



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
(15-12-2008
(43803 - 43798))

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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IN TRIAL CHAMBER III

Before: Hon. Dennis C. M. Byron, Presiding
Hon. Gberdao Gustave Kam
Hon. Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 15 December 2008

The PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
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2008 DEC 15 P 4: 51

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**Prosecutor's Response to:
Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision**

For the Prosecutor:

Mr. Don Webster
Mr. Iain Morley
Mr. Saidou N'Dow
Ms. Gerda Visser
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

For the Accused:

Ms. Dior Diagne and Mr. Moussa Félix Sow for *Édouard Karemera*
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for *Mathieu Ngirumpatse*
Mr. Peter Robinson and Patrick Nimy Mayidika Ngimbi for *Joseph Nzirorera*

BACKGROUND

1. This is the Prosecutor's Response to *Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision*, dated 8 December 2008 but filed and distributed to parties on 12 December 2008.

2. In his application Nzirorera is inviting the Trial Chamber to reconsider its Decision (hereinafter "the Impugned Decision"). Because he alleges the following six errors:

- Error #1 Nzirorera alleges that this Trial Chamber based its decision – to find Nzirorera's Motion for extension of time moot and abusive of the process – on the incorrect factual premise that Nzirorera's filing was made after the 24 October 2008 Order.
- Error #2 Nzirorera alleges that this Trial Chamber based its decision – to find Nzirorera's Motion for reconsideration ungrounded and abusive of the process – on an incorrect legal reasoning with regard to Nzirorera's failure to appeal whereas certification was specifically granted whilst at a later stage requesting for reconsideration.
- Error #3 Nzirorera alleges that the Chamber erred when it found that the motion to subpoena Ntawumenyumunsi is abusive to the process as it is filed after the Order of 24 October 2008.
- Error #4 Nzirorera alleges that this Trial Chamber made an error when finding that Nzirorera had breached the 24 October 2008 Order concerning Rule 92*bis* filing in view of the fact that Nzirorera had filed a motion for reconsideration of the Order on the day that the 92*bis* filing was due.
- Error #5 Nzirorera alleges that the Trial Chamber erred when deciding that Nzirorera by filing 92*bis* application on a case by case basis intentionally exploited the remuneration system.
- Error #6 Nzirorera alleges that this Trial Chamber committed an error when ordering a communication of misconduct to State Bar of Lead Counsel for Nzirorera because it was based on the above six errors.

PROSECUTOR'S SUBMISSIONS

3. The Prosecutor acknowledges that it is well established jurisprudence that a Trial Chamber may reconsider its own decisions if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.¹ A Trial Chamber may also reconsider a previous interlocutory decision if a

¹ *Prosecutor v Nindiyimana et al*, No. ICTR-2000-56-T, Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004, para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosecutor's Consolidated Corrigendum to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 7 July 2005, para. 7; *Prosecutor v*

clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.²

Alleged Error # 1

4. With regard to error #1, the Prosecution has no observations concerning the date of filing suggested by counsel for Nzirorera, and leaves resolution of the precise timing to case management and its significance to the Chamber.

5. However, it is noteworthy that the Impugned Decision also refers to the general history of Nzirorera's late and / or incomplete Rule 73ter filings and its conclusion that the Motion for extension of time was abusive of process was therefore not solely based on the timing issue.

6. Thus, the Prosecution respectfully suggests that whether or not the request for additional time was filed before or after the Order of 24 October 2008, the conclusion that the specific request for additional time may be abusive may remain the same, whether or not based in part on whether it was filed before or after the actual order.

Alleged Error # 2

7. On 24 October 2008, Nzirorera was ordered to reduce his witnesses to approximately 55 witnesses, but at that time it was expected that Nzirorera would be the third defence case. The order of 24 December 2008 did indicate that certification would

Ndindiliyimana et al, No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I Case in Evidence, 10 October 2005, para.11; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005, 24 November 2005, para. 18

² *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, Appeals Judgement, 23 May 2005, para. 203; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005, 24 November 2005, para. 19. *Emmanuel Ndindabahizi v Prosecutor* ICTR-01-71-A, Decision on Defence "requête de l'appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle", 14 June 2006, para. 2.

be granted and thus directly allowed certification to appeal. However, Nzirorera did not appeal, as was permitted.

8. On 6 November 2008, Nzirorera was ordered to be the second defence case. At this point, appeal was no longer possible as it is time barred. There may be good reasons being second instead of third might conceivably mean Nzirorera would now want to argue the witness limitation and re-evaluate his defence presentation.

9. The Prosecution is sympathetic to Nzirorera's potential need to change his defence in light of the 6 November 2008 events. However, the only appropriate manner in which to proceed would have been to file the witness list as ordered, and then to file an additional motion to show good cause to vary the witness list at a later stage in light of the decision of 6 November. The filing of yet again a motion for reconsideration of an already reconsidered motion may therefore still be abusive.

10. The fact that Nzirorera might have to start his case before Ngirumpatse may be a new fact which has however no impact on the Court Order. As the Trial Chamber clearly indicated in the Impugned Decision, Nzirorera's Rule 73*ter* filing should have been made before the commencement of the defence case irrespective of the order in which the defence is presented.

11. Moreover, the motion to reconsider the 24 October 2008 Decision was offered on the due date for the reduced witness list, namely on 7 November. It is a matter for the Chamber as to whether such a late argument on the due date amounts to a frivolous or vexatious attempt to obstruct the progress of the proceedings, particularly in light of the history of defence motions practice, the voluminous filings, and the apparent hesitation since February 2008 to comply with Rule 73*ter* demands.

12. The Prosecution recalls that the Chamber commenced its reasoning in the Impugned Decision by clearly indicating that although the event of 6 November 2008 did create a change in circumstance it did not have any impact on the Court's Order and would thus not merit a reconsideration of the 24 October 2008 Order. Only after these findings did the Chamber make reference to how Nzirorera's motion for reconsideration is frivolous and to how appeal had been granted but was not used.

Alleged Error # 3

13. With regard to error #3, the Prosecution is cautiously sympathetic with Nzirorera, as the motion of 24 October 2004 does not prohibit any subsequent subpoena motion, and it does appear that Pascal Ntawumenyumunsi was a witness mentioned in Counsel's original suggested list of 229 witnesses, whose refusal to attend voluntarily may have arisen late and as pleaded. It is not immediately clear how the motion is clearly abusive in the light of the 24 October 2008 Order, although it may be the Prosecutor has misunderstood. In any event, whether a subpoena should be issued remains arguable.

14. However, in the 24 October 2008 Decision the Trial Chamber made clear that it would prefer omnibus filings of Rule 92*bis* motions instead of one-by-one filings. The same reasoning might apply for other motions such as subpoena motions. The filing of several similar motions within a short time frame might be considered abusive by the Chamber whether or not it has warned that party.

Alleged Error # 4

15. Regarding error #4, the Prosecution disagrees with Nzirorera there was any error. The motion to reconsider the 24 October 2008 Decision was offered on the due date for the 92*bis* material. The Prosecution is sympathetic to Nzirorera's potential need to change his defence in light of the 6 November 2008 events. However, the 92*bis* filing, should properly have been made on the due date of 7 November, and never have been made the subject of a reconsideration application. If there were to be 92*bis* amendments subsequent to the 6 November ruling, then they ought to be offered by a fresh motion to vary. Given that Rule 73*ter* encompasses the filing of Rule 92*bis* material, in the sense 92*bis* witnesses ought to be part of the overall 73*ter* list, then as with the error #2 argument above it remains a matter for the Chamber as to whether such a late reconsideration filing on the due date amounts to a frivolous or vexatious attempt to obstruct the progress of the proceedings, particularly in light of the history of defence motions practice, the voluminous filings, and the apparent hesitation since February 2008 to comply with Rule 73*ter*.

Alleged Error # 5

16. With regard to the alleged error # 5, the Prosecution first asserts that the Chamber when confronted with unnecessary duplicative filings has the right to quash legal aid rates, with or without warning. The Prosecution asserts that this Trial Chamber has not abused its discretionary power by indicating that fees can be withhold. A pattern of filings can be used to come to the conclusion that these filings might evince intent to exploit the remuneration system.

17. However, the question of the filing history and fees remains entirely in the discretion of the Bench and the Prosecutor will comment no further.

Alleged Error # 6

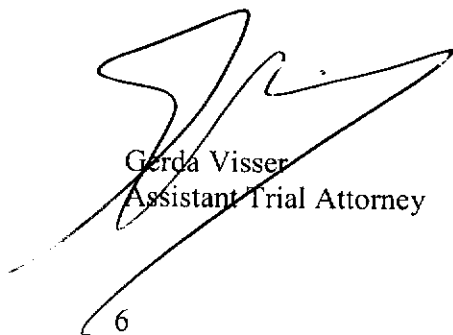
18. Regarding error # 6, the Prosecution offers no argument on report to the domestic bar, as this is a matter of conduct and is properly in the hands of the Bench. However, the Prosecution does recognise the seriousness of a personal report by the Tribunal to a domestic bar, and short of jailing a counsel for contempt; it seems difficult to imagine a more severe response. The Prosecutor recognises that if one or more of the findings of the Chamber will be reconsidered, then the Chamber might in its discretion wish to consider afresh the appropriate penalty.

WHEREFORE, the prosecution prays that the Trial Chamber will dismiss the Motion for reconsideration as being without merit.

Respectfully submitted in Arusha, this 15th day of December 2008

For the Prosecutor:

PP
Don Webster
Senior Trial Attorney


Gerda Visser
Assistant Trial Attorney



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison
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Case Name:	The Prosecutor vs. Karemera et al.		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 15 December 2008		Document's date: 15 December 2008	
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Reference material is provided in annex to facilitate translation.

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CMS SHALL NOT take any action regarding translation.

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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: