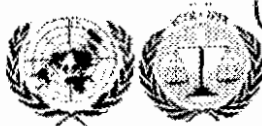


ICTR-98-44D-T  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

UNITED NATIONS  
NATIONS UNIES

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 29 August 2011

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JUDICIAL RECORDS/ARCHIVES  
UNICTR

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**

*Case No. ICTR-98-44D-T*

**DECISION ON MOTION FOR RECONSIDERATION OF SANCTIONS**

*Rule 46(A) of the Rules of Procedure and Evidence*

**Office of the Prosecution:**

Paul Ng'arua  
Memory Maposa  
Simba Mawere  
Mary Diana Karanja

**Defence Counsel**

Vincent Courcelle-Labrousse, Lead Counsel  
Philippe Larochelle, Co-Counsel

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## INTRODUCTION

1. On 15 April 2011, the Defence brought a Motion to admit the transcripts of witness CNAB's testimony in the *Prosecutor v. Karemera et al.* proceedings.<sup>1</sup> In its Motion, the Defence disclosed the name of a protected witness.
2. The Prosecution filed a Response to the Motion on 20 April 2011.<sup>2</sup>
3. On 26 April 2011 the Defence filed a Reply but inadvertently the Reply was not forwarded to the Chamber until 18 May 2011.<sup>3</sup>
4. On 10 May 2011, the Trial Chamber denied the Defence Motion ("Impugned Decision").<sup>4</sup> In addition, the Trial Chamber sanctioned the Defence under 46(A) for disclosing the name of a protected witness in its Motion, and denied the Defence legal fees in relation to the work performed on the Motion.<sup>5</sup>
5. On 18 May 2011 the Defence filed the Instant Motion.<sup>6</sup>
6. On 23 May 2011, the Prosecutor filed its Response to the Instant Motion.<sup>7</sup>
7. On 24 May 2011, the Defence filed its Reply to Prosecutor's Response.<sup>8</sup>

## SUBMISSIONS OF THE PARTIES

### Defence Motion

9. The Defence submits that the Trial Chamber erred twice in the Impugned Decision, once on the facts and once on the law.<sup>9</sup>

<sup>1</sup> *Prosecutor v. Caillixte Nzabonimana*, Case no. ICTR-98-44D-T, Motion to Admit Transcripts from *Karemera et al.*, 15 April 2011 ("Motion").

<sup>2</sup> *Prosecutor v. Caillixte Nzabonimana*, Case no. ICTR-98-44D-T, Prosecutor's Response to *Nzabonimana's* Motion to Admit Transcripts from the *Karemera et al.* Case, 20 April 2011.

<sup>3</sup> *Prosecutor v. Callixte Nzabonimana*, Case no. ICTR-98-44D-T, *Nzabonimana's* reply to Prosecutor's response to Motion to Admit Transcripts from *Karemera et al.*, 26 April 2011.

<sup>4</sup> *Prosecutor v. Callixte Nzabonimana*, Case no. ICTR-98-44D-T, Decision on Motion to admit transcripts from *Karemera et al.*, 10 May 2011 ("Impugned Decision").

<sup>5</sup> Impugned Decision, 15.

<sup>6</sup> *Prosecutor v. Callixte Nzabonimana*, Case no. ICTR-98-44D-T, Motion for Reconsideration of Sanctions, 18 May 2011.

<sup>7</sup> *Prosecutor v. Callixte Nzabonimana*, Case no. ICTR-98-44D-T, Prosecutor's Response to *Nzabonimana's* Motion for Reconsideration of Sanctions, 23 May 2011.

<sup>8</sup> *Prosecutor v. Callixte Nzabonimana*, Case no. ICTR-98-44D-T, *Nzabonimana's* Reply to Prosecutor's response to Motion for Reconsideration of Sanctions, 24 May 2011.

<sup>9</sup> Instant Motion, para. 6.



10. First the Defence submits that the Trial Chamber found that the Defence had not filed a Reply to the Prosecution's Response apologising and/or explaining its disclosure of the name of a protected witness.<sup>10</sup> The Defence submits that this was incorrect as it did file a Reply in which it apologised for revealing the name of a protected witness. It therefore contends that this constitutes a new fact warranting reconsideration of the sanction imposed on the Defence.<sup>11</sup>
11. Second, the Defence submits that according to the applicable jurisprudence, the Trial Chamber acted outside of its jurisdiction in imposing the pecuniary sanction on Counsel pursuant to Rule 46 of the Rules of Procedure and Evidence ("Rules").<sup>12</sup> The Defence argues that imposing a pecuniary sanction was an error that resulted in an injustice which thus constitutes another basis for reconsideration of the sanctions imposed on it.<sup>13</sup>

#### Prosecution Response

12. The Prosecution submits that the Defence has not satisfied the threshold for reconsideration because the Impugned Decision was not premised on the Defence's failure to reply, and the Defence is taking the Trial Chamber's discussion of the lack of Reply out of context.<sup>14</sup>
13. The Prosecution recalls that in the Impugned Decision the Trial Chamber emphasised the gravity of violating protective measures and noted that the Defence had received numerous 46(A) warnings for both its in-court behaviour and written pleadings.<sup>15</sup> The Prosecutor further states that based on the above facts the Trial Chamber decided that sanctions denying the Defence all fees payable in relation to all work performed in preparing the Instant Motion was necessary.<sup>16</sup>
14. The Prosecution concludes that the Trial Chamber's main focus in sanctioning the Defence was the severity of the issue and the aggravating circumstances of the previous record of the Defence.<sup>17</sup> It states that the inadvertent late filing of the Reply does not

<sup>10</sup> Instant Motion, para. 6.

<sup>11</sup> Instant Motion, paras. 6-9.

<sup>12</sup> Instant Motion, paras. 6 and 10, citing *Leonidas Nshogoza v. The Prosecutor*, Case no. ICTR-2007-91-A on Appeal Concerning Sanctions, 26 June 2009, para. 29 and *The Prosecutor v. Edouard Karemera et al.*, Case no. ICTR-2007-91-A, Decision on Nzirorera Motion for Reconsideration of Fine 3 July 2009, para. 7

<sup>13</sup> Instant Motion para. 10.

<sup>14</sup> Response, paras. 11, 13-14, 19.

<sup>15</sup> Response, para. 17, citing Decision, para. 46.

<sup>16</sup> Response, para. 17, citing Decision, para 46.

<sup>17</sup> Response, para. 17-18.

amount to a new fact that would warrant reconsideration because it was not the determinant factor in the issuance of sanctions.<sup>18</sup>

15. In response to Defence's submission on the Trial Chamber's jurisdiction, the Prosecutor submits that the Trial Chamber did not exceed its jurisdiction in denying fees for the Defence motion.<sup>19</sup> The Prosecutor distinguishes the cases cited by the Defence stating that those cases show that the Trial Chamber should not impose a fine, but that the denial of fees is permissible under 46(A).<sup>20</sup>

#### Defence Reply

16. In its Reply, the Defence reiterates that the existence of its Reply to its original Motion constitutes a new fact as the Trial Chamber was not aware of its existence when it made its Impugned Decision.<sup>21</sup> The Defence submits that the Chamber's prior warnings cannot serve as a proper basis for sanctions if there is no new conduct warranting sanction.<sup>22</sup>
17. The Defence cites *Nshogoza* to support its position that the Trial Chamber cannot impose pecuniary sanctions under Rule 46(A), and that the nonpayment of fees can only be imposed under Rule 73(F) when accompanied by a finding that a motion is frivolous or an abuse of process.<sup>23</sup> The Defence concludes again that the Trial Chamber exceeded its jurisdiction in sanctioning the Defence under Rule 46(A) and this error warrants reconsideration.<sup>24</sup>

### DELIBERATIONS

#### Applicable Law

##### Reconsideration of Prior Decisions

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

<sup>18</sup> Response, para. 21.

<sup>19</sup> Response, para. 22.

<sup>20</sup> Response, paras. 23-27 citing *The Prosecutor v. Edouard Karemera*, Case no., ICTR 98-44-T, Decision on Nzirerera Motion for Reconsideration of Fine, 3 July 2009 and *Leonida Nshogoza v. The Prosecutor*, Case no., ICTR-2007-91-A, Decision on Appeal Concerning Sanctions, 26 June 2009.

<sup>21</sup> Reply, para. 16.

<sup>22</sup> Reply, paras. 8-10.

<sup>23</sup> Reply, paras. 11-14 citing *Leonida Nshogoza v. The Prosecutor*, Case no., ICTR-2007-91-A, Decision on Appeal Concerning Sanctions, 26 June 2009, para. 29.

<sup>24</sup> Reply, para. 15.

- 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 abuse of discretion by the trial chamber resulting in an injustice.<sup>25</sup>

Trial Chamber's Jurisdiction to Impose Sanctions:

19. The Appeals Chamber in *Nshogoza* held that "pecuniary sanctions are not within the permitted scope of penalties that may be applied under Rule 46 of the rules."<sup>26</sup>

*Analysis*

Reconsideration

20. The Trial Chamber observes that in the Impugned Decision it stated:

"The Defence does not deny that it disclosed the name of a protected witness in the motion it filed publicly before the tribunal, nor does it present any excuse or apologies (for example, by way of filing a reply, which it elected not to do) for its conduct."<sup>27</sup>

21. The Trial Chamber further observes that after issuing the Impugned Decision, it discovered that the Defence had in fact filed a timely Reply to the Prosecution Response in which it acknowledged that it had inadvertently revealed the name of a protected witness and apologised for doing so.<sup>28</sup> Based on this discovery, the Chamber considers that the fact that the Defence filed a timely reply in which it apologised for revealing the name of a protected witness mitigates the sanctions previously imposed, and thus warranting reconsideration.

<sup>25</sup> See e.g. *Prosecutor v Karemera et al.*, ICTR 98-44-PT, Decision on the Defense Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, ICTR-99-44-T, Decision on Reconsideration Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera et al.*, 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.

<sup>26</sup> *Leonida Nshogoza v. The Prosecutor*, Case no., ICTR-2007-91-A, Decision on Appeal Concerning Sanctions, 26 June 2009, para. 29.

<sup>27</sup> Impugned Decision, para. 14.

<sup>28</sup> *Prosecutor v. Callixte Nzabonimana*, Case no. ICTR-98-44D-T, Defence's Reply to the Prosecutor's Response to Nzabonimana's Motion to Admit Transcripts From the *Karemera et al.* Case, para. 7

22. Firstly, the Trial Chamber recalls that in the Impugned Decision it imposed the sanction of denial of fees to the Defence pursuant to Rule 46(A). The Trial Chamber finds that it erred and observes that such sanctions should have been imposed under Rules 46 and 73 (F).
23. Secondly, given the Defence apology contained in its Reply, the Trial Chamber considers that reconsideration of the Impugned Decision is warranted and thus withdraws its prior sanctions. However, the Trial Chamber deems it necessary to caution the Defence in order to underscore the critical importance of witness protective measures and deter further mishaps in the future. The Chamber considers that the Defence's failure to take adequate care of protective measures accorded to witnesses is a serious matter even if such failure was inadvertent. Thus, should there be another breach of the protective measures accorded to witnesses; the Trial Chamber will proceed to sanction counsel.

**FOR THE ABOVE NOTED REASONS, THE CHAMBER**

**GRANTS** the motion;

**RESCINDS** the sanction of denying fees; and

**CAUTIONS** the Defence against further violations of the protective measures of witnesses under Rule 75(F)(i).


Arusha, 29 August 2011, done in English.



Solomy Balungi Bossa  
Presiding Judge



Bakhtiyar Tuzmukhamedov  
Judge  
(Absent at time of signature)



Mparany Rajohnson  
Judge

