



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

556/H

GA

ICTR-07-91-AR77

07th July 2011

{556/H - 543/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding Judge
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. Adama Dieng

Decision of: 7 July 2011

ICTR Appeals Chamber
Date: *07th July 2011*
Action: *R. Jelenc*
Copied To: *Concerned Judges,*

Parties, Judicial Archives,
LOs, LSS
[Signature]
Léonidas NSHOGOZA
v.
THE PROSECUTOR
Case No. ICTR-07-91-AR77

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SENT BY ME
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NAME / NOM: *KDEEL KIMÉLLE A. AFRANDE*
SIGNATURE: *[Signature]* DATE: *07 July 2011*

DECISION ON NSHOGOZA'S APPEAL OF DECISION ON ALLEGATIONS OF CONTEMPT BY MEMBERS OF THE PROSECUTION

Counsel for Léonidas Nshogoza:

Ms. Allison Turner

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James J. Arguin
Mr. Abdoulaye Seye

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 on 10 December 2010, by Mr. Léonidas Nshogoza ("Nshogoza"),¹ against a decision of 25 November 2010 by Trial Chamber III of the Tribunal ("Trial Chamber") declining to initiate contempt investigations or proceedings against members of the Prosecution.² Nshogoza filed his Appeal Brief on 28 December 2010.³ The Prosecution responded on 7 January 2011,⁴ and Nshogoza filed his reply on 14 January 2011.⁵

A. Background

2. On 2 July 2009, the Trial Chamber convicted Nshogoza of one count of contempt of the Tribunal based on his violation of a witness protection order for Prosecution witnesses in the *Kamuhanda* case⁶ by meeting with and disclosing the identifying information of protected witnesses in that case.⁷ The Indictment against Nshogoza followed an investigation ordered by the Appeals Chamber in the *Kamuhanda* case on 19 May 2005.⁸ In that Indictment, Nshogoza was also charged with, but acquitted of, other allegations that included manipulating, inciting, instigating, inducing, or bribing witnesses into giving false evidence before the Appeals Chamber.⁹ The Trial Chamber sentenced Nshogoza to 10 months of imprisonment.¹⁰ On 15 March 2010, the Appeals

¹ Léonidas Nshogoza's Notice of Appeal, 10 December 2010 ("Notice of Appeal").

² *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010 ("Impugned Decision"), p. 7.

³ Léonidas Nshogoza's Appeal Brief, 28 December 2010 ("Appeal Brief").

⁴ Prosecutor's Response Brief, 7 January 2011 ("Response Brief").

⁵ Léonidas Nshogoza's Reply, 17 January 2011 ("Reply"). Nshogoza filed a submission on 25 January 2011 clarifying that, although his Reply bears a file stamp indicating filing on 17 January 2011, his counsel in fact transmitted it electronically on the date of the deadline, 14 January 2011. See Submissions Concerning Reply, 25 January 2011, paras. 1, 2, Annex A.

⁶ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-5[4]-I, Decision on the Prosecutor's Motion for Protective measures for Witnesses, 10 July 2000 ("*Kamuhanda* Prosecution Witness Protection Order").

⁷ T. 2 July 2009 pp. 9, 10. See also *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgement, 7 July 2009 ("*Nshogoza* Trial Judgement"), paras. 188, 189.

⁸ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-I, Indictment, 7 January 2008 ("Indictment"); *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, 17 December 2008, para. 30, citing *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005.

⁹ *Nshogoza* Trial Judgement, paras. 190-211.

¹⁰ *Nshogoza* Trial Judgement, para. 233.

Chamber affirmed Nshogoza's conviction for contempt and, Judges Robinson and Güney dissenting, his sentence.¹¹

3. During the course of Nshogoza's trial, the Trial Chamber heard evidence from Witnesses Fulgence Seminega, Augustin Nyagatare, and Straton Nyarwaya that *prima facie* indicated that members of the Prosecution may have contacted them in violation of witness protection orders issued in the *Rwamakuba* and *Kamuhanda* cases.¹² Nshogoza raised this possible violation in his Closing Brief and requested the Trial Chamber to initiate contempt proceedings.¹³ In the Trial Judgement, the Trial Chamber found that the conduct of the Prosecution highlighted by the Defence witnesses "may justify an investigation into the conduct of members of the [Prosecution] as requested by the Defence."¹⁴ By separate order of 16 July 2009, the Trial Chamber requested the parties to file further submissions before determining whether to grant the request to initiate further proceedings.¹⁵

4. On 25 November 2010, the Trial Chamber declined to initiate contempt investigations or proceedings against members of the Prosecution who met with Witnesses Seminega, Nyagatare, and Nyarwaya.¹⁶ The Trial Chamber noted that the content of the testimony of those witnesses during the *Nshogoza* trial and the Prosecution's subsequent submissions provided it with "reason to believe that the Prosecution did not comply with the prescribed protective measures" in the *Kamuhanda* and *Rwamakuba* cases.¹⁷ The witness protection orders in those cases required the Prosecution to notify the defence of any request to contact defence witnesses.¹⁸

5. The Trial Chamber rejected the Prosecution's claim that the Appeals Chamber had implicitly authorized its investigators to contact the witnesses or that such orders would have impeded a proper investigation.¹⁹ In particular, it considered that the protection orders were

¹¹ *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010 ("*Nshogoza* Appeal Judgement"), para. 112.

¹² Impugned Decision, para. 3, citing *Nshogoza* Trial Judgement, paras. 44, 45.

¹³ Impugned Decision, para. 2, citing *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-T, Closing Brief of Léonidas Nshogoza, 17 April 2009 ("*Nshogoza* Closing Brief"), paras. 96-104. A public redacted version of the *Nshogoza* Closing Brief was filed on 27 May 2009.

¹⁴ *Nshogoza* Trial Judgement, para. 45.

¹⁵ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, 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, p. 2.

¹⁶ Impugned Decision, p. 7.

¹⁷ Impugned Decision, para. 15.

¹⁸ *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 Defense Witnesses, 22 March 2001 ("*Kamuhanda* Defence Witness Protection Decision"); *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Protective Measures, 21 September 2005 ("*Rwamakuba* Defence Witness Protection Decision").

¹⁹ Impugned Decision, paras. 16-18.

specifically directed at the Prosecution and that the Prosecution, if necessary, could have requested, on a confidential and *ex parte* basis, a variation of the protective measures.²⁰

6. Nonetheless, the Trial Chamber considered that “[a]lthough there may be sufficient grounds to proceed, [...] consideration of the gravity of the alleged conduct and underlying motivations of the [Prosecution] investigators, as well as the penal goals to be served by initiating contempt proceedings, militate against pursuing this matter further.”²¹ In this respect, the Trial Chamber contrasted the actions of the Prosecution with the “more serious misconduct” underpinning Nshogoza’s indictment, “including allegations that he engaged in bribery and induced witnesses to testify falsely before the Appeals Chamber.”²² The Trial Chamber also accepted that the Prosecution “may have acted on the mistaken belief that they were authorised to meet with the relevant defence witnesses by the Appeals Chamber[’s] Order.”²³ Finally, the Trial Chamber determined that, in the circumstances of this case, the initiation of proceedings would not further the “important goals of deterrence and denunciation”.²⁴

B. Submissions

7. Nshogoza submits that the Trial Chamber erred in refusing to initiate contempt proceedings against members of the Prosecution.²⁵ In particular, Nshogoza contends that, where a Trial Chamber has reason to believe that an individual may have acted in contempt, its discretion is limited to determining whether to initiate investigations or proceedings.²⁶ In Nshogoza’s view, it may not – as the Trial Chamber did in this case – simply do nothing.²⁷ Furthermore, Nshogoza submits that the Trial Chamber erred in ordering further submissions from the parties rather than appointing an *amicus curiae* to investigate, claiming that it lacked authority to investigate the matter itself.²⁸ In this respect, he also contends that, in the absence of some form of an investigation, the Trial Chamber lacked a sufficient basis to make an informed decision.²⁹ Moreover, Nshogoza argues that the Trial Chamber erred in limiting its consideration solely to whether further investigations should be ordered.³⁰

²⁰ Impugned Decision, paras. 17, 18.

²¹ Impugned Decision, para. 21.

²² Impugned Decision, para. 22.

²³ Impugned Decision, para. 23.

²⁴ Impugned Decision, para. 24.

²⁵ Notice of Appeal, para. 3; Appeal Brief, para. 4.

²⁶ Appeal Brief, paras. 14, 15.

²⁷ Appeal Brief, para. 15.

²⁸ Appeal Brief, para. 16.

²⁹ Reply, paras. 16, 17.

³⁰ Appeal Brief, para. 20.

8. In addition, Nshogoza submits that the Trial Chamber erred in basing its decision not to initiate contempt proceedings on considerations such as the gravity of the purported violations, the underlying motivations of the members of the Prosecution, and the penal goals of contempt.³¹ He argues that, in doing so, the Trial Chamber effectively reversed its prior determination that there were sufficient grounds to initiate contempt proceedings.³² Nshogoza contends that the Trial Chamber failed to provide a reasoned opinion for not initiating contempt proceedings given that (i) the Prosecution's purported conduct was clearly illegal; (ii) the Trial Chamber was concerned that the Prosecution's approach to binding court orders could lead to potential abuse; and (iii) the Prosecution's alleged violations were similar in gravity to the conduct for which he was convicted.³³

9. Moreover, Nshogoza submits that the Trial Chamber erred in minimizing the Prosecution's conduct by comparing it to the other more serious charges for which he was acquitted.³⁴ In this respect, Nshogoza again emphasizes the similarity of the Prosecution's actions with the very conduct underpinning his conviction, which was harshly condemned by the Trial Chamber.³⁵ Nshogoza claims that the Trial Chamber failed to consider the Prosecution's intimidating conduct aimed at Witnesses Seminega, GAA, and A7/GEX in assessing the gravity of its actions.³⁶ Finally, Nshogoza submits that the Trial Chamber erred in accepting the Prosecution's claim that its members acted on a mistaken belief that they were authorized to meet with the witnesses.³⁷ Nshogoza argues that this contention was based on submissions alone, not evidence, and should have properly been tested at trial.³⁸

10. The Prosecution responds that, although it does not agree with all of the reasoning in the Impugned Decision,³⁹ the Trial Chamber's ultimate conclusion should be affirmed.⁴⁰ Alternatively, the Prosecution submits that the Trial Chamber applied the correct legal standard, offered adequate reasons for its decision, and correctly considered that the Prosecution's conduct was sufficiently different from that at issue in the *Nshogoza* case.⁴¹ The Prosecution also argues that the Trial

³¹ Appeal Brief, paras. 18, 19, 22-36, 53; Reply, paras. 20-23.

³² Appeal Brief, paras. 17, 19, 22.

³³ Appeal Brief, paras. 23-36, 38-42, 53; Reply, paras. 20-23.

³⁴ Appeal Brief, paras. 40, 41; Reply, para. 23.

³⁵ Appeal Brief, paras. 39, 40, 42.

³⁶ Appeal Brief, paras. 43, 46-52.

³⁷ Appeal Brief, paras. 30-36.

³⁸ Appeal Brief, paras. 31, 35; Reply, para. 11.

³⁹ In particular, the Prosecution disagrees with the Trial Chamber's conclusion that the Prosecution was not implicitly authorized to contact the witnesses in view of the Appeals Chamber's order to investigate the possible false testimony of Witness GAA. In its view, this error provides a basis for rejecting Nshogoza's appeal. See *Response Brief*, paras. 4, 6-8, 24-34. The Appeals Chamber notes, however, that the Prosecution did not appeal this aspect of the Impugned Decision.

⁴⁰ *Response Brief*, paras. 4, 85.

⁴¹ *Response Brief*, paras. 35-52, 63, 65, 67-69, 79-84.

Chamber acted within its discretion in considering the underlying motives of the members of the Prosecution.⁴² Finally, the Prosecution emphasizes that Nshogoza's assertions that it used threats and intimidation are unfounded.⁴³

C. Discussion

11. A Trial Chamber's decision to initiate an investigation or prosecution of contempt pursuant to Rule 77 of the Rules of Procedure and Evidence of the Tribunal ("Rules") is a matter that falls within its discretion.⁴⁴ In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber committed a discernible error.⁴⁵ The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁴⁶

12. The Appeals Chamber recalls that a Trial Chamber is entitled to find a *prima facie* case of contempt and then determine, within the bounds of its discretion, whether or not to initiate further proceedings.⁴⁷ Consequently, there is no merit to Nshogoza's contention that, after finding sufficient grounds to proceed, the Trial Chamber's discretion in this case was limited to either ordering an investigation or prosecuting members of the Prosecution.

13. Similarly, the Appeals Chamber can identify no error in the Trial Chamber's decision to order further submissions from the parties, rather than immediately appoint an *amicus curiae* to conduct investigations, in response to Nshogoza's request for the initiation of contempt proceedings. Nshogoza's request surfaced in a short section of his Closing Brief, and he only touched briefly on the matter during closing arguments.⁴⁸ Given the scope of the allegations, the relative brevity and timing of Nshogoza's submissions on the matter, and the absence of a response by the Prosecution,⁴⁹ the Appeals Chamber considers that it was both reasonable and within the

⁴² Response Brief, paras. 53-62.

⁴³ Response Brief, paras. 71-78.

⁴⁴ *The Prosecutor v. Hormisdas Nsengimana*, Case Nos. ICTR-01-69-A, ICTR-2010-92, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, 16 December 2010 ("*Nsengimana* Appeal Decision"), para. 8. See also *The Prosecutor v. Édouard Karemera et al.*, 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 Motion for Oral Arguments, 22 January 2009 ("*Karemera et al.* Decision of 22 January 2009"), para. 13; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 31.

⁴⁵ *Nsengimana* Appeal Decision, para. 8; *Karemera et al.* Decision of 22 January 2009, para. 13.

⁴⁶ *Nsengimana* Appeal Decision, para. 8.

⁴⁷ *Nsengimana* Appeal Decision, para. 17.

⁴⁸ Nshogoza Closing Brief, paras. 96-104; T. 29 April 2009 pp. 39, 40.

⁴⁹ The Appeals Chamber notes that the Prosecution and Nshogoza filed their Closing Briefs simultaneously on 17 April 2009. See *supra* n. 13. See also *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-T, Prosecutor's Closing Brief, 17 April 2009. In addition, Nshogoza only touched on this collateral issue in his reply at the end of the parties' closing arguments. See T. 29 April 2009 pp. 39, 40.

Trial Chamber's discretion for it to order further submissions from the parties before deciding whether to initiate further proceedings.

14. There is also no merit to Nshogoza's suggestion that the Trial Chamber limited its consideration of his request to whether an investigation should be ordered. A review of the Impugned Decision reflects that the Trial Chamber summarized the relevant standards for both initiating investigations under Rule 77(C) of the Rules and directing the Registrar to appoint an *amicus curiae* to prosecute the matter under Rule 77(D) of the Rules.⁵⁰ In addition, the Trial Chamber expressly recalled Nshogoza's request for either an investigation or a prosecution.⁵¹ Finally, in dismissing the request, the Trial Chamber expressly declined "to exercise its discretion to initiate contempt investigations or proceedings pursuant to Rules 77(C) or (D)."⁵² Accordingly, it is clear that the Trial Chamber did not limit its consideration only to the matter of whether to initiate an investigation, as argued by Nshogoza.

15. At the core of Nshogoza's submissions is the contention that the Trial Chamber applied a double standard in severely condemning him for violating a witness protection order in nearly identical circumstances to the purported violations by the Prosecution. Although there are several superficial similarities, the Appeals Chamber, Judge Pocar dissenting, considers that there are important distinctions between the circumstances in the *Nshogoza* trial and those related to the present appeal.

16. First, as the Trial Chamber correctly noted, Nshogoza was charged, not only with contacting protected witnesses, but also with a number of very serious allegations, including disclosing their identities and manipulating, inciting, instigating, inducing, or bribing them into giving false evidence before the Appeals Chamber.⁵³ Although many of these charges were not proven, the circumstances *at the time of the confirmation of Nshogoza's indictment* were significantly different from those at issue in this appeal. The Appeals Chamber, Judges Güney and Pocar dissenting, is satisfied that these differences were a relevant consideration for the Trial Chamber in reaching the Impugned Decision. More importantly, Nshogoza fails to appreciate that he was not only convicted of contacting protected witnesses in violation of applicable witness protection measures, but also of disclosing their identities to third parties.⁵⁴ The Appeals Chamber considers, Judge Pocar

⁵⁰ Impugned Decision, paras. 7, 8.

⁵¹ Impugned Decision, para. 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). Alternatively, the Defence request the Chamber to direct the Registrar to appoint an *amicus curiae* pursuant to Rule 77 (C)(ii) to conduct further investigations.") (internal citations omitted).

⁵² Impugned Decision, para. 24. *See also* Impugned Decision, p. 7 (disposition).

⁵³ *Nshogoza* Trial Judgement, paras. 190-202.

⁵⁴ *Nshogoza* Trial Judgement, paras. 188, 189.

dissenting, that Nshogoza's transgression is therefore significantly more grave than the alleged violations of the members of the Prosecution, which do not involve the disclosure of the witnesses' identifying information.⁵⁵

17. Second, there are key differences in the relevant witness protection measures. The witness protection measures violated by Nshogoza in the *Kamuhanda* case required, not only notice to the Prosecution, but also express authorization from a Chamber before the Defence could contact a protected witness.⁵⁶ This measure reflects a heightened concern for Prosecution witnesses in that case.⁵⁷ In contrast, the Defence witness protection measures in the *Kamuhanda* and *Rwamakuba* cases purportedly violated by the Prosecution required only notification to Defence Counsel prior to contact with the witnesses in order to facilitate the interview.⁵⁸ The Appeals Chamber considers, Judge Pocar dissenting, that this important difference has a significant bearing on the gravity of the violation.

18. There is no merit to Nshogoza's contention that the Trial Chamber failed to consider that the circumstances surrounding the Prosecution's interviews with Witnesses Seminega, GAA, and A7/GEX amounted to intimidation. Witnesses GAA and A7/GEX were not covered by the relevant protection orders at issue in this appeal.⁵⁹ In such circumstances, Nshogoza has failed to demonstrate how the Prosecution's purported conduct in relation to these two witnesses bears on its treatment of the Defence witnesses covered by the *Kamuhanda* and *Rwamakuba* Defence Witness Protection Decisions. In addition, Nshogoza in his submissions before the Trial Chamber related to Witness Seminega did not assert that the Prosecution intimidated the witness.⁶⁰ Therefore, it was

⁵⁵ The Appeals Chamber observes that each of the Defence witnesses contacted by the Prosecution testified openly in the *Nshogoza* trial.

⁵⁶ *Kamuhanda* Prosecution Witness Protection Order, para. 2(i) ("Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or Judge thereof, [...] that the Prosecution shall undertake all necessary arrangements to facilitate such interview").

⁵⁷ In a similar vein, the Trial Chamber in the *Kamuhanda* case also *proprio motu* ordered that Prosecution witnesses could not waive their protective measures without specific authorization from the Tribunal. See *Kamuhanda* Prosecution Witness Protection Order, para. 12. See also *Kamuhanda* Prosecution Witness Protection Order, p. 6 ("MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.").

⁵⁸ *Kamuhanda* Defence Witness Protection Decision, para. 4, measure [6] ("Requiring that the Prosecutor and her representatives, acting on her instructions, shall notify the Defense of any request to contact Defense witnesses and for the Defense to make the necessary arrangements to that end"). *Rwamakuba* Defence Witness Protection Decision, para. VIII ("The Prosecution shall notify the Defence in writing, on reasonable notice, of its wish to contact a protected victim or potential defence witness or a relative of such person. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, the Defence shall immediately undertake all necessary arrangements to facilitate the interview. The Witnesses and Victims Support Section of the Tribunal may facilitate the interview.").

⁵⁹ *Nshogoza* Trial Judgement, para. 43.

⁶⁰ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T. Mr Nshogoza's Submissions on Prosecution Interference with Protected Defence Witnesses, 7 August 2009 ("*Nshogoza* Submissions"), paras. 26, 27. Instead,

reasonable for the Trial Chamber not to specifically address this point. In any case, a review of the portion of his testimony quoted by Nshogoza reveals that the witness was concerned, not by any particular statement or act during his interview, but simply by the fact of being interviewed by the Prosecution.⁶¹ The witness's subjective concern about being interviewed by the Prosecution does not amount to intimidation.

19. The Appeals Chamber can identify no error in the Trial Chamber's consideration of the possible underlying motivations of the members of the Prosecution in conducting the interviews. The Appeals Chamber has held that, although not a defence, personal motives may be considered in connection with a decision to initiate contempt proceedings.⁶² Therefore, contrary to Nshogoza's submissions, this threshold consideration did not need to be litigated at trial. There is also no requirement that a Trial Chamber rely on evidence which is tested at trial in reaching a decision on whether to order further proceedings.⁶³ In the circumstances of this case, it was reasonable for the Trial Chamber to rely on the Prosecution's submissions concerning the motives of its members rather than evidence since the Prosecution's arguments on this point were legal in nature.⁶⁴ Therefore, the Appeals Chamber is satisfied that the Trial Chamber had a reasonable basis on which to take its decision.

20. Finally, Nshogoza has not demonstrated that the Trial Chamber erred in considering that the initiation of proceedings would not further the important goals of deterrence and denunciation. Although the Trial Chamber did not elaborate on this finding, the Appeals Chamber considers that a Trial Chamber is not required to determine whether the initiation of contempt proceedings is the most effective and efficient way to ensure compliance with witness protection measures.⁶⁵ In any case, the Appeals Chamber observes that the Trial Chamber explicitly considered other factors which reasonably support its decision, such as the gravity of the purported violation. Furthermore, the Appeals Chamber observes that, although still in force, the specific provisions purportedly violated by the Prosecution – namely notifying the Defence to facilitate contact with the relevant

Nshogoza refers only to the Prosecution's use of "false or vague pretences" to "lure the witness" to its "offices". See Nshogoza Submissions, para. 27.

⁶¹ Nshogoza Submissions, para. 27 ("This witness testified that when he came to know that the people were from the OTP, 'the situation changed because a Prosecutor is someone who is feared by everybody. So I thought that maybe I had a problem which required that I give some explanations. Personally, I felt in the position of someone who has committed something wrong, and who has to go and explain his deeds.'") (emphasis omitted), quoting T. 19 March 2009 p. 58.

⁶² Nshogoza Appeal Judgement, para. 57.

⁶³ By way of comparison, the Appeals Chamber notes that, in confirming an Indictment, a reviewing Judge simply examines "supporting materials". See Rule 47(E) of the Rules.

⁶⁴ See Impugned Decision, paras. 16-20.

⁶⁵ Nsengimana Appeal Decision, para. 23.

witnesses⁶⁶ – were no longer necessary or enforceable. Indeed, at the time, the *Kamuhanda* and *Rwamakuba* cases had concluded, and the respective Defence teams had been dissolved.

21. For the foregoing reasons, the Appeals Chamber finds, Judge Pocar dissenting, that Nshogoza has not demonstrated that the Trial Chamber applied the incorrect legal standard, failed to provide a reasoned opinion, or acted unfairly or unreasonably. Accordingly, the Appeals Chamber is satisfied, Judge Pocar dissenting, that it was within the Trial Chamber's discretion not to initiate an investigation or a prosecution despite finding that there were sufficient grounds to proceed.

D. Disposition

22. For the foregoing reasons, the Appeals Chamber, Judge Pocar dissenting, **DISMISSES** the appeal.

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

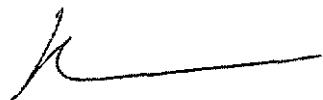
Done this 7th day of July 2011,
at The Hague,
The Netherlands.

Judge Güney appends a separate opinion.

Judge Pocar appends a dissenting opinion.



[Seal of the Tribunal]



Judge Patrick Robinson
Presiding

⁶⁶ See *supra* n. 58.

SEPARATE OPINION OF JUDGE MEHMET GÜNEY

1. The Appeals Chamber has upheld, by majority, the Trial Chamber decision of 25 November 2010,¹ declining to initiate contempt investigations or proceedings against members of the Prosecution. I concur with this outcome of the Majority Decision, as I do not believe that the *Impugned Decision* was so unfair or unreasonable as to constitute an abuse of discretion. However, I do not agree with part of the reasoning articulated by the Majority.

2. I recall my dissenting opinion in the corresponding contempt case in which the Appeals Chamber upheld the conviction and ten-month sentence of Nshogoza.² I remain of the opinion that the ten-month sentence imposed on Nshogoza for the underlying crimes was so excessive as to constitute an abuse of discretion. In fact, this sentence was so unusual that it cannot be isolated from the very particular circumstances of this case.³ This sentence should not be considered a valid precedent in the determination of the gravity of a similar violation.

3. The fact that, in this case, the Trial Chamber, upheld by the Majority, focused on the other charges included in the initial indictment against Nshogoza in order to legitimate its refusal to initiate contempt proceedings into the Prosecution violations that were similar to the ones Nshogoza was ultimately convicted of, only reinforces my position.⁴ Indeed, it leads to the inference that had Nshogoza been indicted only of the crimes of which he was convicted, it might have not have led to the launching of an investigation by the Tribunal, which stands in stark contrast with the severity of the sentence. I am therefore unable to subscribe to this part of the reasoning of the Majority Decision. However, I agree with the rest of the Majority's analysis.

¹ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-A, Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010 ("Impugned Decision").

² *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010 ("*Nshogoza Appeal Judgement*").

³ I note in particular that Nshogoza voluntarily surrendered to the Tribunal on 8 February 2008, that his trial commenced only one year later, on 9 February 2009, and that the judgement was rendered on 7 July 2009. During that time, Nshogoza remained in custody and was refused provisional release. See *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, 7 July 2009, ("*Nshogoza Trial Judgement*"), paras 19-25, 126 of Annex.

⁴ Impugned Decision, para. 22; Majority Decision, para. 16.

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



Judge Mehmet Güney

On this 7th day of July 2011,
at The Hague, the Netherlands.



[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE FAUSTO POCAR

1. In this Decision,¹ the Appeals Chamber dismisses Nshogoza's appeal requesting it to reverse the Impugned Decision.² I disagree with the reasoning and the conclusion of the Impugned Decision and I believe that the Trial Chamber's decision was so unfair or unreasonable as to constitute an abuse of its discretion.

2. I recall that the same Trial Chamber found Nshogoza guilty of one count of contempt of the Tribunal, which "rest[ed] solely on his meetings with protected Prosecution witnesses in violation of protective measures ordered by the *Kamuhanda* Trial Chamber."³ The Trial Chamber sentenced Nshogoza to 10 months of imprisonment.⁴ Both Nshogoza's conviction and sentence were affirmed by the Appeals Chamber.⁵

3. In its Impugned Decision, the Trial Chamber stated that it "has reason to believe that the Prosecution did not comply with the prescribed protective measures"⁶ in the *Kamuhanda* and *Rwamakuba* cases.⁷ The witness protection decisions in those cases required the Prosecution to notify the defence of any request to contact defence witnesses.⁸ However, the Prosecution failed to notify the Defence or to seek leave to vary this measure, which, as the Trial Chamber noted, could have been done on an *ex parte* and confidential basis.⁹

4. Instead of initiating contempt investigation and proceedings as was done in the *Nshogoza* case, the Trial Chamber found that, "[a]lthough there may be sufficient grounds to proceed, [...] 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."¹⁰ It, therefore, declined to initiate contempt investigations or proceedings pursuant to Rule 77(C)(ii), or Rule 77(D)(ii), of the Rules of Procedure and Evidence of the Tribunal.¹¹

¹ Decision, para. 22.

² Léonidas Nshogoza's Appeal Brief, 28 December 2010, Disposition, p. 20.

³ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010 ("Impugned Decision"), para. 22.

⁴ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgement, 7 July 2009, para. 233.

⁵ *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010, para. 112.

⁶ Impugned Decision, para. 15.

⁷ Impugned Decision, para. 15.

⁸ *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 Defense 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.

⁹ Impugned Decision, para. 18.

¹⁰ Impugned Decision, para. 21.

¹¹ Impugned Decision, p. 7 (Disposition).

5. In my view, for the two reasons expressed below, the Trial Chamber applied a double standard in this case in refusing to initiate contempt investigations against members of the Prosecution for similar conduct for which it found Nshogoza guilty of contempt and considered it justifying a harsh sentence.

6. First, the Trial Chamber tried to justify its decision by invoking that Nshogoza "was also indicted for more serious misconduct".¹² I believe that the Trial Chamber's reasoning is flawed because, even if Nshogoza was originally indicted for various grounds of contempt, he was ultimately convicted solely for conduct similar to that of the Prosecution's members in the present case. In my view, the Trial Chamber's comparison of the Prosecution's actions with those for which Nshogoza was acquitted of is a wholly irrelevant consideration.

7. Second, the Trial Chamber failed to appreciate that, in sentencing Nshogoza for very similar conduct as alleged against the Prosecution, it entered one of the harshest penalties ever imposed in a contempt proceeding before this Tribunal or the International Criminal Tribunal for the former Yugoslavia. Therefore, the Trial Chamber's suggestion that the gravity of the Prosecution's purported offence "militate[s] against pursuing this matter further"¹³ is patently unreasonable and clearly highlights a double standard.

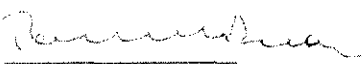
8. For the foregoing reasons, I believe that the Trial Chamber's Impugned Decision was so unfair and unreasonable as to constitute an abuse of its discretion. Upon careful consideration of the Impugned Decision, I would grant Nshogoza's appeal and overturn the Impugned Decision.

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

Done this 7th day of July 2011,
at The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Fausto Pocar

¹² Impugned Decision, para. 22.

¹³ Impugned Decision, para. 21.