ICTR-07-91-AR
28-12-2010
(505/A - 484/A)

505/A

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

BEFORE THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng, Registrar

Date Filed: 28 December 2010

LÉONIDAS NSHOGOZA

v.

THE PROSECUTOR

Case #: ICTR-2007-91-AR

LÉONIDAS NSHOGOZA'S APPEAL BRIEF

Office of the Prosecutor

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504/A

TO THE HONOURABLE APPEALS CHAMBER, THE APPELLANT RESPECTFULLY SUBMITS

INTRODUCTION

1. On 7 July 2009, Trial Chamber III ('**Chamber**') of the International Criminal Tribunal for Rwanda ('**Tribunal**') issued its Judgement ('**Trial Judgement**') finding Léonidas Nshogoza ('**Appellant**') guilty of contempt of the Tribunal under Count 1 of the Indictment and for having contact with protected prosecution witnesses and sentenced him to ten months' imprisonment.[1] He was acquitted of all remaining counts. The Appeals Chamber upheld Mr Nshogoza's conviction on 15 March 2010 ('**Appeal Judgement**').[2] The Appellant served 17 months in provisional detention in Arusha and nearly six months in prison in Rwanda, for charges he faced there based on the same allegations, for a total of **23 months of provisional detention**.

2. At trial, the Chamber found that the testimonies of three protected defence witnesses "*prima facie* indicate that the Prosecution may have acted in violation of witness protection orders.[3] However, prior to giving "full consideration" to the merits of the Defence's request for an *amicus curiae* investigation,[4] the Chamber invited the Parties to file further submissions on the OTP interference.[5] The additional submissions were filed on 7 August 2009.[6] The Appellant, in his submissions, included allegations and evidence of OTP threats and intimidation of witnesses and moved the Chamber to prosecute the OTP members involved.

3. In its decision rendered 15 months later, a clear departure from the judgement in *Nshogoza* where the Appellant was convicted and sentenced to 10-months in prison for the exact same conduct attributed to the six OTP members, the Chamber declined to investigate the matter and did not decide on the Appellant's motion to prosecute under Rule 77(D).

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[1] *Nshogoza* Trial Judgement, 7 July 2009.
[2] *Nshogoza* Appeal Judgement, 15 March 2010.
[3] Nshogoza Judgement, 7 July 2009, para. 44.
[4] Nshogoza Judgement, 7 July 2009, para. 45.
[5] 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').
[6] Mr Nshogoza's Submissions on Prosecution Interference with Protected Defence Witnesses ('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.

4. The decision, replete with errors in law and in fact, demonstrates the disparate treatment accorded by the Tribunal to the Prosecution and to the Defence and is so unfair and unreasonable that it amounts to such an abuse of judicial discretion calling into question the integrity of the Tribunal ('**Impugned Decision**' or '**Decision**').[7]

5. On 10 December 2010 the Appellant filed his Notice of Appeal pursuant to Rule 77(J) of the ICTR R.P.E. introducing the grounds of appeal ("**Notice**"),[8] and he now files this Appeal Brief to more amply explain the Chamber's errors and abuses of discretion ("**Brief**").

RIGHT OF APPEAL

6. The *chapeau* of Rule 77(J) provides in part: *'Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal.'* In *Šešelj* the Appeals Chamber found that decisions rendered pursuant to the corresponding ICTY provision are appealable on the basis that "*a decision dismissing a request to initiate contempt proceedings is a decision disposing of the contempt case within the meaning of Rule 77(J) of the Rules.*"[9] The Appeals Chamber further considered "*[...] that the right to make such a request, by implication, gives rise to a corresponding right to challenge any incorrect application of the legal standard governing such requests.*"[10]

7. The 16 July 2009 Order recognized the Appellant's right to make the request to initiate proceedings against members of the OTP and, in turn, gave rise to a corresponding right to challenge any incorrect application of the legal standard governing this request. It is in virtue of the Appeal Chamber's holding in *Šešelj* that the Appellant lodges the present appeal.

STANDARD OF REVIEW

[7] Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010.
[8] Nshogoza, ICTR-07-91-AR, Léonidas Nshogoza's Notice of Appeal, 10 December 2010.
[9] *Ibid.*
[10] *Prosecutor v Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber Decision of 10 June 2008, 25 July 2008,para. 13.

502/A

8. The issue on appeal is whether the Trial Chamber has correctly exercised its discretion. According to now well-established jurisprudence, the Appeals Chamber will overturn a discretionary first-instance decision:

> [W]here 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. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[11]

GROUNDS OF APPEAL

APPEAL GROUND ONE: The Chamber applied an incorrect legal standard to the issue of the reasonable discretion a Trial Chamber can exercise in decisions pursuant to Rule 77 Contempt of the Tribunal, generally, and, in particular, when it concluded that "the important goal of deterrence and denunciation" constitutes a valid consideration in the exercise of discretion under Rule 77 Contempt of the Tribunal, whereas there is no authority to support this finding".

9. Through a series of procedural and substantive legal errors, and an abuse of its discretion, the Chamber applied an incorrect legal standard to the six OTP contempt cases at bar, thereby committing a number of discernible errors invalidating the Decision.

10. It is uncontested that Hélène Moenback, Kilita Mukumbo, Aaron Musonda, Pierre Duclos and Collette Murebwayire, Ms Loretta Lynch, and Mr Cohen (all of whom worked or currently work for the ICTR-OTP) met with and took statements from a number of Defence witnesses from the *Rwamakuba*, *Kamuhanda* and *Nshogoza* cases who were protected under court order. Based on the testimonies of defence witnesses[12] and the OTP written statements

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[11] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR.91, Decision on Matthieu Ngirumpatse's Appeal against Decision on Remand on Provisional Release, 8 December 2009, para. 5.

[12] Witness Seminega (T. 19 March 2009, p. 53-57); Witness Nyarwaya (T. 20 March 2009, p. 4 and 23); and Witness Nyagatare (T. 23 March 2009, p. 19)

taken from them in violation of protective measures,[13] and because the Appelland by then had already spent 14 months in provisional detention, he moved the Chamber to direct the Registrar to appoint an *amicus curiae* to investigate OTP conduct under Rule 77(C) Contempt of the Tribunal.[14]

11. In addressing the matter for the first time, the Trial Chamber employed terminology associated with Rule 77(D) prosecution of Contempt of the Tribunal finding that the testimonies of witnesses Seminega, Nyarwaya and Nyagatare "*prima facie indicate that the Prosecution may have acted in violation of witness protection orders.*"[15] The Chamber then initiated an investigation itself through the Order for additional submissions.

12. The Appellant's Submissions provided further details of the multiple examples of OTP violations of witness protective measures as well as incriminating evidence of OTP threats to and intimidation of witnesses Seminega, GAA and GEX/A7. Because of the greater seriousness of the latter and the fact that he had just spent 17 months in prison for the former the Appellant requested the Chamber to *prosecute* the OTP members under Rule 77(D)(ii), or alternatively to direct the Registrar to appoint an *amicus curiae* pursuant to Rule 77(C)(ii) to conduct further investigations.[16] None of six OTP members filed an affidavit or other evidence in response to the Chamber's Order, and the Prosecutor denied that the contact with protected defence witnesses violated witness protection measures for a number of reasons, all of which were rejected by the Chamber in its Decision. Therefore, once the Parties complied with the Order, the Chamber had no further information to detract from its *prima facie* findings of contempt by six OTP members. On the contrary, it now faced far more serious allegations and evidence of OTP threats and intimidation.

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[13] Seminega Statement to the OTP members Hélène Moenback, Collette Murebwayire and Pierre Duclos, 4 August 2008 (tendered 19 March 2009 as Exhibit D-51); Nyagatare Statement to the OTP members Hélène Moenback, Collette Murebwayire and Pierre Duclos, 1 August 2008 (tendered 23 March 2009 as Exhibit D-59). *See also*, Straton Nyarwaya Statement to Pierre Duclos, Colette Murebwayire, Me Loretta Lynch and Me Cohen (OTP members and OTP Special Counsel), 15 March 2006 attached to Prosecutor's Submissions regarding Defence Witness Stratton (*sic.*) Nyarwaya's Statement to the Office of the Prosecutor dated 15 March 2006, 27 March 2009.

[14] *Nshogoza*, Closing Brief of Léonidas Nshogoza filed 17 April 2009, paras. 96-104.

[15] Nshogoza Judgement, 7 July 2009, para. 44.

[16] Defence Submissions, para. 38. Decision, para. 11.

13. The Chamber applied an incorrect legal standard to the issue of reasonable discretion a Trial Chamber can exercise in decisions pursuant to Rule 77 Contempt of the Tribunal generally.

14. First, the Chamber applied an incorrect legal standard when it misinterpreted the scope of Rule 77 discretion as open to apply this rule *or not*:

> "*... the fact a Trial Chamber has reason to believe that a person is in contempt does not oblige it to order an investigation or prosecution. 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.*"[17]

15. Judicial discretion is a practical tool employed to expedite and facilitate, not impede action. Rule 77(C) and (D) discretion relates to the options that are open to the Trial Chamber when deciding what action to take when the legal standards are met and there is no option open to the Chamber to do nothing at all. If the drafters of the ICTR R.P.E. intended to allow Trial Chambers the option of doing nothing at all when they had "reason to believe" contempt was committed or had "sufficient grounds" to prosecute, they would have included "do nothing at all" in the list of available courses of action. However, a Trial Chamber is not empowered to "do nothing" if it has sufficient grounds to prosecute Contempt of the Tribunal. It is logically untenable to suggest that where sufficient grounds exist to prosecute contempt, a Chamber can violate Rule 77 and decide not to. The Chamber therefore committed a discernible error of legal interpretation invalidating the Decision when it stated that it was not "obliged" to order an investigation or prosecution when the legal thresholds to do so are met.

16. Second, the Chamber applied an incorrect legal standard and abused its discretion when it found the Appellant had demonstrated *prima facie* contempt by OTP members for violations of witness protection orders, but then failed to apply Rule 77 (C) or (D), opting instead to put on an investigator's cap to order the Parties to file "additional submissions" to "fully consider" the matter. Rule 77(C) empowers the Chamber to direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to it, not to investigate the

[17] Decision, para. 20.

matter itself. The correct procedural legal standard would be for the Chamber to either direct the Registry to appoint an amicus curiae to a) investigate pursuant to Rule 77(C)(ii), b) to initiate proceedings itself pursuant to Rule 77(C)(iii), or c) to prosecute the matter (or prosecute the matter itself) following the issuance of orders in lieu of indictments pursuant to Rule 77(D)(ii). In failing to proceed in this manner the Trial Chamber committed a discernible error of procedural law invalidating the Decision.

17. Third, the Chamber applied an incorrect legal standard and abused its discretion when it its request for additional submissions yielded no evidence mitigating or refuting the *prima facie* cases of OTP contempt (on the contrary, it gave rise to far more serious evidence of OTP threats and intimidation) and yet decided not to apply the Rule 77 legal standards of "reason to believe" and/or "sufficient grounds". In abandoning these legal thresholds the Chamber committed a discernible error invalidating the Decision.

18. The Chamber committed a further error in law and abused its discretion, when it failed to apply the legal threshold and instead *purportedly entertained* three considerations: gravity, underlying motivations and penal goals. Contrary to the implied assertion in the Decision,[18] the Appeals Chamber in Nshogoza did not state that "even where there are sufficient grounds and therefore a *prima facie* case to pursue contempt proceedings, a Trial Chamber may consider the gravity if an alleged perpetrator's conduct or his underlying motivations when deciding whether to initiate contempt proceedings." The Appeals Chamber held:

> *"Considerations of the gravity of an accused's conduct or his underlying motivations are rather to be assessed in connection with the decision to initiate proceedings or in sentencing."*[19]

19. The Appellant submits that the Chamber either committed an error when it gave an overly-broad interpretation to the Appeals Chamber words, or it abused its discretion by drawing inferences which served its departure from the legal standard. Additionally, as it turns out, while it stated that it could consider gravity, underlying motivations and penal goals in relation to this matter, the Chamber failed to explain how it considered these three factors arriving at its conclusion which reversed its previous finding of sufficient grounds.

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[18] Decision, para. 20 "Thus, Footnote 35: "See *Nshogoza* Appeals Judgement, para. 57.
[19] *Nshogoza*, ICTR-07-91-A, Judgement (AC), 15 March 2010, paras. 56 and 57.

The errors in law associated with the Chamber's consideration of gravity are discussed under Grounds Three and Four, whereas those in connection with "underlying motivations" are demonstrated under Ground Two.

20. Finally, the Chamber committed a discernible error and abused its discretion invalidating the Decision when it recognized the Appellant's motion to either direct an amicus curiae to prosecute the matter or to prosecute the matter itself pursuant to Rule 77(D)(ii) or alternatively to direct the Registrar to appoint an amicus curiae pursuant to Rule 77(C)(ii) to conduct further investigations,[20] and then limited the scope of its Decision to one question: "*Should the Chamber Direct the Registrar to Appoint Amicus Curiae to Investigate Possible Contempt?*".[21] As the Chamber recognized the Appellant's right to request the initiation of contempt proceedings against OTP members, the Chamber ought to have rendered a decision on this motion or at least, explained why it did not render such decision.

21. The following paragraphs address the second part of APPEAL GROUND ONE as well as APPEAL GROUND ELEVEN[22] in that both pertain to the issue of deterrence and limiting the potential for abuse.

22. The Chamber applied an incorrect standard of law and abused its discretion when it held that "penal goals" were a valid consideration in the exercise of discretion,[23] and reached an unsubstantiated conclusion that penal goals "militated against pursuing this matter further",[24] and the pursuit of contempt proceedings was not "necessary to achieve the important goals of deterrence and denunciation in this case".[25] Besides being unsubstantiated, these conclusions are in contradiction with the reasoning put forward in the Impugned Decision itself, and at variance with standards applied by the Chamber previously. As such, it is manifestly unreasonable and unfair, and should be reversed by the Appeals Chamber.

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[20] Decision, para. 11.
[21] *See* Notice, Appeal Ground 10. The Appellant has not abandoned Appeal Ground TEN, rather, he has chosen to address it in the analysis under Appeal Ground 1.
[22] *See* Notice, Appeal Ground 11.
[23] Decision, para. 21.
[24] Decision, para. 21.
[25] Decision, para. 24.

23. The conclusions are unsubstantiated as the Chamber failed to explain *why* contempt proceedings were unnecessary to pursue the important goals of deterrence and denunciation. Given its unambiguous opinion that the conduct in question was unlawful, it should have at the very least stated what other measures, if not contempt proceedings, were appropriate. Instead, the Decision merely disposes of the whole matter.[26] The right to a reasoned opinion is a fundamental right guaranteed by Article 22 of the Statute of the Tribunal. The Statute speaks of the right to judicial reasoning in relation to judgements on the merits. However, the Appeals Chamber has held that the right to a reasoned opinion is an aspect of the fair trial requirement[27] and it has applied it to ordinary decisions, as well.[28] The Chamber's unsubstantiated statement with respect to the penal goals thus runs afoul of the fair trial requirements and as such it is manifestly unreasonable.

24. Secondly, the statement in question is contradicted by the Chamber's reasoning in the Impugned Decision. The Chamber expressed an unequivocal concern that the approach of the Prosecution, by which it left to itself to determine whether it remains bound by the court orders, *'opens up the possibility of abuse.'*[29] The prosecution of those who may have engaged in 'abuse' of the purpose behind witness protection measures certainly serves the general goals of deterrence and denunciation. By using reasoning that is inherently contradictory, the Chamber acted in a manifestly unreasonable way.

25. Thirdly, the conclusion made by the Chamber is also at variance with standards it has applied previously in the case of Mr Nshogoza in the sentencing part of the trial judgement. It referred to those standards in the Impugned Decision itself,[30] without, as has been already said, sufficiently distinguishing the case of the Prosecution investigators from that of Mr Nshogoza. The reasoning from the Trial Judgement is worth revisiting at this stage:

> 218. The Chamber recalls that contempt of the Tribunal is a grave offence, constituting a "direct challenge to the integrity of the trial process."

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[26] *Cf.* Decision, para. 24, second sentence ('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).').

[27] *Musema v. Prosecutor*, Case No. ICTR-96-13-A, 16 November 2001, Appeal Judgement, para. 18

[28] *See, e.g., Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 15, fn. 21; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006, para. 10.

[29] Decision, para. 17. This addresses Appeal Ground Eleven.

[30] Decision, para. 24 n. 36, citing *Nshogoza* Trial Judgement, paras. 218-219.

> Maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences. Indeed, the Chamber is mindful that,
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> > "the nature of the crimes under the jurisdiction of the Tribunal and the context in which they were committed necessitate substantial reliance upon oral evidence. That fact entails appropriate measures for the protection of the integrity of witnesses and their testimony...."
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> As noted by the ICTY, "*any deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice.*" It is fundamental to the fulfilment of the Tribunal's mission that individuals who come to give evidence before the Tribunal, often about traumatic or difficult experiences, may do so with the security provided by protective measures. *It is therefore necessary for general deterrence and denunciation to be given high importance in sentencing policies.*
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> 219. *The Accused's conduct in the present case amounted to a determination that he would contact protected witnesses on his own conditions, that is, he would control the circumstances in which he met with the protected witnesses. He thus defied the authority of the court by breaching the protective measures that were in place.* The Chamber considers that breach of the protective measures order undermined the authority of the Kamuhanda Trial Chamber, as well as confidence in the effectiveness of protective measures, and the administration of justice. *Such conduct not only defies the authority of the Tribunal but may also have the effect of dissuading witnesses from testifying before it.* To deter this type of conduct, and to express the Chamber's disapproval of the same, a custodial sentence is merited[.][31]

26. The alleged conduct of Prosecution investigators consisting of meeting protected Defence witnesses in defiance and breach of witness protective measures applicable to those witnesses may be described in exactly the same terms as were used in the cited passage from the Trial Judgement. What is more, at least one of the witnesses testified that he was feeling threatened by the investigators' conduct.[32] Intimidating and threatening behaviour towards protected witnesses, besides being a different and more serious form of contempt,[33] only serves to further dissuade witnesses from testifying before the Tribunal. As such, the conduct in question merits the pursuit of contempt proceedings precisely in light of the penal goals

[31] *Nshogoza* Trial Judgement, paras. 218-219 (internal footnotes omitted) (emphases added).
[32] Defence Submissions, para. 27, citing the testimony of Fulgence Seminega, T. 19 March 2009, p. 58.
[33] See Rule 77(A)(iv).

referred to by the Chamber. By disregarding these considerations, it has exercised its discretion in a manifestly unfair and unreasonable way.

27. The Chamber found all of the conditions necessary for the initiation of contempt proceedings were fulfilled, with one exception: it decided to decline to exercise its discretion to do so. The Chamber found that it had reason to believe that the Prosecution violated witness protection measures.[34] Indeed, the evidence submitted by the Defence and uncontested by the Prosecution[35] indicates that the Prosecution representatives repeatedly contacted and met with protected defence witnesses in defiance of witness protection orders issued by the Trial Chamber.

28. The Chamber rejected all objections raised by the Prosecution as to why the conduct of its members would have been lawful. In particular, the Prosecution contended that the order to investigate allegations of witness interference and false testimony, issued by the Appeals Chamber, served as a *carte blanche* to *'interview all persons (protected and unprotected witnesses)'*.[36] The Chamber's response was particularly scathing:

> To leave it to the Prosecution to determine whether it remains bound by Chamber's orders when it is investigating contempt proceedings opens up the possibility of abuse.[37]

29. If the Trial Chamber were serious about deterrence or limiting the potential for abuse, its Decision not to investigate or initiate proceedings sent the OTP the wrong signal.

APPEAL GROUND TWO: The Chamber applied an incorrect legal standard when it accepted "that members of the OTP may have acted on the mistaken belief that they were

[34] Decision, para. 15.

[35] *Cf.* Decision, para. 15 n. 30 ('The Prosecution ... 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 interview.').

[36] Prosecution Submissions, para. 10.

[37] Decision, para. 17.

authorized to meet with the relevant defence witnesses" as though a general and vague written submission constituted evidence of an "underlying motive"; and furthermore, when it found that an alleged "mistaken belief" which is not a valid defence to contempt, constitutes grounds not to initiate contempt proceedings.

30. With regard to the underlying motivations of OTP investigators, the Chamber found 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 [sic] Order.'*[38] The inclusion of the word 'may' is clearly not due to administrative oversight or misprint. The Chamber described its extent of (mis)trust towards the Prosecution's submissions in this respect in the same terms also elsewhere in the Impugned Decision.[39]

31. As the Chamber observed itself, the sufficient grounds standard under Rule 77(D) is satisfied where the evidence establishes a *prima facie* case.[40] A finding that the members of the OTP 'may' have been mistaken (i.e. as opposed to a finding that they 'have been mistaken') does not exclude the possibility that they were, in fact, not mistaken in their belief and acted with the full knowledge that they were not authorized to contact protected Defence witnesses. By way of an example, the fact that the Prosecution withheld for a long time a statement it obtained in violation of a court order from one of the protected Defence witnesses,[41] claimed repeatedly that it did not exist,[42] only to suddenly discover it in an abandoned carton box[43] after the Defence drew the attention of the Chamber to a copy of the statement provided by the witness,[44] supports rather this alternative explanation. Hence, the establishment of a *prima facie* case that would lack the purportedly benign motivation

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[38] Decision, para. 23 (emphasis added).

[39] See Decision, para. 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.') (emphasis added).

[40] Decision, para. 8 n. 16 and sources cited therein.

[41] Statement of Straton Nyarwaya to Rwamakuba Defence dated 21 June 2004. The statement was not admitted into evidence by the Trial Chamber as it found it inadmissible due to its 'lack [of] probative value in relation to [Nyarwaya's] *viva voce* testimony'. *See* Decision on Defence Motion to Admit into Evidence Statement of Defence Witness Straton Nyarwaya and for Other Relief, 1 July 2009, para. 30. Note that this decision was rendered over three months after the Defence moved for the statement to be admitted into evidence and only six days before the Trial Judgement was issued by the Trial Chamber.

[42] T. 20 March 2009, p. 25, lines 20-21; T. 20 March 2009, p. 33, lines 14-15; T. 20 March 2009, p. 35, lines 8-11.

[43] T. 25 March 2009, p. 45, lines 33-34 ('a statement has been found in a carton containing other documents which had not been submitted to our electronic database by the Kigali office').

[44] T. 25 March 2009, p. 44, lines 18-25

remains perfectly plausible and as such, it should be tested in trial. By viewing its conclusion that the Prosecution investigators may have been mistaken as dispositive of the issue of motivation, the Chamber has based its decision on an incorrect application of the governing law and as such, it should be overturned on appeal.

32. Moreover, the Chamber's finding goes to the assessment of *mens rea* of an undetermined group of people and it is based on an unreserved acceptance of the Prosecution's submissions, without any further analysis. This is manifestly unreasonable. No reasonable Trial Chamber would claim to be able to assess the state of mind of a group of people identified only as 'members of the OTP'. To do so at the beginning of contempt proceedings is not only premature—as that assessment may properly take place only during the trial itself—but it is also in violation of the principle of *individual* criminal responsibility firmly entrenched in international law.[45]

33. The Chamber applied an incorrect legal standard invalidating the Decision when it a) considered the concept of "underlying motivations" independently of the legal standard pursuant to Rule 77(C) or (D), b) incorrectly inferred or, as it stated, "accepted" that the OTP members may have acted on a "mistaken belief", and c) when it conflated the inference that it drew from the Prosecutor's submission with evidence of "underlying motivation" and when it analysed "underlying motivation" independent of the underlying motivations of any of the six OTP suspects. All three legal errors invalidating the Decision underscore the importance of testing allegations at trial, determining whether the constituent elements of the crime are present, and when they are, to punish the perpetrators accordingly.

34. First, the Chamber erred in law when it considered purported and unsubstantiated underlying motivations independent of its assessment that *prima facie* cases of contempt against OTP members had been established. The Chamber did not embark on an reasoned analysis of this consideration and thus committed a discernible error invalidating the Decision.

35. Second, the Chamber erred in law when it incorrectly inferred or "accepted" that OTP members "may have" acted on a "mistaken belief". At this stage of the proceedings, the role of the Trial Chamber is to apply Rule 77, not to investigate and draw its own inferences from

[45] *Cf.* Statute of the ICTR, Art. 6.

unsworn-to vague submissions. And third, the Chamber erred in law when it conflated the inference it drew from the Prosecutor's submissions with evidence of "underlying motivations". The Chamber had before it no evidence of any underlying motivations of Hélène Moenback, Kilita Mukumbo, Aaron Musonda, Pierre Duclos, Collette Murebwayire, Ms Loretta Lynch, or Mr Cohen. In so doing, the Chamber committed a discernible error invalidating the Decision.

36. The Prosecutor cannot speak for a prosecution lawyer, investigator or interpreter facing potential charges of contempt of the Tribunal any more than Defence Counsel Aïcha Condé could speak for her investigator, Léonidas Nshogoza; and *why* or *the fact that* Me Condé instructed the Appellant to meet witnesses GAA and GEX/A7 was not considered by the Court as a reason not to proceed against him or a reason to lighten the heaviest sentence the Tribunal ever imposed on an individual for contempt.

APPEAL GROUND THREE: The Chamber applied an incorrect legal standard in denying Mr Nshogoza's fundamental right to the presumption of innocence and the Trial Chamber's acquittals of all witness bribery charges in its legal analysis of what constituted criteria for assessing the gravity of allegations of contempt;

APPEAL GROUND FOUR: The Chamber applied an incorrect legal standard when it confounded aspects of procedural and substantive criminal law to draw a factually and legally incorrect distinction between the gravity of the case of Léonidas Nshogoza and those of persons working for the OTP.

37. The Appellant hereunder addresses APPEAL GROUNDS THREE and FOUR as well as APPEAL GROUND SEVEN, all of which relate to the Chamber's consideration of gravity in the exercise of its discretion not to initiate contempt proceedings.

38. Though it referred to *Nshogoza* as authority for considering gravity in the exercise of judicial discretion to initiate proceedings under Rule 77, the Chamber incorrectly applied this legal standard. In *Nshogoza*, the impugned conduct of violating a witness protection order was deemed sufficiently grave to warrant the heaviest custodial sentence ever handed down, at the time, for violating a witness protection order. In this case, there are a number of *prima*

facie cases against persons working for the OTP who engaged conduct identical to that which resulted in the Appellant's severe punishment.

39. The Chamber committed a discernable error of law when it applied the gravity legal standard differently to two "like cases" to arrive at diametrically opposed conclusions i.e. the imposition of the harshest prison sentence on the one hand and the declining to investigate/prosecute the matter on the other. If a certain type of conduct is grave enough to warrant the application of the most serious sentence at the Tribunal's disposal, *a maiori ad minus* it is sufficiently grave to warrant an investigation, if not contempt proceedings.

40. The Chamber, mindful of its findings in the principal case, admitted that the essence of the OTP members' actions and those of the Appellant were equivalent, in fact, the conduct is *identical*: i.e. the unauthorized meeting with protected witnesses of the other Party. It is a central principle in law that "like cases be treated alike". The Chamber's analysis should have ended there.[46] Reaching another outcome without reasonable grounds to distinguish the cases is so unjust and unfair that it constitutes an abuse of discretion invalidating the Decision. The Chamber attempted to distinguish Mr Nshogoza's case from that of the Prosecution investigators by referring to the content of indictment issued against Mr Nshogoza:

> However, Nshogoza was also *indicted for* more serious misconduct, including allegations that he engaged in bribery and induced witnesses to testify 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.[47]

This holding is erroneous as it is alarming.

41. By taking the Prosecution's legal assessment into account, the Trial Chamber failed to correctly interpret the fundamental principles of criminal law by giving weight to irrelevant considerations in reaching its decision. First, it demonstrates a grave misunderstanding of the fundamental principles of criminal law on part of the Trial Chamber by erroneously conflating substantive and procedural aspects of criminal law. An indictment is a procedural

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[46] *Compare* Decision, para. 21 ('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') *with* para. 22 ('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.').

[47] Decision, para. 22.

document issued by a party whose interests are directly opposed to those of the person accused of wrongdoings alleged in the indictment.[48] It is an error to ascribe to the party who has prepared an indictment the impartiality required to objectively establish the gravity of acts alleged. Furthermore, the Chamber's approach defies the notion of presumption of innocence as it is understood in international law. The court must not prejudge the outcome of a trial.[49] This is also true on a more abstract level. Relying on the Prosecutor's determination of gravity of conduct is not the legal standard in the exercise of discretion to assess gravity of alleged conduct, and to do so means that the Chamber's determination of the outcome of a trial is based solely on the Prosecutor's assertions thus undermining the presumption of innocence.

42. Secondly, the Trial Chamber's approach is manifestly unreasonable as it is at odds with standards it has itself established and applied in the present case. The Chamber considered in the Trial Judgement that the conduct consisting of *'a determination that [a person] would contact protected witnesses on his own conditions, that is, he would control the circumstances in which he met with the protected witnesses'* merits *'a custodial sentence'*.[50] With respect to evidence adduced to the Prosecution investigators' conduct, the same Chamber concluded that there were sufficient grounds to believe that the Prosecution acted as if it was left to it *'to determine whether it remains bound by Chamber's orders'* when contacting protected witnesses.[51] Like cases must be treated alike.

43. Thirdly, the Chamber failed to give weight to considerations arising out of the alleged conduct of the Prosecution investigators towards witness Fulgence Seminega. The Defence adduced evidence of the OTP's intimidating conduct toward this witness.[52] If tested and found to be true, these acts constitute an extremely serious form of coercive conduct specifically prohibited under Rule 77(A)(iv). By disregarding these considerations altogether

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[48] The indictment is 'the primary accusatory instrument'. *Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 114.

[49] ECtHR, *Barberà v Spain* (1988) 11 EHRR 360, para. 77 ('a court should not start with the preconceived idea that the accused has committed the offence charged'); Human Rights Committee, 'General Comment 13/21', UN Doc A/39/40, para. 7 (the presumption of innocence imposes a duty on all public authorities to 'refrain from prejudging the outcome of a trial').

[50] *Nshogoza* Trial Judgement, para. 219.

[51] Cf. Decision, para. 17; see also Decision, paras. 14-16 and 20-21.

[52] Defence Closing Brief, para. 100; Defence Submissions, paras. 26-27 (including Mr Seminega's testimony that during the unlawfully conducted meeting, the investigators made him feel as if he were 'someone who has committed something wrong, and who has to go and explain his deeds').

(the Impugned Decision does not even reflect submissions made with respect to individual witnesses), the Chamber failed to give weight to relevant considerations establishing the gravity of the alleged conduct and it has thus further abused its discretion.

44. The Trial Chamber did not provide any additional reasons why the alleged conduct of the members of the Prosecution would not be of sufficient gravity. It is submitted that by holding that the allegations against these persons were not sufficiently serious, it abused its discretion.

APPEAL GROUND FIVE: [abandoned]

APPEAL GROUND SIX: The Chamber reached a patently incorrect conclusion of fact when it found that "[t]he testimonies of witnesses Seminega, Nyagatare and Nyarwaya do not support such serious allegations against members of the OTP who met with them", although it heard the testimony of witness Seminega and read the submissions of the Defence which support the allegation of contempt for intimidation by OTP members punishable under Rule 77(A)(iv).

45. The Appellant addresses APPEAL GROUNDS SIX and TWELVE together as both relate to the Chamber's failure to consider the evidence and allegations of OTP threats and intimidation.

46. The Chamber reached a patently incorrect conclusion of fact when it found that the testimonies of witnesses Seminega, Nyagatare and Nyarwaya "do not support such serious allegations against members of the OTP who met with them". The "serious allegations" the Chamber is referring to are the "more serious misconduct" for which the Appellant was indicted including "allegations that he engaged in bribery and induced witnesses to testify falsely before the Appeals Chamber."

47. Though he did not allege that the Prosecutor "engaged in bribery and inducted witnesses to testify falsely before the Appeals Chamber", the Appellant's Submissions highlight repeated examples of OTP threats to and intimidation of witnesses. Threatening and

intimidating a person is coercive misconduct falling under same Rule 77(A)(iv) category of contempt as "bribery":

> *"(iv)* ***threatens, intimidates****, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber"*

48. The Appellant's Submissions reference witness Seminega's testimony which suggested that he felt intimidated by OTP members who summoned him to provide a statement to them.[53] In addition, the Chamber heard the testimonies of GAA and GEX/A7 who provided evidence of the more serious OTP conduct of threats to and influence over witnesses to have them change their testimony. GAA testified that Ms Hélène Moenback met with him before he returned to Arusha to testify before the Appeals Chamber in *Kamuhanda* in May 2005, that she read him his Miranda rights and that he was afraid because his statement was being recorded on tape.[54] After he testified before the Appeals Chamber in *Kamuhanda*, on 29 September 2005, GAA was interviewed by Ms Loretta Lynch and others from the OTP. Ms Lynch spent four hours trying to get GAA to tell her that his recantation was not true because the Appeals Chamber did not believe his recantation. For four hours, GAA repeatedly expressed fatigue and frustration at why Ms Lynch was not accepting the truth. The four-hour long interrogation session of GAA after his Appeals Chamber interview constituted an interference with the administration of justice in that Ms Lynch attempted to coerce GAA to go back on his recantation evidence.[55]

49. Witness GEX/A7 testified that when the OTP took her statement where she confirmed that the Appellant had not offered her any bribe to recant her prior statement in *Kamuhanda*, a man interviewing her asked if she "dreaded being arrested or detained".[56]

50. The Trial Chamber erred in law and abused its discretion in disregarding all of the Appellant's submissions regarding witnesses GAA and GEX/A7.[57] The Appellant's additional submissions related to two matters: i) the question of the protected status of these

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[53] Submissions, paras 26 and 27.
[54] Submissions, para. 18. *Nshogoza*, T. 18 February 2009, pp. 7-9.
[55] Submissions, para. 21 and 22.
[56] Submissions, para. 24. *Nshogoza*, T. 18 March 2009, p.49.
[57] Decision, para. 5.

witnesses and, ii) OTP threats and intimidation (which is independent of their status as protected witnesses).

51. The Chamber based its dismissal of *all* the Defence submissions related to witnesses GAA and A7/GEX on the fact that they testified as protected Prosecution witnesses in the original *Kamuhanda* trial.[58] The point of the Defence's submissions, however, was that regardless of whether they were protected prosecution or defence witnesses, the evidence of threats and intimidation bolstered the *prima facie* cases of contempt against the OTP members involved.[59] Witness interference by way of threats or intimidation is contempt under Rule 77(A)(iv) regardless of which Party the witness 'belongs' to or whether they fall under protective measures.

52. The Defence reiterates its submissions made in relation to unlawful interference with witnesses GAA and A7/GEX[60] and invites the Appeals Chamber to hold that the Trial Chamber erred in law by disregarding this evidence in the Impugned Decision.

APPEAL GROUND SEVEN: [See APPEAL GROUNDS THREE AND FOUR][61]

APPEAL GROUND EIGHT: [See APPEAL GROUND TWO][62]

APPEAL GROUND NINE: The Impugned Decision is so unfair and unreasonable that it constitutes an abuse of discretion in that it fails to substantiate or attempt to explain the Trial Chamber accepts the Prosecution's submission that interviews of the concerned defence witnesses may have been undertaken by members of the OTP on a good faith basis

[58] Decision, para. 5 n. 12, incorporating the reasoning in *Nshogoza* Trial Judgement, para. 43 ('In relation to Witnesses GAA and A7/GEX, the Chamber notes that they testified as protected prosecution witnesses in the original *Kamuhanda* trial and, due to the Defence's failure to follow proper procedure, were still protected Prosecution witnesses at the time contact took place. Accordingly, the Defence submissions in relation to these two witnesses are dismissed.').

[59] Defence Submissions, paras. 13 and 17-25.

[60] Defence Submissions, paras. 17-25.

[61] The Appellant has not abandoned Appeal Ground Seven.

[62] The Appellant has not abandoned Appeal Ground Eight.

whereas earlier in the Impugned Decision the Chamber recalled that "mistake of law is not a valid defence to contempt, and does not excuse a violation of a protective order" (and the Chamber did not accept the clear explanations of Mr Nshogoza and witness Aicha Condé), nor does the Chamber substantiate nor explain why it did not "consider that pursuit of contempt proceedings is necessary to achieve the important goals of deterrence and denunciation in this case".

53. The Chamber abused its discretion when it failed to explain why it accepted that OTP interviews with protected defence witnesses were undertaken on a "good faith", and why it did not consider "pursuit of contempt proceedings" as necessary "to achieve the important goals of deterrence and denunciation". The Appellant is entitled to reasoned explanations for why the Chamber reaches a particular finding in fact or in law. The failure to provide one is unfair and unreasonable such that it amounts to an abuse of discretion invalidating the Decision.

APPEAL GROUND TEN: [See APPEAL GROUND ONE][63]

APPEAL GROUND ELEVEN: [See APPEAL GROUND ONE][64]

APPEAL GROUND TWELVE: [See APPEAL GROUND SIX][65]

CONCLUSION

54. The treatment of Mr Nshogoza is the proverbial elephant in the room. The Chamber opted in his case for an unprecedentedly harsh punishment, which was criticized by Judge Robinson in the following way:

> [T]he custodial sentence of 10 months of imprisonment stands in stark contrast to other prevailing practice at the Tribunal and the ICTY, where conduct of similar gravity is either not prosecuted or typically results

[63] The Appellant has not abandoned Appeal Ground Ten.
[64] The Appellant has not abandoned Appeal Ground Eleven.
[65] The Appellant has not abandoned Appeal Ground Twelve.

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> exclusively in a fine. In the present case, the appropriate penalty, based on Nshogoza's specific conduct as found by the Trial Chamber, would either have been a reprimand or at most a fine of $1,000.[66]

It is thus not surprising that it took it over 15 months since the submissions were filed to produce the 24-paragraph Impugned Decision.[67] The Appeals Chamber needed less than half of that time to complete the entire appellate procedure and issue the appeal judgement in Mr Nshogoza's case.[68] The Trial Chamber realized that it would not be able to dispel the charge of applying double standards.

55. This Trial Chamber stated in the Trial Judgement in Mr Nshogoza's case that it *'does not consider it necessary to explore the variety of factors that may influence a Chamber's decision whether or not to order an investigation or prosecution for contempt once its discretion to do so is enlivened.'*[69] It is hoped that the Appeals Chamber will save the image of the Tribunal from being tarnished by the only plausible inference that can be made from the Impugned Decision—that these 'factors' are stretched and bent to arrive at a conclusion arbitrarily decided upon by the trial judges, and not one dictated by the demands of justice and fairness.

FOR THE FOREGOING REASONS, MAY IT PLEASE THE APPEALS CHAMBER

GRANT this Appeal;

REVERSE the Impugned Decision;

DIRECT the Trial Chamber or the ICTR Registrar to appoint an *Amicus Curiae* to initiate and execute contempt proceedings against Hélène Moenback, Aaron Musonda, Kitila Mukumbo, Pierre Duclos, Collette Murebwayire for violations of witness protection orders; and

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[66] *Nshogoza* Appeal Judgement, Partially Dissenting Opinion of Judge Patrick Robinson, para. 7.

[67] The decision was issued on 25 November 2010, 475 days or nearly 16 months after the Parties' submissions were filed on 7 August 2009.

[68] The appeals judgement was rendered on 15 March 2010, 203 days or less than 7 months after the Appellant's Reply Brief was filed on 24 August 2009.

[69] *Nshogoza* Trial Judgement, para. 176.

DIRECT the Trial Chamber or the ICTR Registrar to appoint an *Amicus Curiae* to initiate and execute contempt proceedings against Hélène Moenback, Aaron Musonda, Kitila Mukumbo, Pierre Duclos, Collette Murebwayire, and Ms Loretta Lynch for threats to and intimidation of witnesses pursuant to Rule 77(A)(iv) and (v).

Word Count – 8863

THE WHOLE respectfully submitted,

Montreal, 28 December 2010

Allison Turner
Counsel for Léonidas NSHOGOZA

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From:	☐ Chamber (names)	☒ Defence **ALLISON TURNER** (names)	☐ Prosecutor's Office (names)	☐ Other: (names)
Case Name:	The Prosecutor vs. **LÉONIDAS NSHOGOZA**		**Case Number:** ICTR-2007-91-AR	
Dates:	Transmitted: **28 December 2010**		Document's date: **28 December 2010**	
No. of Pages:	**XXXXX**	**Original Language:** ☒ English	☐ French	☐ Kinyarwanda
Title of Document:	**Leonidas Nshogoza's Appeal Brief**			

Classification Level:	**TRIM Document Type:**			
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