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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 23 February 2005

THE PROSECUTOR

v.

Édouard KAREMERA

Mathieu NGIRUMPATSE

Joseph NZIRORERA

Case No. ICTR-98-44-PT

DECISION ON MOTION TO VACATE SANCTIONS

Rules 73(F) and 120 of the Rules of Procedure and Evidence

Office of the Prosecutor:
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Defence Counsel for Mathieu Ngirumpatse
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Defence Counsel for Joseph Nzirorera
Peter Robinson

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Motion to vacate sanctions" ("Motion"), filed by the Defence of Joseph Nzirorera ("Defence") on 6 July 2004;

CONSIDERING the Prosecutor's Response thereto, filed on 12 July 2004 and Nzirorera's Reply's Brief thereto, filed on 22 July 2004;

HEREBY DECIDES the Motion pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. While the appeal on continuation of the trial was pending before the Appeals Chamber,[1] the parties in the present case continued to file motions. Those motions remained pending. Upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that six of those motions filed by Nzirorera, including the current Motion, were still pending.[2] Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera,[3] the Chamber may now address these Motions.

ARGUMENTS OF THE PARTIES

Defence Motion

2. The Defence submits that Rule 73(F) of the Rules, as applied by the Tribunal, violates the principle of equality of arms. It contends that sanctions have been imposed against Defence Counsel in all major trials held at the Tribunal, while the Prosecutor has never been more than warned. The application of the Rule in this way would discourage the Defence from bringing motions, and would affect the right to a fair trial. The Defence relies on jurisprudence of the International Criminal Tribunal for Former Yugoslavia ("ICTY") and European Court of Human Rights on equality of arms.[4] The Defence also claims that five specific sanctions decided by the Chamber against it were unwarranted and unjust. It submits

[1] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-AR15bis.2 (*Karemera et al.*), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[2] See Oral Decision, T. 26 November 2004, pp. 1-2.

[3] *Karemera et al.*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

[4] *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999; European Court of Human Rights (ECHR), *Papageorgiou v. Greece*, 9 May 2003; ECHR, *Dombo Beheer B.V. v. The Netherlands*, 27 October 1993; ECHR, *Suominen v. Finland*, 1 July 2003; ECHR, *Lanz v. Austria*, 31 January 2002.

that the Decision of 4 September 2003, rejecting the Motion and denying the payment of any costs or fees, was based on a wrong principle because the request sought the very same relief ordered by the ICTY in other cases.[5] The Decision of 29 September 2003 and the sanction imposed thereby would be also wrong because, contrary to the Chamber's view, the Decision granting protective measures to Prosecution witnesses would clearly apply to all "potential Prosecution witnesses" and not only to protected witnesses.[6] The filing of a Motion would have therefore been necessary. The Defence alleges that the denial to pay half of the fees and costs associated with its Motion, decided on 7 October 2003, was based on the failure to appreciate that, the legal basis and items requested in the motions were different, justifying the filing of two separate motions.[7] It contends that the sanction decided in the Decision of 29 March 2004 should be removed because the motion raised a legitimate legal issue for which there was no applicable precedent, and failure to have raised that objection would have precluded the possibility of raising it on appeal.[8] For the same reason, it claims the withdrawal of the sanction imposed by the Decision of 29 March 2004 on the Motion to dismiss the indictment as void *ab initio*.[9] Finally, the Defence alleges that if the sanctions are not vacated, its Lead Counsel will be obliged to report them to his State Bar, which could result in the loss of public or judicial employment opportunities in the future.

Prosecution

3. The Prosecution opposes the Motion. It argues that, pursuant to the jurisprudence of both *ad hoc* Tribunals, the Defence does not meet the standard for reconsideration.[10] It further considers that there is insufficient data upon which to conclude with any degree of statistical confidence that there is any appreciable disparity in sanctions enforcement.

Defence Reply

4. The Defence argues that three circumstances intervened since the Decisions imposing sanctions were rendered: first, the Trial Chamber is reconstituted with a new presiding Judge; second, the President's Decision of 26 January 2004[11] and the Appeals Chamber's Decision of 9 June 2004[12] have ruled for the first time that sanctions imposed under Rule 73(F) of the Rules are not subject to review of any kind; and third, the Appeals Chamber has stated that

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[5] *Karemera et al.*, Decision on the Defence Motion to Order the Government of Rwanda to Show Cause (TC), 4 September 2003.

[6] *Karemera et al.*, Decision on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu, and Omar Serushago (TC), 29 September 2003.

[7] *Karemera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003.

[8] *Karemera et al.*, Décision relative à la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence : Chapitre VII de la Charte des Nations Unies (TC), 29 March 2004.

[9] *Karemera et al.*, Décision relative aux requêtes de Karemera et Nzirorera aux fins d'invalidation de l'acte d'accusation pour vices de procédure et forme (TC), 29 March 2004.

[10] *The Prosecutor v. Hazim Delic*, Case No. IT-96-21-A, Decision on Hazim Delic's Emergency Motion to Reconsider Denial of Request of Provisional Release (AC), 1 June 1999; *The Prosecutor v. Eliezer Niyitegeka*, No. ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003 (AC), 19 December 2003.

[11] *Karemera et al.*, Decision on Lead Counsel's Request to the President for Review of Sanctions Imposed Pursuant to Rule 73(F), 26 January 2004.

[12] *Karemera et al.*, Decision on Counsel's Appeal from Rule 73(F) Decisions (AC), 9 June 2004.

"Trial Chambers should use the power to impose sanctions cautiously".[13] The Defence also asserts that the only provision providing the possibility to impose sanction on the Prosecutor would be Rule 46(A) of the Rules, which prohibits the imposition of sanctions without a prior warning, a requirement not requested by Rule 73(F).

DELIBERATIONS

5. On the merits, the Chamber will consider separately the question of the consistency of Rule 73(F) of the Rules as applied by the Tribunal with the equality of arms principle, on one hand, and the specific sanctions imposed on the Lead Counsel for the Accused Nzirorera by the Chamber, on the other hand.

On the Equality of Arms

6. Rule 73(F) of the Rules prescribes that in addition to the sanctions provided by Rule 46, sanctions may be imposed against Counsel if he or she brings a Motion, including a preliminary Motion, which, in the Chamber's view, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part of fees associated with the motion and/or costs thereof. The Chamber is of the view that such a Rule, which grants a court or a tribunal an effective power to regulate its own proceedings, including the conduct of the parties, is reasonably required in any judicial system. The power to impose sanctions should, however, be exercised cautiously, bearing in mind the interests of justice and the right to a fair trial. The need for caution is also emphasized by the absence of appellate review.[14]

7. The wording of Rule 73(F) of the Rules does not distinguish between Counsel for the Prosecution or the Defence. The specific power to order non-payment of fees associated with a Motion, which could only refer to Defence Counsel, because of the system for remuneration, is merely included among the sanctions that the Chamber could impose. There is nothing in the Rule which removes the power of the Chamber to impose sanctions of any other kind on Prosecution Counsel. The Chamber also notes that the power to impose sanctions pursuant to Rule 46(A) of the Rules when the conduct of any Counsel remains "offensive or abusive, obstructs the proceedings or is otherwise contrary to the interests of justice" is additional to the power contained in Rule 73(F). The requirement of a warning prior to the imposition of sanctions is equally applicable to Counsel for both sides. The Chamber does not consider that any discrimination or violation of the equality of arms may arise since the power to impose sanctions may be applied to either the Prosecution or the Defence.

8. The Chamber notes that the situations addressed by the jurisprudence quoted by the Defence were not similar to the present case and, therefore, do not support its Motion. The Chamber is also not satisfied with the statistical arguments raised by the Defence. Numerous motions were filed by the Defence in contrast to the few filed by the Prosecution and the Defence has not shown that, for similar behavior, the Prosecution was only warned, while the Lead Counsel for Nzirorera was sanctioned. No statistical analysis was made which

[13] *Karemera et al.*, Decision on Interlocutory Appeals Regarding Participation of *Ad Litem* Judges (AC), 11 June 2004.
[14] *Karemera et al.*, Decision on Counsel's Appeal from Rule 73(F) Decisions (AC), 9 June 2004.

could permit any conclusion on the existence of any discriminatory application of the Rule 73(F) of the Rules.

On the Specific Sanctions Imposed on the Lead Counsel for Nzirorera

9. The Rules do not contain any specific power for a Chamber to reconsider decisions on motions. But as an analogy it is noted that, pursuant to Rule 120 of the Rules, a Trial Chamber may review a judgment, at the request of a party, where a new fact has been discovered which was not known to the moving party at the time of the proceedings before the Trial Chamber and could not have been discovered through the exercise of due diligence. In *Barayagwiza Case,*[15] the Appeals Chamber stated that the mechanism of review requires satisfaction of four criteria: "there must be a new fact; this fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision".[16] The power to reconsider decisions on motions has been exercised on a number of occasions by the Tribunal.[17] Reconsideration is, however, an exceptional measure that is available only in particular circumstances, including new circumstances that have arisen since the filing of the impugned Decision that affects its premise.[18]

10. The Chamber has addressed the arguments raised by the Defence in its Motion in relation to each impugned Decisions. First, it is noted that one of the impugned decisions, filed on 29 September 2003, has already been reconsidered. The application was rejected on the ground that none of the reasons submitted constituted special circumstances warranting reconsideration. The Chamber is of the view that repeated reconsideration would be inconsistent with the interests of justice and the principle of *res judicata*. Accordingly, the request to reconsider the Decision of 29 September 2003 is rejected. Second, the Chamber notes that, in each case for which reconsideration is sought, the Defence's contention is only based on the assumption that the Chamber made an error in the application of the law to the relevant facts, and that, consequently, its discretionary power was exercised on wrong principles. The application of law however does not constitute a new fact that could lead to reconsideration. The Chamber also considers that contrary to Nzirorera's contentions, the changed composition of the Bench, the lack of competence of the President and of the Appeals Chamber to review Decisions imposing sanctions and the Appeals Chamber statement on the duty to be cautious in the imposition of sanctions, do not constitute new circumstances which could affect the basis of the impugned Decisions and could justify their reconsideration. The Chamber notes that the sanctions may lead to consequences in Lead

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[15] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, paras. 37 and seq (*Barayagwiza* Decision).
[16] *Barayagwiza* Decision, para. 41.
[17] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (*Bagosora et al.* Case), Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003; *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Reconsideration of the Decision of the "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and abuse of process'" (TC), 20 May 2004; *Bagosora et al.* Case, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)" (TC), 14 July 2004.
[18] *Ibid.*

Council home jurisdiction; however, the Chamber does not consider it as one of the criteria for reconsideration. The Chamber is therefore not satisfied that the Defence has shown the existence of circumstances that were not known at the time of the impugned Decisions and which could have affected their outcome.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 23 February 2005, done in English.

Dennis C. M. Byron
Presiding Judge

Emile Francis Short
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]