



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  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 17 March 2009

**THE PROSECUTOR**

v.

**Léonidas NSHOGOZA**

**Case No. ICTR-07-91-T**

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**FURTHER DECISION TO SANCTION DEFENCE COUNSEL FOR MISCONDUCT**

*Rules 46 and 54 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Richard Karegyesa  
Abdoulaye Seye  
Dennis Mabura  
Marie Ka

**For the Accused:**

Allison Turner

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## INTRODUCTION

1. The Prosecutor's case, including cross-examination, was conducted from 9 February 2009 to 19 February 2009. The Defence case was scheduled to commence on 9 March 2009. The Defence sought a one week postponement of its case, requesting that it commence on 16 March 2009.<sup>1</sup> The Defence request was denied.<sup>2</sup>

2. The Chamber adjourned the proceedings on 9 March 2009 because Defence Counsel had failed to file a reduced list of witnesses as had been repeatedly ordered by the Chamber.<sup>3</sup> During the 9 March 2009 proceedings, she was ordered to file the requisite list by 4:00 p.m. that day.<sup>4</sup> The list was not filed. On 11 March 2009, the Chamber issued a Decision sanctioning Defence Counsel for her failure to comply with the Chamber's directions to file a reduced list of witnesses.<sup>5</sup>

3. The proceedings were again adjourned on 11 March 2009, *sine die*, because Defence Counsel declined to commence the Defence case. Despite two witnesses being present in Arusha, one of which was in the courtroom, Defence Counsel declined to make an opening statement, or commence the examination of any witness, and stated that she did not know her case.<sup>6</sup> In addition, the Chamber had to repeatedly direct Defence Counsel to sit down, to stop interfering, and advised her that her conduct amounted to contempt of Court.<sup>7</sup>

4. At the end of the 11 March 2009 proceedings, the Prosecutor submitted that, despite repeated warnings, Defence Counsel "behaved in a manner contemptuous of this Court, obstructive of the proceedings," and that her misconduct should be sanctioned under Rule 46 (A) of the Rules of Procedure and Evidence ("Rules").<sup>8</sup>

5. On 12 March 2009, the Defence filed submissions stating that it would be ready to proceed with its case on Monday 16 March 2009.<sup>9</sup>

6. At the commencement of the proceedings on 16 March 2009, the Chamber rendered an abridged version of this Decision in an Oral Ruling sanctioning Defence Counsel for her conduct.<sup>10</sup> This Decision is the authoritative version of the Chamber's Oral Ruling.

<sup>1</sup> *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, "Preliminary List of Defence Witnesses and Motion for One-week Postponement of Defence," filed 20 February 2009.

<sup>2</sup> *Nshogoza*, Decision on Defence Motion for Postponement of Defence Case, 26 February 2009.

<sup>3</sup> *Nshogoza*, Further Order for the Defence to Reduce its List of Witnesses, 23 February 2009; *Nshogoza*, Decision on Defence Motion for Reconsideration of the Chamber's Further Order for the Defence to Reduce its Witness List, 26 February 2009; *Nshogoza*, Order for the Defence to Comply with the Chamber's Order of 23 February 2009 and Decision of 26 February 2009 for the Defence to Reduce its List of Witnesses, 3 March 2009.

<sup>4</sup> T. 9 March 2009, pp. 12-13.

<sup>5</sup> *Nshogoza*, Decision to Sanction the Defence for Failure to Comply with the Chamber's Orders, 9 March 2009 ("Sanctions Decision").

<sup>6</sup> T. 11 March 2009, pp. 3, 4, 13, 14.

<sup>7</sup> T. 11 March 2009.

<sup>8</sup> T. 11 March 2009, p. 15.

<sup>9</sup> *Nshogoza*, "Defence Submissions on Commencement of Defence Case," 12 March 2009, paras. 6, 7, 9.

<sup>10</sup> T. 16 March 2009 ("Oral Ruling").



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**BACKGROUND**

7. When the Accused surrendered to the Tribunal in February 2008, Ms. Turner commenced acting on his behalf as *pro bono* counsel pursuant to a power of attorney, and continued to do so for several months. Due to a series of events, primarily relating to a dispute between Ms. Turner and the Registrar regarding remuneration, she had not been formally assigned by the Registrar as counsel for the Accused.<sup>11</sup>

8. In August 2008, Ms. Turner filed motions on behalf of the Accused for her to be assigned in this case as Counsel of choice.<sup>12</sup> She submitted that the assignment of Mr. Greciano, then the Assigned Counsel, would delay the proceedings and “thus further violating (*sic*) Mr. Nshogoza’s right to be tried without undue delay.”<sup>13</sup> By comparison, Defence Counsel submitted on 1 September 2008 that she was very familiar with the case, and the Tribunal procedures, and was “ready to immediately move forward with this case.”<sup>14</sup>

9. As a result of Ms. Turner’s representations, and in light of her having acted on behalf of the Accused since February 2008, the Chamber ordered the Registrar to assign Ms. Turner as Counsel in these proceedings.<sup>15</sup> In its 13 October 2008 Decision directing the Registrar to assign counsel of choice, Allison Turner, the Chamber stated at paragraph 25:

“The Chamber’s decision to replace Mr. Greciano with Ms. Turner... is based on the need for this trial to move forward without further delay, and is made pursuant to the Chamber’s power to issue any orders as may be necessary for the conduct of this trial and to ensure fair and expeditious proceedings under Articles 19 and 20 of the Statute, and Rules 45 (H) and 54 of the Rules.”<sup>16</sup>

10. Despite having submitted on 1 September 2008 that she was ready to immediately move forward with the case, during the 22 October Pre-Trial Conference, Defence Counsel advised that she would not be prepared to proceed to trial on 23 November 2008 and sought to postpone the proceedings.<sup>17</sup>

<sup>11</sup> *Nshogoza*, Decision on Motions Requesting Assignment of Counsel of Choice, 13 October 2008, paras. 1-5 (“Decision to Assign Counsel of Choice”).

<sup>12</sup> *Nshogoza*, Case No. ICTR-07-91-T, Accused’s Request of 5 August 2008 and “Extremely Urgent Motion for Order to Registrar to Assign Counsel of Choice Pursuant to Article 20 (4) (d) ICTR Statute” filed on 21 August 2008; *Nshogoza*, “Defence Extremely Urgent Request for Hearing on Motion to Assign Counsel of Choice Allison Turner and Amended Prayer of Relief,” filed on 26 August 2008.

<sup>13</sup> *Nshogoza*, “Defence Extremely Urgent Request for Hearing on Motion to Assign Counsel of Choice Allison Turner and Amended Prayer of Relief,” filed 26 August 2008, para 15; *See also* T. 28 August 2008, Closed Session, pp. 2, 6. The Accused refused to recognize his Assigned Counsel as his representative. Mr. Greciano submitted that, in light of his recent appointment and difficulties in communicating with his client, he would not be ready to proceed by the scheduled trial date of 29 September 2008 but rather by the end of 2008 or the beginning of 2009.

<sup>14</sup> *Nshogoza*, “Supplementary Submissions to ‘Defence Extremely Urgent Motion (...)’ and to ‘Defence Extremely Urgent Request (...)’,” filed 1 September 2008, para 22.

<sup>15</sup> Decision to Assign Counsel of Choice That day, the Registrar, having resolved the dispute with Ms. Turner over remuneration, assigned her as Counsel for the Accused pursuant to Rule 45 of the Rules.

<sup>16</sup> Decision to Assign Counsel of Choice.

<sup>17</sup> T. 22 October 2008, pp.2, 4-5. Additionally, Defence Counsel submitted that she recently received disclosure of certain materials and needed time to review them. *See* T. 22 October 2008, pp. 6-8 (Counsel submitted that she had only been formally assigned in October, and had yet to meet her investigator and conduct investigations); *Nshogoza*, “Defence Motion for Order to the Prosecution to Complete Rule 66 (A) (ii)



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11. The Chamber granted the Defence's request for six to eight weeks to investigate and prepare for trial, and moved the proposed trial date from 23 November 2008 to 2 February 2009.<sup>18</sup> The trial was finally scheduled to commence on 9 February 2009.<sup>19</sup> The Chamber notes that the period between the 30 October 2008 Pre-Trial Conference, when the Defence requested six to eight weeks to prepare, and the scheduled date that trial commenced was approximately fourteen weeks - some six to eight weeks more than requested by the Defence.

12. A few days prior to the scheduled trial date, the Defence brought a motion for a stay of proceedings due to alleged disclosure violations.<sup>20</sup> Subsequently, the Defence brought several motions, both oral and written, seeking to postpone the proceedings.<sup>21</sup> During the course of the proceedings on 9 February 2009, the Defence moved orally, in the absence of a decision on the Stay Motion, for the Chamber to adjourn the proceedings due to the alleged disclosure violations.<sup>22</sup> The Defence then moved orally for certification to appeal the Chamber's oral ruling denying its motion.<sup>23</sup> Some minutes later, Defence Counsel again sought an adjournment on the same basis, and again during the afternoon session.<sup>24</sup> In addition, Defence Counsel sought to adjourn the proceedings on the basis that she was not prepared to cross-examine the Prosecutor's witness because she believed the order of presentation of the five witnesses to be different.<sup>25</sup> The Defence then filed a written motion seeking reconsideration and certification to appeal the Chamber's decision not to postpone the case.<sup>26</sup>

13. When the Prosecutor's case closed, the Defence sought to postpone the commencement of its case by one week on the basis that the Prosecutor's case, including cross examination, took four trial days longer than had been originally scheduled.<sup>27</sup> The Defence then sought reconsideration and certification to appeal the Chamber's decisions, as well as a stay of proceedings due to alleged interference with Defence witnesses.<sup>28</sup>

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Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza," filed 29 October 2008, paras. 3, 44.

<sup>18</sup> T. 30 October 2008, pp. 4-5, 13-16.

<sup>19</sup> Nshogoza, Scheduling Order, 10 December 2008.

<sup>20</sup> Nshogoza, "Motion for Stay of Proceedings Due to the On-going Violation of the Prosecutor's Disclosure Obligations," filed 5 February 2009 ("Stay Motion").

<sup>21</sup> T. 9 February 2009, pp. 3, 4-6, 8, 39; Nshogoza, "Defence Request for Reconsideration, or, in the alternative, Certification to Appeal the Trial Chamber's Oral Decision of 9 February 2009 Denying a Postponement of Proceedings Due to Disclosure Violations," filed 12 February 2009 ("Motion").

<sup>22</sup> T. 9 February 2009, p. 3.

<sup>23</sup> T. 9 February 2009, p. 8.

<sup>24</sup> T. 9 February 2009, pp. 8, 39.

<sup>25</sup> T. 9 February 2009, pp. 4-6.

<sup>26</sup> Nshogoza, "Defence Request for Reconsideration, or, in the alternative, Certification to Appeal the Trial Chamber's Oral Decision of 9 February 2009 Denying a Postponement of Proceedings Due to Disclosure Violations," filed 12 February 2009 ("Motion").

<sup>27</sup> Nshogoza, "Preliminary List of Defence Witnesses and Motion for One-Week Postponement of Defence Case," filed 20 February 2009, para. 2.

<sup>28</sup> Nshogoza, "Defence Request for Reconsideration of the 'Decision on Defence Motion for Postponement of the Defence Case' and Request to Postpone the Filing of the Pre-Defence Brief," filed 2 March 2009; Nshogoza, "Defence Motion for Certification of the Trial Chamber's 'Decision on Defence Motion for Reconsideration of the Chamber's Decision on Motion for Postponement of Defence Case'," filed 6 March 2009; Nshogoza, "Urgent Motion for Stay of Proceedings Due to Interference with Defence Witnesses," filed 4 March 2009.

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14. The proceedings of 9 March 2009 – the scheduled date for the commencement of the Defence case – were adjourned due to the Defence's failure to comply with the Chamber's orders. During the proceedings on 9 March 2009, Defence Counsel twice stated that if required to comply with the Chamber's order to submit a list of ten witnesses, she would submit her resignation.<sup>29</sup> She asserted that she could not comply with the Chamber's order because the Accused had instructed her not to file a list of ten witnesses as it would compromise his defence.<sup>30</sup> The Chamber, however, adjourned the proceedings, in the interests of justice, to allow the Defence to file its reduced list of witnesses.<sup>31</sup>

15. On 11 March 2009, when the Defence again failed to file the reduced list as directed, the Chamber issued a Decision sanctioning Defence Counsel, pursuant to Rule 46 of the Rules.<sup>32</sup> On 12 March 2009, the Chamber issued a Further Order for the Defence to Comply with its various orders and to file a reduced list of witnesses.<sup>33</sup> On 13 March 2009, nearly three weeks after the first order from the Chamber for the Defence to reduce the number of its witnesses who would give oral testimony to a maximum of ten, the Defence filed its reduced list of witnesses as directed.<sup>34</sup>

## DISCUSSION

### *The Applicable Law*

16. Rule 46 (A) of the Rules allows the Chamber to impose sanctions against counsel, after a warning, "if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice." Under Rule 46 (B), "a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission...."

17. According to the Tribunal's Code of Professional Conduct for Defence Counsel ("Code"), Counsel "have an overriding duty to defend their client's interests, to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice";<sup>35</sup> and must "[a]bide by a client's decision concerning the objectives of representation if not inconsistent with Counsel's ethical duties."<sup>36</sup> In addition, Counsel "must at all times comply with the Rules and such rulings as to conduct and procedure as may be applied by the

<sup>29</sup> T. 9 March 2009, p. 10. During the proceeding, when ordered to file the list of ten witnesses, Defence Counsel stated, "if I, as an officer of the Court and a member of the bar of Quebec, am faced with such a contradictory instruction... I must cease to exist to put an end to this impasse. And so I submit to your Honourable Justices that if you want to order me, Allison Turner, to file a list of ten witnesses on behalf of my client, I submit my resignation at this point in time."

<sup>30</sup> T. 9 March 2009 p. 10; *Nshogoza*, "Defence Submissions Further to the Trial Chamber's Oral Order of 9 March 2009," filed 9 March 2009, para. 6 and Annex 1.

<sup>31</sup> T. 9 March 2009, pp. 14-15.

<sup>32</sup> *Nshogoza*, Case No. ICTR-07-91-T, Decision to Sanction the Defence for Failure to Comply with the Chamber's Orders, 9 March 2009.

<sup>33</sup> *Nshogoza*, Further Order for the Defence to Comply with the Chamber's Orders and File its Reduced List of Witnesses, 12 March 2009.

<sup>34</sup> *Nshogoza*, "Defence Submissions Further to 'Further Order for the Defence to Comply with the Chamber's Orders and File its Reduced List of Witnesses'," filed 13 March 2009.

<sup>35</sup> Code of Professional Conduct for Defence Counsel ("Code"), Introduction, para. 3.

<sup>36</sup> Code, Article 4.

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Tribunal in its proceedings,” and have regard to the fair conduct of the proceedings.<sup>37</sup> Further, it is professional misconduct for Counsel to “engage in conduct which is prejudicial to the proper administration of justice before the Tribunal.”<sup>38</sup>

*Should the Chamber Impose Sanctions on Defence Counsel for her Conduct During the 11 March 2009 Proceedings?*

*i) Refusal to Make an Opening Statement or Call any Witnesses*

18. During the proceedings on 11 March 2009, Defence Counsel repeatedly interrupted the Chamber and was directed to sit down several times.<sup>39</sup> Further, Counsel was advised that the Chamber would take her “continuous interference as contempt of Court.” The Chamber had to subsequently warn counsel a second time, stating that if she interfered again, she would be held in contempt.<sup>40</sup>

19. Further, Defence Counsel declined to proceed with her case, stating that she would not proceed with any witness without making an opening statement, and that the Defence was not prepared to give an opening statement when Defence Counsel did not “know what the situation is with respect to its witnesses.”<sup>41</sup> In light of the Defence submissions that its witnesses refused to testify unless their questions about the disclosure of their identity to Rwandan authorities were answered, the Chamber called Defence Witness A3 into the courtroom to question him about his willingness to testify.<sup>42</sup>

20. When asked by the Chamber, after it has finished questioning Defence Witness A3 about his willingness to testify, if she was ready to proceed, Defence Counsel responded that the Defence “is in a state of disarray since Monday. The Defence doesn’t even know what its case is.”<sup>43</sup> Further, Defence Counsel stated, “I don’t even know what case I have in front of me or with me to bring. I’m unable to make an opening statement; I don’t know what my case is going to be. I need to find out what it is.”<sup>44</sup>

21. Ultimately, as a result of Defence Counsel’s unwillingness to proceed, the Chamber adjourned the proceedings *sine die*.<sup>45</sup>

22. The Chamber notes that on 12 March 2009, after having insisted during the 11 March 2009 proceedings that it was impossible to commence the Defence case, and that Counsel did not know what the Defence case was, the Defence filed written submissions, stating that it

<sup>37</sup> Code, Article 12.

<sup>38</sup> Code, Article 20 (d).

<sup>39</sup> T. 11 March 2009, pp. 3, 4, 7, 8, 9, 10, 11. At one point, the Chamber directed Defence Counsel to refrain from speaking. See T. 11 March 2009, p. 7.

<sup>40</sup> T. 11 March 2009, pp. 9-11.

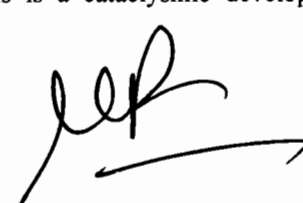
<sup>41</sup> T. 11 March 2009, p. 4.

<sup>42</sup> T. 11 March 2009, pp. 1-10.

<sup>43</sup> T. 11 March 2009, p. 13.

<sup>44</sup> T. 11 March 2009, p. 14. Defence Counsel also submitted - referring to the procedure involved in securing travel documents for witnesses to travel to Arusha - that she would have to “go back to my witnesses and inform them that they fact that they are testifying here for Léonidas Nshogoza, in the defence, is known by the Prosecutor General of Rwanda and the Ministry of Justice. This is a cataclysmic development in these proceedings....” See T. 11 March 2009, p. 15.

<sup>45</sup> T. 11 March 2009, p. 15.



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would be ready to proceed on Monday 16 March 2009 – one week later than the scheduled date for the commencement of the Defence case.<sup>46</sup>

*ii) Comportment*

23. The Chamber has cautioned Defence Counsel on various occasions about appropriate conduct in the courtroom, about her tone, her language and about the need to comply with the Chamber's orders.<sup>47</sup> Although she has been warned repeatedly, the conduct of Defence Counsel has been obstructive and eventually brought the proceedings to a halt.

24. The Chamber considers that the conduct of Defence Counsel has led to unnecessary delay, has been contrary to the interests of justice, and is inconsistent with the Code of Conduct for Defence Counsel. Further, the Chamber considers that such conduct is not in the interest of the Accused, nor is it consistent with the Accused's right to a fair and expeditious trial in accordance with the Rules as enshrined in Article 19 (1) of the Statute.

**FOR THESE REASONS,** the Chamber

**SANCTIONS** Defence Counsel, Ms. Allison Turner, pursuant to Rule 46 (A) of the Rules, for her obstructive conduct during the proceedings of 11 March 2009, including her comportment in the courtroom, and her refusal to commence her case, by imposing a fine of \$500.00 (Five Hundred) dollars; and,

**DIRECTS** the Registrar, pursuant to Rule 46 (B) of the Rules, to seek the President's approval to communicate Defence Counsel Allison Turner's misconduct, including copies of this Decision, the record of proceedings 11 March 2009, and any written apology filed by Defence Counsel in accordance with the Oral Ruling,<sup>48</sup> to the professional body that regulates the conduct of counsel in her State of admission; and,

<sup>46</sup> Nshogoza, "Defence Submissions on Commencement of Defence Case," filed 12 March 2009, paras. 6, 7, 9.

<sup>47</sup> T. 28 August 2008, pp. 3-4; T. 9 February 2009, pp. 3, 8, 16, 17; T. 9 March 2009, pp. 3, 7, 9-12; T. 11 March 2009, pp. 3, 5, 7-9, 11, 14.

<sup>48</sup> In the Oral Ruling rendered on 16 March 2009, the Chamber invited Defence Counsel, Ms. Allison Turner, to submit a written apology for her conduct during the proceedings on 11 March 2009 no later than Tuesday 17 March 2009 at 9:00 a.m.



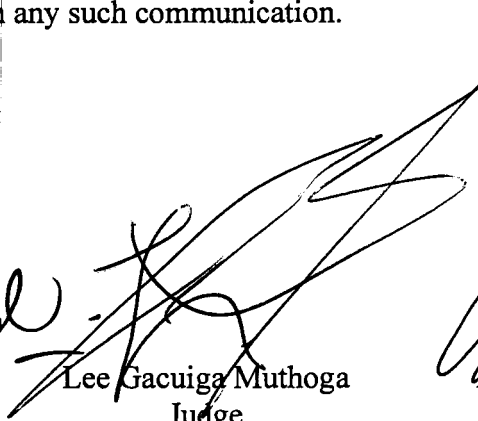
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**DIRECTS** the Registrar, pursuant to Rule 46 (B), further to its Decision of 11 March 2009, in which the Chamber imposed sanctions on Defence Counsel and sought the President's approval to communicate Defence Counsel's misconduct to the professional body that regulates the conduct of counsel in her State of admission,<sup>49</sup> to include copies of the record of proceedings of 9 March 2009 in any such communication.

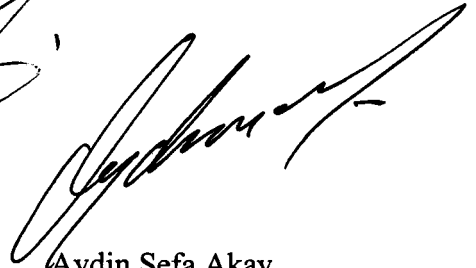
Arusha, 17 March 2009



Khalida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge



Aydin Sefa Akay  
Judge

[Seal of the Tribunal]



<sup>49</sup> Sanctions Decision