

ICTR-07-91-PT
17-12-2008
(2283 - 2276)

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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 Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 17 December 2008

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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-PT

**DECISION ON DEFENCE PRELIMINARY CHALLENGE TO PROSECUTOR'S
JURISDICTION AND SUBSIDIARY MOTION TO DISMISS THE INDICTMENT**

Rules 72, 73, and 77 of the Rules of Procedure and Evidence

Office of the Prosecutor:

For the Accused:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Florida Kabasinga

Allison Turner

INTRODUCTION

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1. On 19 May 2005, the Appeals Chamber issued an order to the Prosecutor, pursuant to Rules 77 and 91 of the Rules of Procedure and Evidence (the "Rules"), to investigate allegations regarding interference with witnesses in the *Prosecutor v. Jean de Dieu Kamuhanda* appellate proceedings.¹
2. On 4 January 2008, a Judge of the Tribunal reviewed and confirmed an indictment against Mr. Nshogoza ("the Accused").²
3. By way of Motion filed on 13 November 2008, the Defence seeks to challenge the Indictment and to have it dismissed.³
4. The Defence submits that the Prosecutor initiated proceedings against the Accused without any order from a Chamber, and that the Prosecutor lacks "jurisdiction to bring these proceedings."⁴
5. In his Response, the Prosecutor submits that the Motion should be dismissed because Rule 72 is not applicable, the Appeals Chamber directed the Prosecutor to investigate the matter pursuant to Rule 77, and the Confirming Judge authorized the prosecution of the Accused when he reviewed and confirmed the Indictment.⁵

BACKGROUND

6. On 11 April 2008, the Defence filed a motion seeking to postpone the date for filing motions under Rule 72 because the time period for filing such motions is related to the date on which the Prosecutor discloses all Rule 66 (A) (i) supporting materials. The Defence submitted that it had reason to believe that the Prosecutor's disclosure pursuant to that Rule was not complete.⁶
7. The Defence then filed "Preliminary Pro Forma Submissions" on 14 April 2008, challenging the Prosecutor's jurisdiction, and alleging defects in the Indictment.⁷ The Defence also filed motions seeking further disclosure of supporting materials.

¹ *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005 ("Kamuhanda Appeal Decision").

² *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-I, "Indictment," filed 7 January 2008. The Accused is charged pursuant to Rules 77 (A), (B) and (G) of the Rules of Procedure and Evidence ("Rules").

³ *Nshogoza*, Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment (Rules 72 and 73 ICTR R.P.E), filed 13 November 2008.

⁴ Motion, paras., 13 - 17, 19, 22.

⁵ *Nshogoza*, "Prosecutor's Response to 'Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment (Rules 72 and 73 ICTR R.P.E)'," filed 19 November 2008 ("Prosecutor's Response"), para. 2.

⁶ *Nshogoza*, "Urgent Defence Request Regarding the Commencement of the Rule 72 30-Day Delay," filed 11 April 2008, paras. 1-4.

⁷ *Nshogoza*, "Defence Preliminary Pro Forma Submission in support of Preliminary Motions Pursuant to Rule 72 of the ICTR Rules of Procedure and Evidence," filed 14 April 2008.

8. On 25 June 2008, the Defence filed a preliminary motion challenging the Indictment and seeking its dismissal pursuant to Rule 72, or alternatively, Rule 73.⁸ This motion was stated to replace the April Preliminary Pro Forma Submissions which the Defence had filed "out of an abundance of caution" on 14 April 2008.

9. The Chamber issued a Decision on defence motions for disclosure and regarding the Rule 72 30-day delay on 1 October 2008, in which it ordered the Prosecutor to file a declaration that he had disclosed all supporting materials. It further ordered that the time for filing preliminary challenges under Rule 72 would commence from the date of filing of the Prosecutor's Declaration.⁹

10. In addition, the 1 October Decision stayed any decision on the merits of the Defence's Rule 72 motions until the 30-day time period had elapsed, and it permitted the Defence to either amend its pending Rule 72 preliminary motions or to file new preliminary motions within the 30 day period.¹⁰

11. On 3 November 2008, the Defence filed a motion seeking clarification regarding the time for filing preliminary motions under Rule 72.¹¹

12. In accordance with the Chamber's further Decision of 7 November¹² regarding the time period for filing motions under Rule 72, the Defence filed a Motion on 13 November 2008 challenging the Indictment, and seeking its dismissal pursuant to Rule 72, or alternatively, Rule 73.¹³

DISCUSSION

Preliminary Matter

13. Pursuant to Rule 72, or alternatively, Rule 73 of the Rules, the Defence seeks to challenge the Prosecutor's power to investigate and prosecute the Accused.¹⁴

14. The Defence acknowledges the case law which holds that challenges to the jurisdiction of the Tribunal in contempt proceedings cannot be brought pursuant to Rule 72 (A) (i).¹⁵ The

⁸ Nshogoza, "Defence Preliminary Motions Pursuant to Rule 72, and Alternative Motion under Rule 73 to Dismiss the Indictment," filed 25 June 2008.

⁹ Nshogoza, Decision on Defence Motions for Disclosure of Supporting Materials; and Clarification on Rule 72 30-Day Period, 1 October 2008 ("1 October Decision"), p. 4.

¹⁰ Nshogoza, 1 October Decision, p. 5.

¹¹ Nshogoza, "Defence Request Concerning the Deadline for Rule 72 Preliminary Exceptions Motion," filed 3 November 2008.

¹² Nshogoza, Decision on Defence Request Concerning the Deadline for Rule 72 Preliminary Exceptions, 7 November 2008.

¹³ Nshogoza, "Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment (Rules 72 and 73 ICTR R.P.E.)," filed 13 November 2008 ("Motion"). The Chamber considers that this Motion, which is substantially similar to the previous Rule 72 motion, replaces the Defence Preliminary Motions filed 25 June 2008.

¹⁴ Motion, para. 17.

¹⁵ Motion, para. 18. See *Prosecutor v. Marijan Krizic*, Case No. IT-95-14-R77.4-AR72.1, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 2 March 2006, paras.4-6; *Prosecutor v. Ivica Marijagic and Markica Rebic*, Case No. IT-95-14-R77.2, 7 October 2005.

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Defence submits, however, that the jurisprudence on Rule 72 does not relate to the "jurisdiction of the Prosecutor," nor to conflict of interest, nor to irregularities that amount to an abuse of process.¹⁶

15. Rule 72 (A) defines preliminary motions as those which "challenge jurisdiction; allege defects in the form of the indictment; seek the severance of counts joined in one indictment ...; or raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)." Such motions must be made in writing, within thirty days after the date the Prosecutor discloses supporting materials under Rule 66 (A) (i).¹⁷

16. The Chamber considers that the language contained in Rule 72 is clear. According to Rule 72 (D), preliminary motions challenging jurisdiction under Rule 72 (A) are expressly limited to those which relate to either the competence of the Tribunal, or to the temporal, personal, territorial or subject matter jurisdiction of the Tribunal as set out in the Statute.¹⁸

17. The Chamber recalls that it is not possible to challenge the jurisdiction of the Tribunal to prosecute individuals for contempt under Rule 72. Nor is there a basis under Rule 72 to challenge the Prosecutor's authority to investigate and prosecute the Accused. This challenge does not fall within the meaning of a challenge to the "jurisdiction" of the Tribunal in relation to Articles 1, 2, 3, 4, 5, 6, 7, or 8 of the Statute as required by Rule 72 (D).¹⁹

18. The Chamber will now consider the Defence submissions under Rule 73 of the Rules.

The Relevant Legal Provisions

19. Rule 73 is the general provision for bringing motions, with the exception of those motions which must be brought pursuant to Rule 72 of the Rules.²⁰

20. The offence of contempt of the Tribunal is found in Rule 77, which provides that the Tribunal may hold in contempt any person who knowingly and willingly threatens, intimidates, injures, bribes or otherwise interferes with current, future or past witnesses; or who attempts to do so.²¹ Though it is provided for in the Rules rather than the Statute, the inherent power of the Tribunal to hold individuals in contempt has been confirmed in the jurisprudence.²²

¹⁶ Motion, paras. 18-20.

¹⁷ Rule 72 (A). Rule 66 (A) (i) requires the Prosecutor to disclose to the Defence, "[w]ithin 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused...."

¹⁸ Rule 72 (D) defines a motion challenging jurisdiction as referring "exclusively to a motion which challenges an indictment on the ground that it does not relate to any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute; the territories listed in Articles 1, 7 and 8 of the Statute; the period indicated in Articles 1, 7 and 8 of the Statute; or any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute."

¹⁹ *Prosecutor v. Marijan Krizic*, Case No. IT-95-14-R77.4-AR72.1, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 2 March 2006, para. 4; see also Rule 72 of the Rules.

²⁰ Rule 73 (A).

²¹ Rule 77 (A) (iv) provides, in relevant part, that "[t]he Tribunal ... may hold in contempt ... any person who ... threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber...." Under Rule 77 (B), attempt to commit contempt and incitement to commit contempt of the Tribunal are likewise punishable under the Rules.

²² *Prosecutor v. Dusko Tadic*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. 94-1-A-R77, 31 January 2000, paras. 12-18; *Prosecutor v. Zlatko Aleksovski*, Judgment on Appeal by Auto

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21. Under Rule 77 (C), when a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

1. direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
2. where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
3. initiate proceedings itself.²³

22. Rule 77 (D) provides that where a Chamber believes there are sufficient grounds to proceed against a person for contempt, the Chamber may:

1. in circumstances described in paragraph (C) (i), direct the Prosecutor to prosecute the matter; or
2. in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

23. The Prosecutor has power to conduct investigations pursuant to Article 17 of the Statute, and "shall have the power to question suspects, victims, and witnesses, to collect evidence, and to conduct on-site investigations".²⁴ Unlike some other statutory provisions, Article 17 makes no reference to serious violations of international humanitarian law.

24. Further, Rule 39 sets out what the Prosecutor may do in the conduct of an investigation, while Rule 47 establishes the procedure to be followed to confirm an indictment.²⁵ Pursuant to Rule 77 (E), Parts Four to Eight of the Rules apply *mutatis mutandis* to Rule 77 proceedings. Therefore, Rules 39 and 47 are applicable to contempt proceedings.

25. Rule 47 provides that the Prosecutor, if satisfied "that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the Jurisdiction of the Tribunal," shall prepare and forward an indictment along with the supporting material, to the Registrar for confirmation by a Judge.²⁶ The reviewing Judge shall examine each of the counts in the indictment to determine whether a case exists against the suspect.²⁷ The reviewing Judge can request additional material, confirm each count, dismiss each count, or adjourn the review in order to allow the Prosecutor to modify the indictment.²⁸

Nbilo Against Finding of Contempt, Case No. It-95-14/1-AR77, 30 May 2001, paras. 30-35; *Prosecutor v. Ivica Marijacic and Markica Rebic*, Decision on Motions to Dismiss the Indictment Due to Lack of Jurisdiction and Order Scheduling a Status Conference, Case No. It-95-14-R77.2, pp.5-6.

²³ Rule 77 (C).

²⁴ ICTR Statute, Article 17 (1), 17 (2).

²⁵ Pursuant to Rule 77 (E), Parts Four to Eight of the Rules apply *mutatis mutandis* to Rule 77 proceedings.

²⁶ Rule 47 (B).

²⁷ Rule 47 (E). The standard for review is set out in Article 18 of the Statute.

²⁸ Rule 47 (F).

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Does the Prosecutor Have the Authority to Prosecute the Accused?

26. The Defence submits that no Chamber authorized the investigation against the Accused pursuant to Rule 77, that the Prosecutor "instituted proceedings of its own accord," and that "[t]he order relied upon relates to false testimony...and not to contempt proceedings."²⁹ The Defence asserts that this is "an abuse of procedure amounting to a miscarriage of justice."³⁰ The Defence further submits that the Prosecutor has a conflict of interest and that *amicus curiae* should have been appointed to conduct any investigation.³¹

27. In the *Kamuhanda* Appeal Decision, the Appeals Chamber directed the Prosecutor to conduct investigations into possible contempt and false testimony.³² The Chamber stated that it had "been given reason to believe that there may have been attempts to pervert the course of justice with respect to this appeal in the form of the solicitation of false testimony." Referring to Rule 77 (A) and Rule 91 (B) of the Rules, the Appeals Chamber ordered as follows with respect to possible contempt of the Tribunal:

Accordingly the Appeals Chamber refers the matter to the Prosecutor for general investigation, and, in particular:

- 1) directs the Prosecutor, pursuant to Rule 77 (C) (i) of the Rules to investigate allegations made in evidence given before the Appeals Chamber during the Rule 115 hearing, to the effect that Tribunal employees may have attempted to interfere with the witness who had given evidence in proceedings before this Tribunal...³³

28. The Appeals Chamber went on to make an order pursuant to Rule 91 (B) as well, and stated that "in so directing the Prosecutor, it leaves it to his discretion to take the eventual steps and measures which he deems necessary and appropriate under the circumstances."³⁴

29. It is abundantly clear from this order that the Prosecutor was directed by the Appeals Chamber to conduct general investigations into possible contempt of the Tribunal pursuant to Rule 77 (C) (i) and, in addition, to specifically investigate the allegations made in evidence given before the Appeals Chamber that Tribunal employees interfered with witnesses. The order was not limited to the investigation of only those persons identified by the witnesses in their testimony.

²⁹ Motion, paras. 13, 14, 19. In the Motion, at footnote 12, the Defence cites only the portion of the *Kamuhanda* Appeals Decision that contains the order for investigations under Rule 91 (B) but omits to acknowledge the immediately preceding order under Rule 77 (C). The Defence only acknowledges the Rule 77 (C) order at page 3 of its Reply after the Prosecutor. At paragraph 11 of his Response, submits that the Defence "misrepresented and proffered a truncated version of the Appeals Chamber's directive to the Prosecutor." The Prosecutor then goes on to cite, at paragraphs 12 and 13, the Appeals Chamber's repeated references to Rule 77.

³⁰ Motion, para. 17.

³¹ Motion, paras. 15-17.

³² *Kamuhanda* Appeal Decision pp. 2, 3.

³³ *Ibid.*, p. 2.

³⁴ *Ibid.*, p. 3.

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30. The Chamber is satisfied that the Prosecutor was authorized to conduct investigations into possible contempt of the Tribunal relating to the *Kamuhanda* appeal proceedings by the Appeals Chamber in the *Kamuhanda* Appeal Decision.

31. Regarding the Defence submission that the Prosecutor had a conflict of interest, it was open to the Appeals Chamber to direct the Registrar to appoint *amicus curiae* to investigate the matter pursuant to Rule 77 (C) (iii) if, in the view of the Appeals Chamber, the Prosecutor had a conflict of interest with respect to the relevant conduct.³⁵

32. The Defence further submits that the prosecution of the Accused is unauthorized, and that the Prosecutor should have gone to the Chamber that issued the original order for review before commencing any contempt proceedings.³⁶

33. The Appeals Chamber in the case of *Prosecutor v. Jovic* considered a similar assertion that the Prosecutor lacked the authority to prosecute the accused because the Prosecutor had only been directed by a Chamber to conduct investigations but had not been ordered to prosecute the case pursuant to Rule 77 (D). The Appeals Chamber concluded, "[w]hile Rule 77(D) (i) provides that a Chamber may direct the Prosecutor to prosecute a person for contempt, it does not preclude a Confirming Judge from authorizing the Prosecution to prosecute on behalf of the Trial Chamber that is seized with the matter."³⁷

34. In this case, the Appeals Chamber directed the Prosecutor to conduct investigations in accordance with Rule 77 (C) (i), which provides for investigations to be carried out "with a view to the preparation and submission of an indictment for contempt...."³⁸

35. Following its investigations, the Prosecutor prepared and submitted an indictment against the Accused for review as required by Rule 47. The Chamber recalls that, pursuant to Rule 47 (F), the Judge who reviews an indictment can dismiss it if he is not satisfied that there is sufficient evidence to support the charges. The Confirming Judge reviewed the Indictment, and was satisfied that there is sufficient evidence to support the prosecution of the Accused.³⁹

36. The Chamber is satisfied that the prosecution of the Accused has been duly authorized in accordance with the Rules.

Warning to Defence Counsel

37. The Chamber notes, with concern, that the Defence has misrepresented information to the Chamber. In its Motion, the Defence asserts that the *Kamuhanda* Appeal Decision related

³⁵ Rule 77 (C) (iii).

³⁶ Motion, para. 16.

³⁷ *Prosecutor v. Josip Jovic*, Case No. I-95-14-T & 14/2-R77-A, 15 March 2007, paras. 35 - 36. The Chamber observes that the Defence cites a number of cases in which a Chamber issued an order for the prosecution of an individual. However, in those cases, the Chamber issued an order in lieu of an indictment and decided to prosecute the matter itself or initiate proceedings itself. See, for example, *In the Contempt Case of Dragan Jokic*, Order in Lieu of an Indictment on Contempt Concerning Dragan Jokic, 1 November 2007; *In the Contempt Case of Shefqet Kabashi*, Order in Lieu of an Indictment on Contempt Concerning Shefqet Kabashi, 5 June 2007; *In the Case against Florence Hartman*, Order in Lieu of an Indictment on Contempt, 27 August 2008; *Prosecutor v. Vojislav Seselj*, Order in Lieu of an Indictment for Contempt against Ljubisa Petkovic, 13 May 2008

³⁸ *Kamuhanda* Appeal Decision.

³⁹ *Nshogozo*, Confirmation of the Indictment and Witness Protection Orders, 4 January 2008.

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only to false testimony under Rule 91 (B), and not to contempt, while omitting any reference in its Motion to the Rule 77 order by the Appeals Chamber which immediately preceded the Rule 91 (B) order.⁴⁰ The Defence acknowledged the Rule 77 order in its Reply after the Prosecutor raised it in his Response.

38. The Chamber reminds counsel of her obligations under the Code of Professional Conduct for Defence Counsel to act honestly and diligently, and cautions counsel to ensure that her future representations to the Chamber are an accurate reflection of the record.⁴¹ The Chamber considers this to be a serious matter, which, if repeated, may warrant further consideration, and necessary action.

FOR THESE REASONS, the Chamber

DENIES the Motion in its entirety.

Arusha, 17 December 2008

For and on behalf of
Khalida Rachid Khan
Presiding Judge

Lee Gacumba Muthoga
Judge

For and on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]



⁴⁰ See para. 4 of the Motion, and pages 2-3 of the *Kamuhanda* Appeal Decision. In addition, the Defence states, at paragraph 6 of its Reply, that two prosecution witnesses testified that they "were subjected to influence and offers of bribery by persons associated with the OTP...." In support of this assertion of bribery by persons associated with the OTP, the Defence refers to the 18 May 2005 Transcript from the *Kamuhanda* appeal proceedings. Having reviewed the Transcript, the Chamber considers that this is not an accurate representation of the witness's testimony. While Witness GAG testified that the persons who approached her stated that they were from the Office of the Prosecutor, the Witness also testified in Closed Session at pp. 65-66 (Index pp. 87 onward) that she asked these persons for identification, that she could not read their names, and that "since they told me something which was not - which was incompatible with what I had stated, I went to find out from the Office of the Prosecutor." She also testified in Open Session that she was worried that they did not take her to the Tribunal offices, that she conveyed her concerns to them and asked for their names. According to her testimony, when she was asked by a Tribunal staff member whether the individuals concerned were from the Tribunal, she responded that the vehicles they drove looked like vehicles used by officials from the Tribunal. See Transcript 18 May 2005, pp. 41-43 (Index pp. 78 onward).

⁴¹ ICTR, Code of Professional Conduct for Defence Counsel, Annex, Article 13, and Article 20. The Annex states, in relevant part, "[t]he role of Counsel as specialist advocates in the administration of justice requires them to act honestly, fairly, skillfully, diligently and courageously;" and "[c]ounsel have an overriding duty to defend their client's interests, to the extent they can do so without acting dishonestly or by improperly prejudicing the administration of justice." Further, Article 20 describes "conduct involving... misrepresentation" as professional misconduct.