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ICTR-07-91-AR
17-01-2011
(542/A - 534/A)

542/A
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 Andréia Vaz

Registrar: Mr. Adama Dieng, Registrar

Date Filed: 14 January 2011

JUDICIAL RECORDS ARCHIVES
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LÉONIDAS NSHOGOZA

v.

THE PROSECUTOR

Case #: ICTR-2007-91-AR

LÉONIDAS NSHOGOZA'S REPLY

Office of the Prosecutor

Richard Karegyesa
Paul Ng'arua
Abdoulaye Seye
Dennis Mabura

Counsel for Léonidas Nshogoza

Allison Turner

TO THE HONOURABLE APPEALS CHAMBER, THE APPELLANT
RESPECTFULLY SUBMITS

1. On 10 January 2011 the Prosecutor's Response Brief to the Appellant's Appeal of the 25 November 2010 Trial Chamber decision ("**Response**") was circulated to several individuals including the Parties and the Trial and Appeals Chamber registries. Pursuant to the *Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal*, Section III, paragraph 7, the Appellant files this Reply to the Prosecutor's Response within allotted four days.

I. NO WAIVER OF ARGUMENTS

2. The Prosecutor suggests that the Appellant's arguments in paragraphs 16-18 were not raised in Notice.¹ The arguments contained in these paragraphs however were contained under Appeal Ground 1 in the Notice i.e. that the TC "*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 (...)*".² "Generally" means that the Trial Chamber erred in the *overall manner* that it applied the correct legal standard under this Rule. It erred in its application of the correct legal standard under Rule 77, generally, in that each step it took along the way derogated from its provisions. The Appellant submits that this ground provided the Prosecutor with sufficient notice as to the nature of the points that would be raised therein. The Appellant further refers the Appeals Chamber to its decision in *Nsengimana*,³ which takes up a series of arguments advanced by the Prosecutor, which are highly similar to those being advanced by the Appellant under this Ground. By the time he received the Notice, the Prosecutor was arguably quite well-versed on the application of Rule 77 provisions. Because the articulation of the argument rests on the literal application of the provisions of Rule 77, the Appellant submits that it would be unfair to deprive him of this argument on the basis that not every single aspect of it was stated in the Notice.

¹ Response, paras. 21-23 and 36.

² Emphasis added.

³ See below.

3. The Prosecutor suggests that the arguments of the Appellant contained in paragraphs 22 and 23 were not raised in Notice.⁴ They are, however, contained *verbatim* under Appeal Ground Nine which reads: "...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"". The Appellant apologises for not having cross-referenced this Appeal Ground, and submits that it would be unfair to exclude this argument on the basis of what, he would suggest, is a small oversight.

II. PROSECUTOR'S WAIVER OF HIS PRELIMINARY ARGUMENT B

4. The Prosecutor raises the preliminary argument for dismissal of the appeal on the "ground that the Appellant failed to make a *prima facie* case for contempt based on OTP investigators' alleged violation of the witness protective orders." However, the Impugned Decision confirms the finding that "the Prosecution" (or, the six persons working for the OTP whose conduct is herein under scrutiny) "did not comply with the prescribed protective measures".⁵ The confirmation of these repeated violations constitutes a re-affirmation of the Trial Chamber's *prima facie* finding in the 7 July 2009 Judgement in *Nshogoza*. The Prosecutor is *estopped* from raising any such argument at this time; he had the opportunity to challenge this finding and its failure to do so amounts to a tacit acceptance of this aspect of the Impugned Decision.

5. In the event that the Appeals Chambers wishes to hear this preliminary argument, the Appellant submits that it is misplaced. It is not for the *Appellant* to make a *prima facie* case for contempt.⁶ The Appellant does not bear the same burden as the Prosecutor who, when indicting an individual in accordance with the Statute and the Rules, has the onus of establishing a *prima facie* case. The Appellant has no investigative powers. This is why Rule 77 empowers a Chamber with investigative powers where there exists reason to believe that a person may be in contempt. Accordingly, the Prosecutor's argument is inherently flawed and should be summarily dismissed.

⁴ Response, paras. 21-23 and 42.

⁵ Decision, para. 15.

⁶ The position of the Appellant is not the same as the position of the Prosecutor who bears the burden nre to decide to indict someone

III. REPLY TO PROSECUTOR'S RESPONSE

Nsengimana Decision, Incorrect Application of Rule 77, Incorrect Appreciation of Underlying Motivations

6. On 16 December 2010, the Appeals Chamber rendered a decision on a Prosecution appeal of Trial Chamber I's decision not to conduct further investigations or to prosecute defence investigators for contempt in the context of the *Nsengimana* trial.⁷ Despite the glaring similarity of the circumstances in that case to those in the six cases at bar, the Prosecutor is now taking a diametrically opposed position to argue the reverse of what it argued in *Nsengimana*, in the hopes that in this case the Trial Chamber III will be seen by the Appeals Chamber to have acted within its "discretion". This radical "change of heart" on the law of Rule 77 illustrates how the Prosecutor is in *conflict* whose submissions, on behalf of his own employees and former contract workers, are unreliable.

7. In support of its position, the Appellant relies on the position taken by the Prosecutor in *Nsengimana* taken up by the Appeals Chamber in paragraph 14 of its decision its entirety in support of its position:

"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." 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. 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. (Emphases in original)

8. In apparent contradiction with the above position, the Prosecutor now submits in the cases at bar, at paragraph 37 of his Response,

No sound rule of law or practice should preclude a Trial Chamber from requesting further submissions from the parties. Indeed, the entire purpose of requiring further submissions is to ensure that the Chamber is able to make a fully-informed assessment of the issues before it.

⁷ *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.

9. In *Nsengimana*, the Prosecutor contended, as the Appellant contends here, that the Trial Chamber exceeded its jurisdiction in declining to order the prosecution of the persons involved. Here, the Appellant adds that not only did the Trial Chamber III exceed its jurisdiction by declining to investigate/prosecute the members of the OTP, it abused its discretion by purporting to investigate with its Order for additional submissions.

10. The Order constitutes a whitewash to put a halt to any serious investigation of the underlying evidence of OTP protective measure violations. Furthermore, the Order gave the Prosecutor an occasion to act as “attorney” for the persons who worked/work for him. More importantly, however, the Order served as a whitewash for the existing evidence of OTP threats and intimidation against witnesses. All the preliminary evidence in support of these extremely serious allegations was referenced in the Appellant’s submissions, and it is disingenuous for the Prosecutor to suggest that pages 56 through 58 of witness Seminega’s testimony provides no evidence that he felt intimidated. In any event, the Trial Chamber order incorrectly put a halt to this investigation by refusing to consider the allegations.

11. The Order closed the door on any serious form of investigation and thus undermined the proceedings as a whole. In relying exclusively on the additional submissions as purported evidence, the Chamber applied an incorrect legal standard invalidating the Impugned Decision in its entirety.

12. In *Nsengimana*, lawyers were assigned to the defence investigators in question. At a minimum, lawyers should have been assigned to Ms Hélène Moenback, Mr Kilita Mukumbo, Mr Aaron Musonda, Mr Pierre Duclos, Ms Collette Murebwayire, Ms Loretta Lynch, and to Mr Cohen.

13. *Nsengimana* is distinguishable from the six cases at bar.

14. First, when it faced allegations of violations of witness protection orders and possible threats or intimidation, and in strict compliance with Rule 77(C), Trial Chamber I ordered the Registrar to conduct an investigation. In the six cases at bar, Trial Chamber III did not comply with Rule 77(C) or (D), stepped outside the ambit of Rule 77 and ordered the Parties in *Nshogoza* to file “additional submissions”. Although Mr Nshogoza did not raise an objection to the Chamber’s method of proceeding, he nonetheless questioned its legal basis, however complied with the order not be held in *contempt*. Under these circumstances, it

cannot reasonably be said that the Appellant waived any right to question the legal basis on which the Trial Chamber proceeded.

15. Second, following the procedurally correct order for an investigation, the *Nsengimana* Trial Chamber was in a position to draw a conclusion that the witnesses in that case had not experienced fear or intimidation.⁸ In the six cases at bar, the Trial Chamber went beyond the scope of Rule 77, ordered additional submissions and when these submissions drew the Chamber's attention to the compelling evidence it heard during the trial in relation to OTP threats and intimidation of witnesses (in addition to violations of protective measures), the Chamber ignored these submissions in their totality and thereby stifling any ensuing consequences. Had Trial Chamber III considered the damning evidence of OTP threats and intimidation, it would have been in a position to properly determine whether additional action was required for this form of contempt by the persons working for the OTP.

16. Third, and perhaps most importantly, the decision in *Nsengimana* can be distinguished from the Impugned Decision to the extent that the *Nsengimana* Trial Chamber was in a position to make an "informed assessment" and in the six cases at bar, Trial Chamber III is not in a position to make an informed assessment. In the cases at bar, while the Chamber has the evidence that led to the Appellant's motion for investigation / prosecution under Rule 77, it does not have the benefit of any further evidence as a result of any serious investigation. *The Additional Submissions filed by the Prosecutor are unreliable, for the reasons expounded above.* Without evidence to the contrary in any form, the Trial Chamber is not in a position to make an informed assessment of the actions of any of the six persons who worked for the OTP. The Appeals Chamber in *Nsengimana* held:

*"In the present case, the Trial Chamber had the benefit of the Registrar's Reports which were compiled following interviews with Protected Witnesses, in addition to submissions filed on behalf of the Investigators and the Prosecution. Accordingly, the Appeals Chamber considers that the Trial Chamber was in a position to make an informed assessment."*⁹

17. At a minimum, Rule 77(C) requires that a Trial Chamber order a serious investigation that would yield evidence and report(s). The Chamber's failure to comply with Rule 77(C) resulted in its not being in a position to make an *informed assessment* of each of the six cases.

⁸ *Nsengimana*, « However, according to the [Registrar's] Report of 21 April 2008, none of the witnesses had expressed fears for their security since testifying or had been threatened at any point. » para 3.

⁹ *Nsengimana*, para. 35.

While the Chamber did find the *prima facie* threshold had been met in all cases, it relied on a vague allegation, and not on evidence, in its decision not to act.

18. The Chamber's failure to rely on evidence in its assessment of the six cases at bar, to comply with Rule 77(C) or (D), and to even identify the persons concerned by these proceedings (Ms Hélène Moenback, Mr Kilita Mukumbo, Mr Aaron Musonda, Mr Pierre Duclos, Ms Collette Murebwayire, Ms Loretta Lynch, and Mr Cohen) testifies to the Chamber's lack of seriousness in its treatment of all six cases.

19. In *Nsengimana*, the Appeals Chamber found that 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. The Appellant invites the Appeals Chamber to re-assess its position. If a Court can a) go to the trouble and expense to find a *prima facie* case either before or after preliminary investigations (pursuant to Rule 77(C) or not) then it makes no sense for this same Court to subsequently decide to do nothing at all. If, it is open to a Trial Chamber to do nothing at all, then there is no point to going to the trouble of investigating to find that a *prima facie* case is established.

"Underlying Motivations"

20. The Prosecutor submits that "in assessing whether a *prima facie* case for contempt was alleged against the OTP investigators, the Trial Chamber properly considered whether the investigators engaged in any knowing or wilful violation of the witness protection orders" and "reasonably concluded that they may have acted in good faith".¹⁰ The Chamber mentioned "knowing and wilful" three times in its Decision. However, every time it used these terms it was in relation to the wording of Rule 77 or a previous decision which held that conduct must be "knowing and wilful". At no point in the Impugned Decision does the Chamber enter into even a remotely reasoned analysis as to whether any of the impugned conduct was "knowing and wilful". The Chamber instead merely remarks that it "accepts" the possibility that the conduct was in good faith, and this based on no evidence whatsoever.

¹⁰ Response, para. 55.

21. The Chamber committed a discernible error when it erroneously when it “accepted” that persons working for the Prosecutor “may have” acted on a “mistaken belief” that their action was authorised. And the Prosecutor is misquoting the Chamber when it suggests that the latter “properly considered whether the investigators engaged in any knowing or wilful violation of the witness protection orders”.

22. If the Chamber wished to consider the “underlying motivations” of the six persons working for the OTP, then it should have ordered an investigation to obtain evidence on the underlying motivations of these individuals. Instead, it drew a conclusion on a vague submission of “good faith” made by the Prosecutor’s office. In drawing this conclusion based on no evidence at all, the Trial Chamber committed a discernible error that was so unreasonable that it constitutes an abuse of its discretion.

Gravity

23. The Prosecutor goes to great lengths in his attempt to distinguish the contempt allegations against the six persons who represent him, from the case of Nshogoza. The truth of the matter however is that the cases are identical:

SIX PROSECUTION MEMBERS	NSHOGOZA
Meeting with witnesses from the opposite party protected by court ordered witness protection measures.	Meeting with witnesses from the opposite party protected by court ordered witness protection measures.
Obtaining written statements from the said witnesses protected by court ordered protection measures.	Obtaining written statements from the said witnesses protected by court ordered protection measures.
Meetings took place in “good faith” believing that meetings were authorized by an Appeals Chamber Court Order.	Meetings took place in good faith, believing that meetings were authorized based on Lead Counsel Aïcha Condé’s instructions to take the witnesses’ statements.

FOR THE FOREGOING REASONS, MAY IT PLEASE THE APPEALS CHAMBER

GRANT this Appeal;

REVERSE the Impugned Decision;

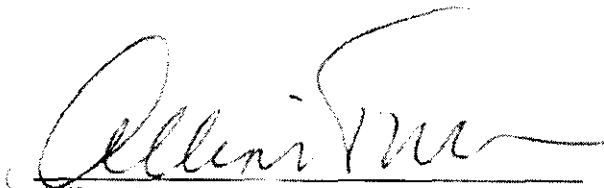
DIRECT the Trial Chamber or the ICTR Registrar to appoint an *Amicus Curiae* to initiate and execute contempt proceedings against Hélène Moenback, Aaron Musonda, Kitila Mukumbo, Pierre Duclos, Collette Murebwayire for violations of witness protection orders; and

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 – 2813

THE WHOLE respectfully submitted,

Montreal, 14 January 2011



Allison Turner
Counsel for Léonidas NSHOGOZA

0312



**TRANSMISSION SHEET
FOR FILING OF DOCUMENTS WITH CMS**

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
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From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence ALLISON TURNER (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. LÉONIDAS NSHOGOZA			Case Number: ICTR-2007-91-AR
Dates:	Transmitted: 14 January 2011		Document's date: 14 January 2011	
No. of Pages:	9	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	Leonidas Nshogoza's Reply			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte <input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input checked="" type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities		

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Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

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Original	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines:



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Date: 17/01/2011		Case Name / affaire: -L. Nshogoza	
		Case No / no. de l'affaire: ICTR-07-91-A	
To: A:	Appeals Chamber Support Unit, The Hague: - Mr. Koffi Afande - Ms. Rosette Muzigo-Morrison - Mr. Ramadhani T. Juma		<input checked="" type="checkbox"/> Judge / Juge, Patrick Robinson, Presiding <input checked="" type="checkbox"/> Judge / Juge Mehmet Guney <input checked="" type="checkbox"/> Judge / Juge Fausto Pocar <input checked="" type="checkbox"/> Judge / Juge Liu Daqun <input checked="" type="checkbox"/> Judge / Juge Andresia Vaz
	ACCUSED / DEFENSE <input checked="" type="checkbox"/> Accused / Accusé NSHOGOZA... see / voir "CMS4" <input checked="" type="checkbox"/> Lead Counsel / Conseil Principal: A. TURNER <input type="checkbox"/> In Arusha / à Arusha: (see / voir CMS3) <input type="checkbox"/> Fax: <input type="checkbox"/> Co-Counsel / Conseil Adjoint: <input type="checkbox"/> Arusha (see / voir CMS3) <input type="checkbox"/> Fax:		
OTP / BUREAU DU PROCUREUR <input type="checkbox"/> Hassan Bubacar Jallow, Prosecutor <input type="checkbox"/> B. Majola, Deputy Prosecutor <input type="checkbox"/> James Arguin <input checked="" type="checkbox"/> Senior Trial Attorney in charge of case: (<input type="checkbox"/> A. Seye <input type="checkbox"/> The Hague / La Haye <input type="checkbox"/> Arusha (see / voir CMS3) <input type="checkbox"/> Kigali			
From: De:	<input type="checkbox"/> (Chief, CMS) <input type="checkbox"/> (Chief, JPU) <input checked="" type="checkbox"/> C. Hometowu (TC III) <input type="checkbox"/> F. A. Talon (Team IV) <input type="checkbox"/> Other		
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