



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

133/H

ICTR-01-69-A;

ICTR-10-92

16th December 2010

{133/H - 121/H}

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 16 December 2010

ICTR Appeals Chamber
Date: 16th December 2010
Action: R. Duménil
Copied To: Judges, LO, SCO, ALO, Parties, OCMS, LSS.
J. Duménil

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case Nos. ICTR-01-69-A
ICTR-2010-92

PUBLIC

Re: Léonard Safari and Rémi Mazas

**DECISION ON PROSECUTION APPEAL OF DECISION CONCERNING
IMPROPER CONTACT WITH PROSECUTION WITNESSES**

Office of the Prosecutor
Hassan Bubacar Jallow
Deborah Wilkinson
Abdouleye Seye

Counsel for Hormisdas Nsengimana
Emmanuel Altit
David Hooper

Interested Parties
Rémi Mazas
Léonard Safari
Philippe Moriceau
Andreas O'Shea

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS
NAME / NOM: *KOPEI KUMELIO A. AFANDE*
SIGNATURE: *[Signature]* DATE: *16 Dec. 2010*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal, filed by the Prosecution pursuant to Rule 77(J) of the Rules of Procedure and Evidence of the Tribunal ("Rules") on 2 February 2010,¹ against the "Confidential Decision on Prosecution and Defence Requests Concerning Improper Contact with Prosecution Witnesses" issued confidentially on 18 January 2010 ("Impugned Decision") by Trial Chamber I of the Tribunal ("Trial Chamber").²

I. BACKGROUND

A. Procedural History

2. On 17 November 2009, the Trial Chamber acquitted Hormisdas Nsengimana ("Nsengimana") of all counts in the indictment against him and ordered his immediate release.³ The Prosecution did not appeal the Trial Judgement.

3. During the Prosecution case, four protected Prosecution witnesses testified that they had been approached by members of Nsengimana's Defence team ("Defence") shortly prior to testifying before the Tribunal.⁴ In compliance with the Trial Chamber's request,⁵ the Registry of the Tribunal ("Registry") conducted an investigation and interviewed a number of protected Prosecution witnesses in order to determine whether they had been contacted by the Defence and whether any of them had been threatened.⁶ The Registry submitted the results of its investigations to the Trial Chamber in two reports dated 21 April 2008 and 2 May 2008, respectively.⁷ The Registrar's Reports concluded that members of the Defence had contacted several protected

¹ Prosecutor's Notice of Appeal, 2 February 2010 ("Prosecution Notice of Appeal"). See also Prosecutor's Appellant's Brief, 17 February 2010 (confidential); Public Redacted Version of Prosecutor's Appellant's Brief, 30 November 2010 ("Prosecution Appellant's Brief") (collectively, "Prosecution Appeal").

² *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, Confidential Decision on Prosecution and Defence Requests Concerning Improper Contact with Prosecution Witnesses, 18 January 2010 (confidential).

³ *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, Judgement, pronounced on 17 November 2009 and filed on 18 January 2010 ("Trial Judgement"), paras. 853, 854.

⁴ See Impugned Decision, para. I. Prosecution Witnesses CAN, CAW, CAY, and CBF were subject to witness protection measures. Such measures also applied to Prosecution Witness CAO. See *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 2 September 2002 ("Witness Protection Decision").

⁵ See *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, T. 24 January 2008 pp. 14, 18, 19.

⁶ *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, The Registry's Report to the Chamber on Alleged Interference with Prosecution Witnesses, 21 April 2008 (confidential) ("Report of 21 April 2008"), paras. 3, 4.

⁷ Report of 21 April 2008; *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, The Registry's Further Submission to the Chamber on Alleged Interference with Prosecution Witnesses, 5 May 2008 (confidential) ("Report of 2 May 2008"). The Report of 21 April 2008 and Report of 2 May 2008 are herein collectively referred to as the "Registrar's Reports".

Prosecution witnesses and that there was “a *prima facie* case that the Defence Investigators’ meetings with Witnesses CAY, CBF and CAW [had been] arranged, *knowing* that they were protected prosecution witnesses.”⁸ However, according to the Report of 21 April 2008, none of the witnesses had expressed fears for their security since testifying or had been threatened at any point.⁹

4. On 26 May 2008, the Prosecution requested that contempt proceedings be instituted against three Defence investigators, namely, Rémi Mazas, Léonard Safari, and Denis Sekamana, pursuant to Rules 77(A)(iv), (v), 77(C)(i), and 77(D)(i) of the Rules.¹⁰

5. In its Impugned Decision, the Trial Chamber, *inter alia*,¹¹ declined to exercise its discretion pursuant to Rule 77(D) of the Rules to initiate contempt proceedings against the three investigators for their alleged improper contact with protected Prosecution Witnesses CAY, CAW, CAN, CAO, and CBF (collectively, “Protected Witnesses”).¹² Subsequently, the Prosecution appealed against the decision not to initiate contempt investigations or proceedings against Messrs. Mazas and Safari (“Investigators”).¹³

6. By its Decision of 19 April 2010, the Appeals Chamber allowed the Investigators “to make representations in response to the Prosecution’s appeal on an exceptional basis.”¹⁴ Subsequently, on 15 June 2010, the Registrar assigned Mr. Philippe Moriceau to represent the Investigators’ interests in the proceedings.¹⁵ On 17 June 2010, after being informed of this development, Mr. Mazas declined to be represented by Mr. Moriceau.¹⁶ On 24 June 2010, Mr. Moriceau filed a Respondent’s

⁸ Report of 21 April 2008, para.10 (emphasis added). See also Report of 21 April 2008, para. 8. In the Report of 2 May 2008, the Deputy Registrar asserts that Prosecution Witness CAO’s testimony “also offers evidence of unauthorised contact by Defence Investigator Léonard Safari prior to the witness’ testimony” (see Report of 2 May 2008, para. 4; see also Report of 2 May 2008, para. 5).

⁹ Report of 21 April 2008, para. 6.

¹⁰ *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, Prosecutor’s Application for Leave to File Contempt of the Tribunal Proceedings Against Mr. Safari L[é]onard [sic] @ [sic] Serugendo, Father R[é]mi Mazas and Father Denis Sekimana [sic], 26 May 2008 (confidential), paras. 10-14.

¹¹ The Impugned Decision also disposed of two further motions. See Impugned Decision, paras. 61-69, Disposition. See also *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, *Requête urgente de la défense aux fins de protection de l’enquêteur de la défense*, 30 January 2008; *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, *Requête de la défense en certification ou, subsidiairement, en reconsidération de la décision orale de la Chambre du 24 janvier 2008*, 31 January 2008 (confidential).

¹² Impugned Decision, paras. 47, 55, 59, Disposition.

¹³ See Prosecution Notice of Appeal, p. 1, para. 1; Prosecution Appellant’s Brief, paras. 1, 3. The Appeals Chamber notes that the Trial Chamber’s decision not to order further proceedings against Mr. Sekamana is not subject to this appeal (cf. Prosecution Notice of Appeal, p.1; Prosecution Appellant’s Brief, paras. 1, 2, 34-44).

¹⁴ Decision on Submissions by the Defence Team of Hormisdas Nsengimana, 19 April 2010 (“Decision of 19 April 2010”), para. 6. See also Decision of 19 April 2010, Disposition.

¹⁵ *Observations du Greffier en vertu de l’Article 33(B) au regard de la commission d’office de Maître Philippe Moriceau aux fins fournir [sic] une assistance juridique limitée à Messieurs Rémi Mazas et Léonard Safari*, 1 July 2010 (confidential) (“Registrar’s Submissions”), para. 1.

¹⁶ See Registrar’s Submissions, para. 3.

Brief on behalf of Mr. Safari.¹⁷ In compliance with the Decision of 23 July 2010, Mr. Andreas O'Shea filed a Respondent's Brief on behalf of Mr. Mazas on 23 August 2010.¹⁸ The Prosecution did not file a reply.

B. Impugned Decision

7. The Trial Chamber found that there was an insufficient basis under Rule 77(C) or (D) of the Rules to order further proceedings against the Investigators based on threats, intimidation, or bribery.¹⁹ It also found that the Investigators' conduct violated the Witness Protection Decision and proceeded to consider whether the Investigators "acted with the sufficient knowledge and intent when doing so."²⁰ The Trial Chamber considered that the totality of the information before it suggested that "there is a basis under Rule 77(C) and (D) [of the Rules] to warrant further investigations or prosecution" with respect to both Investigators.²¹ However, the Trial Chamber observed that the Investigators' "violations appear to have had little impact on the proceedings",²² noted their apologies,²³ and concluded that, in the present circumstances, the initiation of contempt proceedings would not be "the most effective and efficient way to ensure compliance with the witness protection measures."²⁴

II. STANDARD OF REVIEW

8. The Appeals Chamber recalls that the decision whether to order the prosecution of alleged false testimony or contempt is discretionary.²⁵ Where an appeal is filed against a discretionary decision of a Trial Chamber, the issue on appeal is confined to the question of whether the Trial Chamber has correctly exercised its discretion in rendering the decision.²⁶ Consequently, the Trial Chamber's exercise of discretion will only be reversed where it is demonstrated that the Trial

¹⁷ *M[é]moire d'Appel: Léonard Safari*, 24 June 2010 ("Safari Respondent's Brief"). In his Respondent's Brief, Mr. Safari requested, *inter alia*, a further extension of time for the preparation of his defence and an order instructing the Registry to disclose materials. Mr. Safari also requested the opportunity to file further submissions in response to the Prosecution Appellant's Brief following further disclosure (collectively, "Request for Disclosure and Extension of Time") (see Safari Respondent's Brief, paras. 5, 6, 28-31). The Appeals Chamber notes that Mr. Safari has not pursued the Request for Disclosure and Extension of Time which is, consequently, moot (see Decision on Requests of Léonard Safari and Rémi Mazas, 23 July 2010 (confidential) ("Decision of 23 July 2010"), paras. 18, 20, Disposition).

¹⁸ Second Respondent's Appeal Brief, 23 August 2010 ("Mazas Respondent's Brief"). In the circumstances, the Appeals Chamber finds that the Mazas Respondent's Brief was validly filed (see Mazas Respondent's Brief, para. 3; see also Power of Attorney, 19 August 2010).

¹⁹ Impugned Decision, paras. 44, 45.

²⁰ Impugned Decision, para. 49.

²¹ Impugned Decision, para. 54. See also Impugned Decision, para. 59.

²² Impugned Decision, para. 55. See also Impugned Decision, para. 60.

²³ Impugned Decision, para. 60.

²⁴ Impugned Decision, para. 59. See also Impugned Decision, paras. 54, 60.

²⁵ See *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision not to Prosecute Witness B'TH for False Testimony, 16 February 2010 ("*Karemera et al.* Decision of 16 February 2010"), para. 15 and references cited therein.

Chamber committed a discernible error in rendering the impugned decision, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the impugned decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.²⁷

III. DISCUSSION

A. Scope of the Appeal

9. The Prosecution contends that the Trial Chamber exceeded its jurisdiction and abused its discretionary power by refusing to initiate contempt proceedings against the Investigators despite its acknowledgement that there was a *prima facie* case of contempt.²⁸ It posits that there are "sufficient grounds to order further investigations or prosecution for contempt" under Rules 77(A)(ii), 77(A)(iv) and Rule 77(B) of the Rules.²⁹ The Prosecution further requests that the Appeals Chamber direct the Prosecution "to conduct further investigations and prosecute [the Investigators] for contempt of the Tribunal" or, in the alternative, "[i]ssue an order in lieu of an indictment, and either direct the Registrar to appoint an *amicus curiae* to prosecute the matter or prosecute the matter itself."³⁰

10. The Appeals Chamber notes that the Prosecution does not advance any argument to the effect that further investigations are warranted. Rather, it focuses on the Trial Chamber's alleged abuse of discretion in not ordering the prosecution of the Investigators. The Prosecution therefore fails to substantiate its request that the Appeals Chamber order further investigations under Rule 77(C) of the Rules.

11. Accordingly, the Appeals Chamber dismisses the Prosecution appeal to the extent it contends that there are sufficient grounds to order further investigations and will limit its analysis to the question of whether the Trial Chamber erred in its application of Rule 77(D) of the Rules by declining to order the prosecution of the Investigators for acting in violation of the Witness Protection Decision.

B. Alleged errors in the Trial Chamber's application of Rule 77(D) of the Rules

12. The Prosecution submits that the Trial Chamber: (i) failed to apply the correct legal standard under Rule 77(D) of the Rules;³¹ (ii) erroneously relied on irrelevant jurisprudence;³² (iii)

²⁶ *Karemera et al.* Decision of 16 February 2010, para. 15 and references cited therein.

²⁷ *Karemera et al.* Decision of 16 February 2010, para. 15 and references cited therein.

²⁸ Prosecution Notice of Appeal, paras. 1, 4, 5, 16; Prosecution Appellant's Brief, paras. 3, 17, 63.

²⁹ Prosecution Appellant's Brief, para. 63. *See also* Prosecution Notice of Appeal, para. 16.

³⁰ Prosecution Appellant's Brief, para. 64. *See also* Prosecution Notice of Appeal, para. 17.

³¹ Prosecution Notice of Appeal, paras. 1-4; Prosecution Appellant's Brief, paras. 3, 16, 17, 20.

erroneously entered findings on the ultimate merits of the contempt allegations;³³ (iv) took into account extraneous or irrelevant considerations and denied the Prosecution an opportunity to present its case;³⁴ and (v) failed to take into account relevant factors.³⁵

1. Whether the Trial Chamber applied the correct legal standard

13. The Prosecution asserts that the Trial Chamber misdirected itself as to the applicable legal standard and the scope of its discretion under Rule 77(D) of the Rules, thereby committing a discernible error.³⁶ It submits that the Trial Chamber was only required to ascertain whether sufficient grounds existed to prosecute the Investigators³⁷ and, having found that a *prima facie* case of contempt existed, the Trial Chamber was required to order their prosecution.³⁸

14. The Prosecution acknowledges that the Trial Chamber noted the correct legal standard and recalled that “in initiating a *prosecution* for contempt, a Chamber should determine *only* whether a *prima facie* case is established, which is the same standard [employed] to confirm an indictment.”³⁹ Referring to Article 18 of the Statute of the Tribunal (“Statute”), the Prosecution contends that once a Chamber has determined that there are sufficient grounds to proceed against a person for contempt, it *shall* order their prosecution.⁴⁰ It asserts that the Trial Chamber impermissibly departed from this legal standard and exceeded its jurisdiction in declining to order the prosecution of the alleged contemnors despite having found that a *prima facie* case existed.⁴¹

15. Mr. Safari responds that the Trial Chamber correctly followed the procedure under Rule 77 of the Rules and duly considered the relevant factors at stake.⁴² He contends that the Prosecution erroneously interprets Rule 77 of the Rules and maintains that the existence of sufficient grounds to proceed did not effectively deprive the Trial Chamber of its discretion to determine whether or not to initiate proceedings.⁴³

³² Prosecution Notice of Appeal, para. 5; Prosecution Appellant’s Brief, paras. 22-26.

³³ Prosecution Notice of Appeal, para. 7; Prosecution Appellant’s Brief, paras. 4, 44, 47, 48.

³⁴ Prosecution Notice of Appeal, paras. 6, 10-14; Prosecution Appellant’s Brief, paras. 5, 49-58, 61.

³⁵ Prosecution Appellant’s Brief, paras. 5, 59, 60.

³⁶ Prosecution Notice of Appeal, p. 1, paras. 1, 2; Prosecution Appellant’s Brief, paras. 16, 17.

³⁷ Prosecution Appellant’s Brief, paras. 3, 19, 20, 29, 32. *See also* Prosecution Notice of Appeal, para. 4.

³⁸ Prosecution Notice of Appeal, para. 4; Prosecution Appellant’s Brief, paras. 17, 20.

³⁹ Prosecution Appellant’s Brief, para. 20, *citing with emphasis* Impugned Decision, para. 41. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution’s Appeal Against the Trial Chamber’s Decision of 10 June 2008, 25 July 2008 (public redacted version), para. 16; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR.91, Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [A] Prosecution Witness for False Testimony” and on Motions for Oral Arguments, 22 January 2009 (“*Karemera et al.* Decision of 22 January 2009”), para. 19.

⁴⁰ Prosecution Appellant’s Brief, para. 20. *See also* Prosecution Notice of Appeal, para. 2.

⁴¹ Prosecution Notice of Appeal, paras. 2-4; Prosecution Appellant’s Brief, para. 20.

⁴² Safari Respondent’s Brief, paras. 13, 15.

⁴³ Safari Respondent’s Brief, para. 16.

16. Mr. Mazas similarly responds that the initiation of contempt proceedings is not mandatory where a *prima facie* case exists, but is rather a discretionary decision having regard to all the circumstances of the case.⁴⁴ He claims that it would not be in the interests of an effective criminal court to make the initiation of contempt proceedings automatic as this would undermine the court's ability to fulfil its primary function and prosecute crimes under its jurisdiction in an expeditious manner.⁴⁵

17. In the present case, the Trial Chamber considered the Registrar's Reports and found that a *prima facie* case of contempt existed against the Investigators.⁴⁶ It acknowledged that "the totality of the information may suggest that there is a basis under Rule 77(C) and (D) [of the Rules] to warrant further investigations or prosecution."⁴⁷ The Trial Chamber proceeded to exercise its discretion and declined to initiate contempt proceedings as it was "not convinced in the present circumstances that this would be the most effective and efficient way to ensure compliance with the witness protection measures."⁴⁸ The Appeals Chamber discerns no error in this approach. It recalls that decisions taken pursuant to Rule 77(D) of the Rules are discretionary.⁴⁹ Accordingly, the Trial Chamber was entitled to find a *prima facie* case of contempt and then determine, within the bounds of its discretion, whether or not to initiate proceedings against the Investigators.

18. In light of the foregoing, the Prosecution's Appeal is dismissed in this regard.

2. Whether the Trial Chamber erroneously relied on irrelevant jurisprudence

19. The Prosecution submits that the Trial Chamber erred in finding, without providing reasons, that it was "not convinced that in the present circumstances [prosecution for contempt] would be the most effective and efficient way to ensure compliance with the witness protection measures".⁵⁰ It claims that, in so doing, the Trial Chamber erroneously relied on the standard established by the Appeals Chamber in the *Karemera et al.* Decision of 22 January 2009 which concerned the initiation of proceedings for false testimony under Rule 91(B) of the Rules.⁵¹

⁴⁴ Mazas Respondent's Brief, paras. 12, 13. See also Mazas Respondent's Brief, para. 19.

⁴⁵ Mazas Respondent's Brief, para. 13.

⁴⁶ Impugned Decision, paras. 54, 59.

⁴⁷ Impugned Decision, para. 54. See also Impugned Decision, para. 59.

⁴⁸ Impugned Decision, para. 59. See also Impugned Decision, para. 54.

⁴⁹ See Rule 77(D) of the Rules. See also *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010, para. 57.

⁵⁰ Prosecution Appellant's Brief, para. 22, citing Impugned Decision, para. 54. See also Prosecution Notice of Appeal, para. 5; Impugned Decision, para. 59.

⁵¹ Prosecution Notice of Appeal, para. 5; Prosecution Appellant's Brief, paras. 22, 24, referring to *Karemera et al.* Decision of 22 January 2009, para. 21.

20. The Prosecution avers that Rule 91(B) of the Rules is materially different from Rule 77(D) both in terms of procedure and substance.⁵² More specifically, it contends that “the factors deemed relevant for determining whether it is appropriate to initiate proceedings under Rule 91(B) of the Rules are not applicable in the circumstances of this case where the Trial Chamber was required to determine whether there were sufficient grounds to *prosecute* a person for contempt, under Rule 77(D) of the Rules.”⁵³ Finally, the Prosecution argues that even if factors such as effectiveness and efficiency were to be considered under Rule 77 of the Rules, the Trial Chamber should have done so at the initial stage of the process when it ordered the Registry to investigate the matter pursuant to Rule 77(C) of the Rules.⁵⁴

21. Mr. Safari responds that the Trial Chamber correctly considered the correlation between the provisions of Rules 77 and 91 of the Rules.⁵⁵ Mr. Mazas likewise responds that Rules 91(B) and 77(D) both involve similar considerations of effectiveness and efficiency which a Chamber has the inherent discretion to consider.⁵⁶

22. The Appeals Chamber notes that the Trial Chamber explicitly considered whether, in the circumstances of this particular case, the initiation of contempt proceedings against the Investigators would be “the most effective and efficient way to ensure compliance with obligations flowing from the Statute and Rules in the specific circumstances of the case”.⁵⁷ While the situations envisaged by Rule 77(D) and Rule 91(B) of the Rules differ, the Appeals Chamber is of the view that the Trial Chamber was entitled to consider these factors, along with others, in determining whether to initiate proceedings against the Investigators. As the Appeals Chamber has already noted, pursuant to Rule 77(D), the Trial Chamber may decline to initiate contempt proceedings despite the fact that sufficient grounds exist to proceed against a person for contempt.⁵⁸

23. Thus, although the Trial Chamber was not required to determine whether the initiation of contempt proceedings against the Investigators was “the most effective and efficient way to ensure compliance with the witness protection measures”, the Appeals Chamber finds that the consideration of these factors was within the scope of its discretion.

24. Accordingly, the Appeals Chamber dismisses the Prosecution’s contention that the Trial Chamber committed a discernible error in this respect.

⁵² Prosecution Notice of Appeal, para. 5; Prosecution Appellant’s Brief, paras. 22, 24, 25.

⁵³ Prosecution Appellant’s Brief, para. 26.

⁵⁴ Prosecution Appellant’s Brief, paras. 27, 28.

⁵⁵ Safari Respondent’s Brief, paras. 16, 17.

⁵⁶ Mazas Respondent’s Brief, paras. 16-18.

⁵⁷ Impugned Decision, para. 42, citing *Karemera et al.*, Decision of 22 January 2009, para. 21. See also Impugned Decision, paras. 43, 54, 59.

⁵⁸ See *supra*, para. 17.

3. Whether the Trial Chamber erroneously entered findings on the merits of the contempt allegations

25. The Prosecution contends that the Trial Chamber committed a discernible error by “requiring and making findings on the ultimate merits of the contempt allegations.”⁵⁹ It submits that, in so doing, the Trial Chamber erroneously went beyond the requirement of determining whether a *prima facie* case existed and inappropriately engaged in a premature assessment on the merits, essentially requiring a final finding of contempt for it to exercise its discretion to initiate contempt proceedings.⁶⁰

26. The Prosecution submits that “sufficient grounds” exist to warrant the prosecution of the Investigators.⁶¹ It asserts that the Trial Chamber erred by purporting to weigh the sufficiency of the Investigators’ *mens rea*,⁶² and maintains that the question of whether the Investigators acted with “sufficient knowledge and intent” when they contacted, met, or attempted to meet the Protected Witnesses can only be settled after reviewing all the evidence and the parties’ submissions at trial.⁶³

27. Mr. Mazas responds that the Trial Chamber was not precluded from legitimately engaging in a preliminary analysis of the information available regarding the Investigators’ intention and knowledge. He claims these factors are relevant both to the determination of whether a *prima facie* case exists and also to the necessity of instigating proceedings.⁶⁴

28. In the present case, the Trial Chamber found that the Investigators had contacted the Protected Witnesses in violation of the Witness Protection Decision and noted that the Investigators acknowledged, in retrospect, having done so.⁶⁵ Furthermore, as the Appeals Chamber has already observed, the Trial Chamber also found that there were sufficient grounds to initiate contempt proceedings against the Investigators but declined to order their prosecution.⁶⁶

29. In this context, the Trial Chamber’s observation that the “crucial issue is whether the [Investigators] acted with the sufficient knowledge and intent [when acting in breach of the Witness Protection Decision]”, is unfortunate.⁶⁷ While the Trial Chamber was entitled to take the Investigators’ *mens rea* into consideration, such language gives the impression that it placed undue emphasis on this factor. However, the Appeals Chamber is of the view that any undue consideration

⁵⁹ Prosecution Appellant’s Brief, para. 4. *See also* Prosecution Notice of Appeal, para. 7.

⁶⁰ Prosecution Notice of Appeal, para. 7; Prosecution Appellant’s Brief, paras. 4, 35, 44, 47, 48.

⁶¹ Prosecution Appellant’s Brief, paras. 35-44.

⁶² Prosecution Appellant’s Brief, para. 48.

⁶³ Prosecution Notice of Appeal, para. 7; Prosecution Appellant’s Brief, paras. 48, 58.

⁶⁴ Mazas Respondent’s Brief, para. 25. *See also* Mazas Respondent’s Brief, paras. 26, 27.

⁶⁵ Impugned Decision, para. 49.

⁶⁶ *See supra*, para. 17.

⁶⁷ Impugned Decision, para. 49.

had little or no impact on the Trial Chamber's findings. A holistic review of the Trial Chamber's reasoning discloses no error in its general approach or its conclusion that "sufficient grounds" exist for the initiation of proceedings against the Investigators. Accordingly, the Prosecution's suggestion that the Trial Chamber required a "final finding" of contempt before proceeding to exercise its jurisdiction pursuant to Rule 77(D) of the Rules misconstrues the Trial Chamber's findings.

30. In light of the foregoing, the Appeals Chamber rejects the Prosecution's challenges to the Trial Chamber's assessment of the "sufficient grounds" threshold.

4. Whether the Trial Chamber abused its discretion by taking into account extraneous or irrelevant considerations and denying the Prosecution an opportunity to present its case

31. The Prosecution contends that the Trial Chamber erred in relying on extraneous and irrelevant considerations in determining whether to institute contempt proceedings against the Investigators.⁶⁸ In particular, it alleges that the Trial Chamber erred in: (i) finding that the admitted violations of the Witness Protection Decision appear to have had little impact on the proceedings;⁶⁹ (ii) considering whether the Protected Witnesses felt threatened or intimidated;⁷⁰ and (iii) taking into account the Investigators' regrets, apologies, and good faith.⁷¹ According to the Prosecution, these considerations were irrelevant to the question of whether to initiate contempt proceedings and are more appropriately addressed as mitigating factors in sentencing.⁷² The Prosecution further claims that the Trial Chamber relied on the Investigators' "self-serving statements" without giving the Prosecution the opportunity to present its case.⁷³

32. Mr. Safari responds that the Trial Chamber properly applied the governing rules when it noted the regrets and apologies of the Investigators and found them to merit consideration.⁷⁴ He

⁶⁸ Prosecution Notice of Appeal, paras. 10-14; Prosecution Appellant's Brief, paras. 5, 49-57. The Appeals Chamber notes that the Prosecution also claims that the Trial Chamber erred in law and in fact in its assessment of whether the Investigators knew who the Protected Witnesses were, the time at which the Defence obtained the full particulars of the Witnesses, and the sources from which they obtained such information (see Prosecution Notice of Appeal, para. 11; Prosecution Appellant's Brief, paras. 54-58). However, in light of the Appeals Chamber's findings with respect to the existence of "sufficient grounds" it considers that these submissions are moot. The Prosecution further alleges that the Trial Chamber erroneously relied, *a posteriori*, on its findings about the credibility of the witnesses in the Trial Judgement (see Prosecution Notice of Appeal, para. 12; Prosecution Appellant's Brief, paras. 5, 52). The Appeals Chamber finds that the Prosecution fails to substantiate this vague contention and dismisses it accordingly.

⁶⁹ Prosecution Notice of Appeal, para. 13; Prosecution Appellant's Brief, paras. 5, 49-51.

⁷⁰ Prosecution Appellant's Brief, paras. 5, 50, 61.

⁷¹ Prosecution Notice of Appeal, para. 14; Prosecution Appellant's Brief, paras. 5, 61.

⁷² Prosecution Notice of Appeal, paras. 13, 14; Prosecution Appellant's Brief, paras. 5, 61.

⁷³ Prosecution Appellant's Brief, para. 61. See also Prosecution Notice of Appeal, para. 8.

⁷⁴ Safari Respondent's Brief, para. 26.

also asserts that the Trial Chamber correctly took into account the fact that the alleged violations had little impact on the proceedings.⁷⁵

33. Mr. Mazas submits that the Prosecution fails to demonstrate that the alleged errors in the Trial Chamber's reasoning rendered its decision so unfair or unreasonable as to amount to an abuse of its discretion.⁷⁶ He adds that even if one or more of the Trial Chamber's considerations were accepted as irrelevant, in the overall circumstances of the case, the Trial Chamber did not abuse its discretion.⁷⁷ Finally, Mr. Mazas submits that the violations at issue do not qualify as the most serious or deliberate interferences with the administration of justice.⁷⁸

34. Mindful of the fundamental importance of the protective measures, the Trial Chamber carefully considered the impact of the Investigators' violations of the Witness Protection Decision.⁷⁹ In particular, it noted that, despite being contacted by the Investigators, none of the Protected Witnesses felt threatened or intimidated and all testified in the *Nsengimana* trial.⁸⁰ Finally, the Trial Chamber noted the Investigators' apologies and their regret in not having exercised greater caution during their investigations.⁸¹ The Appeals Chamber discerns no error in this approach. The impact of the Investigators' breach of the Witness Protection Decision was a relevant consideration for the Trial Chamber to take into account, in its discretion, when determining whether to order prosecution for contempt.

35. As to the Prosecution's contention that it was deprived of an opportunity to make submissions with respect to the Investigators' apologies and the impact of their acts on the proceedings, the Appeals Chamber considers that the Trial Chamber acted within the scope of its discretion in rendering its decision based upon the submissions before it without hearing further from the Prosecution. In the present case, the Trial Chamber had the benefit of the Registrar's Reports which were compiled following interviews with the Protected Witnesses, in addition to submissions filed on behalf of the Investigators and the Prosecution.⁸² Accordingly, the Appeals Chamber considers that the Trial Chamber was in a position to make an informed assessment.

⁷⁵ Safari Respondent's Brief, para. 27.

⁷⁶ Mazas Respondent's Brief, para. 20.

⁷⁷ Mazas Respondent's Brief, paras. 21, 22.

⁷⁸ Mazas Respondent's Brief, para. 26. See also Mazas Respondent's Brief, paras. 28, 29.

⁷⁹ Impugned Decision, para. 60. The Trial Chamber noted that "adherence to court orders is essential to the fair and expeditious functioning of the Tribunal's proceedings."

⁸⁰ With respect to Mr. Mazas, see Impugned Decision, paras. 36-39, 59. As regards Mr. Safari, see Impugned Decision, paras. 21-24, 29-35, 55.

⁸¹ Impugned Decision, paras. 55, 60.

⁸² Cf. Registrar's Reports.

36. Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber abused its discretion by taking into account irrelevant and extraneous considerations in declining to order the prosecution of the Investigators for contempt.

5. Whether the Trial Chamber abused its discretion by failing to take into account relevant considerations

37. The Prosecution submits that the Trial Chamber failed to explain why it was not convinced that the initiation of contempt proceedings would be the most effective and efficient way to ensure compliance with the witness protection measures.⁸³ It claims that the Trial Chamber also failed to give sufficient weight to: (i) the "impact and harm such repeated contemptuous behaviour caused to the credibility of the Witness Protection [Decision] in this case and the functioning of the Tribunal at large"; (ii) the importance of deterring such violations of witness protection orders in general; and (iii) the repetitious pattern of violations in this case.⁸⁴

38. Mr. Mazas responds that the alleged repeated contemptuous behaviour does not concern him as he stands accused of only one incident of unauthorized contact with a Prosecution witness.⁸⁵ He further asserts that the Trial Chamber gave due regard to the Tribunal's general concerns with respect to witness protection.⁸⁶

39. The Appeals Chamber notes that the Trial Chamber did not fully explain why it was not convinced that the initiation of contempt proceedings would be the most effective and efficient way to ensure compliance with witness protection measures. However, the Appeals Chamber considers that it was not required to do so.⁸⁷ The Appeals Chamber observes that the Trial Chamber explicitly considered factors which reasonably support its decision not to initiate contempt proceedings in the present case. Such factors include the lack of any resulting harm to the *Nsengimana* trial proceedings and the absence of fear or intimidation occasioned by the Investigators' breaches of the Witness Protection Decision.⁸⁸

⁸³ Prosecution Appellant's Brief, para. 59. The Prosecution also contends that the Trial Chamber failed to give any indication as to what would be the most effective and efficient way to ensure compliance with protective measures, or which measures it took to ensure such compliance during trial (Prosecution Appeal Brief, para. 59). The Appeals Chamber considers that such submissions are wholly irrelevant to the matters at stake and therefore summarily dismisses these arguments.

⁸⁴ Prosecution Appellant's Brief, para. 60.

⁸⁵ Mazas Respondent's Brief, para. 31.

⁸⁶ Mazas Respondent's Brief, para. 32.

⁸⁷ The Appeals Chamber recalls that while a Trial Chamber is generally obliged to set out a reasoned opinion in writing, it is not required to address every argument and consideration in detail (*see, e.g., Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010, paras. 128, 252).

⁸⁸ *See Impugned Decision*, paras. 54, 55, 59, 60.

40. Furthermore, the Trial Chamber unequivocally emphasised the importance of adherence to court orders for the fair and expeditious functioning of the Tribunal's proceedings. It also admonished the Investigators and the Defence for failing to act with greater caution and underscored the importance of avoiding any breach of the Witness Protection Decision.⁸⁹ In this context, Appeals Chamber is not persuaded that the Trial Chamber abused its discretion in failing to consider relevant factors or in failing to accord them sufficient weight.

41. In light of the foregoing, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber committed a discernible error in rendering the Impugned Decision.

IV. DISPOSITION

42. For the foregoing reasons, the Appeals Chamber

DENIES the Prosecution Appeal.

Done in English and French, the English version being authoritative.

Dated this sixteenth day of December 2010
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Liu Daqun
Presiding Judge

⁸⁹ See Impugned Decision, paras. 56, 60.