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(33/A – 26/A)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN THE APPEALS CHAMBER

Case No. ICTR-2001-69-T

ENGLISH
Original: FRENCH

Before: Patrick L. Robinson, presiding

Registrar: Adama Dieng

Date of filing: 8 February 2010

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

RESPONSE BY HORMISDAS NSENGIMANA'S DEFENCE TO THE PROSECUTOR'S NOTICE OF APPEAL (77J) FILED ON 2 FEVRIER 2010

Office of the Prosecutor:
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A10-0029 (E)

Translation certified by LSS, ICTR

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1. The Defence hereby submits a response to the Prosecutor's Notice of Appeal, filed pursuant to Rule 77(J) of the Rules of Procedure and Evidence (RPE).

2. The Tribunal's jurisprudence allows the Defence to file a response to such notices: in the *Šešelj* case, Trial Chamber III ordered, in its Decision on a notice of appeal filed under Rule 77(J), that the Accused, if he so wishes, shall "*file a reply to the Response no later than seven days from the date of service to the Accused of the present decision in a language he understands.*"[1]

I. The Prosecutor cannot rely on Rule 77 at this stage of the proceedings

3. The Prosecutor files his Notice pursuant to Rule 77(J) of the RPE.

4. However, the Prosecutor cannot rely on Rule 77 (J) at this stage.

5. Rule 77 provides that the Chamber can initiate proceedings for contempt of the Tribunal.

6. This provision is set forth in Chapter VI of the RPE, under the heading "*Proceedings before Trial Chambers*".

7. In the present case, trial proceedings had been concluded since 17 November 2009, on which date the Trial Chamber rendered its judgement.

8. The Prosecutor would have been able to rely on Rule 77 in respect of proceedings which no longer exist in the present case, since the case was removed from the Trial Chamber on the day it rendered its judgement.

9. The purpose of Rule 77 is to protect witnesses when a trial is going on. However, at this stage of the proceedings, witnesses no longer need protection, since judgement has been rendered.

10. The Prosecutor can, therefore, not file his Notice under Rule 77, which is no longer applicable in the current proceedings.

II. Interpretation of Rule 77 of the Rules of Procedure and Evidence

A. The provisions of Rule 77

11. The Prosecutor submits that the Trial Chamber erred in law in its application and interpretation of Rule 77 of the Rules of Procedure and Evidence (hereinafter RPE).

12. In support of his right to appeal, the Prosecutor cites the *Šešelj* Decision, in which the Appeals Chamber allowed an appeal against refusal to instigate investigations for contempt,

[1] *Prosecutor v. Šešelj*, Decision on the Accused's oral request to reply to the Prosecution Oral Response to his Motion for contempt proceedings, 20 June 2007.

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in accordance with Rule 77 of the Rules of Procedure and Evidence of ICTY.[2] However, the issue in the *Šešelj* case is one that had been raised at trial.

13. The Prosecutor, again, cites this Decision in support of his submission that the trial Chamber exceeded its jurisdiction by acting beyond the scope of Rule 77.

14. Thus, the Prosecutor has erroneously construed Rule 77(D). He, in fact, submits that the jurisdiction of a Trial Chamber under Rule 77 is to "*ascertain whether a* prima facie *case exists and, if so, to authorize a prosecution.*"

15. However, and, as recalled by the Trial Chamber in its Decision of 18 January 2010, the wording of Rule 79(D) is clear:

> "*If the Chamber considers that there are sufficient grounds to proceed against a person for contempt,* ***the Chamber may [...]*** *in the circumstances described in paragraph (C) (i) direct the Prosecutor to prosecute the matter* [...]"

16. The wording of this Rule correctly suggests that the Chamber's decision to initiate or not to initiate proceedings for contempt is decretionary.

17. Although the Trial Chamber has jurisdiction under Rule 77 to ascertain whether or not a *prima facie* case exists, it also has the discretion, in any event, to initiate proceedings.

18. It thus fell to the Chamber to ascertain, on the basis of the Registry's Report, whether or not there were sufficient grounds to prosecute Léonard Safari and Rémi Mazas for contempt.

B. *Karemera* case-law

19. The Prosecutor further argues that the Chamber erred in relying on the decisions rendered in the *Karemera* case for its interpretation of Rule 77.

20. According to the Prosecutor, the provisions of Rule 91 are materially different from those of Rule 77(D), and no analogy can be made between them.

21. However, in *Karemera*, the Appeals Chamber itself acknowledges that although *"this provision* [Rule 91] *is materially different from Rule 77(C) of the ICTY Rules and the analogous provision in Rule 77(C) of the Rules, which concern contempt of the Tribunal and provide for an investigation when a Chamber has "reason to believe" that a person may be in contempt* [...], [t]*his provision is similar to that of Rule 77(D) of the ICTY Rules, and Rule 77(D) of the Rules, in that it also envisages a "sufficient grounds" standard.*"[3]

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[2] *Prosecutor v. Šešelj*, Decision on the Prosecution's Appeal against the Trial Chamber's Decision of 10 June 2008, 25 July 2008.

[3] *The Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Appeal from Refusal to Investigate Prosecution Witness for False Testimony and Motion for Oral Arguments.

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22. Thus, although the two provisions are materially different, they are identical in respect of the proceedings envisaged.

23. Indeed, Rule 91(C) provides that "*If the Chamber considers that there are suffucient grounds to proceed against a person for giving false testimony, the Chamber may: (i) in the circumstances described in paragraph (B)(i), direct the Prosecutor to prosecute the matter.*"

24. The wording of Rule 77(D) is exactly the same, namely that "*If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may, [...] in the circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter.*"

25. However, in *Karemera,* the Appeals Chamber indeed stated that in dealing with the proceedings envisaged in Rule 91(B), a Chamber will have to consider carefully *"if these proceedings are the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of the case."*[4]

26. The point here is not to compare the substance of these two provisions, but to recognize the similarity of proceedings.

27. While the Defence admits that the two Rules have different purposes, we contend that the Prosecutor's submission that the proceedings envisaged by them are different lacks merit.

28. These two Rules give the Chamber the discretion to ascertain whether or not prosecution is necessary.

III. The discretionary power of the Chamber

A. Extent of the the Chamber's discretionary power

29. The Prosecutor submits in error that the Chamber abused its discretion.

30. Rule 77(A) of the Rules provides that "*The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice* [...]".

31. Both this Tribunal and the International Criminal Tribunal for the Former Yugoslavia have, in certain circumstances, assumed jurisdiction on the basis of their "inherent powers":

> "[...] *there may be need to take account of the inherent competence of a judicial body, whether civil or criminal, to regulate its own procedure in the event of silence in the written rules, so as to assure the exercise of such jurisdiction as it has, and to fulfil itself, properly and effectively, as a court of law.*"[5]

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[4] *Ibid.*

[5] *Joseph Kanyabashi v. The Prosecutor*, ICTR 96-15 A, Dissenting Opinion of Judge Shahabudden, 3 December 1999.

32. The power to prosecute for contempt of the Tribunal, provided for in Rule 77 of the Rules of Procedure and Evidence, derives, according to ICTY case law, mainly from the inherent power of the Chambers to deal with conduct which interferes with the proper administration of justice, so as to ensure that their "basic judicial functions are safeguarded."[6]

33. However, it should be emphasized that the Trial Chamber is best placed to defend its interests and to raise any issues of contempt.

34. Moreover, decisions relating to the general conduct of trial proceedings are discretionary decisions of the Trial Chamber to which the Appeals Chamber must accord deference.[7]

35. The impugned decision in the present case is, therefore, a discretionary decision.

36. Where an appeal is filed against a discretionary decision of a Trial Chamber, the issue on appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with it, but rather whether the Trial Chamber has correctly exercised its discretion in rendering the decision.[8]

B. Limits to a Chamber's discretionary power

37. The Appeals Chamber has laid down the standard to be applied when a party challenges the Trial Chamber's exercise of its discretion.

38. The party must, indeed, identify a "discernible error" made by the Trial Chamber, that is, it must be demonstrated that the Chamber:

- *"misdirected itself as to the principle to be applied, or*
- *as to the law which is relevant to the exercise of the discretion;*
- *has given weight to extraneous or irrelevant considerations;*
- *has made an error as to the facts upon which it has exercised its discretion."*[9]

39. In the light of established precedents, the Trial Chamber's exercise of discretion will be reversed only *"if it is demonstrated that the Trial Chamber made a discernible error in the*

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[6] *Tadić* Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000.
[7] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("*Karemera et al.* Decision of 23 January 2008"), para. 7, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 7 ("*Karemera et al.* Decision of 5 October 2007"); *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeals against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Ndayambaje et al.* Decision of 21 August 2007").
[8] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008, para. 6, referring to *The Prosecutor v. Vojislav [e{elj*, Case No. IT-03-67-AR73.5, Decision on Vojislav [e{elj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.
[9] *The Prosecutor v. Bagosora et al.*, Decision on Prosecution's interlocutory appels regarding exclusion of evidence, 19 December 2003, para 11.

Impugned Decisions because they were based on an incorrect interpretation of governing law, on a patently incorrect conclusion of fact, or because they were so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[10]

40. In the case at bar, however, we submit that the Trial Chamber did not make an error in its interpretation of the governing law and that it made a correct assessment of the facts.

- **As to error of law**

41. The Prosecutor contends that the Chamber's Decision was based on an incorrect interpretation of the law.

42. It is the Defence submission that the Trial Chamber correctly applied the provisions of the Rules, since it had to determine whether the Prosecution had established that the Defence investigators had wilfully and knowingly violated the witness protection order.

43. The Chamber acknowledged that there might have been contact between Prosecution witnesses and Defence investigators, but the Prosecutor has failed in his attempt to show that there was intimidation or threat.

44. Further, the Prosecutor has failed to establish *mens rea*, that is, that the investigators intentionally violated a witness protection order.

45. However, in the *Kajelijeli* case, the Chamber stated that "*the party alleging that such conduct occurred should satisfy the Chamber that the alleged contemnor(s) acted with an intention to commit the crime of contempt [...]* [and] *if the individuals concerned acted in knowing and wilful violation of a witness protection order of this court, or if they tried to intimidate witnesses, as specified under Rule 77(C) of the Rules, or, notably, if they tried to induce them to change their testimony.*"[11]

46. Moreover, at the 24 January 2008 hearing, the Prosecutor admitted that he had no probative material to disclose to the Defence in support of the allegations of intimidation.

47. Furthermore, it is worth noting that neither the trial transcripts nor the statements made by Prosecution witnesses in respect of Defence investigators make any mention of threats or intimidation by Defence investigators.

- **As to the assessment of facts**

48. The Prosecutor contends that the Chamber erred in relying on [an erroneous finding of fact].

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[10] *Karemera et al.*, Decision of 23 January 2008, para. 7, referring to *Karemera et al.* Decision of 5 October 2007, para. 7; *Ndayambaje et al.* Decision of 21 August 2007, para. 10.

[11] *The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44a-t,* Decision on Kajelijeli's Motion to hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)).

49. However, the numerous contradictions made during the direct examination and cross-examination of each of the witnesses cast serious doubt on their credibility.

50. It should be noted that, on the contrary, the Prosecutor's Notice of Appeal contains approximations.

51. The Prosecutor is, indeed, trying to support his arguments with a number of untruths.

52. For instance, the Prosecutor claims that Rémi Mazas held discussions with Witness CBF two or three months before the Witness testified and, in any event, after his status as Prosecution witness had been disclosed. However, the Defence investigator did not go to Rwanda after the identity of witnesses had been disclosed.

53. His meeting with CBF took place on 22 November 2006, after CBF's identity had been disclosed.

54. The Prosecutor is trying to distort the meaning and scope of Rule 77 of the Rules through vague and unfounded allegations.

IV. The Prosecutor's use of Rule 77 for purposes other than those provided for in the RPE

55. The Prosecutor takes issue with the Chamber for taking into account extraneous considerations for the purpose of Rule 77.

56. However, it has been demonstrated, *supra*, that the Chamber relied on available evidence, revealed in the course of the proceedings and corroborrated by the Registry Report.

57. On the contrary, not only has the Prosecutor misused and misinterpreted the provisions of the Rules, he, in fact, also tries to use them for purposes of a distorted form of appeal.

58. Thus, it is worthy to note that at the tail end of the Notice of Appeal the Prosecutor refers to Rule 108 of the RPE, which is extraneous to the arguments put forward.

59. The notice of appeal provided for in Rule 77(J) is different from the notice of appeal provided for in Rule 108 of the RPE, as regards both its purpose and its procedural aspect.

60. As was recalled *supra*, Rule 77 applies to trial proceedings, while Rule 108 covers appeals of trial judgements.

61. The Prosecutor appears to mix up these two provisions for the sole purpose of persuading the Chamber, by using Rule 77, of the existence of additional evidence entitling him to file an appeal.

62. However, the Prosecutor cannot rely on the provisions of the Rules, while undermining the spirit and letter thereof, to get round the shortcomings and weaknesses of his arguments.

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FOR THESE REASONS,

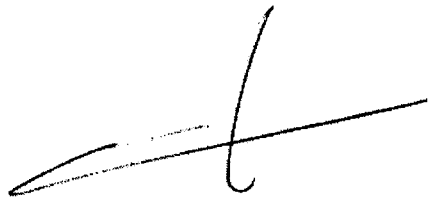
Hormisdas Nsengimana's Defence respectfully prays the Appeals Chamber:

TO DISMISS the Prosecutor's Notice of Appeal for lack of a legal basis.

Done at Paris, this 8th day of February 2010

Emmanuel Altit
Lead Counsel

David Hooper
Co-Counsel



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