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25-11-2010
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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A

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 25 November 2010

JUDICIAL RECORDS MACHINE
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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-A

**DECISION ON DEFENCE ALLEGATIONS OF CONTEMPT BY MEMBERS OF
THE PROSECUTION**

Rules 54, 73 and 77 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

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1. On 7 July 2009, the Chamber rendered its Judgement against Léonidas Nshogoza, in which it found him guilty of Contempt of the Tribunal pursuant to Count 1 of the Indictment and sentenced him to ten months imprisonment.¹ Mr. Nshogoza was acquitted of the remaining three Counts.² The Appeals Chamber upheld Nshogoza's conviction.³

2. In its Closing Brief, the Defence alleged numerous violations of witness protective measures by members of the Office of the Prosecutor ("OTP").⁴ The Defence submitted that members of the OTP contacted, met with and took statements from the following Defence witnesses in violation of witness protection orders issued in the *Kamuhanda* or *Rwamakuba* cases: Witnesses GAA, A7/GEX, Fulgence Seminega, Augustin Nyagatare and Straton Nyarwaya.⁵ The Defence requested the Chamber to order an investigation into these allegations.⁶

3. The Chamber found that the testimony of Witnesses Fulgence Seminega, Augustin Nyagatare and Straton Nyarwaya *prima facie* indicated that members of the OTP may have acted in violation of witness protection orders.⁷ With respect to Witnesses GAA and A7/GEX, the Chamber found that, due to the *Kamuhanda* defence team's⁸ failure to follow the procedures for meeting with protected Prosecution witnesses adopted by the Trial Chamber in that case, these witnesses remained protected Prosecution witnesses at the time that OTP representatives made contact with them; the Chamber therefore dismissed the Defence submissions in relation to these witnesses.⁹

4. On 16 July 2009, the Chamber issued an order requesting further submissions from the Parties concerning the Defence allegations.¹⁰ On 7 August 2009, the Prosecution and the Defence filed submissions in response to the Order for Submissions.¹¹

¹ *Nshogoza* Trial Judgement, 7 July 2009, para. 233.

² *Nshogoza* Trial Judgement, paras. 202, 211.

³ *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement (AC), 15 March 2010 ("*Nshogoza* Appeal Judgement").

⁴ Closing Brief of Léonidas Nshogoza (Confidential), 17 April 2009, paras. 96-105.

⁵ Exhibit D26 (*The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, 22 March 2001); *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Protective Measures, 21 September 2005.

⁶ Defence Closing Brief, paras. 96-104. Also during its Closing Arguments, on 29 April 2009, the Defence further alleges several OTP violations of Defence witness protection measures. See T. 29 April 2009, pp. 39-40.


⁷ *Nshogoza* Trial Judgement, paras. 44-45.

⁸ Although the word "defence" was capitalized, it is clear from the context that the Trial Chamber intended to refer to the *Kamuhanda* defence team and not Nshogoza's defence team.

⁹ *Nshogoza* Trial Judgement, para. 43.

¹⁰ Order for Submissions from the Parties on the Conduct of Staff of the Prosecution and the Possible Violation of Witness Protective Measures, 16 July 2009 ("Order for Submissions").

¹¹ Mr Nshogoza's Submissions on Prosecution Interference with Protected Defence Witnesses (the "Defence Submissions"), filed 7 August 2009; Prosecutor's Submissions on "Order for Submissions from the Parties on the Conduct of Staff of the Prosecution and the Possible Violation of Witness Protective Measures" ("Prosecution Submissions"), filed 7 August 2009.



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DISCUSSION

Preliminary Matter: Defence Submissions on Alleged Prosecution Violations with regard to Witnesses GAA and A7/GEX

5. Despite the Chamber's dismissal of the Defence submissions concerning Witnesses GAA and A7/GEX¹² and its subsequent Order requesting the Parties to file submissions only on the alleged OTP violations with regard to Witnesses Seminega, Nyagatare and Nyarwaya,¹³ the Defence has made further submissions regarding alleged Prosecution violations of witness protection orders in relation to these witnesses. The Chamber considers this a request for reconsideration of its previous decision, rendered in the Judgement. The Chamber finds, however, that the Defence has failed to demonstrate any new material circumstances warranting reconsideration of its Decision and has failed to show that there has been an error of law or an abuse of discretion. Therefore, the Defence has not met the standard for reconsideration,¹⁴ and the Chamber will disregard the Defence's further submissions concerning Witnesses GAA and A7/GEX.

Applicable Law

6. According to Rule 77 (A) of the Rules of Procedure and Evidence,¹⁵ the Tribunal may hold in contempt those who knowingly and wilfully interfere with its administration of justice.

7. Pursuant to Rule 77 (C), when a Chamber has reason to believe that a person may be in contempt of the Tribunal, it (i) may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt; or (ii) where the Prosecutor has a conflict of interest with respect to the relevant conduct, may 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 (iii) initiate proceedings itself.

8. Where a Chamber considers that there are sufficient grounds to proceed against a person for contempt, in accordance with Rule 77 (D), the Chamber may: (i) in circumstances described in sub-Rule (C)(i), direct the Prosecutor to prosecute the matter; or (ii) in circumstances described in sub-Rules (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. The

¹² *Nshogoza* Trial Judgement, para. 43.

¹³ The Defence claims that these submissions are presented to the Chamber in the interests of judicial economy, as the issue of the status of Witnesses GAA and A7/GEX as protected Prosecution witnesses is among the issues currently before the Appeals Chamber. *See* Defence Submissions, para. 5. The Chamber does not consider that raising submissions before it concerning a matter that is already before the Appeals Chamber promotes judicial economy.

¹⁴ Decision on Defence Motion for Review of Provisional Measures, or alternatively, for Provisional Release, 17 November 2008, para.8; *see also* *The Prosecutor v. Édouard Karemera et al*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision on 17 September 2008 (AC), 30 January 2009, para. 13; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7.

¹⁵ Unless otherwise specified, all further references in this Decision to Rules are to the Rules of Procedure and Evidence.



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sufficient grounds standard is satisfied where the evidence establishes a *prima facie* case of contempt.¹⁶

9. As this Chamber found in the Judgement and as was upheld by the Appeals Chamber in its Judgement, a knowing and wilful violation of protective measures ordered by a Trial Chamber is punishable as contempt of the Tribunal.¹⁷ The Chamber recalls that mistake of law is not a valid defence to contempt, and does not excuse a violation of a protective measures order.¹⁸

Submissions of the Parties

10. The Defence submits that members of the OTP met with and took statements from Defence Witnesses Seminega, Nyagatare and Nyarwaya in violation of the *Rwamakuba* and *Kamuhanda* witness protection orders for defence witnesses. These witnesses confirmed during their testimony in this trial that they testified as protected defence witnesses either in the *Kamuhanda* (Defence Witness Seminega) or *Rwamakuba* trials (Defence Witnesses Nyagatare and Nyarwaya). They also testified that they were subsequently contacted and interviewed by representatives from the OTP, who took statements from them.¹⁹

11. The Defence moves the Chamber to either direct an *amicus curiae* to prosecute the matter or to prosecute the matter itself pursuant to Rule 77 (D)(ii).²⁰ Alternatively, the Defence requests the Chamber to direct the Registrar to appoint an *amicus curiae* pursuant to Rule 77 (C)(ii) to conduct further investigations.²¹

12. The Prosecution submits that no violation of witness protection orders occurred and, therefore, the Defence allegations should be dismissed.²² According to the Prosecution, it did not need to request the Appeals or Trial Chamber's authorization to interview the protected witnesses.²³ The meetings with these witnesses were part of the investigations which led to the indictments and trials of Witness GAA and Nshogoza and were undertaken pursuant to the oral ruling of the Appeals Chamber,²⁴ which directed the Prosecution to investigate offences against the administration of justice pursuant to Rules 77 (C)(i) and 91 (B).²⁵

¹⁶ See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision Not to Prosecute Witness BTH for False Testimony (AC), 16 February 2010, paras. 19, 21 (discussing the meaning of the sufficient grounds standard for contempt and false testimony).

¹⁷ *Nshogoza* Appeal Judgement, paras. 58, 80; *Nshogoza* Trial Judgement, para. 178; see also, *The Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement (AC), 15 March 2007 ("*Jovic* Appeal Judgement"), para. 30 (quoting the *Marijačić* Appeal Judgement, para. 44).

¹⁸ *Nshogoza* Trial Judgement, para. 181; see also, *Jović* Appeal Judgement, para. 27.

¹⁹ Seminega, T. 18 March 2009 pp. 53, 56-59, see Exhibit D.51(E); Nyagatare, T. 23 March 2009 p.19, see Exhibit D.59(E); Nyarwaya, T. 20 March 2009 pp. 4, 23.

²⁰ Defence Submissions, para. 38.

²¹ The Defence, however, submits that the second alternative would be "unnecessary" in the interests of judicial expediency with regard to some of the alleged conduct. See Defence Submissions, para. 39.

²² Prosecution Submissions, paras. 4-5.

²³ Prosecution Submissions, paras. 10-11.

²⁴ *Jean de dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Ruling following Rule 115 Evidentiary Hearing, T. 19 May 2005 pp. 50-51 ("*Appeals Chamber's Order*").

²⁵ Prosecution Submissions, paras. 6-8.

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13. According to the Prosecution, the general order issued by the Appeals Chamber authorized it to interview all persons, including protected and unprotected witnesses.²⁶ It claims that requesting permission to interview witnesses may have prejudiced its investigations. The Prosecution also notes that *amicus curiae* have met with and interviewed protected witnesses without having to request permission from the Trial Chamber.²⁷ Finally, the Prosecution submits that the interviews were conducted under the good faith belief that they were authorized by the Appeals Chamber's Order.²⁸

Should the Chamber Direct the Registrar to Appoint Amicus Curiae to Investigate Possible Contempt?

14. As an initial matter, the Chamber recalls that the protective measures ordered in the *Kamuhanda* and *Rwamakuba* cases, among other things, prohibited the Prosecution from contacting defence witnesses without first notifying the respective defence teams and having them make the necessary arrangements.²⁹ The protective measures ordered in these cases do not require the Prosecution to seek the *Kamuhanda* or *Rwamakuba* Trial Chambers' permission to meet with the protected defence witnesses.

15. The Chamber notes that the Prosecution does not specify whether it notified the relevant defence representatives before interviewing the witnesses. Nor do the Defence submissions address this issue specifically. Nonetheless, given the content of the Prosecution submissions and the testimony of the relevant witnesses, the Chamber has reason to believe that the Prosecution did not comply with the prescribed protective measures.³⁰

16. The Chamber does not consider that the Appeals Chamber's Order authorized the Prosecution to ignore the protective measures ordered in the *Kamuhanda* or *Rwamakuba* cases. There is no legal basis for different rules or procedures applying to investigations under Rules 77 and 91. On the contrary, Rule 77 specifically provides that Parts Four through Eight of the Rules of Procedure and Evidence, which cover investigations and include all relevant provisions regarding protective measures, apply *mutatis mutandis* to contempt proceedings.

17. The Chamber considers the Prosecution's reliance on the investigation practices of *amici curiae* appointed by this Tribunal to be inapposite. The relevant provisions of the *Kamuhanda* and *Rwamakuba* protective measures were directed at the Prosecution, and not at third parties.³¹ To leave it to the Prosecution to determine whether it remains bound by

²⁶ Prosecution Submissions, para. 10.

²⁷ Prosecution Submissions, paras. 11-12.

²⁸ Prosecution Submissions, paras. 11-13.

²⁹ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses (TC), 22 March 2001 (entered as Exhibit D26 in this case); *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Protective Measures (TC), 21 September 2005; see also Judgement, para. 44.

³⁰ The Prosecution relies on the argument that the Appeals Chamber's Order authorized it to meet with apparently any protected defence witness. It does not submit that it complied with the relevant protective measures. Moreover, none of the relevant witnesses testified that his interview with the Prosecution had been arranged by the relevant defence team or that the relevant defence teams had, to the witnesses' knowledge, even been informed of the interviews.

³¹ Even though it was investigating contempt pursuant to the Appeals Chamber's Order, the Prosecution remained party to the criminal proceedings against Kamuhanda and Rwamakuba, as well as all other proceedings before the Tribunal.



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Chamber's orders when it is investigating contempt proceedings opens up the possibility of abuse.

18. The Chamber is not convinced that requiring the Prosecution to respect protective measures would have impeded its investigations.³² Given the particular circumstances of this case, the Chamber cannot reject the possibility that having to inform the *Kamuhanda* defence team of its desire to interview witnesses may have impeded its investigations to the extent that they were focused on Nshogoza, who was an investigator for that defence team. In such circumstances, the Chamber considers that the proper course under such circumstances would have been for the Prosecution to seek the guidance of either the Appeals Chamber or the *Kamuhanda* Trial Chamber. In this regard, the Chamber notes that, when justified under the circumstances, *ex parte* submissions are accepted practice at the Tribunal.³³

19. The Chamber accepts the Prosecution's submission that the interviews of the concerned defence witnesses may have been undertaken by members of the OTP in the good faith belief that they were authorized by the Appeals Chamber's Order. However, for the reasons specified above, the Chamber finds that this belief was mistaken.

20. The Chamber recalls that the language of Rule 77 is discretionary. The Tribunal *may* hold in contempt persons who knowingly and wilfully interfere with the administration of justice, but the fact that a Trial Chamber has reason to believe that a person is in contempt does not oblige it to order an investigation or prosecution.³⁴ Thus, even where there are sufficient grounds and therefore a *prima facie* case to pursue contempt proceedings, a Trial Chamber may consider the gravity of an alleged perpetrator's conduct or his underlying motivations when deciding whether to initiate contempt proceedings.³⁵

21. The submissions of the Parties suggest that members of the OTP may have violated witness protective measures and thus may have acted in contempt by meeting with protected defence witnesses Seminega, Nyagatare and Nyarwaya in contravention of the relevant orders given by the *Kamuhanda* and *Rwamakuba* Trial Chambers. Although there may be sufficient grounds to proceed, in the Chamber's view, consideration of the gravity of the alleged conduct and underlying motivations of the OTP investigators, as well as the penal goals to be served by initiating contempt proceedings, militate against pursuing this matter further.

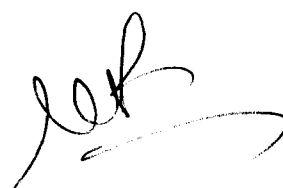
22. The Chamber is mindful that Nshogoza's conviction for contempt rests solely on his meetings with protected Prosecution witnesses in violation of protective measures ordered by the *Kamuhanda* Trial Chamber. However, Nshogoza was also indicted for more serious misconduct, including allegations that he engaged in bribery and induced witnesses to testify

³² As a general matter, the argument that requiring the Prosecution to notify defence teams of its intention to interview defence witnesses will impede Prosecution investigations has been rejected by Trial Chambers when issuing protective measures on behalf of defence witnesses. In fact, this argument was rejected by the *Kamuhanda* Trial Chamber. *Kamuhanda*, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses (TC), paras. 6, 21.

³³ See e.g., *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008, para. 5 (noting that "*ex parte* applications may be necessary when they respond to the interests of justice and when the disclosure to the other party of the information contained in the application would likely prejudice the persons related to the application.").

³⁴ *Nshogoza* Trial Judgement, para. 176.

³⁵ See *Nshogoza* Appeals Judgement, para. 57.



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falsely before the Appeals Chamber. The testimonies of witnesses Seminega, Nyagatare and Nyarwaya do not support such serious allegations against the members of the OTP who met with them.


23. Turning to the underlying motivations of the OTP investigators, the Chamber accepts that the members of the OTP may have acted on the mistaken belief that they were authorised to meet with the relevant defence witnesses by the Appeals Chambers Order.

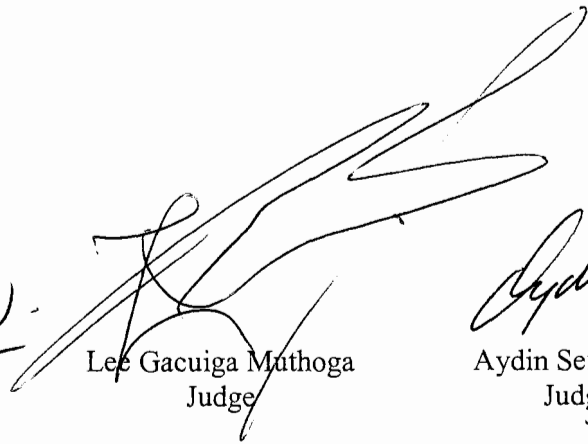
24. Moreover, the Chamber does not consider that pursuit of contempt proceedings is necessary to achieve the important goals of deterrence and denunciation in this case.³⁶ Under the particular circumstances of this case, the Chamber declines to exercise its discretion to initiate contempt investigations or proceedings pursuant to Rules 77 (C) or (D).

FOR THESE REASONS, the Chamber


DECLINES to initiate contempt investigations or proceedings pursuant to Rule 77 (C)(ii), or Rule 77 (D)(ii), against the members of the Prosecution who met with Witnesses Seminega, Nyagatare and Nyarwaya.

Arusha, 25 November 2010


Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge


Aydin Sefa Akay
Judge



³⁶ See *Nshogoza* Trial Judgement, paras. 218-219 (referring to sentencing goals).