parties, Judicial Archives,
LOs *[Signature]*

Registrar:

Mr. Adama Dieng

Decision of:

20 September 2010

CALLIXTE NZABONIMANA

v.

THE PROSECUTOR

Case Nos. ICTR-98-44D-AR7bis
ICTR-98-44D-AR7bis.2

**DECISION ON CALLIXTE NZABONIMANA'S INTERLOCUTORY
APPEAL ON THE ORDER RESCINDING THE 4 MARCH 2010 DECISION
AND ON THE MOTION FOR LEAVE TO APPEAL THE PRESIDENT'S
DECISION DATED 5 MAY 2010**

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *KOFFI KUMELID A. AFANDE*
SIGNATURE: *[Signature]* DATE: *20 Sept 2010*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seised of an interlocutory appeal ("Appeal"),¹ filed by Callixte Nzabonimana ("Nzabonimana"), concerning an order of Trial Chamber III of the Tribunal ("Impugned Order" and "Trial Chamber", respectively),² rescinding the Decision of 4 March 2010,³ issued pursuant to Rule 7bis of the Rules of Procedure and Evidence of the Tribunal ("Rules"). The Prosecution filed its response to the Appeal on 14 June 2010.⁴ Nzabonimana replied on 21 June 2010.⁵

2. The Appeals Chamber is also seised of "Nzabonimana's Motion for Leave to Appeal the Decision of the President of the International Criminal [sic] for Rwanda 'Decision on Nzabonimana's Motion for the Implementation of the Order of Trial Chamber III of March 2010 and for Allowing the Defence to Make Submissions Before the Security Council Dated 5 May 2010'", filed by Nzabonimana on 10 May 2010 ("Motion for Leave to Appeal the 5 May 2010 President's Decision"). The Prosecution responded on 17 May 2010.⁶ Nzabonimana replied on 24 May 2010.⁷

¹ Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision, 7 June 2010. On 8 June 2010, the Appeals Chamber granted Nzabonimana, Judges Pocar and Liu dissenting, a one-week extension of time to file the Appeal. See Decision on Nzabonimana's Urgent Motion for an Extension of Time to File an Interlocutory Appeal, 8 June 2010.

² *The 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.

³ *The 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 ("4 March 2010 Decision").

⁴ Prosecutor's Response and Annex "A" to Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision, 14 June 2010 ("Prosecution Response"). See also Prosecution Response, Annex B, Annex C.

⁵ Callixte Nzabonimana's Reply to Prosecutor's Response to Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision, 21 June 2010 ("Nzabonimana's Reply").

⁶ Prosecutor's Response to Nzabonimana's Motion for Leave to Appeal the Decision of the President of the International [sic] Tribunal for Rwanda "Decision on Nzabonimana's Motion for the Implementation of the Order of Trial Chamber III of March 2010 and for Allowing the Defence to Make Submissions Before the Security Council Dated 5 May 2010[]" and Annex 'A', 17 May 2010 ("Prosecution Response to Motion for Leave to Appeal the 5 May 2010 President's Decision")

⁷ Reply to Prosecutor's Response to "Nzabonimana's Motion for Leave to Appeal the Decision of the President of the International Criminal [sic] for Rwanda 'Decision on Nzabonimana's Motion for the Implementation of the Order of Trial Chamber III of March 2010 and for Allowing the Defence to Make Submissions Before the Security Council Dated 5 May 2010' [sic]", 24 May 2010 ("Nzabonimana's Reply to Prosecution Response").

A. Background

3. Nzabonimana has sought the cooperation of French authorities in obtaining information relevant to his alibi since January 2009.⁸ The Trial Chamber has issued a number of orders and decisions addressing alleged difficulties with the requested cooperation.⁹

4. On 4 March 2010, the Trial Chamber, noting the “continuing failure of France to provide the information requested”¹⁰ in previous decisions, requested the President of the Tribunal to “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 7bis of the Rules”.¹¹

5. On 8 March 2010, the Registrar notified the President of the Tribunal that he had been informed by the French Embassy in Tanzania that “all relevant available documents” would be transmitted to the Tribunal soon.¹² On 11 March 2010, the Registry received correspondence from the French Embassy in Tanzania, providing several documents.¹³ This correspondence and the

⁸ Decision on Callixte Nzabonimana’s Motion for Leave to Appeal an Alleged *Ultra Vires* Referral to the President, 9 February 2010, para. 2 and references cited therein. In response to the first request for assistance presented by Nzabonimana, the French Authorities provided the Registrar with copies of the excerpts of three diplomatic telegrams dated 7, 9 and 11 April 1994, listing persons taking refuge at the French Embassy in Kigali. See *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, Objet : Affaire le Procureur contre Callixte Nzabonimana*, 29 January 2009, with Annexes.

⁹ In this context, the Pre-Trial Chamber and the Trial Chamber addressed two judicial requests for cooperation to the French Government, pursuant to Article 28 of the Statute. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-PT, *Décision sur la requête urgente de Callixte Nzabonimana demandant à la Chambre d’ordonner à la France coopération et assistance*, 2 July 2009 (“2 July 2009 Decision”); *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-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, 19 October 2009 (“19 October 2009 Decision”). See also Appeal, Annex 5. By these decisions, the Pre-Trial Chamber and the Trial Chamber requested the cooperation of France on two main issues: (i) providing the list of all persons who sought refuge at the French Embassy in Kigali between 7 and 11 April 1994 (or, as indicated in the 19 October 2009 Decision, explaining why it did not possess such a list); and (ii) providing the list of personnel working at the French Embassy in Kigali between 7 and 11 April 1994 (the 2 July 2009 Decision also requested France to authorise personnel of the Embassy to meet Nzabonimana’s Defence). On 20 November 2009, the Registry, at the President’s request, sent a *Note Verbale* to the French Embassy in Tanzania requesting the assistance of the French authorities in obtaining the above-mentioned documents, attaching three certified copies of the Trial Chamber Decision of 13 November 2009, in which the Trial Chamber had referred the matter of French cooperation with the Tribunal to the President, pursuant to Rule 54 of the Rules. See *Note Verbale* from the Office of the Registrar to M. Jacques Champagne de Labriolle, French Ambassador in Dar es Salaam, Tanzania, dated 20 November 2009, Ref: ICTR/IOR/ERSPS/11/09/312-RD; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, 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, 13 November 2009, para. 39, Disposition. See also T. 9 November 2009 p. 8.

¹⁰ 4 March 2010 Decision, para. 43.

¹¹ 4 March 2010 Decision, Disposition.

¹² *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Registrar’s Submission Under Rule 33 (B) of the Rules of Procedure and Evidence on the “Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France’s Cooperation with the Tribunal”, 8 March 2010 (“Registrar’s Submissions”), para. 3. The Registrar indicated that the French Ambassador to Tanzania had informed him that “France ha[d] complied with the Chamber’s request” and that all available documents were being transmitted to the Tribunal. The Registrar added that “these new developments” might affect the 4 March 2010 Decision. See Registrar’s Submissions, paras. 3, 4.

¹³ Appeal, Annex 10. Correspondence from the French Embassy in Tanzania to the Registry of the Tribunal, No. 140/TPIR, dated 11 March 2010 (“11 March 2010 Correspondence”), and the documents annexed thereto.

appended documents were served on the parties on 16 March 2010 ("16 March 2010 Documents").¹⁴

6. On 17 March 2010, the President of the Tribunal, in an interoffice memorandum, requested the Presiding Judge of the Trial Chamber to inform him whether the 16 March 2010 Documents addressed in full the Trial Chamber's cooperation requests.¹⁵ On 30 March 2010, the Presiding Judge, on behalf of the Trial Chamber, sent an interoffice memorandum to the President of the Tribunal requesting him "to take no action on the matter at present" as it would issue a decision after considering "all the various submissions of the parties" relating to this matter.¹⁶

7. On 20 March 2010, the Court Management Section of the Tribunal ("CMS") indicated to the parties that "[s]hould [they] have any submission about that issue, [they were] requested to do it by Tuesday, 23rd Marh [sic] 2010, COB".¹⁷ Nzabonimana filed his submissions on 23 March 2010 submitting that the 16 March 2010 Documents were incomplete and redacted and that France was not in compliance with the cooperation orders previously issued by the Tribunal.¹⁸ The Prosecution did not file any submission,¹⁹ however, it responded to Nzabonimana's submissions on 24 March 2010.²⁰

8. On 21 April 2010, Nzabonimana requested the President of the Tribunal to implement the 4 March 2010 Decision, report the matter of the alleged refusal of France to cooperate with the Tribunal to the United Nations Security Council ("Security Council") and to allow him "to make submissions to the Security Council concerning the prejudicial conduct of France in his trial".²¹ He contended that "any steps taken by France after [the] request has been made [to the President of the

¹⁴ The parties acknowledge that they received the 16 March 2010 Documents on that day. See Appeal, para. 32; Prosecution Response, para. 6(b), fn. 6.

¹⁵ Interoffice Memorandum from the President of the Tribunal, addressed to Judge Bossa, Presiding Judge, Trial Chamber III, Ref.: ICTR/PRES/02/10, Subject: *Nzabonimana* - Cooperation with France, dated 17 March 2010 ("17 March 2010 Interoffice Memorandum"), para. 2. The President added that if the documents provided by France addressed in full the Trial Chamber's requests for cooperation "an order of the Chamber would be required that the request to the President to report non-cooperation of France to the Security Council is moot". See 17 March 2010 Interoffice Memorandum.

¹⁶ Interoffice Memorandum from Judge Bossa, Presiding Judge, Trial Chamber III, addressed to the President of the Tribunal, Subject: *Nzabonimana*: Cooperation of France, dated 30 March 2010 ("Interoffice Memorandum to the President"), para. 4.

¹⁷ Appeal, Annex 11, E-mail sent to the parties through CMS on 20 March 2010 ("20 March 2010 E-mail").

¹⁸ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Submissions Concerning the Documents Received from France on 16 March 2010, 23 March 2010 ("Nzabonimana's Submissions on Documents from France"), paras. 3, 5, 7, 20, 21, 25, Prayer.

¹⁹ See Impugned Order, para. 5.

²⁰ See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D-T, Prosecutor's Response to Defence Submissions Concerning the Documents Received from France on 16 March 2010, 24 March 2010 ("Prosecution Response to Nzabonimana's Submissions").

²¹ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D-T, 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, 21 April 2010 ("Motion for the Implementation of the 4 March 2010 Decision"), Prayer.

Tribunal pursuant to Rule 7bis] cannot delay or prohibit the President to act in accordance with the Chamber's request".²²

9. On 23 April 2010, the Trial Chamber issued the Impugned Order. The Trial Chamber considered that the information provided in the 16 March 2010 Documents "constitute[d] a new circumstance warranting reconsideration of its 4 March 2010 Decision";²³ found that France had "fulfilled the requests made by the Pre-Trial and Trial Chambers in Decisions dated 2 July 2009, 19 October 2009 and [...] 13 November 2009"; and concluded that France "has now complied with its obligations pursuant to Article 28 of the Statute."²⁴ As a result, the Trial Chamber rescinded the 4 March 2010 Decision by which it had requested the President of the Tribunal to report, pursuant to Rule 7bis of the Rules, the failure of the Government of France to comply with its obligations of cooperation with the Tribunal to the Security Council.²⁵

10. On 5 May 2010, in light of the Impugned Order, the President of the Tribunal dismissed as moot Nzabonimana's Motion for the Implementation of the 4 March 2010 Decision.²⁶ On 27 May 2010, the Trial Chamber granted certification to appeal the Impugned Order.²⁷

11. The Appeals Chamber will consider in turn the Appeal and the Motion for Leave to Appeal the 5 May 2010 President's Decision.

²² Motion for the Implementation of the 4 March 2010 Decision, para. 20; *see also* Motion for the Implementation of the 4 March 2010 Decision, paras. 24, 25. Nzabonimana also reiterated his complaint with respect to the alleged incompleteness of the 16 March 2010 Documents provided by France. *See* Motion for the Implementation of the 4 March 2010 Decision, para. 9.

²³ Impugned Order, para. 18. The Trial Chamber observed that "France provided lists of persons who sought refuge at the French Embassy in Kigali between 7 and 11 April 1994, and a more complete list of personnel working at the French Embassy" during this period. *See* Impugned Order, para. 18.

²⁴ Impugned Order, para. 20.

²⁵ Impugned Order, para. 20, Disposition.

²⁶ *The Prosecutor v. Callixte Nzabonimana*, Case No. 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 ("5 May 2010 President's Decision"), Disposition. The President considered that "it is also in the power of the Trial Chamber at any given moment until the request for transmission to the Security Council has been implemented to reconsider its decision and to rescind a request made under Rule 7 bis (B) [*sic*] if a change in circumstances occurs that affects the assessment of the Chamber that a Member State has violated its obligations under Article 28 of the Statute". *See* 5 May 2010 President's Decision, para. 6. The President further considered that "it is not within the jurisdiction of the President to replace the assessment of the Chamber about a Member State's violation of Article 28 of the Statute at the request of a party with his own. A Party disputing the assessment of the Chamber must seek to address this dispute through the normal appeals procedure". *See* 5 May 2010 President's Decision, para. 9.

²⁷ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Certification to Appeal the Decision of 23 April 2010, 27 May 2010 ("Decision on Motion for Certification to Appeal").

B. Applicable Law

1. Rule 7bis (A) of the Rules

12. Article 28 of the Statute of the Tribunal ("Statute") provides for the cooperation of States with the Tribunal. Pursuant to Rule 7bis (A) of the Rules, "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". Thus, under Rule 7bis (A) of the Rules, the President of the Tribunal effectively has the role of *nuncius*, simply transmitting to the Security Council the judicial findings of the relevant Chamber.²⁸

2. Law on Reconsideration

13. Although the Rules do not explicitly provide for it, according to the Tribunal's established jurisprudence, a Trial Chamber has the inherent discretionary power to reconsider its own decisions where new material circumstances have arisen that did not exist at the time of the original decision or where the decision was erroneous and has caused prejudice or injustice to a party.²⁹

C. Analysis

1. Preliminary Matters

14. The Appeals Chamber notes that Nzabonimana does not challenge the Trial Chamber's findings that, in transmitting the information contained in the 16 March 2010 Documents, France "fulfilled the requests made by the Pre-Trial and Trial Chambers in Decisions dated 2 July 2009, 19 October 2009, and [...] 13 November 2009."³⁰

²⁸ Cf. *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, 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 ("*Blaškić* Judgement on Request for Review"), para. 37.

²⁹ *Prosecutor v. Stanislav Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009, 7 July 2010, para. 16. The Appeals Chamber recalls, however, that there is no power to reconsider a final judgement. See *Prosecutor v. Zoran Žigić aka "Ziga"*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9; *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52B-R, Decision on Ferdinand Nahimana's Motion for Reconsideration of the Appeal Judgement, 30 June 2010, para. 6.

³⁰ Impugned Order, para. 20. This is confirmed by Nzabonimana's request to the Appeals Chamber to report to the Security Council - or to order the President of the Tribunal to report - "France's *past failure* to cooperate" (emphasis added). See Appeal, Prayer. However, pointing to the interval between the requests of such information and their transmission, he contends that France's compliance was not "without undue delay" and, therefore, amounted to a violation of Article 28. See Nzabonimana's Reply, para. 11.

15. Nzabonimana submits that the Trial Chamber erred in law in (i) rescinding its 4 March 2010 Decision in light of France's subsequent cooperation;³¹ and (ii) doing so without hearing submissions from the parties.³² Nzabonimana also requests that the Appeals Chamber provide general guidelines on the Trial Chambers' discretion to issue Rule 7bis requests, and to overturn the criteria listed by the Trial Chamber in its 19 October 2009 Decision.³³

16. Nzabonimana further requests that the Appeals Chamber set aside the Impugned Order,³⁴ and report France's non-cooperation to the Security Council,³⁵ or, in the alternative, acknowledge France's failure to cooperate and order the President of the Tribunal to report France to the Security Council, pursuant to Rule 7bis of the Rules.³⁶

17. The Appeals Chamber declines to address Nzabonimana's request to provide criteria to guide Trial Chambers' discretion pursuant to Rule 7bis of the Rules.³⁷ This matter falls outside the scope of the present Appeal, which is limited to whether the Trial Chamber erred in making the Impugned Order.³⁸

18. The Appeals Chamber also notes Nzabonimana's allegation that France is currently failing to cooperate with respect to a request for assistance addressed to the French authorities following receipt of the 16 March 2010 Documents. This failure to cooperate pertains to the facilitation of interviews with certain individuals mentioned in the 16 March 2010 Documents.³⁹ On 4 June 2010, the Trial Chamber denied Nzabonimana's request for an order to France to provide such assistance.⁴⁰ The Appeals Chamber will not address these submissions, as they do not fall within the scope of the present Appeal.

19. The Appeals Chamber now turns to consider Nzabonimana's arguments relating to the Trial Chamber's power to reconsider the 4 March 2010 Decision and the Trial Chamber's alleged failure to allow the parties to present submissions in this regard.

³¹ Appeal, paras. 50(1), 52-66.

³² Appeal, paras. 50(2), 67-71.

³³ Appeal, paras. 50(3), 72. *See also* Appeal, paras. 73-75.

³⁴ Appeal, para. 1, Prayer.

³⁵ Appeal, paras. 50(4), 78.

³⁶ Appeal, paras. 2, 79. Nzabonimana submits that the Appeals Chamber has the inherent power to apply an effective remedy when the Trial Chamber has made an error of law. *See* Appeal, para. 77.

³⁷ Appeal, paras. 50(3), 72-76.

³⁸ *See* Decision on Motion for Certification to Appeal, paras. 18-23.

³⁹ *See* Appeal, para. 62; Nzabonimana's Reply, para. 13.

⁴⁰ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France, 4 June 2010; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Certification to Appeal the "Decision on Third Urgent Defence Motion Requesting an Order Directed at France", 14 July 2010.

2. Whether the Trial Chamber had the inherent power to reconsider and rescind the 4 March 2010Decision

20. Nzabonimana submits that the Trial Chamber erred in law in rescinding its 4 March 2010 Decision.⁴¹ While he acknowledges that, pursuant to Rule 54 of the Rules, a Trial Chamber has the inherent power to reconsider its own decision when new circumstances arise,⁴² he asserts that, once a Trial Chamber has requested the President to report a State's failure to cooperate with the Tribunal to the Security Council pursuant to Rule 7bis of the Rules, it cannot rescind such a request in light of subsequent cooperation by the State.⁴³ Nzabonimana contends that a request under Rule 7bis of the Rules is a sanction, not a warning.⁴⁴

21. The Prosecution responds that Nzabonimana's interpretation of Rule 7bis of the Rules is "absurd and unsubstantiated".⁴⁵ It submits that the Trial Chamber has the power to vary its previous orders in view of newly arising circumstances,⁴⁶ and that Nzabonimana has not produced a single authority suggesting that an exception would exist with regard to orders issued pursuant to Rule 7bis of the Rules.⁴⁷

22. Nzabonimana replies that the Prosecution has not cited any case-law showing that a Trial Chamber can rescind a Rule 7bis order pursuant to Rule 54 of the Rules.⁴⁸ Further, he submits that the 16 March 2010 Documents do not constitute a "material change" in circumstances for the application of Rule 54 of the Rules,⁴⁹ because "subsequent cooperation does not remedy past non-cooperation, deserving of denunciation".⁵⁰

23. The Appeals Chamber recalls that a Chamber may reconsider a decision when there has been a change in the material circumstances before it.⁵¹ This is equally true when the decision is

⁴¹ Appeal, para. 54.

⁴² Appeal, para. 54.

⁴³ Appeal, paras. 50(1), 54. Nzabonimana asserts that the plain language of Rule 7bis of the Rules supports such interpretation as it uses the past tense when referring to the finding of a Trial Chamber that "a State has failed to comply" with an obligation under Article 28 of the Statute. See Appeal, para. 52 (emphasis in the original). See also Appeal, para. 51.

⁴⁴ Appeal, para. 53, referring to *Blaškić* Judgement on Request for Review, para. 33, which states that "[i]t is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State". Nzabonimana further argues that "[b]oth Rule 7bis and Article 28 are tactics to pressure a State to cooperate", and that, since "Rule 7bis [of the Rules] cannot simply duplicate the function of Article 28 [of the Statute]", it should have the further purpose of "punish[ing] past non-cooperation by a State". See Appeal, para. 53.

⁴⁵ Prosecution Response, para. 11. See also Prosecution Response, paras. 13, 15, 16.

⁴⁶ Prosecution Response, para. 12, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *The Prosecutor v. Édouard Karemera et al.*, 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 Witness GAY, 28 September 2007, para. 10.

⁴⁷ Prosecution Response, para. 14. See also Prosecution Response, paras. 85-89.

⁴⁸ Nzabonimana's Reply, para. 14.

⁴⁹ Nzabonimana's Reply, para. 9.

⁵⁰ Nzabonimana's Reply, para. 11. See also Nzabonimana's Reply, para. 12.

⁵¹ See *supra*, para. 13 and references cited therein.

issued pursuant to Rule *7bis* of the Rules. A Trial Chamber is not precluded from reconsidering its decision to request the President to report the non-cooperation of a State to the Security Council when a change in circumstances occurs, particularly where, as in this case, that change of circumstance was cooperation by the State concerned.

24. As to Nzabonimana's related submission that the 16 March 2010 Documents do not constitute a "material change" in circumstances as they do not change the fact that France "has failed" to cooperate as of 4 March 2010 and subsequent cooperation does not remedy past non-cooperation,⁵² the Appeals Chamber considers that while the subsequent cooperation of France does not rectify its earlier failures, the purpose of Rule *7bis* of the Rules is to report non-compliance of a State with its obligation, under Article 28 of the Statute, to cooperate with the Tribunal. Accordingly, the Appeals Chamber is satisfied that subsequent cooperation by France amounted to a new material circumstance for the exercise of the Trial Chamber's power of reconsideration.

25. The Appeals Chamber concludes that the Trial Chamber did not err in finding that it had the power to reconsider its 4 March 2010 Decision and that the delivery by France of the 16 March 2010 Documents amounted to new circumstances.

3. Whether the Trial Chamber erred by failing to allow the parties to make submissions

26. Nzabonimana contends that the Trial Chamber erred in failing to allow the parties to make submissions before reconsidering the 4 March 2010 Decision.⁵³ He submits that, while the Trial Chamber invited the parties to make submissions regarding the disclosure of the 16 March 2010 Documents, it did not inform them of its intention to reconsider the 4 March 2010 Decision.⁵⁴ He also claims that, due to the informal nature of the request, sent by e-mail, he could not have foreseen that they would be used in that context.⁵⁵ Nzabonimana further submits that, had he been informed of the purpose of the submissions, he would have presented different arguments relating to the interpretation of Rules *7bis* and 54 of the Rules and would not have mentioned certain other issues.⁵⁶

27. The Prosecution responds that the parties were heard prior to the rendering of the Impugned Order.⁵⁷ It submits that they were requested to comment on the 16 March 2010 Documents by

⁵² Nzabonimana's Reply, paras. 9-11.

⁵³ Appeal, para. 71.

⁵⁴ Appeal, para. 68.

⁵⁵ Appeal, para. 69. In addition, Nzabonimana argues that he also learned of the Interoffice Memorandum to the President only through the Impugned Order and was therefore unable to express his position thereon. See Appeal, para. 68.

⁵⁶ Appeal, para. 70; Nzabonimana's Reply, paras. 17, 18.

⁵⁷ Prosecution Response, para. 18.

CMS, on behalf of the Trial Chamber.⁵⁸ It also contends that the Trial Chamber was not required to make any further clarification, because it was clear that these submissions, “received from the French authorities as an on going [*sic*] obligation under Article 28,”⁵⁹ might have had an “impact on the status of France’s compliance”.⁶⁰ Additionally, the Prosecution submits that, pursuant to Rule 54 of the Rules, the Trial Chamber was not obliged to request the parties’ submissions prior to reconsidering its decision.⁶¹

28. In his Reply, Nzabonimana acknowledges that Rule 54 of the Rules does not require the Chamber to first hear the parties prior to reconsideration, but submits that “a Chamber acting in good faith would ask for submissions from the parties, given that it was one of the parties who initiated the Rule 7bis Motion in first place”, and that, in the adversarial system, a Trial Chamber should ask for both parties’ arguments.⁶²

29. The Appeals Chamber considers that while a Trial Chamber may *proprio motu* decide to reconsider its own decision, this does not relieve it of its duty to hear a party whose rights may be affected by this reconsideration.⁶³

30. In the present case, the Trial Chamber merely allowed the parties to present submissions in relation to the disclosure of the 16 March 2010 Documents,⁶⁴ but failed to indicate that it considered the 16 March 2010 Documents to be a new circumstance and that it was inclined to reconsider its 4 March 2010 Decision in light thereof.⁶⁵ Accordingly, the Appeals Chamber finds that the Trial Chamber violated Nzabonimana’s right to be heard by failing to properly inform the parties of its intention to reconsider the 4 March 2010 Decision and in not inviting them to make submissions on the matter.

31. While the Appeals Chamber is satisfied that the Trial Chamber erred in failing to advise the parties of action it might take in light of the 16 March 2010 Documents, the Appeals Chamber is not satisfied that Nzabonimana has demonstrated that he was prejudiced by that failure. The Trial

⁵⁸ Prosecution Response, para. 19.

⁵⁹ Prosecution Response, para. 22.

⁶⁰ Prosecution Response, para. 25. See also Prosecution Response, paras. 22-24. The Prosecution further submits that knowledge that the submission would be considered in reconsidering the 4 March 2010 Decision, would not have “changed or added to the essence” of the arguments raised by Nzabonimana. See Prosecution Response, para. 26.

⁶¹ Prosecution Response, paras. 31, 34, 35.

⁶² Nzabonimana’s Reply, para. 16.

⁶³ See *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 27, referring to *R. v. Barking and Dagenham Justices, ex parte Director of Public Prosecutions* [1995] Crim LR 953, and *Director of Public Prosecution v. Cosier*, Q.B.D., 5 April 2000.

⁶⁴ Appeal, Annex 11, 20 March 2010 E-mail.

⁶⁵ The Appeals Chamber also notes that the Interoffice Memorandum to the President, which revealed that the Trial Chamber was in the process of reconsidering the 4 March 2010 Decision, was not copied to the parties. See Interoffice Memorandum to the President.

Chamber considered Nzabonimana's submissions relating to the 16 March 2010 Documents,⁶⁶ and the Prosecution's response,⁶⁷ when issuing the Impugned Order.⁶⁸ In his Submissions on Documents from France, Nzabonimana specifically requested that the Trial Chamber implement the order issued in its 4 March 2010 Decision and request the President of the Tribunal to seise the Security Council of the matter of France's non-cooperation.⁶⁹ In this respect, the Trial Chamber was aware of Nzabonimana's view that the 16 March 2010 Documents should not impact on the Trial Chamber's decision requesting the President of the Tribunal to report France's previous non-cooperation to the Security Council and his reasoning thereto.

32. The Appeals Chamber also considers that although Nzabonimana contends that, had he known the intention of the Trial Chamber to reconsider its 4 March 2010 Decision, he would have made different submissions, he does not show that the substance of his submissions would have been substantially affected so as to impact the Trial Chamber's analysis. He merely indicates that he would not have mentioned "issues not related to reconsideration, such as the Mount Ndiza soldiers",⁷⁰ and would have claimed that the Trial Chamber was not entitled to reconsider its 4 March 2010 Decision.⁷¹ The Appeals Chamber finds that neither of these arguments could have impacted the Impugned Order. The Trial Chamber correctly interpreted the law on reconsideration and Nzabonimana does not explain how he suffered prejudice from mentioning in his submissions issues not related to reconsideration.

D. Motion for Leave to Appeal the 5 May 2010 President's Decision

33. Nzabonimana seeks leave to appeal the 5 May 2010 President's Decision.⁷² He argues that the Appeals Chamber has inherent jurisdiction to allow a party to appeal even in the absence of a rule providing for such an appeal.⁷³ He submits that the President erred in (i) considering the conduct of France subsequent to the Trial Chamber's request to report its failure to cooperate to the

⁶⁶ Nzabonimana submitted, *inter alia*, that the telegrams listing the persons who sought refuge at the French Embassy in Kigali, were incomplete and redacted. See Nzabonimana's Submissions on Documents from France, paras. 3-25.

⁶⁷ The Prosecution objected, *inter alia*, to the admission into evidence of the 16 March 2010 Documents, which had been requested by Nzabonimana. See Prosecution Response to Nzabonimana's Submissions, paras. 4-8; Nzabonimana's Submissions on Documents from France, paras. 26-29, Prayer. The Appeals Chamber notes that on 7 May 2010 the Trial Chamber admitted the 16 March 2010 Documents into evidence. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D-T, Decision on Defence Motion for the Admission of Documentary Evidence, 7 May 2010.

⁶⁸ Impugned Order, paras. 9-14. The Trial Chamber found Nzabonimana's submissions on the incompleteness of the lists of persons who sought refuge at the French Embassy unsubstantiated and amounted to mere speculation. It considered that "the information provided by France now allows the Defence to move forward with its investigations [on the alibi]". See Impugned Order, para. 19.

⁶⁹ Nzabonimana's Submissions on Documents from France, para. 25. The Appeals Chamber notes that this request was addressed by the Trial Chamber in the Impugned Order. See Impugned Order, paras. 12, 19, 20.

⁷⁰ Nzabonimana's Reply, para. 17. See also Appeal, para. 70.

⁷¹ Nzabonimana's Reply, para. 17. See also Nzabonimana's Reply, para. 18.

⁷² Motion for Leave to Appeal the 5 May 2010 President's Decision, para. 1, Prayer.

⁷³ Motion for Leave to Appeal the 5 May 2010 President's Decision, para. 27.

Security Council;⁷⁴ (ii) relying on the Trial Chamber's erroneous findings that France had fulfilled its requests for cooperation;⁷⁵ and (iii) relying only on the Trial Chamber's findings in the Impugned Order without considering his submissions on both the incompleteness of the 16 March 2010 Documents and on France's failure to implement further requests for cooperation.⁷⁶

34. The Prosecution responds that the matter is not properly before the Appeals Chamber and should be dismissed for violating Rule 73 of the Rules.⁷⁷ It also submits that the matter is already *sub judice*.⁷⁸ In addition, it argues that Nzabonimana requested the President to act *ultra vires*, in contravention of the Impugned Order.⁷⁹

35. As recognised in the 5 May 2010 President's Decision, the role of the President of the Tribunal under Rule 7bis (A) of the Rules is simply to transmit the judicial finding of the relevant Chamber to the Security Council.⁸⁰ The Appeals Chamber therefore agrees that "it is not within the jurisdiction of the President to replace the assessment of the Chamber about a Member State's violation of Article 28 of the Statute at the request of a party with his own".⁸¹ Accordingly, once a Trial Chamber has rescinded its request under Rule 7bis of the Rules, the President is no longer seised of the matter and his subsequent decision not to report the matter to the Security Council cannot be successfully challenged on appeal.

⁷⁴ Motion for Leave to Appeal the 5 May 2010 President's Decision, paras. 26, 29-39.

⁷⁵ Motion for Leave to Appeal the 5 May 2010 President's Decision, paras. 26, 40-42.

⁷⁶ Motion for Leave to Appeal the 5 May 2010 President's Decision, paras. 43-46, 52-54.

⁷⁷ Prosecution Response to Motion for Leave to Appeal the 5 May 2010 President's Decision, p. 2, paras. 3, 12, 13, 16, 17, 21.

⁷⁸ Prosecution Response to Motion for Leave to Appeal the 5 May 2010 President's Decision, para. 20. *See also* Prosecution Response to Motion for Leave to Appeal the 5 May 2010 President's Decision, paras. 6, 16-20, 22. *See also* Nzabonimana's Reply to Prosecution Response, para. 8.

⁷⁹ Prosecution Response to Motion for Leave to Appeal the 5 May 2010 President's Decision, paras. 4, 5, 53-55.

⁸⁰ 5 May 2010 President's Decision, para. 5, *referring to Blaškić* Judgement on Request for Review, para. 37.

⁸¹ 5 May 2010 President's Decision, para. 9.

E. Disposition

36. For the foregoing reasons, the Appeals Chamber

DENIES the Appeal; and

DISMISSES the Motion for Leave to Appeal the 5 May 2010 President's Decision.

Done this twentieth day of September 2010,
at The Hague, The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to be "P. Robinson", written over a horizontal line.

Judge Patrick Robinson
Presiding