



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
15-06-2011
(7895-7888)

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OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 15 June 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

**DECISION ON PROSECUTION MOTION FOR RECONSIDERATION AND/OR
CERTIFICATION OF THE TRIAL CHAMBER'S WARNING TO THE PROSECUTION
PURSUANT TO RULE 46**

Rules 73(B) Rules of Procedure and Evidence

Office of the Prosecutor

Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse
Philippe Larochelle

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INTRODUCTION

1. On 14 February 2011, the Trial Chamber issued a Decision allowing the Prosecution to recall Defence Witness Jean-Marie Vianney Mporanzi ("Mporanzi").¹
2. On 2 March 2011, the Defence filed a Motion requesting that the Prosecution disclose records or receipts of payments made to Witness Mporanzi in 1998 ("Original Motion").²
3. On 7 March 2011, the Prosecution filed a Motion requesting an extension of time to respond to the Defence Motion, wherein it expressed its willingness to disclose the records to the Defence but indicated that the documents were not in its "immediate control" ("First Motion for Extension").³
4. On 8 March 2011, the Trial Chamber's Legal Officer, at the behest of the Trial Chamber, sent an email to Mr. Paul Ng'arua, Senior Trial Attorney for the Prosecution in the present proceedings ("Mr. Ng'arua"), noting the Prosecution's requests for extensions of time with respect to the Mporanzi receipts and another matter, and stating:

...With respect to the second request, the Trial Chamber notes that according to [Commander of Investigations in the Office of the Prosecutor] Alfred Kwende, in paragraph 4 of his affidavit, the receipts or records sought by the Defence are with the "Finance Unit of ICTR." Thus, the Chamber would also request a communication from that department indicating the time it will take to provide the records to the Prosecution. The Trial Chamber would be grateful if it could receive the two communications by the close of business tomorrow, Wednesday 9 March 2011.

5. On 9 March 2011, Mr. Ng'arua sent an email to the Trial Chamber stating:

¹ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Decision on Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 14 February 2011.

² *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Nzabonimana's Urgent Motion for Inspection and Disclosure of Evidence Pertaining to Mr. Mporanzi's Recall, 2 March 2011.

³ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Prosecutor's Motion for Extension of Time to Respond to Nzabonimana's Urgent Motion for Inspection and Disclosure of Evidence Pertaining to Mr. Mporanzi's Recall, 7 March 2011.

Finance unit in Kigali has informed our investigator Mr. Djibo that Finance section need up to Tuesday 15th March to inform me on the position on the availability of the documents Defence has requested to inspect. Meanwhile they are looking through the archives [sic] to find out what they have preserved on this issue. They think that on 15th instant [sic] they will be in a better position to inform us on what they have.

6. Although the Chamber received no communication from the "Finance Unit of the ICTR", or copy of such communication from the Prosecution, it nevertheless granted the First Motion for Extension on 10 March 2011, and set a deadline for the Prosecution to respond to the Original Motion by 16 March 2011, indicating "whether the records are available, and if so, when they can be disclosed to the Defence."⁴
7. On 16 March 2011, the Prosecution filed a Motion for a further extension of time ("Second Motion for Extension"). It asked for leave to respond to the Original Motion on 26 March 2011 rather than 16 March 2011, submitting that it had received information from the Finance Unit in Kigali that it only maintained records dating back to 2001. The Prosecution was therefore attempting to locate the documents at the head office of the Finance Unit in Arusha.⁵ Again, the Prosecution appended no copies of its communications with the Finance Unit in Kigali.
8. On 22 March 2011, the Trial Chamber's Legal Officer, on behalf of the Trial Chamber, again wrote an email to Mr. Ng'arua stating:

With respect to the Prosecution's Motion for a further extension of time, filed on 16 March 2011, the Trial Chamber wishes to reiterate its concern that the Prosecution has attached no copies of its communications with the various organs of the Tribunals substantiating the difficulties it is encountering. In particular, it is not clear why it took the Finance Section in Kigali one week to inform the Prosecution that it only maintains records dating back to 2001. Thus, the Chamber directs the Prosecution to provide **copies of its correspondence** with the organs of the Tribunal confirming that it has taken steps to retrieve the information sought by the Defence by the close of business on 23 March 2011. The Trial Chamber requires this information before making a decision.

⁴ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecutor's Motions for Extension of Time, 10 March 2011, para. 5.

⁵ *Prosecution v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Motion for a Further Extension of Time to Respond to Nzabonimana's Urgent Motion for Inspection and Disclosure of Evidence Pertaining to Mr. Mporanzi's Recall, 16 March 2011.

9. The Chamber received no response from the Prosecution on 23 March 2011. It thus considered that the Prosecution had failed to provide it with information it required to issue a Decision on the Second Motion for Extension in a timely manner. Therefore, on 24 March 2011, the Chamber issued a Decision warning the Prosecution pursuant to Rule 46 (A) to desist from conduct obstructing the proceedings ("Impugned Decision").⁶
10. On 28 March 2011, the Prosecution disclosed to the Defence the receipts of payments made in 1998 between the Finance Unit of the ICTR, Prosecution investigators and local Rwandese authorities, effectively responding to the Original Motion.⁷
11. On 31 March 2011, the Prosecution filed a Motion requesting reconsideration and/or certification to appeal the Impugned Decision ("Instant Motion").⁸
12. The Defence did not file a Response.

SUBMISSIONS OF THE PARTIES

Instant Motion

13. The Prosecution requests reconsideration and/or certification of the Impugned Decision on the basis of new evidence and circumstances not available to the Chamber when that Decision was reached.⁹

Reconsideration

14. The Prosecution submits that it did not intentionally obstruct the proceedings or disobey the Trial Chamber's directive of 23 March 2011 instructing it to transmit correspondence to the Chamber to enable it to issue a Decision on the Second

⁶ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Warning to the Prosecution Pursuant to Rule 46, 24 March 2011.

⁷ T. 29 March 2011, p. 2.

⁸ *Prosecution v. Callixte Nzabonimana, Case No. ICTR-98-44D-T*, Prosecutor's Motion for Reconsideration and in the Alternative Certification of the Trial Chamber's Warning to the Prosecution Pursuant to Rule 46, 31 March 2011.

⁹ Instant Motion, paras. 1-3.

Motion for Extension.¹⁰ The Prosecution contends that it inadvertently “missed” the email communication sent by the Legal Officer due to “pressure of work and human error.”¹¹ It further notes that whilst Mr. Ng’arua appeared before the Chamber on 22 and 23 March 2011 in the context of the trial, the Chamber did not take this opportunity to instruct him to transmit the information required.¹² The Prosecution asserts that “this oversight would have been cured” had the directive been communicated on the TRIM electronic filing system or in open court and/or copied to other members of the Prosecution team working on the instant case.¹³

15. The Prosecution submits as proof of its diligence that on 28 March 2011 it disclosed to the Defence six documents found in the archives of the Finance Unit in Arusha.¹⁴

16. The Prosecution submits that the warning issued in the Impugned Decision is “harsh in the circumstances” as it is predicated upon the erroneous assumption that Mr. Ng’arua read the email sent by the Legal Officer that contained the Chamber’s directives and thus deliberately failed to adhere to the Chamber’s instructions.¹⁵

17. Finally, the Prosecution argues that it should have been given an opportunity to show good cause for its omission prior to the issuance of the Rule 46 (A) warning, as such warnings reflect on the “good standing of Counsel.”¹⁶

Certification to appeal

18. The Prosecution argues that certification should be granted so that the Appeals Chamber may determine whether a party should be given an important notice via ordinary email rather than a more reliable channel such as TRIM.¹⁷

¹⁰ Instant Motion, paras. 12-14.

¹¹ Instant Motion, paras. 11 & 17.

¹² Instant Motion, paras. 12 & 15.

¹³ Instant Motion, paras. 15-16, 20.

¹⁴ Instant Motion, paras. 18-19, 21.

¹⁵ Instant Motion, paras. 30-32.

¹⁶ Instant Motion, paras. 37-38.

¹⁷ Instant Motion, paras. 42-44.

DELIBERATIONS

Applicable Law

19. Rule 54 of the Rules of Procedure and Evidence ("Rules") states that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

20. As affirmed in *Karemera*, Trial Chambers have the "inherent power" to reconsider their own decisions, under the following "exceptional" circumstances:

- i. when a new fact has been discovered that was not known by the Trial Chamber;
- ii. where new circumstances arise after the original decision;
- iii. where there was an error of law or an abuse of discretion by the Trial Chamber resulting in an injustice.¹⁸

21. Rule 73 (B) states:

Decisions rendered on... motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

22. Thus, in order to grant Certification to appeal one of its Decisions, a Trial Chamber must find: 1) that the decision in question involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and 2) that an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.¹⁹ Even where both factors are present, Certification is not automatic, but at the discretion of

¹⁸ See e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

¹⁹ *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para.16; citing *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2.

the Trial Chamber,²⁰ and remains an exceptional measure.²¹ As was noted in *Ntahobali*, "Rule 73(B)... provides... that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of [its] decisions".²²

Analysis

The Rules

23. The Trial Chamber observes that Rule 54 is silent with respect to the mode of communication of orders that "may be necessary for the... conduct of the Trial." Furthermore, the Trial Chamber is unaware of any applicable directive or guideline to that effect promulgated by the Tribunal. In fact, the Prosecution itself cites no Rule or jurisprudence in objecting to the Chamber's communication to it via email.

The Practice

24. The Trial Chamber notes that a practice of communication via email has developed in this case, between the parties themselves, and between the parties and the Chamber, when an expedited mode of communication is deemed to be appropriate. The Trial Chamber recalls that Witness Mporanzi had been scheduled to testify on 29 March 2011 by prior order of the Chamber, which was barely three weeks after the Prosecution's First Motion for Extension was filed through the conventional channels of the Court Management Section of the Registry ("CMS") on 7 March 2011, and less than two weeks after the Prosecution's Second Motion for Extension was filed on 16 March 2011, again through CMS. Given these time-sensitive circumstances, in the Chamber's view it was necessary to adopt an expedited mode of communication to dispose of matters pertaining to the recall of the Witness.

²⁰ *Ngirabatware*, para. 17. See also *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

²¹ *Prosecutor v. Karemera et al.*, ICTR-98-44-NZ, Decision on Joseph Nizorera's Application for Certification to Appeal Decision on the 24th Rule 66 Violation, 20 May 2009, para. 2. See also *Prosecutor v. Nshogoza*, ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber's Decision on Defence Urgent Motion for a Subpoena to Ms. Loretta Lynch, 19 February 2009, para. 4; *Ngirabatware*, para. 17.

²² *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 13-15.

25. The Trial Chamber recalls that in numerous instances during the course of these proceedings, the parties have sent official internal correspondences between themselves and to the Trial Chamber via email. The Prosecution has never objected to this form of communication before and indeed has itself transmitted relevant concerns and information via email.

26. Indeed, the Trial Chamber recalls that on 8 March 2011, the Legal Officer, on behalf of the Trial Chamber, sent an email to Mr. Ng'arua seeking further information to facilitate the Chamber's deliberations vis-à-vis the First Motion for Extension. On 9 March 2011, Mr. Ng'arua provided a partial response to this email request, without challenging the means of communication at that time.

Did the Prosecution grant itself an extension of time

27. The Trial Chamber notes that the Prosecution did not receive a determination from the Chamber with respect to its Second Motion for Extension. The Prosecution may have interpreted the Chamber's silence as approval of its request, but this was an improper inference.

Did the Prosecution provide the information required by the Chamber to make a determination on the Motions for extension

28. The Trial Chamber notes that, to date, the Prosecution has never provided "**copies of its correspondence** with the organs of the Tribunal confirming that it has taken steps to retrieve the information sought by the Defence", as requested on two occasions by the Chamber.

Reconsideration

29. Nevertheless, the Trial Chamber can be sympathetic to an argument of a human error raised by the Prosecution to explain its failure to respond to the email sent on behalf of the Trial Chamber on 22 March 2011. The Trial Chamber is also apprehensive of the absence in the Rules or in other relevant documents of clear guidance regarding proper means of communication between the Chamber and the parties. Finally, it is inclined to believe that the Prosecution ought to have been

offered an opportunity to explain its failure to respond to the Chamber's request for further information prior to issuing the Rule 46 (A) warning. These circumstances combined may warrant the reconsideration of the Impugned Decision.

Certification for Leave to Appeal

30. The Prosecution has not attempted to demonstrate that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate resolution of the issue by the Appeals Chamber might materially advance the proceedings. Thus, the Prosecution has failed the test for certification of the Impugned Decision.

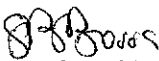
FOR THESE REASONS, THE TRIAL CHAMBER

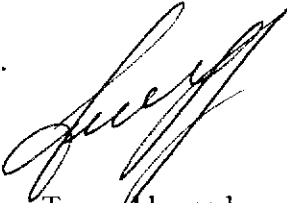
GRANTS the Prosecution Motion;


WITHDRAWS the Rule 46(A) warning against the Prosecution;

DIRECTS that henceforth, any communication between the parties and Chambers, both formal and informal, be filed through CMS. The parties may continue to communicate amongst each other in any manner they both find suitable.

Arusha, 15 June 2011, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tuzmukhamedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

