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Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

ICTR-07-91-A  
26<sup>th</sup> June 2009  
{106/H - 96/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Andréia Vaz, Presiding  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Theodor Meron

**Registrar:** Mr. Adama Dieng

**Decision of:** 26 June 2009

*Handwritten vertical note:*  
29/06/2009

Léonidas NSHOGOZA  
v.

THE PROSECUTOR

Case No. ICTR-2007-91-A

**DECISION ON APPEAL CONCERNING SANCTIONS**

**Counsel for the Defence**  
Ms. Allison Turner

**Office of the Prosecutor**  
Mr. Hassan Bubacar Jallow  
Mr. Richard Karegyesa  
Mr. Abdoulaye Seye  
Mr. Dennis Mabura

**ICTR Appeals Chamber**  
Date: 26-June-2009  
Action: RTJ  
Copied To: Concerned Judges,  
Parties, Judicial Archives,  
LOs, LSS  
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**ICTR  
CENTRAL REGISTRY**  
29 JUN 2009  
ACTION: APPEALS/CMS  
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NAME / NOM: K. E. E. KUMELIO A. AFANDE  
SIGNATURE: *[Handwritten signature]* DATE: 26 June 2009

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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 seized of the "Defence Counsel Appeal as of Right from Sanctions Decisions" filed by Léonidas Nshogoza's Defence Counsel, Ms. Allison Turner ("Counsel"), on 25 March 2009 ("Appeal").<sup>1</sup>

#### A. Procedural History

2. Léonidas Nshogoza ("Accused"), a former Defence investigator in the case against Jean de Dieu Kamuhanda,<sup>2</sup> is charged with contempt of the Tribunal and attempt to commit acts punishable as contempt pursuant to Rule 77 of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>3</sup>

3. On 31 December 2008, the bench of Trial Chamber III of the Tribunal seized of Léonidas Nshogoza's case ("Trial Chamber"), noting that the trial was to start on 9 February 2009, ordered the Defence to file *ex parte* a list of witnesses it intended to call to testify.<sup>4</sup> The Defence subsequently filed a list of witnesses containing 40 names.<sup>5</sup>

4. Considering that the Defence was intending to call an excessive number of witnesses to prove the same facts, the Trial Chamber ordered it to reduce the witness list on 12 February 2009.<sup>6</sup> On 16 February 2009, the Defence filed a revised list of witnesses indicating that it intended to call 36 witnesses to testify, including the Accused.<sup>7</sup> The following day, the Trial Chamber issued a new order instructing the Defence to further reduce the number of witnesses it intended to call to testify and to provide the Trial Chamber with a "significantly reduced revised preliminary Witness List,

<sup>1</sup> Communicated by the Registry to the Appeals Chamber on 16 April 2009.

<sup>2</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A.

<sup>3</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-I, Indictment, 7 January 2008.

<sup>4</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Order for the Defence to File a List of Witnesses, 31 December 2008, p. 2.

<sup>5</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Defence Strictly Confidential, Ex Parte and Under Seal Filing, confidential and *ex parte*, 9 January 2009, Annexure A (containing the list of 34 witnesses); *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Defence Further Strictly Confidential, Ex Parte and Sealed Filing, confidential and *ex parte*, 16 January 2009, Annexure B (containing a list of six additional witnesses). Pursuant to the "Order for the Defence to File a Summary of Anticipated Witness Testimony" issued on 28 January 2009, the Defence filed the "Ex Parte Preliminary List of Defence Witness Summaries Filed Pursuant to Court Order of 28 January 2009" which listed 45 witnesses, including the Accused.

<sup>6</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Ex Parte Order for the Defence to Reduce its List of Witnesses, confidential and *ex parte*, 12 February 2009, pp. 2, 3.

<sup>7</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Ex Parte Revised Preliminary List of Defence Witness Summaries Filed Pursuant to Court Order of 12 February 2009, confidential and *ex parte*, 16 February 2009, Annexure A. In this filing, the Defence also provided a list of witnesses whose written statements it intended to have admitted under Rule 92bis of the Rules.

[...] along with a summary of anticipated testimony” no later than 18 February 2009.<sup>8</sup> The Defence failed to comply with this order and the Trial Chamber again ordered it to file the revised list and the necessary documents no later than 20 February 2009.<sup>9</sup> In the revised list of witnesses it then filed, the Defence indicated that it intended to call 22 witnesses, including the Accused.<sup>10</sup>

5. On 23 February 2009, the Trial Chamber directed the Defence to further reduce the number of witnesses it intended to call to no more than ten and to file a revised witness list by 25 February 2009.<sup>11</sup> By way of a motion filed on 25 February 2009, the Defence moved the Trial Chamber for reconsideration of its 23 February 2009 Order, which the Trial Chamber denied on 26 February 2009.<sup>12</sup> On 2 March 2009, the Defence filed a revised list of witnesses, containing 22 names, including the Accused’s.<sup>13</sup> The same day, it also filed an application before the Appeals Chamber for leave to appeal the 26 February 2009 Decision.<sup>14</sup>

6. On 3 March 2009, noting that the Defence had failed to comply with its order to reduce the witness list, the Trial Chamber ordered the Defence to file the reduced list no later than the following day.<sup>15</sup> The Trial Chamber also issued a warning to the Counsel pursuant to Rule 46 of the Rules “for her failure to comply with the [Trial Chamber’s orders]” and cautioned her “that, having now been warned twice by the Chamber, further misconduct may lead the Chamber to consider imposing sanctions in accordance with the Rules”.<sup>16</sup>

7. In written submissions filed on 6 March 2009, the Counsel explained, *inter alia*, that she was conducting investigations in Rwanda and that it was impossible for her to comply with the Trial Chamber’s order until she was able to consult the Accused upon her return in Arusha,

<sup>8</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, *Ex Parte* Order for the Defence to Further Reduce its List of Witnesses, 17 February 2009, p. 3.

<sup>9</sup> T. 19 February 2009 p. 105.

<sup>10</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, *Confidential Preliminary List of Defence Witnesses and Motion for One-Week Postponement of Defence Case*, confidential, 20 February 2009. The Defence specified it would only be in a position to confirm whether it would call certain witnesses after interviewing them.

<sup>11</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, *Further Order for the Defence to Reduce its List of Witnesses*, 23 February 2009 (“23 February 2009 Order”), p. 3.

<sup>12</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, *Decision on Defence Motion for Reconsideration of the Chamber’s Further Order for the Defence to Reduce its Witness List*, 26 February 2009 (“26 February 2009 Decision”), p. 4. In this decision, the Trial Chamber clarified that if the Accused was willing to testify in his case, the Defence would be allowed to call him in addition to the ten other witnesses.

<sup>13</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, *Defence Strictly Confidential List of Witnesses*, confidential, 2 March 2009. See also *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, *Defence Strictly Confidential List of Witnesses (corrigendum)*, confidential, 3 March 2009.

<sup>14</sup> *Urgent Defence Application for Leave to Request a Review of a Trial Chamber Decision Denying the Accused a Fair Trial*, 2 March 2009.

<sup>15</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, *Order for the Defence to Comply with the Chamber’s Order of 23 February 2009 and the Chamber’s Decision of 26 February 2009 for the Defence to Reduce its List of Witnesses*, 3 March 2009 (“3 March 2009 Order”), p. 3.

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Tanzania.<sup>17</sup> At the hearing held on 9 March 2009, the date on which the Defence case was scheduled to commence, the Counsel further argued that she was unable to comply with the Trial Chamber's order to reduce the witness list because the Accused had instructed her not to reduce the list further. She stated that she would submit her resignation if the Trial Chamber were to order her to do so.<sup>18</sup> The Counsel also pointed out that her application before the Appeals Chamber was still pending.<sup>19</sup> The Trial Chamber ordered the Counsel to file a witness list in compliance with its previous orders no later than 4:00 p.m. on 9 March 2009.<sup>20</sup> The proceedings were adjourned until 11 March 2009.<sup>21</sup> In response, the Defence filed further submissions, but failed to file the reduced witness list.<sup>22</sup>

8. On 11 March 2009, the proceedings were adjourned *sine die* as a result of the Counsel's unwillingness to make the Defence's opening statement.<sup>23</sup> Later that day, considering that the Defence's failure to file the reduced witness list "amount[ed] to flagrant disregard for its orders, obstruct[ed] the proceedings, and [was] contrary to the interests of justice", the Trial Chamber sanctioned the Counsel pursuant to Rule 46(A) of the Rules by imposing a fine of US\$5,000 (five thousand U.S. Dollars) and accordingly directed the Registrar to retrieve the same amount from the Counsel.<sup>24</sup> The Trial Chamber further directed the Registrar to seek the President's approval to communicate the Counsel's misconduct to the professional body that regulates the conduct of counsel in her State of admission pursuant to Rule 46(B) of the Rules.<sup>25</sup>

<sup>16</sup> 3 March 2009 Order, p. 3. The Trial Chamber referred to its "Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment" rendered on 17 December 2008 in which it issued a warning to the Counsel for misrepresenting information to the Chamber. See 3 March 2009 Order, p. 2.

<sup>17</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Urgent Defence Submissions Further to Court Order of 3 March 2009 and on the Status of Defence Preparation, 6 March 2009, paras. 5, 6.

<sup>18</sup> T. 9 March 2009 pp. 9, 10.

<sup>19</sup> T. 9 March 2009 pp. 10, 12.

<sup>20</sup> T. 9 March 2009 p. 10. The Counsel then offered to the Trial Chamber to eliminate witnesses from the list, which was found "insultive [sic]" by the Trial Chamber. T. 9 March 2009 pp. 10, 11.

<sup>21</sup> T. 9 March 2009 p. 12.

<sup>22</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Defence Submissions Further to the Trial Chamber's Oral Order of 9 March 2009, 9 March 2009. Therein, at paragraph 6, the Counsel submitted that in case more than ten witnesses were still willing to testify, "the Trial Chamber may stop the defence case from proceeding further after the 11<sup>th</sup> witness".

<sup>23</sup> T. 11 March 2009 pp. 13-15. During the hearing, the Prosecution submitted that "despite repeated warnings" the Counsel had "behaved in a manner contemptuous of this Court, obstructive of the proceedings" and that "to maintain the integrity of these proceedings, it [was] imperative that she be sanctioned under Rule 46(A) for her misconduct". T. 11 March 2009 p. 15.

<sup>24</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision to Sanction the Defence for Failure to Comply with the Chamber's Orders, 11 March 2009 ("First Sanction Decision").

<sup>25</sup> First Sanction Decision, p. 4.

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9. On 12 March 2009, the Trial Chamber once again ordered the Defence to file the reduced witness list, and to do so no later than 13 March 2009 with a view of resuming the proceedings on 16 March 2009.<sup>26</sup> The Defence complied with this order on 13 March 2009.<sup>27</sup>

10. The Proceedings resumed on 16 March 2009. At the beginning of the hearing, the Trial Chamber issued an oral ruling sanctioning the Counsel for her conduct pursuant to Rule 46(A) of the Rules by imposing a fine of US\$500 (five hundred U.S. Dollars). It further directed the Registrar to seek the President's approval to communicate the Counsel's misconduct to the professional body that regulates the conduct of counsel in her State of admission pursuant to Rule 46(B) of the Rules. The Trial Chamber also invited the Counsel to submit a written apology for her conduct during the 11 March 2009 hearing.<sup>28</sup> The Defence then orally requested the Trial Chamber to reconsider the First Sanction Decision, as well as its Oral Ruling.<sup>29</sup> On 17 March 2009, the Trial Chamber issued a written authoritative version of its Oral Ruling, in which it specified that the Counsel was sanctioned "for her obstructive conduct during the proceedings of 11 March 2009, including her comportment in the courtroom, and her refusal to commence her case".<sup>30</sup>

11. On 25 March 2009, the Appeals Chamber dismissed the Defence's application for leave to request review of the 26 February 2009 Decision on the ground that, in the absence of certification by the Trial Chamber, it was not properly seized of the matter.<sup>31</sup>

12. The same day, the Counsel filed her Appeal before the Appeals Chamber, in which she requests the Appeals Chamber to set aside the First and Second Sanction Decisions (together "Impugned Decisions") and grant a suspension of the obligation to pay the fines imposed by the Trial Chamber until the resolution of her Appeal by the Appeals Chamber.<sup>32</sup> The Prosecution responded that the Appeal was not properly before the Appeals Chamber.<sup>33</sup> The Counsel filed a reply on 16 April 2009.<sup>34</sup>

<sup>26</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Further Order for the Defence to Comply with the Chamber's Orders and File its Reduced List of Witnesses, 12 March 2009, p. 4.

<sup>27</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Defence Submissions Further to "Further Order for the Defence to Comply with the Chamber's Orders and File its Reduced List of Witnesses", 13 March 2009.

<sup>28</sup> T. 16 March 2009 p. 2 ("Oral Ruling").

<sup>29</sup> T. 16 March 2009 p. 3. See also T. 25 March 2009 p. 44.

<sup>30</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Further Decision to Sanction Defence Counsel for Misconduct, 17 March 2009 ("Second Sanction Decision"), disposition.

<sup>31</sup> Decision on Léonidas Nshogoza's Application for Leave to Request Review of a Trial Chamber Decision, 25 March 2009.

<sup>32</sup> Appeal, pp. 2, 11.

<sup>33</sup> Prosecutor's Response to "Defence Counsel Appeals as of Right from Sanctions Decisions", 6 April 2009 ("Response"), paras. 7, 8.

<sup>34</sup> Defence Counsel Reply to Prosecution Response to Appeal as of Right from Sanctions Decisions, 16 April 2009 ("Reply").

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13. The Trial Chamber denied the Counsel's request for reconsideration of the Impugned Decisions on 23 April 2009.<sup>35</sup>

14. On 8 June 2009, Giuseppe Battista, from the Quebec Bar, and Kenneth S. Gallant, from the Arkansas Bar, informed the Appeals Chamber that they had received mandate from the Counsel to represent her in her Appeal.<sup>36</sup> In their filing, they submit that they need an extension of time to familiarize themselves with the case and the applicable law before determining whether "there is a necessity to add or otherwise vary the filings already made in this case".<sup>37</sup> Specifically, Mr. Battista and Mr. Gallant request that the Appeals Chamber grant them "until 20 July 2009 to inform the Court whether Ms. Turner will need to file further documents in this appeal, and (if so) until 18 August 2009 to file the said documents".<sup>38</sup>

### B. Submissions

15. In her Appeal, the Counsel first submits that the Appeals Chamber has jurisdiction to consider the merits of the Appeal. She argues that since the maximum pecuniary sanction that may be imposed on a person found to be in contempt of the Tribunal under Rule 77 of the Rules is a fine not exceeding US\$10,000 (ten thousand U.S. Dollars), a "fine in the middle of the permitted sentencing range under Rule 77 is, consequently, a sanction of a penal nature".<sup>39</sup> After stating that the Trial Chamber did not inform her that it was going to impose penal sanctions, she contends that "a person upon whom such a penal sanction is imposed by a Chamber [...] must have the right to appeal the decision particularly when the person has not been heard in her own defence".<sup>40</sup> She adds that certification to appeal pursuant to Rule 73(B) of the Rules was not required in the present circumstances as the Impugned Decisions were not rendered pursuant to a request for relief under Rule 73(A) of the Rules.<sup>41</sup>

16. The Counsel submits that the Impugned Decisions were adopted without a valid legal basis.<sup>42</sup> Although Rule 46(A) of the Rules speaks generally of "sanctions against a counsel", the Counsel argues, it does not allow for the imposition of pecuniary sanctions. She avers that "[d]ue regard must be given to the context of this provision and to other sanctions listed under the said

<sup>35</sup> *The Prosecutor v. Léonidas Nshogora*, Case No. ICTR-07-91-T, Decision on Oral Motion for Reconsideration of Sanctions, 23 April 2009.

<sup>36</sup> Entry of Appearance and Request for Extension of Time to File Brief and/or Other Materials Concerning Defence Counsel Appeal of 25 March 2009, 8 June 2009 ("Request for Extension of Time"), para. 1.

<sup>37</sup> Request for Extension of Time, paras. 3, 4.

<sup>38</sup> Request for Extension of Time, para. 5, p. 3.

<sup>39</sup> Appeal, pp. 2, 3.

<sup>40</sup> Appeal, p. 3. See also *ibid.*, p. 5.

<sup>41</sup> Appeal, p. 3.

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Rule".<sup>43</sup> In her view, "[t]he drafters of the Rules cannot possibly have contemplated a sanction with gravity equal to the penalty for criminal contempt to apply under the same provision as [the less severe sanctions listed under the Rule] without an explicit norm to that effect".<sup>44</sup> The Counsel also stresses that the Impugned Decisions were not validly rendered under Rules 73(F) and 77 of the Rules.<sup>45</sup>

17. The Counsel further submits that even if there were a legal basis for the adoption of the Impugned Decisions, the Trial Chamber erred in the exercise of its discretion in sanctioning her.<sup>46</sup> In support of her contention, she affirms never having disregarded a court order.<sup>47</sup> She also argues that the Trial Chamber "disregarded the existence of a state of crisis" when issuing the First Sanction Decision.<sup>48</sup> Similarly, the Counsel submits that the Trial Chamber erred in adopting the Second Sanction Decision by disregarding the fact that she was acting to preserve the rights of her client and by mischaracterizing and misrepresenting her conduct at the 11 March 2009 hearing.<sup>49</sup> Lastly, she argues that the fine imposed as a result of the Impugned Decisions "is manifestly excessive when assessed against [her] alleged infractions".<sup>50</sup>

18. In addition to her request to set aside the Impugned Decisions, the Counsel requests the Appeals Chamber to grant a suspension of the obligation to pay the fines imposed until the resolution of the Appeal.<sup>51</sup>

19. In response, the Prosecution submits that the Appeal is not properly before the Appeals Chamber and should therefore be dismissed without being considered on the merits.<sup>52</sup> It argues that since neither the Rules nor the Statute provide for an appeal from the imposition of sanctions by a Trial Chamber pursuant to Rule 46 of the Rules, the disciplinary sanctions imposed on the Counsel under this Rule are not subject to any appeal.<sup>53</sup> The Prosecution further submits that the Appeal should be dismissed on the ground that the Counsel's request for reconsideration of the Impugned Decisions was pending before the Trial Chamber at the time she filed her Appeal.<sup>54</sup>

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<sup>42</sup> Appeal, pp. 3-5.

<sup>43</sup> Appeal, (1) at p. 4.

<sup>44</sup> Appeal, (1) at p. 4.

<sup>45</sup> Appeal, (2) at pp. 4, 5, (3) at p. 5.

<sup>46</sup> Appeal, pp. 5-9.

<sup>47</sup> Appeal, pp. 5-8.

<sup>48</sup> Appeal, (4) at p. 8.

<sup>49</sup> Appeal, (1) and (2) at pp. 8, 9.

<sup>50</sup> Appeal, p. 9.

<sup>51</sup> Appeal, pp. 9, 10.

<sup>52</sup> Response, paras. 2, 8.

<sup>53</sup> Response, paras. 2-5.

<sup>54</sup> Response, para. 6.

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### C. Discussion

#### 1. Preliminary Matters

##### (a) Validity of the Appeal

20. The Appeals Chamber observes that when the Counsel filed her Appeal, her request for reconsideration of the Impugned Decisions was pending before the Trial Chamber. The Trial Chamber was therefore seized of the matter at the time of the filing and the Appeal was consequently not properly before the Appeals Chamber.<sup>55</sup> However, given that the Trial Chamber has since issued a decision denying reconsideration of its Impugned Decisions,<sup>56</sup> the Appeals Chamber has nonetheless decided, in the circumstances of this case<sup>57</sup> and in the interests of justice, to consider the Appeal even though it was not properly before it at the time of its filing.

21. The Prosecution indicated in its Response that “[s]hould the Appeals Chamber deem it necessary to examine the merits of the appeal, [it] reserve[d] the right to respond against a scheduling order of the Appeals Chamber”.<sup>58</sup> Although the Appeals Chamber has decided to consider the Appeal, it deems that the interests of justice do not require that the Prosecution be provided the opportunity to supplement its Response. The Appeals Chamber considers that the Prosecution was given an opportunity to address the merits of the Appeal in its Response, and that it declined to take advantage of the opportunity. Furthermore, the Prosecution’s interests are not prejudiced by the present decision.

##### (b) Validity of the Reply

22. The Appeal was filed by the Counsel as an appeal as of right. For such appeals, the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal provides that the appellant may file a reply within four days of the filing of the response.<sup>59</sup> Because it was filed on 16 April 2009, ten days after the Response was filed, the Counsel’s Reply was not validly filed and, consequently, has not been considered by the Appeals Chamber.

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<sup>55</sup> See *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges Rutaganda’s Appeal Concerning Access to Closed Session Testimony and Sealed Exhibits, 11 November 2008, p. 2; *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-R75, Decision on Emmanuel Ndinabahizi’s Application Concerning Variation of Protective Measures, 9 September 2008, p. 2.

<sup>56</sup> *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Oral Motion for Reconsideration of Sanctions, 23 April 2009.

<sup>57</sup> The Appeals Chamber refers *inter alia* to the fact that it received the Appeal only on 16 April 2009.

<sup>58</sup> Response, para. 2.

<sup>59</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006, para. 3.



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(c) Request for a Suspension of the Obligation to Pay the Fines

23. As regards the Counsel's request for a suspension of the obligation to pay the fines until the resolution of the Appeal, the Appeals Chamber was informed by the Registry that it intended to retrieve the fines imposed on the Counsel from the last instalment of the agreed lump-sum payment in the case, which was to be paid at the end of the trial.<sup>60</sup> The Appeals Chamber was later orally informed by the Registry that the fines had indeed been subtracted from the last instalment paid to the Counsel after the hearing of the closing arguments held on 28 April 2009. Since the Counsel did not have to proceed to payment, the Appeals Chamber considers her request for suspension to be moot.

(d) Request for Extension of Time

24. The Request for Extension of Time was filed by Mr. Battista and Mr. Gallant more than two months after the Counsel filed her Appeal, well after the expiration of the time limits prescribed by the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal for appeals lying as of right.<sup>61</sup> Mr. Battista and Mr. Gallant do not provide any explanation for the lateness of their filing. In the absence of a showing of good cause, the Appeals Chamber denies the Request for Extension of Time. The Appeals Chamber now turns to the Appeal.

## 2. The Appeal

25. It is clear from the Impugned Decisions that the pecuniary sanctions imposed on the Counsel were pronounced pursuant to Rule 46(A) of the Rules,<sup>62</sup> which reads:

A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for the prosecution.

26. The Appeals Chamber recalls that neither the Statute nor the Rules provide a right of appeal from sanctions imposed pursuant to Rule 46 of the Rules.<sup>63</sup> Accordingly, a Trial Chamber's exercise of its discretion under that rule is not subject to review by the Appeals Chamber. However, in the instant case, the Counsel not only challenges the particulars of the Trial Chamber's exercise of its discretion to impose the impugned sanctions, but also questions the Trial Chamber's

<sup>60</sup> E-mail from Koffi Kumelio A. Afande, Head of the Appeals Chamber Support Unit, dated 20 April 2009.

<sup>61</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006, para. 3.

<sup>62</sup> First Sanction Decision, disposition; Second Sanction Decision, disposition.

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jurisdiction to impose pecuniary sanctions at all under Rule 46 of the Rules. While the Appeals Chamber has no jurisdiction to entertain the appeal from sanctions *per se*, it does have jurisdiction to consider this latter issue.

27. Rule 46(A) does not explicitly specify the scope for sanctions applied under its authority. The measures identified in paragraphs B and C of Rule 46 are only specific examples of potential means by which a Chamber may sanction a counsel. Nonetheless, the absence of explicit limitations on the sanctions deployed under Rule 46 of the Rules does not mean that the Trial Chamber is free to pronounce any disciplinary measures it deems appropriate.

28. In order to identify the scope of sanctions permitted under Rule 46 of the Rules, it is necessary to consider the rule's context. The text of Rule 46 itself contains no reference to pecuniary sanctions, even though it does list several potential disciplinary measures. Similarly, the equivalent ICTY rule addressing "Misconduct of Counsel" explicitly limits sanctions to particular penalties which do not include fines.<sup>64</sup> By contrast, other rules, such as Rule 77(G) of the Rules (addressing contempt of the Tribunal), specifically provide for fines in cases of misconduct by individuals, including attorneys.<sup>65</sup> Likewise, Rule 73(F) of the Rules provides that a Chamber may order the non-payment of fees if a counsel brings a motion that is frivolous or an abuse of process.

29. This examination demonstrates that pecuniary sanctions are not within the permitted scope of penalties that may be applied under Rule 46 of the Rules. The text of the rule itself does not refer to pecuniary sanctions, while provisions such as Rule 77(G) of the Rules provide the means for punishing an attorney's misconduct through fines where that is deemed appropriate.<sup>66</sup> Given the absence of clear parameters regarding the scope of sanctions permitted under Rule 46, and the context of the Rules, the Appeals Chamber finds that the Trial Chamber acted outside its jurisdiction in imposing pecuniary sanctions on the Counsel pursuant to Rule 46(A) of the Rules.

<sup>63</sup> See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, 30 January 2009, para. 11.

<sup>64</sup> In its relevant part, Rule 46 of the International Criminal Tribunal for Former Yugoslavia (ICTY) Rules of Procedure and Evidence provides as follows:

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive [...], the Chamber may, after giving counsel due warning:

(i) refuse audience to that counsel; and/or

(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45;

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a university professor of law and not otherwise admitted to the profession, to the governing body of that counsel's University.

<sup>65</sup> See also Rule 91(G) of the Rules addressing false testimony under solemn declaration.

<sup>66</sup> The Appeals Chamber notes that the Trial Chamber repeatedly threatening to hold the Counsel in contempt. See T. 11 March 2009 pp. 9, 11.

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**D. Disposition**

30. For the foregoing reasons, the Appeals Chamber

**DENIES** the Request for Extension of Time;

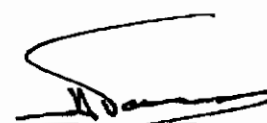
**QUASHES** the pecuniary sanctions imposed in the Impugned Decisions pursuant to Rule 46 of the Rules; and

**INSTRUCTS** the Registry to pay the Counsel the fees subtracted from her last instalment pursuant to the Impugned Decisions.

Done this twenty-sixth of June 2009,  
at The Hague, The Netherlands.



[Seal of the Tribunal]



Judge Andréia Vaz  
Presiding