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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 5 November 2008

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-2007-91-PT

**DECISION ON DEFENCE JUDICIAL AND ADMINISTRATIVE APPLICATION FOR
DEFERRAL IN FAVOUR OF THE ICTR**

*Articles 8(2), 9 and 28 of the Statute and
Rules 9, 10, 11 and 73 of the Rules of Procedure and Evidence*

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Florida Kabasinga

For the Accused

Allison Turner

INTRODUCTION

1. On 7 January 2008, the Prosecutor issued an indictment, charging the Accused, Léonidas Nshogoza, with contempt of the Tribunal and attempt to commit acts punishable as contempt of the Tribunal. These charges arose from his activities with respect to witnesses in the case of *Prosecutor v. Kamuhanda*¹. The Accused was a Defence investigator during the trial stage of that case. Judgment was rendered in that case on 22 January 2004 and the facts giving rise to the charges are alleged to have occurred following the delivery of the Judgment.² On 28 January 2008, the Confirming Judge issued a decision requesting all states to arrest and transfer the Accused to the Tribunal, and ordering that he be remanded in custody at the United Nations Detention Facility in Arusha upon his transfer from the state in which he was arrested.³

2. The Defence submits that on 26 June 2007, the Gasabo Regional Court of Rwanda issued an order remanding the Accused in custody.⁴ At that time, the Accused was an investigator for the Defence team in *Prosecutor v. Rukundo*⁵. The Defence further states that on 30 November 2007 the Accused was granted provisional release by the Gasabo Regional Court, but that charges against the Accused are still pending.⁶

3. The Defence seeks a directive from the Office of the President of the ICTR directing the Registrar to formally advise the Rwandan authorities that the Accused enjoys functional immunity, and that the Rwandan criminal charges against him should be withdrawn and the matter deferred to the Tribunal; or formal notice directly from the Office of the President to the Rwandan authorities.⁷ Alternatively the Defence seeks an order from the Chamber directing the Registrar, or the President of the Tribunal, to formally advise the Rwandan authorities that the Accused enjoys functional immunity, and that the Rwanda criminal charges against him should be withdrawn and the matter deferred to the Tribunal.⁸

¹ ICTR-99-54A-T.

² *Prosecutor v. Léonidas Nshogoza*, ICTR-07-91-I, "Indictment", 7 January 2008. The Accused is charged with contempt of the Tribunal, punishable under Article 14 of the Statute of the International Tribunal for Rwanda ("Statute") and Rule 77 (A), (B), and (G) of the Rules of Procedure and Evidence ("Rules"). The President of the Tribunal assigned the case to this Trial Chamber on 2 May 2008, see *Nshogoza*, Order Assigning the Case to Trial Chamber III, 2 May 2008.

³ An order lifting the confidentiality of the warrant for the arrest of the Accused was issued on 4 February 2008, see *Nshogoza*, Order Lifting the Confidentiality of the Warrant of Arrest and Order for Transfer and Detention Addressed to All States, 4 February 2008.

⁴ *Nshogoza*, "Urgent Defence Judicial and Administrative Application for Deferral in Favour of the ICTR (Articles 8(2), 9, and 28 of ICTR Statute and Rules 10, 11, 54 and 73 of ICTR Rules of Procedure and Evidence)," filed on 26 March 2008. Annexure C, "Order RDP 0469/07/TGI/GSBO to Remand Leonidas Nshogoza in Custody" ("Gasabo Court Order") appears to be an official translation which lists the charges against the Accused as "grossly minimizing the seriousness of the crime of genocide within the meaning of Article 4 of Law No. 33bis/2003 of 6 September 2003 which punishes the crime of genocide, crimes against humanity and war crimes...corruption, an offence under Articles 11 and 15 of Law No. 23/2003 of 7 August 2003 on the prevention and punishment of corruption and related offences. He is also charged with corruption."

⁵ ICTR-2001-70-T.

⁶ Motion, para 22.

⁷ *Ibid.*, para. 1.

⁸ *Ibid.*, paras. 51, 52, 53.



4. In response, the Prosecutor submits that the Motion is wholly without merit and frivolous, and thus is a waste of the Tribunal's time and resources. In this vein, the Prosecutor requests that the Defence be sanctioned for abuse of process, including denial of any fees for the Motion.⁹

DISCUSSION

Preliminary Matters

5. Firstly, the Defence request for a directive from the Office of the President cannot be issued by a Trial Chamber.

6. Secondly, the Defence seeks an order from the Trial Chamber regarding functional immunity.

7. The Accused has been charged by the Tribunal with two counts of contempt, and two counts of attempting to commit acts punishable as contempt for his activities with respect to witnesses who testified in *Kamuhanda*.

8. The Accused has also been charged by Rwandan courts for committing criminal acts under their domestic law. According to the Defence submissions, the crimes with which he has been charged include minimizing genocide, and corruption.¹⁰ The Gasabo Court Order further describes the allegations against the Accused.¹¹

9. The Defence submits that the basis for the Motion is "Mr. Nshogoza's functional immunity and the law of this Tribunal."¹² The Defence asserts that the activities for which the Accused has been charged in Rwanda are immune from prosecution in Rwanda because he enjoys functional immunity as a Defence investigator.

10. The Chamber notes that the offences with which the Accused has been charged are limited to his activities with regard to witnesses from *Kamuhanda*, during which time he was no longer acting in his capacity as a defence investigator in that case. Therefore, the issue of functional immunity does not arise with respect to charges against the Accused in this Indictment.¹³

11. The Chamber will now consider the merits of the Defence Motion for an order for withdrawal of the Rwandan charges, and deferral of jurisdiction.

⁹ Nshogoza, "Prosecutor's Response to 'Urgent Defence Judicial and Administrative Application for Deferral in Favour of the ICTR (Articles 8(2), 9, and 28 of ICTR Statute and Rules 10, 11, 54 and 73 of ICTR Rules of Procedure and Evidence)'," filed 2 April 2008 ("Prosecutor's Response").

¹⁰ Gasabo Court Order.

¹¹ *Ibid.*

¹² Motion, para. 8.

¹³ Paragraph 4 of the Indictment states: "At the time relevant to this indictment, in particular between 1 March 2004 and 31 August 2005, the Accused was not a defence investigator under contract in relation to the appeal against conviction and sentence of Jean de Dieu Kamuhanda. The Accused was not therefore officially entrusted by the Tribunal with any task, or mission, in relation to the appeal of Jean de Dieu Kamuhanda when the offences alleged in this indictment were committed."

Law on Deferral of Jurisdiction

12. The principle that the Tribunal has primacy over national courts is enshrined in various provisions of the Statute and the Rules.

13. Article 8 (1) states that the Tribunal and national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in Rwanda between 1 January 1994, and 31 December 1994.¹⁴ Further, Article 8 (2) of the Statute states that the Tribunal has primacy over the national courts of all States and may request national courts to defer to its competence.¹⁵

14. A prohibition against double jeopardy is found in Article 9 (1), which provides that “[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda”.¹⁶

15. Article 28 requires all States to cooperate in the investigation and prosecution of persons accused of serious violations of international humanitarian law,¹⁷ and, under Rule 54, the Chamber has the power to “issue such orders, ... as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”

16. Finally, pursuant to Rule 9 of the Rules, the Prosecutor has the discretion to ask the Chamber to issue a formal request that the national court defer to the competence of the Tribunal, and Rule 10 allows the Chamber, if satisfied that the requirements of Rule 9 have been met, to issue such request.¹⁸

Law on Double Jeopardy

17. As noted in the previous section, the prohibition against double jeopardy is articulated in Article 9 of the Statute.

¹⁴ Article 8 (1) of the Statute states: “The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.”

¹⁵ Article 8 (2) of the Statute states: “The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda”.

¹⁶ Statute, Article 9(1). There is also an exception found in Article 9 (2) which allows the Tribunal to prosecute and individual who has already been tried before a national court if the crime was “characterized as an ordinary crime” or the proceedings were “not impartial or independent, were designed to shield the accused...or the case was not diligently prosecuted.”

¹⁷ Article 28 provides: “States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

¹⁸ Rule 9: “Where it appears to the Prosecutor that crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State: (i) are the subject of an investigation by the Prosecutor; (ii) Should be the subject of an investigation by the Prosecutor, considering, *inter alia* [...] (iii) Are the subject of and indictment in the Tribunal, the Prosecutor may apply to the Trial Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal.”

18. The principle that an accused person should not be twice subjected to prosecution for the same offence is a well recognized principle at international law. It is enshrined in Article 14 (7) of the *International Covenant on Civil and Political Rights*, which states, "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

Can the Defence Request Deferral of Jurisdiction?

19. The Defence submits that Articles 8(2), 9 and 28 of the Statute require Rwanda to defer to the jurisdiction of the Tribunal,¹⁹ and seeks an application for deferral equivalent to the application that the Prosecutor is empowered to make under Rule 9.²⁰ The Defence argues that equity requires that it be given the same power as the Prosecution to make such an application.²¹

20. The Chamber considers that the Defence application for deferral of jurisdiction in favour of the Tribunal lacks a legal basis. While it is possible to bring an application for relief pursuant to the general provision found in Rule 73, where there is a more specific provision, or *lex specialis*, it is the more specific rule that should be used. The express wording of Rule 9 - the specific rule regarding applications for deferral of jurisdiction - provides that the Prosecution has the discretion to make such an application. This Prosecutorial discretion does not extend to the Defence, nor does equity require that this rule be extended to the Defence.

21. Furthermore, the Chamber recalls that Articles 8 and 9 of the Statute apply to "serious violations of international humanitarian law." The Accused is not charged with any serious violation of international humanitarian law, but rather with the offence of contempt of this Tribunal under Rule 77 of the Rules.

22. Though Articles 8 and 9 of the Statute, and Rule 9 of the Rules cannot form the basis for an application in this case, the Chamber notes that the prohibition against double jeopardy, enshrined in Article 9: *Non Bis in Idem* is a basic legal principle which applies to the Accused regardless of the nature of the charges against him. The Chamber will now consider whether the Rwandan charges against the Accused should be withdrawn in light of the charges against the Accused by this Tribunal.

Should the Chamber Direct Rwanda to Withdraw the Charges?

23. The Defence asserts that this case replicates proceedings before the Rwandan courts because it is based on the same allegations.²² The Defence further submits that the Rwandan prosecution of the Accused is unlawful since the Tribunal has now asserted its lawful jurisdiction.²³

24. The Tribunal has the power, pursuant to Article 8 (2) of the Statute, to request that the national authorities defer to its competence. However, that power relates to "serious

¹⁹ Motion, paras 35 - 41.

²⁰ *Ibid.*, paras 42 - 45.

²¹ *Ibid.*, para 45.

²² *Ibid.*, paras. 3, 27

²³ *Ibid.*, para. 28.



violations of international humanitarian law" as provided for under Article 8 (1) of the Statute.

25. It is clear, nonetheless, that the Accused should be afforded his fundamental right to be protected from double jeopardy. The Chamber must ensure that, in prosecuting the Accused, he is not prosecuted twice for the same crime before this Tribunal.

26. According to the translation of the Gasabo Court Order annexed to the Motion, the facts giving rise to the charges against the Accused in Rwanda include allegations that the Accused:

- i. met with certain individuals and offered them money to testify for the Defence;
- ii. met with these individuals in bars rather than in his office in Gitarama, which is "suspect";
- iii. violated an unspecified rule of the Tribunal which prohibits a member of the Defence team from approaching a Prosecution witness and investigating that witness;
- iv. promised money to an individual but failed to pay as he could not be reached, having changed his telephone number four times;
- v. searched for testimonies in support of Mr. Kamuhanda, whose wife is a cousin of the Accused;
- vi. became "an expert in search of testimonies in favour of people who had been prosecuted in Arusha".²⁴

27. The Gasabo Court Order does not specify what the precise charges are in relation to the allegations described above, but refers to the Accused having been charged with bribery and destruction of evidence relating to the 1994 genocide. Nor is it clear whether all of the allegations relate to the Accused's activities regarding witnesses from the *Kamuhanda* proceedings, or whether this also includes activities regarding witnesses who testified in other cases that are unrelated to the charges in this Indictment.

28. Furthermore, the issue of double jeopardy does not arise until an accused person has been finally convicted or acquitted of an offence. There is nothing before the Chamber to suggest that the Accused has been convicted or acquitted of the crimes for which he has been charged in Rwanda, nor has the Defence made submissions that the Accused has already been prosecuted in another court for the same activities for which he has been charged by this Tribunal.

29. Following a determination of the matter before this Tribunal, it would be for the Rwandan authorities to assess the Rwandan charges against the Accused with a view to ensuring that the principle of *non bis in idem*, the rule against double jeopardy, is respected. It is not possible to speculate about what the Rwandan authorities might do following a determination of this case by the Chamber.

30. Thus, the Chamber considers that the prosecution of the Accused before this Tribunal does not violate the prohibition against double jeopardy.

²⁴ Gasabo Court Order, para. 4



Should the Defence be Sanctioned for filing a Frivolous Motion?

31. Taking into consideration the lack of merit to the Defence requests, the Chamber considers the Motion to be frivolous, and to be an unnecessary expenditure of valuable judicial time and resources. Thus, in these circumstances, the Chamber considers it appropriate to direct the Registrar, in accordance with Rule 73 (f) of the Rules, to deny costs associated with the matter.²⁵

FOR THESE REASONS the Chamber,

DENIES the Defence Motion in its entirety;


DIRECTS the Registry to withhold the payment of any costs associated with the filing of "Urgent Defence Judicial and Administrative Application for Deferral in Favour of the ICTR" filed on 26 March 2008; and hereby

DIRECTS the Registry to transmit a copy of this Decision to the Rwandan authorities.

Arusha, 5 November 2008


Khalida Rachid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


for and on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]



²⁵ Rule 73 (f) of the Rules provides that the Chamber may impose sanctions, including non-payment of fees, against Counsel for bringing a motion that "in the opinion of the Chamber, is frivolous, or is an abuse of process."