ICTR-01-69-A
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(91/A — 77/A)

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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

United Nations
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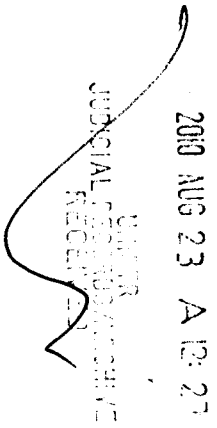
IN THE APPEALS CHAMBER

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

Registrar: Mr Adama Dieng

Date of filing: 23rd August 2010



THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case Nos.ICTR-1-69-A
ICTR-2010-92

Public

Re: Léonard Safari and Rémi Mazas

Second Respondent's Appeal Brief

Office for the Prosecutor

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A. Procedural history

1. The trial of Father Hormisdas Nsengimana began on 22nd June 2007. In the light of assertions by some prosecution witnesses of contact by defence investigators, on 23 January 2008, the prosecution applied to have the investigator Leonard Safari ('the first respondent') excluded from the trial.[1] On 24 January 2008, the Trial Chamber ordered the Registry to investigate such contacts. The Registry reported on the 21 April and 2 May 2008.[2] On 26 May 2008, the Prosecutor applied for leave to initiate contempt proceedings against both the first respondent and Father Rémi Mazas ('the second respondent').[3] It was not until the 18th January 2010 that the Trial Chamber rendered a decision on this motion.[4] It decided that initiating proceedings for contempt would not be the most effective and efficient way to ensure compliance with the obligations under the Statute and Rules in the specific circumstances of this case.

2. On 2 February 2010 the Prosecutor filed a Notice of Appeal of the Trial Chamber's decision[5] and on 17 February filed an Appeal Brief.[6] The Nsengimana defence team filed responses to that Notice of Appeal and the Appeal Brief. On 15th February 2010 the Prosecutor filed a motion to have the response drafted by that defence team struck out.[7] By a decision of 19th April 2010 the Appeals Chamber rejected the defence team submissions on the basis that judgment having been rendered in the case and no appeal having been filed of that judgment, the

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[1] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, T. 23 January 2008 pp. 33-36

[2] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, The Registry's Report to the Chamber on Alleged Interference with Prosecution Witnesses, 21 April 2008; *The Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Registry's Further Submission to the Chamber on Alleged Interference with Prosecution Witnesses, 2 May 2008

[3] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Prosecution's Application for Leave to File Contempt of the Tribunal Proceedings against Mr Safari Leonard @ Seregendo, Father Remi Mazas and Father Denis Sakimana, 26 May 2008

[4] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Confidential Decision on Prosecution and Defence Requests Concerning Improper Contact with Prosecution Witnesses, 18 January 2010

[5] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Prosecutor's Notice of Appeal [Rules77J], 2 February 2010

[6] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Prosecutor's Appellant's Brief, 17 February 2010

[7] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Prosecutor's Motion for the Rejection of the "Réponse de l'équipe de Défense de Péreé Hormisdas Nsengimana à l'Acte d'Appel (77J) depose par le Procureur le 2 février 2010" , 15 February 2010

Defence team had no locus standi.[8] It however afforded the first and second respondents 10 days to respond to the prosecution brief. On the 7 May 2010, the assigned pre-trial appeal judge allowed the response to be provided once relevant documents had been translated into French.[9] Such translations were provided on 15 June 2010.

3. Following difficulties relating to the appointment of counsel, in that the Registrar did not accept the second respondent's choice and the second respondent did not accept the Registrar's assignment, no response was filed on behalf of the second respondent. On 23 July 2010, the Appeals Chamber ordered the second respondent to indicate if he wished to have counsel assigned, or represent himself, within 5 days, and to respond within five days of notification of self-representation or 5 days from the assignment of counsel.[10] Having been subsequently informed by the Registry that his choice would not be taken into consideration, the second respondent proposed that he be represented by his present counsel without recourse to legal aid funds. Counsel did not receive a formal letter of assignment. However, having received from the Registry the impugned Trial Chamber decision and Prosecutor's Brief on the 18th August 2010, counsel submitted his power of attorney to the Registry for filing in terms of Rule 44 of the Rules of Procedure and Evidence on the 19th August 2010.[11]

B. The issues on appeal

4. The respondent opposes each and every ground of appeal and the relief sought. The Appeals Chamber has defined the issue on an appeal challenging the exercise of a discretion of the Trial Chamber, inter alia, in its Decision on Registrar's

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[8] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Decision on Submissions by the Defence Team of Hormisdas Nsengimana (confidential), 19 April 2010

[9] Decision on Investigators' Request for an Extension of Time Pending Translation of Appeal Submissions, 7 May 2010

[10] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, *Re Léonard Safari and Rémi Mazas* - Decision on Requests of Leonard Safari and Remi Mazas, 23 July 2010

[11] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, *Re Léonard Safari and Rémi Mazas* - Power of Attorney for the Representation of Father Remi Mazas by Andreas O'Shea, 19 August 2010

Submission pursuant to Rule 33(B) of 1 June 2010.[12] Accordingly, it was held that the issue on appeal is confined to whether the Trial Chamber has exercised its discretion correctly. It must be determined whether the Trial Chamber has committed a discernable error in rendering the impugned decision, based upon:

(a) an incorrect interpretation of the governing law;
(b) a patently incorrect conclusion of fact; or
(c) where the impugned decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

5. In this case it is (a) and (b) which arise. In a second phase, in the event that a discernable error is identified, it only remains to determine the appropriate remedy for such error. It is submitted that this turns on what is the most effective and just recourse including whether contempt proceedings are in themselves 'the most effective and efficient way to ensure compliance with the obligations flowing from the Statute and Rules in the specific circumstances of this case'.[13] Such circumstances include the procedural history since the Prosecutor's first application for leave to initiate contempt proceedings and whether Fr Mazas's fundamental rights can still be effectively ensured if such proceedings were initiated now. It is submitted here that it is no longer possible to respect his right to trial without undue delay, or in the alternative that this right has been violated in such a significant way as to render the initiation of such proceedings now ineffective and unjust.

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[12] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69Decision on Registrar's Submission pursuant to Rule 33(B) of 1 June 2010

[13] *Prosecutor v Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate a Prosecution Witness for False Testimony" and on Motion for Oral Arguments(AC), 22 January 2009, par 21

C. The Trial Chamber's Interpretation of the governing law

The applicable provision

6. The Appellant assumes that the impugned decision must be considered within the ambit of Rule 77(D).[14] The Appellant does not explain how it reaches this determination. Rule 77(D) sets out the second part of a two part procedure. This two part procedure involves first an investigation and then a prosecution. The investigative part of the procedure is contained in Rule 77(C). Rule 77(D)(i) makes direct reference to Rule 77(C). So it is stated that in circumstances described in Rule 77(C) the Chamber considers whether there are sufficient grounds to proceed. In this case, the circumstances described in Rule 77(C), that is an investigation by the Prosecutor or an *amicus curiae* into the matter with a view to preparation and submission of an indictment for contempt, do not exist.

7. The Chamber requested a preliminary investigation into the matter by the Registry but had not yet reached the stage of invoking procedures under Rule 77(C) let alone Rule 77(D). It appears that this preliminary investigation by the Victims and Witnesses Unit was provoked by a request to exclude the first respondent from the trial.[15] The mandate for this investigation ordered of the Registry, as understood by the Registry, was to 'investigate allegations of security threats and/or unauthorized contact with witnesses made by prosecution witnesses during their testimony'.[16] It was not to investigate with a view to the preparation and submission of an indictment for contempt or to determine whether there were sufficient grounds for instigating contempt proceedings, as envisaged with respect to investigations under Rule 77(C)(1) or (2).

8. Rule 77(C) provides that when the Chamber has reason to believe that a person may be in contempt of the Tribunal it may direct the Prosecutor to investigate

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[14] See Prosecutor's Appellant's Brief, note 6 *supra*, at par 17 and par 19 (first sentence)
[15] See note 1 *supra*
[16] The Registry's Report to the Chamber on Alleged Interference with Prosecution Witnesses, 21 April 2008, par 1

with a view to contempt proceedings. It would appear that the Chamber's initiative to ask the Registry to investigate the matter was a preliminary step aimed at determining the facts surrounding alleged contact in a broader context than the issue of contempt. This preliminary step might have led to a subsequent application of Rule 77(C). This Rule accords a clear discretion on whether to take the next step in the event that it has reason to believe that a person may be in contempt.

9. This distinguishes this case from the case of *Šešelj* where the Chamber had already ordered an investigation in terms of Rule 77(C)(ii) and received a report from an *amicus curiae*.[17] It is therefore not open to the appellant to argue a misapplication of Rule 77(D), since this was not the only provision upon which the exercise of discretion was premised. The Chamber was exercising its discretion whether to invoke Rules 77(C) and (D), Rule 77(C) constituting the first step in the process. In the case of the second respondent this is evidenced in paragraph 59 of the Decision.

10. In any event, nothing in the wording of Rule 77(C) requires that the Trial Chamber must order an investigation by the Prosecutor or an *amicus curiae* where there is reason to believe that there may have been contempt. It 'may' do so. If the drafters had intended the mandatory application of the procedure the word 'must' would have been employed.

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

The legal test for the application of Rule 77(D)

11. The appellant submits that the legal test for the application of Rule 77(D) is that which is set out by the Appeals Chamber in the case of *Šešelj*..[18] In this respect the Prosecutor quotes from the Trial Chamber's own impugned decision[19] and the Appeals Chamber's decision in the case of *Karamera*.[20] The Trial Chamber had stated that 'in initiating a prosecution for contempt, a Chamber should determine *only* whether a *prima facie* case is established, which is the same standard applied to confirm an indictment' [emphasis as added by the appellant].[21]

12. The Prosecutor seems to interpret this to mean that where a *prima facie* case is established the Trial Chamber has no choice but to order the initiation of contempt proceedings.[22] This is a misunderstanding of the use of the word 'only'. The word is employed not to indicate the mandatory operation of the procedure, but merely to indicate that the standard which must be reached before the procedure can be initiated is only 'prima facie' and not something higher, such as beyond reasonable doubt.

13. It stands to reason that the initiation of proceedings for contempt should be discretionary having regard to all the circumstances of the case and not mandatory in all cases where there is a prima facie case. The objective of having an inherent power to initiate proceedings for contempt is to ensure respect for the proceedings of the court. It is not an object in itself, unlike the prosecution of crimes under the Statute. It is not in the interests of an effective criminal court to make proceedings for contempt an automatic procedure as this has the capacity to undermine the

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

[19] See note 3 *supra*

[20] *Prosecutor v Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate a Prosecution Witness for False Testimony" and on Motion for Oral Arguments(AC), 22 January 2009, par 21

[21] See note 3 *supra*, par 41

[22] See Prosecutor's Appellant's Brief, note 6 *supra*, at par 20 (especially the last sentence)

court's ability to fulfill its primary function in an expeditious manner, that is the prosecution of crimes under its jurisdiction.

14. The same would apply to a decision to initiate an investigation under Rule 77(C), although the appellant does not premise his argument on a misapplication of this provision.

Reliance on the *Karemera* case

15. The appellant submits that the trial Chamber erred in its reference to the question asked in the *Karemera* case as to whether prosecution was the most effective and efficient way to ensure compliance with the Statute and Rules in the specific circumstances of the case. This argument is grounded first on the fact that Rule 91(B) dealing with prosecutions for false testimony, is different from Rule 77(D),[23] second on the basis that it applies a different evidential standard[24] and thirdly that the investigative stage was passed in this case.[25] The Prosecutor's two remaining points about the applicability of Rule 77(D) and relevance are dealt with in the sections C and E of this response respectively.

16. Rule 91(B) may be different but it is also very similar in important respects. It deals with a decision to investigate or prosecute interferences with the administration of justice. Rule 77, being based on an inherent discretionary power quite properly involves similar considerations of effectiveness and efficiency of ensuring compliance.

17. The evidential standard applied in the two rules does not effect the importance of looking at the particular facts of the case and only perusing proceedings where it

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[23] Prosecutor's Appellant's Brief, note 6 *supra*, par 24
[24] Prosecutor's Appellant's Brief, note 6 *supra*, pars 25-26
[25] Prosecutor's Appellant's Brief, note 6 *supra*, pars 27-28

is appropriate to do so on those facts exercising a reasonable discretion in that respect.

18. As outlined above, it is submitted that the appellant's understanding that Rule 77(C) was not a provision under consideration is misconceived.

D. Sufficient grounds to proceed

19. The appellant enters into a detailed analysis of the sufficiency of the grounds to proceed. However, the Trial Chamber accepted that there was a basis to proceed but decided it was not appropriate in the particular circumstances. This was a legitimate exercise of its discretion. Responding to this analysis will not therefore be helpful in the determination of the appeal.

E. Was the Trial Chamber's decision so unfair or unreasonable as to amount to an abuse of discretion?

20. The appellant does assert that the Trial Chamber has abused its discretion,[26] but does not address the fundamental question as to whether the decision was so unfair or unreasonable as to amount to an abuse of discretion. Even if it is established that irrelevant factors were taken into account or that relevant factors were not taken into account this does not necessarily invalidate the decision. It must be demonstrated that by doing so the Trial Chamber's decision was so unfair or unreasonable as to amount to an abuse of discretion.

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[26] Prosecutor's Appellant's Brief, note 6 *supra*, par 46

Relevance of matters taken into consideration

21. If the smooth running of the proceedings can be ensured without resorting to contempt proceedings, then this is an option legitimately open to a Chamber. In this case, the testimony of CBF had been offered without any consequences resulting from the contact with the second respondent. There had been no threats. In the words of the Chamber there was no resulting harm. The facts as outlined by the Trial Chamber reveal that this situation involved the making of a comment and the receipt of information (in contrast to a lengthy discourse on the testimony of the witness). The second respondent had acknowledged the error of his contact and had expressed regret. He indicated that he had not gone there with the intention of engaging with a prosecution witness. These were all matters expressly mentioned by the Trial Chamber in reaching its decision and which the Trial Chamber could legitimately take into account.

22. Having regard to the overall circumstances as outlined by the Trial Chamber, even if one or more of these considerations could be argued to be irrelevant, it is submitted that it cannot be said that the Trial Chamber acted unreasonably or unfairly, let alone so unreasonably and unfairly as to abuse its discretion.

***Reference to* mens rea**

23. The appellant submits that the Trial Chamber wrongly evaluated the *mens rea* of the second respondent in reaching its decision.[27] The Trial Chamber stated that the crucial question was whether the respondents in meeting prosecution witnesses without first going through the prosecution, acted with sufficient knowledge and intent in doing so.[28]

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[27] Prosecutor's Appellant's Brief, note 6 *supra*, par 48
[28] Trial Chamber Decision, note 4 *supra*, par 49

24. The appellant argues that this amounted to making a final determination.[29] It is submitted that this is not borne out in the decision. The Trial Chamber clearly recognizes that it need only establish a *prima facie* case to proceed.[30] Moreover, having evaluated the information at its disposal, it determines that there was a basis to proceed under Rules 77(C) or (D), but that to do so would not be appropriate in the circumstances.[31] It is thus plain that far from making final determination on *mens rea*, it concluded that the indicators pointed to a question for the second respondent to answer with respect to knowledge and intention.

25. The fact that the Trial Chamber should not make a final determination on the elements of contempt does not, in the second respondent's submission, preclude a preliminary analysis of the information available regarding intention and knowledge. This is relevant both to the determination of whether there is a prima facie case and also to the necessity of instigating proceedings.

26. With respect to the second respondent's intention in going to the location, CBF was not in a position to contradict the second respondent since the second respondent had said nothing about it, there is no suggestion that he had any knowledge of what occurred prior to the second respondent's arrival or that he had heard anything from others. There is no independent testimony to contradict what the second respondent said about his lack of intention prior to his arrival.[32] There was therefore a strong basis for concluding that any knowledge or intention was formed on meeting with the witness. Also, although the Trial Chamber notes that the second respondent should have known the content of the protective measures decision at the time of contact,[33] there was no evidence available to the Chamber that he actually did. Furthermore, when one looks at this decision it is clear that there is not a prohibition as such on contact with prosecution witnesses,

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[29] Prosecutor's Appellant's Brief, note 6 *supra*, par 47
[30] Trial Chamber Decision, note 4 *supra*, par 41
[31] Trial Chamber Decision, note 4 *supra*, pars 59-60
[32] Trial Chamber Decision, note 4 *supra*, par 58
[33] Trial Chamber Decision, note 4 *supra*, par 58 (last sentence)

but a protocol to follow if the defence forms the intention to do so.[34] These are not matters expressly referred to by the Chamber but matters which, together with the points expressly referred to, form part of the factual matrix highlighting that in so far as a violation could be proved it did not fall within the category of the most serious deliberate interferences with the administration of justice.

27. These were matters which, it is submitted, could rightly lead the Trial Chamber to conclude that initiating contempt proceedings was not the most effective and efficient way to ensure compliance with the obligations under the Statute and Rules in the specific circumstances of this case.

Reference to consequences

28. The appellant asserts that the Trial Chamber wrongly relied on the consequences of the actions of the respondents. The appellant points out that it is not required to prove actual interference with the administration of justice and that the violation of a court order is in itself an interference with the administration of justice.[35]

29. The flaw in this argument lies in the fact that the Trial Chamber was not in the process of deciding the issue of contempt, but the question whether it was appropriate to initiate an investigation or prosecution for contempt. The approach in these two exercises necessarily differs as the range of issues relevant to the decision to prosecute naturally exceeds those relevant to the question of guilt or innocence. This is the very essence of discretion as expressed the label 'may'.

Other matters taken into account

30. The other matters referred to by the appellant as irrelevant were relevant to the overall assessment of the seriousness of the alleged violation, and therefore relevant to the decision as to whether to investigate or prosecute contempt.

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[34] *Prosecutor v Hormisdas Nsengimana*, Case No. ICTR-01-69, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002

[35] Prosecutor's Appellant's Brief, note 6 *supra*, par 50

Matters which it is asserted were not taken into consideration

31. The appellant accuses the Trial Chamber of giving insufficient weight to the impact of repeated contemptuous behaviour.[36] This consideration could not be relevant to the decision whether to pursue contempt proceedings against the second respondent, who is only accused of one distinct incident of unauthorized contact with a prosecution witness.

32. The Trial Chamber does not have to mention every matter which it takes into account. General considerations common to all prosecutions such as the need for deterrence do not need to be expressly mentioned. There is no indication that the need for deterrence was not taken into account. In fact, the Chamber refers to 'the most effective and efficient way to ensure compliance' and to the fact that 'the issue of witness intimidation was of grave concern to the Tribunal' (par 47). These expressions indicate that the Chamber gave due regard to general issues of the need to ensure respect for the orders of the court in relation to witness protection.

F. The appropriate relief

33. In the event that the Appeals Chamber finds a discernable error, the question will arise as to the appropriate relief. The respondent opposes the relief sought. It does not follow as a matter of course that this should be a reversal of the Trial Chamber's decision, an order to reconsider or the instigation of proceedings for contempt.

34. In this case it is submitted that it is relevant to enquire into whether the initiation of proceedings for contempt at this stage will really serve the interests of justice. The allegation against the second respondent involved one incident of one short meeting and a limited discussion. This is a matter which could in all reasonableness have been disposed of very quickly. Instead the issue has extended

[36] Prosecutor's Appellant's Brief, note 6 *supra*, par 60

for more than two years. Not all of that time can be accounted for as necessary procedural steps. As the appellant rightly points out there was a considerable delay between the filing of its motion for leave to initiate contempt proceedings on the 26 May 2008 and the decision on that motion on 15 January 2010. This delay is unexplained. To what extent the delay lies with the Trial Chamber, or is shared between the Trial Chamber and the appellant for not following up on the matter is of little consequence. What is of consequence is that this delay cannot be laid at the door of the second respondent. It is unlikely that the three individuals involved will have as clear a recollection of this relatively inconsequential event as if the matter had been dealt with expeditiously.

35. The effect of undue delay depends on the circumstances.[37] Here it is submitted that his right to trial without undue delay has been violated and that this should be taken into consideration when settling upon an appropriate remedy for any discernable error committed by the Trial Chamber. In any event, it is submitted that it would not be fair or reasonable to have proceedings for contempt initiated now against the second respondent in the second half of 2010.

ACCORDINGLY, it is respectfully requested that the appeal be dismissed.

Word count: 3,491

Andreas O'Shea, Counsel for Fr Rémi Mazas

22nd August 2010

[37] *Prosecutor v Justin Mugenzi et al*, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), 8 November 2002, par 33

APPENDIX I

AUTHORITIES CITED

Prosecutor v Edouard Karemera et al., Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate a Prosecution Witness for False Testimony" and on Motion for Oral Arguments(AC), 22 January 2009, par 21

Prosecutor v Justin Mugenzi et al, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), 8 November 2002

Prosecutor v Vojislav Šešelj, Decision on the Prosecution's Appeal against the Trial Chamber's Decision of 10 June 2008, 25 July 2008

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