UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Andrésia Vaz**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**15 March 2010**

LÉONIDAS NSHOGOZA

v.

THE PROSECUTOR

Case No. ICTR-2007-91-A

JUDGEMENT

Counsel for Léonidas Nshogoza:

Ms. Allison Turner

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Christine Graham
Ms. Linda Bianchi

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal by Léonidas Nshogoza ("Nshogoza") against the Judgement pronounced by Trial Chamber III of the Tribunal ("Trial Chamber") on 2 July 2009 and filed in writing on 7 July 2009 in the case of *The Prosecutor v. Léonidas Nshogoza* ("Trial Judgement").

I. INTRODUCTION

2. This appeal concerns the conviction of Nshogoza for contempt of the Tribunal based on his violation of a witness protection order in the case of *The Prosecutor v. Jean de Dieu Kamuhanda*[1] by meeting with and disclosing the identifying information of protected witnesses who had previously implicated Jean de Dieu Kamuhanda ("Kamuhanda") in an attack at Gikomero Parish on 12 April 1994.[2] The Indictment against Nshogoza followed an investigation ordered by the Appeals Chamber in the *Kamuhanda* case on 19 May 2005.[3]

A. Background

3. Nshogoza was born in 1961 in Rukeri, Kyumba, Muhanga, Southern Province, Rwanda.[4] In 1986, he graduated from the National University of Rwanda, where he studied law.[5] At the end of 2001, he began working as a Defence investigator in the *Kamuhanda* case; he has also worked as a Defence investigator in the case of *The Prosecutor v. Emmanuel Rukundo*.[6] Nshogoza was admitted to the Kigali Bar in April 2005.[7]

4. On 4 January 2008, Judge Dennis C. M. Byron confirmed the Indictment against Nshogoza charging two counts of contempt of the Tribunal and two counts of attempt to commit acts

[1] *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-5[4]-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, signed 7 July 2000, filed 10 July 2000 ("*Kamuhanda* Witness Protection Order").
[2] *Jean de Dieu Kamuhanda v. The Prosecutor,* Case No. ICTR-99-54A-A, Judgement, 19 September 2005, paras. 212, 222 ("*Kamuhanda* Appeal Judgement"). Kamuhanda was the Rwandan Minister of Higher Education and Scientific Research in the interim government from 25 May until mid-July 1994. *See Kamuhanda* Appeal Judgement, para. 2.
[3] *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-07-91-I, Indictment, 7 January 2008 ("Indictment"); *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-07-91-PT, Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment, 17 December 2008, para. 30 ("*Nshogoza* Decision on Defence Preliminary Challenge"), *citing Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005 ("*Kamuhanda* Appeal Decision").
[4] Trial Judgement, para. 4.
[5] Trial Judgement, paras. 4, 223.
[6] Trial Judgement, paras. 4, 223.

punishable as contempt of the Tribunal under Rule 77 of the Rules of Procedure and Evidence of the Tribunal ("Rules").[8] The Indictment alleges that, between approximately 1 March 2004 and 31 May 2005, Nshogoza repeatedly met with protected witnesses without authorization; manipulated, incited, instigated, induced or bribed them into signing false statements and into testifying before the Appeals Chamber; disclosed confidential information; and attempted to procure false statements and testimony.[9] Shortly after learning of the charges against him and the warrant for his arrest,[10] Nshogoza voluntarily surrendered to the Tribunal on 8 February 2008.[11]

5. The Trial Chamber found that Nshogoza repeatedly met with protected Witnesses GAA and A7/GEX and disclosed identifying information in violation of the *Kamuhanda* Witness Protection Order.[12] Based on this conduct, the Trial Chamber found Nshogoza guilty under Count 1 of the Indictment for committing contempt of the Tribunal.[13] He was acquitted of all other counts.[14] For his conviction, he was sentenced to 10 months of imprisonment.[15] Nshogoza was immediately released in view of the credit he received for the approximately 17 months he spent in detention from the date of his arrest.[16]

B. The Appeal

6. Nshogoza filed his Notice of Appeal on 22 July 2009 and his Appeal Brief on 6 August 2009.[17] He requests that the Appeals Chamber reverse his conviction and enter a complete acquittal, or in the alternative, review and reduce his sentence.[18] The Prosecution filed its Response Brief on 17 August 2009,[19] to which Nshogoza replied on 24 August 2009.[20]

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[7] Trial Judgement, paras. 4, 223.
[8] *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-2007-91-I, Confirmation of the Indictment and Witness Protection Orders, 4 January 2008 ("*Nshogoza* Confirmation Decision").
[9] *See* Trial Judgement, para. 3. *See also* Indictment, paras. 5-50.
[10] *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-2007-91-R55*bis*, Warrant of Arrest and Order for Transfer and Detention Addressed to All States, 28 January 2008; *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-2007-91-R55*bis*, Order Lifting the Confidentiality of the Warrant of Arrest and Order for Transfer and Detention Addressed to All States, 4 February 2008.
[11] Trial Judgement, paras. 227, 229.
[12] Trial Judgement, para. 188.
[13] Trial Judgement, paras. 189, 212.
[14] Trial Judgement, paras. 202, 207, 211.
[15] Trial Judgement, para. 233.
[16] Trial Judgement, paras. 232, 234.
[17] Léonidas Nshogoza's Notice of Appeal, 22 July 2009 ("Notice of Appeal"); Léonidas Nshogoza's Appeal of the Conviction for Contempt in the Judgement of 7 July 2009, 6 August 2009 ("Appeal Brief").
[18] Notice of Appeal, p. 12; Appeal Brief, p. 29.
[19] Prosecutor's Respondent's Brief, 17 August 2009 ("Response Brief").
[20] Appellant's Reply Brief, 24 August 2009 ("Reply Brief"). Paragraph 7 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 8 December 2006 ("Practice Direction on Procedure for Filing") provides that in appeals from contempt decisions, an appellant may file a reply within four days of the filing of the response. Accordingly, Nshogoza's Reply Brief was due no later than 21 August 2009 and thus was

C. Preliminary Matters

7. An appeal brief submitted under Rule 77 of the Rules may not exceed 9,000 words.[21] Nshogoza's Appeal Brief contains 8,993 words.[22] Annexed to his Appeal Brief is Appendix A, providing a contextual background and summary of proceedings, and Appendix B, containing cited excerpts of transcripts and legal materials, and a list of "relevant exhibits".[23]

8. In its Response Brief, the Prosecution submits that Appendix A of Nshogoza's Appeal Brief should be rejected and expunged from the official record, and that any arguments which rely on Appendix A should be disregarded.[24] The Prosecution contends that the procedural background required by the Practice Direction on Formal Requirements for Appeals from Judgement ("Practice Direction on Formal Requirements") is not contained in his Appeal Brief, but rather, impermissibly annexed thereto as Appendix A.[25] Moreover, the Prosecution complains that Nshogoza's Appeal Brief contains references to arguments made in Appendix A rather than setting them out,[26] thereby attempting to circumvent the decision denying his request for an extension of the word limit for his Appeal Brief.[27]

9. Nshogoza maintains that Appendix A provides a neutral account of the contextual and procedural background to his case, which is permitted by the relevant practice directions.[28]

10. An Appellant's brief must first contain an introduction with a concise summary of the relevant procedural history.[29] The Appeals Chamber considers that paragraphs 1 and 2 of Nshogoza's Appeal Brief satisfy this minimum requirement. Appendices are permitted and do not count towards the word limit.[30] However, an appendix may not contain legal or factual arguments; it may only contain references, source materials, items from the record, exhibits, and other relevant,

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filed late. On 25 September 2009, Nshogoza explained that the delay in filing his Reply Brief was due to the late service upon him of the Prosecution's Response Brief. *See* Letter to the ICTR Appeals Chamber, "Re: *Léonidas Nshogoza v. The Prosecutor* ICTR-2007-91-A Reply Brief", dated 25 September 2009. Paragraph 19 of the Practice Direction on Procedure for Filing provides that the Appeals Chamber may vary any time-limit prescribed under this Practice Direction or recognize as validly done any act done after the expiration of a time-limit so prescribed. Considering that the delay was minimal and in the absence of any objection by the Prosecution, the Appeals Chamber accepts Nshogoza's Reply Brief as validly filed.

[21] *See* Practice Direction on Procedure for Filing, para. 8; Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006, para. C(2)(a) ("Practice Direction on Length of Briefs").

[22] Appeal Brief, p. 29.

[23] Appeal Brief, pp. 30-51.

[24] Response Brief, para. 8.

[25] Response Brief, para. 9, n. 19.

[26] Response Brief, para. 9, *referring to* Appeal Brief, para. 8.

[27] Response Brief, para. 10, *referring to* Decision on Léonidas Nshogoza's Motion to Exceed Word Limits, 31 July 2009.

[28] Reply Brief, para. 2.

[29] Practice Direction on Formal Requirements, para. 4(a).

non-argumentative material.[31] Therefore, any legal or factual arguments contained in Appendix A of Nshogoza's Appeal Brief are invalid, and the Appeals Chamber will disregard them.

D. Oral Arguments

11. Rule 117(A) of the Rules provides that an appeal of a decision on contempt rendered under Rule 77 of the Rules "may be determined entirely on the basis of written briefs". The parties have not requested to be heard orally on appeal. Having considered the written submissions of the parties, the Appeals Chamber does not deem it necessary to hear oral arguments in this case and hereby renders its Judgement.[32]

[30] Practice Direction on Length of Briefs, para. C(4).
[31] Practice Direction on Length of Briefs, para. C(4).
[32] On 2 December 2009, Nshogoza's Counsel requested clarification as to whether the Appeals Chamber deemed it necessary to hear oral arguments. The Appeals Chamber's position was then communicated to Nshogoza by the Registry. *See* Correspondence from Nshogoza's Counsel "*Léonidas Nshogoza v. The Prosecutor*, ICTR-2007-91-A, Oral Argument", 2 December 2009; Correspondence from Chambers, signed by Koffi Afande, Legal Officer, Appeals Chamber Support Unit, 8 December 2009.

II. STANDARDS OF APPELLATE REVIEW

12. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute of the Tribunal ("Statute"). The Appeals Chamber reviews errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice. This standard of review, applicable for appeals against judgements, also applies to appeals against convictions for contempt.[33]

13. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[34] A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error allegedly invalidates the decision.[35] When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the original decision.[36] In determining whether or not a Trial Chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact made by a Trial Chamber.[37]

14. The Appeals Chamber recalls that an appeal is not a trial *de novo* and a party may not merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such an error as to warrant the intervention of the Appeals Chamber.[38] Arguments of a party that do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[39] The Appeals Chamber has discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[40]

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[33] *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009, para. 14 ("*Haraqija and Morina* Appeal Judgement"). *See also Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009, para. 11 ("*Dragan Jokić* Appeal Judgement").
[34] *Haraqija and Morina* Appeal Judgement, para. 15. *See also Protais Zigiranyirazo v. The Prosecutor,* Case No. ICTR-01-73-A, Judgement, 16 November 2009, para. 10 ("*Zigiranyirazo* Appeal Judgement").
[35] *Haraqija and Morina* Appeal Judgement, para. 15; *Dragan Jokić* Appeal Judgement, para. 12. *See also Zigiranyirazo* Appeal Judgement, para. 9.
[36] *Haraqija and Morina* Appeal Judgement, para. 15; *Dragan Jokić* Appeal Judgement, para. 13. *See also Zigiranyirazo* Appeal Judgement, para. 11.
[37] *Haraqija and Morina* Appeal Judgement, para. 15. *See also Zigiranyirazo* Appeal Judgement, para. 11.
[38] *Haraqija and Morina* Appeal Judgement, para. 16. *See also Zigiranyirazo* Appeal Judgement, para. 12.
[39] *Haraqija and Morina* Appeal Judgement, para. 16; *Dragan Jokić* Appeal Judgement, para. 14. *See also Zigiranyirazo* Appeal Judgement, para. 12.
[40] *Haraqija and Morina* Appeal Judgement, para. 16; *Dragan Joki}* Appeal Judgement, para. 16. *See also Zigiranyirazo* Appeal Judgement, para. 13.

III. ALLEGED PROCEDURAL ERRORS (GROUND 1)

15. Nshogoza submits that the Trial Chamber erred in failing to reconsider *de novo* several interlocutory decisions in the Trial Judgement,[41] in determining that the Prosecution had authority to bring the case,[42] in assessing various forms of interference with the Defence case,[43] and in failing to ensure that he was promptly assigned counsel of his choice.[44] Nshogoza argues that the Trial Chamber's findings that he suffered no prejudice as a result of these alleged errors were unreasonable and that these errors resulted in a miscarriage of justice.[45] He requests that his sentence be reduced as a result and that he be given appropriate financial compensation.[46]

A. Alleged Errors in Failing to Reconsider Interlocutory Decisions

16. During the course of the trial proceedings, the Trial Chamber considered several alleged procedural violations, including disclosure violations, delays in rendering decisions, and restrictions on the Defence case, which Nshogoza raised again in his Closing Brief.[47] In the Trial Judgement, the Trial Chamber declined to revisit these decisions, noting that Nshogoza had failed to present any new arguments or evidence to substantiate his challenges or claims of prejudice.[48]

17. Nshogoza submits that the Trial Chamber erred in not reconsidering *de novo* its prior interlocutory decisions on the ground that they were already dealt with during the course of the proceedings.[49] He asserts that, in finding that his claims of prejudice lacked evidentiary support, the Trial Chamber erroneously relied on his Pre-Defence Brief.[50] He contends that his Closing Brief amply demonstrates prejudice.[51] The Prosecution responds that Nshogoza's submissions lack merit.[52]

18. The Appeals Chamber considers that Nshogoza has failed to demonstrate any error on the part of the Trial Chamber in declining to reconsider its prior decisions in the Trial Judgement. His cursory arguments fail to identify clearly the relevant interlocutory decisions, demonstrate any

[41] Notice of Appeal, paras. 7, 10; Appeal Brief, paras. 3, 4; Reply Brief, paras. 4, 6.
[42] Notice of Appeal, paras. 8, 9; Appeal Brief, paras. 5-7.
[43] Notice of Appeal, para. 11; Appeal Brief, para. 8.
[44] Notice of Appeal, para. 12; Appeal Brief, paras. 9-14.
[45] Notice of Appeal, para. 13; Appeal Brief, para. 15.
[46] Notice of Appeal, para. 13; Appeal Brief, paras. 15, 16.
[47] Trial Judgement, paras. 6-15.
[48] Trial Judgement, paras. 8, 10, 13, 15.
[49] Appeal Brief, para. 3; Reply Brief, paras. 4, 6.
[50] Appeal Brief, para. 3, *referring to The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-T, Pre-Defence Brief of Léonidas Nshogoza, confidential, 9 March 2009 ("Pre-Defence Brief").
[51] Appeal Brief, para. 4, *referring to The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-T, Closing Brief of Léonidas Nshogoza, filed confidentially 17 April 2009, public redacted version filed 27 May 2009 ("Closing Brief").

error in them, or clearly identify any basis warranting reconsideration. Instead, he primarily refers the Appeals Chamber to submissions in his Closing Brief. Merely referring the Appeals Chamber to one's arguments set out at trial is insufficient as an argument on appeal.[53]

19. Accordingly, this sub-ground of appeal is dismissed.

B. Alleged Errors Relating to the Trial Chamber's Jurisdiction

20. In an oral decision of 19 May 2005, the Appeals Chamber in the *Kamuhanda* case noted that, in the course of hearing additional evidence on appeal, there had been significant discrepancies in the testimonies of witnesses, which could amount to false testimony, and that it had reason to believe that such false testimony had perhaps been solicited.[54] Accordingly, the Appeals Chamber referred the matter to the Prosecutor "for general investigation" and, in particular, directed the Prosecutor to investigate both the possibility of false testimony as well as "allegations made in evidence given before the Appeals Chamber during the Rule 115 hearing, to the effect that Tribunal employees may have attempted to interfere with the witness who had given evidence in proceedings before this Tribunal."[55] As a result of this investigation, the Prosecution submitted an indictment against Nshogoza to the President of the Tribunal, which Judge Byron confirmed.[56]

21. On 17 December 2008, the Trial Chamber denied Nshogoza's motion challenging the Prosecution's authority to investigate and prosecute him, noting that it was satisfied that the Appeals Chamber had duly authorized the Prosecution to conduct investigations into possible contempt of the Tribunal relating to its hearing of additional evidence in the *Kamuhanda* case.[57] The Trial Chamber was further satisfied that Nshogoza's prosecution had been duly authorized because the impugned Indictment, which followed the Prosecution's investigations, was reviewed and confirmed by a Judge of the Tribunal.[58]

22. Nshogoza submits that the Trial Chamber's decision to deny his preliminary motion was erroneous.[59] He argues that the Appeals Chamber's order for the investigation of possible contempt pertained solely to specific "Tribunal employees" identified by the Prosecution rebuttal witnesses

[52] Response Brief, paras. 12, 15-19.
[53] *See, e.g., Haraqija and Morina* Appeal Judgement, para. 26; *Mikaeli Muhimana v. The Prosecutor,* Case No. ICTR-95-1B-A, Judgement, 21 May 2007, para. 87 ("*Muhimana* Appeal Judgement"); *Prosecutor v. Radoslav Br|anin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 35.
[54] *Kamuhanda* Appeal Decision, p. 2.
[55] *Kamuhanda* Appeal Decision, pp. 2, 3.
[56] *Nshogoza* Confirmation Decision, paras. 1, 4.
[57] *Nshogoza* Decision on Defence Preliminary Challenge, para. 30, *referring to Kamuhanda* Appeal Decision.
[58] *Nshogoza* Decision on Defence Preliminary Challenge, paras. 35, 36.
[59] Appeal Brief, paras. 5-7.

who testified at the Rule 115 hearing,[60] and that the Trial Chamber incorrectly interpreted the order as being sufficiently broad to investigate and prosecute him.[61] Nshogoza also submits that the Trial Chamber erred in dismissing his motion to subpoena Ms. Loretta Lynch, Special Counsel for the Prosecution,[62] thereby preventing him from proving that he was not a suspect in her investigation and that there were therefore no grounds to prosecute him for contempt.[63] Nshogoza submits that the Trial Chamber erred by failing to find that he suffered material and irreparable prejudice from its wrongful dismissal of both motions.[64]

23. The Prosecution responds that Nshogoza is merely reiterating arguments that were fully litigated at trial.[65] It contends that Nshogoza's restrictive interpretation of the *Kamuhanda* Appeal Decision to investigate possible contempt is incorrect, and that the decision whether to bring an indictment was properly left to the Prosecutor's discretion.[66] The Prosecution further submits that whether or not Nshogoza was a suspect in Ms. Lynch's investigations is irrelevant; it matters only that he became a suspect at some stage.[67] Finally, the Prosecution argues that Nshogoza's failure to raise these issues in his Closing Brief belies his claim of prejudice.[68]

24. The Appeals Chamber is not persuaded by Nshogoza's claim that the *Kamuhanda* Appeal Decision only authorized an investigation regarding employees of the Tribunal. The Appeals Chamber authorized a "general investigation" of the possibility of false testimony and the conduct for which Nshogoza was prosecuted was intimately connected to allegations of false testimony.[69] The Appeals Chamber also finds no merit in Nshogoza's contention that the Trial Chamber erred in denying his motion to subpoena Ms. Lynch to demonstrate that he was not the target of the original investigation. The irrelevance of this issue to the Prosecution's authority to bring a case against him

[60] Appeal Brief, para. 5.
[61] Notice of Appeal, paras. 8, 9; Appeal Brief, para. 6, *referring to Nshogoza* Decision on Defence Preliminary Challenge, para. 29, where the Trial Chamber states that "[t]he order was not limited to the investigation of only those persons identified by the witnesses in their testimony.".
[62] *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-07-91-T, Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch, 10 February 2009. Ms. Loretta Lynch was the Special Counsel for the Prosecution who was mandated to carry out the investigation ordered by the *Kamuhanda* Appeals Chamber. The Trial Chamber observed that, because Ms. Lynch was not present when Witnesses GAA and A7/GEX met with Nshogoza, she would only be in a position to testify to what the witnesses told her (para. 8). It then found that the Defence had not shown that Ms. Lynch had information that could materially assist the Chamber with respect to clearly identified issues relevant to the trial (para. 9).
[63] Notice of Appeal, para. 9; Appeal Brief, para. 6.
[64] Appeal Brief, para. 7.
[65] Response Brief, para. 22.
[66] Response Brief, para. 23.
[67] Response Brief, para. 24.
[68] Response Brief, para. 26.
[69] The Appeals Chamber further notes that in the Trial Judgement of 4 December 2007 sentencing Witness GAA for giving false testimony before the Appeals Chamber, the Trial Chamber expressed disapproval that no indictment had

is manifest. Consequently, the Appeals Chamber finds no error in the Trial Chamber's conclusion that the Prosecution had authority to bring a case against Nshogoza.

25. Accordingly, this sub-ground of appeal is dismissed.

C. Alleged Errors Relating to Interference with Defence Witnesses

26. Nshogoza alleges that the Tribunal's Registry, the Prosecution, and Rwandan government authorities interfered with the preparation and presentation of his case.[70] In particular, he claims that, in March 2009, the Deputy Prosecutor General of Rwanda contacted two protected Defence witnesses in relation to their testimony.[71] Based on this, Nshogoza notes that he filed a motion for a stay of proceedings, which he claims the Trial Chamber erroneously denied.[72] The Prosecution responds that Nshogoza fails to identify any error or demonstrate any prejudice.[73]

27. A review of the Trial Judgement reflects that the Trial Chamber extensively considered Nshogoza's claims of witness interference in the Trial Judgement as well as in interlocutory decisions.[74] Nshogoza's cursory submissions simply allege error on the part of the Trial Chamber's consideration without demonstrating how these decisions were wrong, invalidated the verdict, or resulted in prejudice.

28. Accordingly, this sub-ground of appeal is dismissed.

D. Alleged Errors Relating to the Assignment of Counsel

29. On 8 February 2008, Nshogoza assigned power of attorney to Ms. Allison Turner to represent him during the proceedings.[75] She appeared as his Counsel at his initial appearance on 11 February 2008.[76] On 26 February 2008, Nshogoza requested to be assigned counsel under the Tribunal's legal aid program and listed Ms. Turner as his first choice.[77] At the time, Ms. Turner was

yet been issued against Nshogoza. *See The Prosecutor v. GAA,* Case No. ICTR-07-90-R77-I, Judgement and Sentence, 4 December 2007, para. 11.
[70] Notice of Appeal, para. 11; Appeal Brief, para. 8.
[71] Appeal Brief, para. 8.
[72] Appeal Brief, para. 8.
[73] Response Brief, para. 27.
[74] Trial Judgement, paras. 25-45; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Confidential Decision on Defence Motion for Stay of Proceedings, 22 May 2009. A public version of this decision was filed on 26 June 2009.
[75] Trial Judgement (Annex), para. 5.
[76] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-PT, Order to Assign Counsel, 24 July 2008, para. 2, n. 6 (noting Ms. Turner's assignment as Duty Counsel) ("Order of 24 July 2008"). *See also* Transcripts of 11 February 2008.
[77] Order of 24 July 2008, para. 2.

also assigned under the Tribunal's legal aid program as Co-Counsel in the *Rukundo* case[78] and was thus ineligible to be assigned to another case under the legal aid program.[79] She indicated her willingness to resign from the *Rukundo* case on 5 May 2008.[80]

30. On 15 May 2008, the Registry offered Ms. Turner assignment as Counsel under the legal aid program in this case.[81] The offer explained that it would expire in seven days and that its acceptance must be indicated by signing and returning it to the Registry.[82] Ms. Turner provided the signed acceptance of this offer to the Registry 15 days later, on 30 May 2008.[83] Following this, the Registry altered the terms of the original offer on 6 June 2009 and asked Ms. Turner to indicate her agreement within two days in order to finalize the assignment.[84] In turn, Ms. Turner threatened to suspend all work on the case.[85] The dispute centred on the Registry's change in the terms of remuneration from its original offer of $50,000 in fees plus additional expenses, to the new offer of a total of $50,000, including both fees and expenses.[86] On 24 July 2008, the Trial Chamber ordered the Registrar to assign counsel to Nshogoza without further delay, but it did not specify the terms of

[78] Ms. Turner withdrew from the *Rukundo* case only on 13 October 2008. *See The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on Withdrawal of the Assignment of Ms. Allison Turner, Co-Counsel for the Accused Emmanuel Rukundo, 13 October 2008, p. 2 ("Withdraws the assignment of Ms. Alison Turner as Co-Counsel for Emmanuel Rukundo in order to facilitate her re-assignment as Counsel for Léonidas Nshogoza").
[79] Directive on the Assignment of Defence Counsel, 14 March 2008, Article 15(A).
[80] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, Urgent Motion for Assignment of Counsel, signed 14 May 2008, filed 16 May 2008, para. 10.
[81] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, The Registrar's Submission under Rule 33 (B) of the Rules of Procedure and Evidence on Leonidas [*sic*] Nshogoza's Addendum 2 – Extremely Urgent Motion for Assignment of Counsel, 1 July 2008, Annex I ("The Registrar will pay you up to US $50,000 (Fifty Thousand United States Dollars) to cover the legal fees for you and your support staff incurred during the pre-trial and trial stages of procedure. The Registrar will also meet other expenses related to these proceedings.") ("Registry Submissions of 1 July 2008"). *See also* Order of 24 July 2008, para. 4.
[82] Registry Submissions of 1 July 2008, Annex I ("This offer is valid for seven days from the date of this letter after which the Registrar will assume that you are not willing to be assigned as such. […] We would be grateful if you could indicate your acceptance of the terms of this offer by signing and sending to us this letter at your earliest convenience.").
[83] Order of 24 July 2008, para. 4. On 19 May 2008, Ms. Turner sent a separate letter agreeing to the Registry's offer, which the Registry did not consider as an acceptance since it was not the signed original offer. *See* Registry Submissions of 1 July 2008, para. 4, Annex II.
[84] Registry Submissions of 1 July 2008, Annex III ("On 30 May 2008 we received your acceptance of our offer to you of 15 May 2008. This letter, at the Registrar's request, further clarifies our offer of US $50,000.00 (fifty thousand United States Dollars) made to you in our earlier communication. This sum is a Lump Sum that will be given to you to cover the fees and expenses (travel, accommodation and sundry expenses) for you and any support staff you will be free to enrol, for all the work on the case. […] We trust that you will, by signing and sending to us a copy of this letter, act on this communication within the next two days to enable us to finalize the assignment. If we do not hear from you in the next two days we will assume that you are not willing to take the assignment."). *See also* Order of 24 July 2008, para. 5.
[85] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, Addendum 2 – Extremely Urgent Motion for the Assignment of Counsel, 9 July 2008, para. 4 ("Addendum to Motion for Assignment of Counsel"). *See also* Order of 24 July 2008, para. 6; Trial Judgement (Annex), para. 7.
[86] Registry Submissions of 1 July 2008, Annexes I, III (quoted *supra* nn. 79, 82).

the assignment.[87] The next day, the Registry wrote to Ms. Turner offering her assignment as Counsel in this case, but a dispute arose again over the terms of her remuneration.[88]

31. On 18 August 2008, the Trial Chamber issued another order to the Registrar to give effect to its Order of 24 July 2008 by assigning counsel to Nshogoza.[89] On 20 August 2008, the Registrar assigned Mr. Philippe Greciano.[90] Following this, Nshogoza filed an urgent motion asking the Trial Chamber to assign him his counsel of choice.[91] The Trial Chamber granted the motion on 13 October 2008 and ordered the Registrar to withdraw the assignment of Mr. Greciano and assign Ms. Turner based on the terms of the offer of 15 May 2008.[92] Ms. Turner was then assigned the same day.[93]

32. Nshogoza submits that the Trial Chamber erred in not protecting his fundamental rights to a fair and expeditious trial by failing to ensure that he was promptly assigned his counsel of choice.[94] According to Nshogoza, the Trial Chamber's failure to intervene led to an eight month delay in the assignment of counsel, which contributed to the excessive length of his provisional detention and impeded his material ability to prepare his case.[95]

33. The Prosecution responds that the Trial Chamber did not err as alleged, arguing that circumstances warranting the Trial Chamber's intervention into the assignment of counsel, an administrative matter under the Registry's purview, did not arise until 13 October 2008.[96] The Prosecution contends that Nshogoza and his counsel contributed significantly to the delays both in the assignment of counsel and the start of the trial.[97] It submits that, prior to being officially assigned to the case, Nshogoza's counsel delayed filing the requisite forms to demonstrate Nshogoza's indigence, delayed resigning from the *Rukundo* case in order to be eligible to represent Nshogoza, waited 15 days before accepting the Registrar's initial offer of appointment, and then

[87] Order of 24 July 2008, p. 6. Although the disposition is worded generally and does not expressly refer to Ms. Turner, it appeared to be the common understanding of the Trial Chamber and the Registrar that Ms. Turner was to be assigned. *See* Trial Judgement (Annex), para. 12.
[88] Trial Judgement (Annex), para. 12.
[89] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-PT, Order for Immediate Assignment of Counsel, 18 August 2008. *See also* Trial Judgement (Annex), para. 14.
[90] Trial Judgement (Annex), para. 14.
[91] Trial Judgement (Annex), para. 15.
[92] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-PT, Decision on Motions Requesting Assignment of Counsel of Choice, 13 October 2008, p. 9 ("Decision of 13 October 2008"). *See also* Trial Judgement (Annex), para. 17.
[93] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, Decision on Withdrawal of the Assignment of Mr. Philippe Greciano, Counsel for the Accused Leonidas [*sic*] Nshogoza, 13 October 2008.
[94] Appeal Brief, paras. 9-14.
[95] Appeal Brief, para. 13.
[96] Response Brief, paras. 33-35, 40.
[97] Response Brief, paras. 33-42.

refused to accept the terms of remuneration.[98] The Prosecution argues that, even after Nshogoza's counsel of choice was appointed, she continued to cause delays by making several requests to postpone the proceedings, filing frivolous motions, and engaging in obstructive behaviour.[99]

34. Article 20(4)(d) of the Statute guarantees an accused before the Tribunal the right to counsel of "his or her own choosing". The Appeals Chamber observes that, throughout the proceedings, Nshogoza has benefited from his choice of counsel since Ms. Turner was acting on his behalf, albeit outside the framework of the Tribunal's legal aid program, from the date of his arrest through her assignment under the program in October 2008.[100]

35. An accused who lacks the means to remunerate counsel has the right to have counsel assigned to him by the Registrar from the list drawn up in accordance with Rule 45 of the Rules.[101] The crux of Nshogoza's complaint is not that legal aid was not made available to him, but rather that the Registrar did not promptly assign him the counsel *of his choice* under the Tribunal's legal aid program. While in practice, the Registrar will take account of an accused's preferences in assigning counsel, where an accused's defence is being paid for pursuant to the Tribunal's legal aid program his right to legal counsel of his own choosing from the list kept by the Registrar is not absolute.[102] It is within the Registrar's discretion to override that preference if it is in the interests of justice.[103]

36. A review of the procedural history of this case reflects that there were several impediments to the initial assignment under the Tribunal's legal aid program of Ms. Turner as Nshogoza's counsel after his arrest. Leaving aside Nshogoza's delay in requesting Tribunal paid counsel, Ms. Turner was not eligible for assignment at the time in accordance with Article 15(A) of the Directive on the Assignment of Defence Counsel as she was then assigned as Co-Counsel in the *Rukundo* case. She indicated her willingness to withdraw from that case on 5 May 2008, and an

[98] Response Brief, paras. 36-39.
[99] Response Brief, paras. 41, 42.
[100] In this respect, the Appeals Chamber notes that Nshogoza assigned power of attorney to Ms. Turner on 8 February 2008, and she appeared as his Counsel at the initial appearance. The Trial Chamber also noted that she represented him *pro bono* until 9 June 2008. Notwithstanding her stated intention to suspend all work on the file until formally assigned counsel under the legal aid program, she continued to represent Nshogoza and was accorded standing by the Trial Chamber as his Counsel, even during the brief assignment of Mr. Greciano as his Lead Counsel under the Tribunal's legal aid program. *See, e.g.,* Decision of 13 October 2008, para. 10; Trial Judgement (Annex), paras. 5, 8; Transcripts of 11 February and 28 August 2008.
[101] Article 20(4)(d) of the Statute; Rules 45 and 77(F) of the Rules; Directive on the Assignment of Defence Counsel, as amended on 15 June 2007, Article 2.
[102] *See Prosecutor v. Vidoje Blagojevi} and Dragan Joki}*, Case No. IT-02-60-A, Judgement, 9 May 2007, para. 17 ("*Blagojevi} and Joki}* Appeal Judgement"); *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001, paras. 61, 62; *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000, para. 33.
[103] *Blagojevi} and Joki}* Appeal Judgement, para. 17.

offer was made to her by the Registrar on 15 May 2008, which she accepted on 30 May 2008 after it expired. Given that Ms. Turner was ineligible for assignment until she indicated her willingness to withdraw from the *Rukundo* case and then took two weeks to indicate her acceptance, the Appeals Chamber is not satisfied that any delay in her assignment during this period is attributable to the Trial Chamber or the Registry.

37. However, a further delay was then caused by the Registry's decision on 6 June 2008 to change the terms of her remuneration, which Ms. Turner did not wish to accept. The Registry nonetheless remained willing to appoint her as late as 25 July 2008 when it again offered her assignment as counsel under the legal aid program. The Registry had also made clear to the Trial Chamber in its submissions under Rule 33(B) of the Rules that the reason why it could not assign Ms. Turner was her refusal to accept its new terms of assignment after the original offer expired. Despite two orders to the Registrar by the Trial Chamber, one on 24 July 2008, and one on 18 August 2008, to assign counsel, the Registrar's efforts to assign Ms. Turner were frustrated by the dispute that had arisen over her remuneration. Consequently, the Registrar decided to assign another counsel, to which Nshogoza objected. This resulted in the Trial Chamber expressly ordering the Registrar on 13 October 2008 to withdraw the assignment of Mr. Greciano and assign Ms. Turner under the terms of the Registrar's 15 May 2008 offer of assignment. The Registrar complied with the Trial Chamber's specific instructions the same day, thereby definitively resolving the ongoing dispute.

38. The Appeals Chamber is unable to assess the merits of the claims against the Registrar with respect to the fairness or otherwise of the remuneration variation, which led to the refusal of Ms. Turner to accept the assignment offered. The merits of this matter were neither addressed in detail in the appeal nor by the Trial Chamber.[104]

39. In addition, the Appeals Chamber is not convinced that the delay between the genesis of this fee dispute and the Trial Chamber's Order of 24 July 2008 was unreasonable in view of the need to hear the parties and the Registry on this matter. As to the further delay between the Trial Chamber's Order of 24 July 2008 and Ms. Turner's actual assignment on 13 October 2008, the Appeals Chamber considers that the Trial Chamber bears some responsibility. Although the matter had been

[104] In its Decision of 13 October 2008, the Trial Chamber simply noted that the dispute was causing an impasse in Ms. Turner's assignment and ordered the Registrar to assign her in accordance with the terms in 15 May 2008 offer, in the interest of expediting the trial, without addressing the propriety of the change. *See* Decision of 13 October 2008, para. 25.

repeatedly brought to the Trial Chamber's attention by Nshogoza and the Registrar,[105] it failed to clarify the issue of remuneration, which was at the core of the impasse in Ms. Turner's assignment under the legal aid program, until the Order of 13 October 2008. However, the Appeals Chamber recalls that the assignment of counsel is a matter which falls within the responsibility of the Registrar. In this case, despite having changed the terms of her remuneration, the Registry repeatedly offered to assign Ms. Turner as Nshogoza's Lead Counsel under the Tribunal's legal aid program, which Ms. Turner declined.[106] By insisting that he be represented only by Ms. Turner, despite the problems surrounding her appointment, Nshogoza also contributed to the delay, particularly after refusing the assignment of the alternate counsel, Mr. Greciano, on 20 August 2008.

40. More importantly, the Appeals Chamber is not satisfied that the delays in assigning counsel resulted in prejudice to Nshogoza. As noted above, throughout this period Ms. Turner remained his counsel on a *pro bono* basis and actively represented him; as such, he was never without representation.

41. Accordingly, this sub-ground of appeal is dismissed.

E. Conclusion

42. For the foregoing reasons, the Appeals Chamber dismisses Nshogoza's First Ground of Appeal.

[105] Addendum to Motion for Assignment of Counsel, para. 2; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, Notice to Suspend – Extremely Urgent Motion for Assignment of Counsel, 12 June 2008, paras. 1, 2; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, Preliminary Motions pursuant to Rule 72, and Alternative Motion under Rule 73 to Dismiss the Indictment, 25 June 2008, para. 21; Registry Submissions of 1 July 2008, paras. 1-9, 12; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, Defence Response to Registrar Submissions filed 1 July 2008, 7 July 2008, paras. 2-5, 9; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, The Registrar's Submission under Rule 33 (B) to Defence Response to Registrar's Submission filed 1 July 2008, 23 July 2008, paras. 1-12 ("Registry Submissions of 23 July 2008"); *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-2007-91-PT, *Requête pour la commission d'un conseil de défense*, confidential, 5 August 2008, paras. 1-14 ("Request for the Assignment of Counsel"); *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-2007-91-PT, *Requête aux fins de constat d'entrave de justice,* 13 August 2008, paras. 1-13 ("Motion to Find Perversion of Justice"); *The Prosecutor v. Léonidas Nshogoza,* Case No. ICTR-2007-97-PT, Supplementary Defence Submissions to Léonidas Nshogoza's "Requête pour la commission d'un conseil de défense", 19 August 2008, paras. 5-12.

[106] Addendum to Motion for Assignment of Counsel, para. 2; Registry Submissions of 1 July 2008, paras. 4, 12; Registry Submissions of 23 July 2008, paras. 5-7, 9, 12; Request for the Assignment of Counsel, paras. 3-5; Motion to Find Perversion of Justice, paras. 3-5.

IV. ALLEGED ERRORS IN FINDING THAT NSHOGOZA COMMITTED CONTEMPT (GROUNDS 2 AND 3)

43. The Trial Chamber convicted Nshogoza of contempt of the Tribunal for violating the *Kamuhanda* Witness Protection Order by repeatedly meeting with Witnesses GAA and A7/GEX and disclosing their identifying information to Augustin Nyagatare and a notary public in Rwanda.[107] The Trial Chamber also found that Nshogoza discussed the substance of Witness GAA's testimony in the presence of Witness A7/GEX.[108]

44. Witness GAA testified for the Prosecution in the *Kamuhanda* trial in 2001 and implicated Kamuhanda in an attack at Gikomero Parish on 12 April 1994.[109] Witness A7/GEX, who was Witness GAA's neighbour, gave a statement to Prosecution investigators in which she attested to being a refugee at the parish and hearing other persons there say that Kamuhanda led the attack.[110] The Prosecution disclosed her statement and identified her as a potential Prosecution witness to the *Kamuhanda* Defence, but did not call her to testify in the *Kamuhanda* case.[111] In view of this, and the fact that the *Kamuhanda* Witness Protection Order explicitly covers witnesses and "potential Prosecution witnesses", the Trial Chamber concluded that the protective measures extended to both witnesses.[112]

45. The Trial Chamber found that Witness GAA discussed his testimony in the *Kamuhanda* case with Witness A7/GEX and informed her that he had not in fact been present at Gikomero Parish on 12 April 1994.[113] Witness A7/GEX then arranged a meeting between Witness GAA and Nshogoza on Nshogoza's instructions.[114] Witness A7/GEX had previously met with Nshogoza and informed him of Witness GAA's desire to recant his testimony, but the Trial Chamber was unable to conclude who initiated the meeting.[115] However, it did find that at least as of their first meeting, Nshogoza was aware that Witness A7/GEX had given a statement to the Prosecution in the *Kamuhanda* case, and concluded that throughout all of his meetings with her, Nshogoza was recklessly indifferent to whether his actions violated the *Kamuhanda* Witness Protection Order in

[107] Trial Judgement, paras. 186, 188, 189. Defence Witness Augustin Nyagatare personally participated in the killings in Gikomero in 1994. He informed Nshogoza that Kamuhanda was not present during the attacks. *See* Trial Judgement, para. 100.
[108] Trial Judgement, paras. 94, 187.
[109] Trial Judgement, para. 67.
[110] Trial Judgement, paras. 68, 73.
[111] Trial Judgement, paras. 73, 167.
[112] Trial Judgement, paras. 167-170.
[113] Trial Judgement, para. 73.
[114] Trial Judgement, paras. 73, 86.
[115] Trial Judgement, paras. 73, 85-87.

respect of Witness A7/GEX.[116] The Trial Chamber did not accept Nshogoza's mistaken reliance on the advice of the Lead Counsel of the *Kamuhanda* Defence that, having never been called to testify, Witness A7/GEX was not a protected witness.[117]

46. At his initial meeting with Nshogoza, Witness GAA informed Nshogoza that he had not been present at Gikomero Parish on 12 April 1994 and had not seen Kamuhanda commit acts of genocide.[118] The Trial Chamber considered that, before this initial meeting, Nshogoza knew that Witness GAA had provided a statement to the Prosecution in the *Kamuhanda* case and thus was on notice that he may be a protected Prosecution witness.[119] The Trial Chamber accordingly found that Nshogoza was recklessly indifferent to whether his actions violated the *Kamuhanda* Witness Protection Order in respect of Witness GAA.[120]

47. At their second meeting, Witness GAA signed a recantation statement prepared by Nshogoza.[121] For this and all subsequent meetings between Nshogoza and Witness GAA,[122] the Trial Chamber found that Nshogoza knowingly and wilfully violated the *Kamuhanda* Witness Protection Order in relation to this witness.[123] It further found that Witness A7/GEX attended all of the meetings between Witness GAA and Nshogoza, during which time Nshogoza discussed the details of Witness GAA's testimony in the presence of Witness A7/GEX.[124]

48. In March 2004, Nshogoza brought Witness GAA, Witness A7/GEX, and Augustin Nyagatare to a Rwandan notary public's office in Kigali to confirm their statements and have them notarized.[125] Kamuhanda's Defence then submitted these statements to the Appeals Chamber in support of Kamuhanda's application for the admission of additional evidence on appeal.[126] The Trial Chamber considered that, at the very latest, Nshogoza was aware that Witness GAA was a protected Prosecution witness before meeting with him at the notary public's office.[127] It further found that by bringing them to the notary's office, Nshogoza disclosed to Augustin Nyagatare and to the notary Witness GAA's identity as a Prosecution witness in the *Kamuhanda* case and

[116] Trial Judgement, paras. 79, 81, 183, 188.
[117] Trial Judgement, paras. 79-81, 182.
[118] Trial Judgement, para. 74.
[119] Trial Judgement, para. 183.
[120] Trial Judgement, paras. 183, 188.
[121] Trial Judgement, para. 74.
[122] The Trial Chamber could not determine beyond a reasonable doubt the exact number of meetings or the times and dates of those meetings. *See* Trial Judgement, n. 94.
[123] Trial Judgement, para. 188.
[124] Trial Judgement, paras. 73, 94, 187.
[125] Trial Judgement, para. 74.
[126] Trial Judgement, para. 74.
[127] Trial Judgement, para. 85.

Witness A7/GEX's identity as either someone who had given a statement to the Prosecution or as a potential Prosecution witness.[128]

49. In May 2005, Witness GAA testified before the Appeals Chamber and recanted his earlier testimony against Kamuhanda at trial.[129] Witness A7/GEX also appeared before the Appeals Chamber and disavowed her prior statement to the Prosecution.[130] The Appeals Chamber directed the Prosecution to investigate discrepancies in testimony arising from the hearing for possible contempt and false testimony.[131] Witness GAA subsequently pleaded guilty to giving false testimony before the Appeals Chamber and was sentenced to nine months of imprisonment.[132]

A. Alleged Errors Related to the *Actus Reus* (Ground 2)

50. Nshogoza submits that the Trial Chamber erred in law and in fact in finding that he committed the *actus reus* of contempt.[133] He argues that the Trial Chamber erred in setting out and applying the *actus reus* requirements for contempt,[134] considering Witnesses GAA and A7/GEX to be protected witnesses at the relevant time,[135] and considering him to be bound by the *Kamuhanda* Witness Protection Order.[136]

1. Legal Requirements

51. The Trial Chamber found Nshogoza guilty of Count 1 of the Indictment which charged him with committing contempt of the Tribunal in violation of Rules 77(A) and 77(A)(ii) of the Rules for repeatedly meeting with and disclosing protected information of Witnesses GAA and A7/GEX in violation of the *Kamuhanda* Witness Protection Order.[137] It defined the *actus reus* of a violation of Rule 77(A) of the Rules as "interference with the administration of justice".[138] It held that the *actus reus* for violations of Rule 77(A)(ii) of the Rules is "the physical act of disclosing confidential information relating to proceedings before this Tribunal in an objective breach of a court order."[139]

[128] Trial Judgement, para. 186.
[129] Trial Judgement, para. 67.
[130] Trial Judgement, para. 68.
[131] Trial Judgement, para. 69.
[132] Trial Judgement, para. 70.
[133] Notice of Appeal, paras. 14-23; Appeal Brief, paras. 17-50.
[134] Notice of Appeal, paras. 14, 15, 19, 20; Appeal Brief, paras. 19-37.
[135] Notice of Appeal, paras. 16-18, 22; Appeal Brief, paras. 38-48.
[136] Notice of Appeal, para. 21; Appeal Brief, paras. 47, 49.
[137] Trial Judgement, paras. 160, 188, 189.
[138] Trial Judgement, para. 155.
[139] Trial Judgement, para. 157.

The Trial Chamber further noted that "any violation of an order of a Chamber is a sufficient *actus reus* for contempt."[140]

52. Nshogoza claims that the Trial Chamber failed to identify the specific provision of Rule 77 of the Rules which he violated.[141] Furthermore, he argues that the Trial Chamber adopted an unduly broad definition for the *actus reus* of contempt by finding that any violation of an order of a Chamber satisfies this requirement.[142] Nshogoza submits that the *actus reus* of contempt instead demands defiance of a court order "in a way capable of lessening societal respect for the Tribunal"[143] and must meet a certain threshold of gravity, not simply technical non-compliance.[144] In this respect, he points to several cases where Trial Chambers of this Tribunal and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") have determined that conduct of a similar gravity did not amount to contempt.[145]

53. Nshogoza contends that his conduct did not rise to this high threshold because Witnesses GAA and A7/GEX did not fear danger from the *Kamuhanda* Defence team, as evinced by their willingness to meet with him.[146] He also highlights that Witness GAA voluntarily discussed the substance of his testimony in the presence of Witness A7/GEX and that both voluntarily agreed to sign their statements in the presence of a notary and Augustin Nyagatare at the notary's office.[147] Nshogoza further argues that these meetings resulted directly from instructions given to him by the Lead Counsel for the *Kamuhanda* Defence and that he acted in good faith as an investigator attempting to gather evidence advantageous to his client.[148] Nshogoza also complains that the Trial Chamber failed to assess the "minimal gravity" of his "alleged indiscretion" in comparison to, for

[140] Trial Judgement, para. 175.
[141] Appeal Brief, paras. 17, 20; Reply Brief, para. 9.
[142] Appeal Brief, paras. 20-22, 26.
[143] Appeal Brief, para. 32.
[144] Appeal Brief, paras. 29-32, 35, 36; Reply Brief, paras. 13-15.
[145] *See* Appeal Brief, paras. 36, 40, *citing Prosecutor v. Radoslav Brdjanin (Concerning Allegations against Milka Maglov),* Case No. IT-99-36-R77, Decision on Motion for Acquittal pursuant to Rule 98 *bis*, 19 March 2004; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order, 1 March 2004; *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules, 17 January 2003; *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure etc., 16 July 2001; *Prosecutor v. Anto Furund'ija*, Case No. IT-95-17/1-PT, The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, 5 June 1998.
[146] Appeal Brief, para. 33.
[147] Appeal Brief, para. 33.
[148] Appeal Brief, paras. 23, 34.

example, the "scandalous public revelation" that the Tribunal's Witness and Victims Support Section has transmitted protected information to Rwandan public officials since 2001.[149]

54. The Prosecution responds that the Trial Chamber correctly identified the legal basis for the conviction and properly assessed the *actus reus* of contempt in this case.[150]

55. The Appeals Chamber finds no merit in Nshogoza's contention that the Trial Chamber failed to identify the relevant basis in the Rules for his conviction. In its introduction to Count 1, the Trial Chamber clearly identified Rules 77(A) and 77(A)(ii) of the Rules as the legal basis of the charge for which he was found guilty.[151] As such, the fact that the Trial Chamber did not refer to them again in its ultimate conclusion on Count 1 does not amount to an error.

56. The Appeals Chamber is equally unconvinced by Nshogoza's argument that the *actus reus* of contempt requires a certain threshold of gravity. As the ICTY Appeals Chamber has stated, "[a]ny defiance of an order of a Chamber *per se* interferes with the administration of justice for the purposes of a conviction for contempt."[152] No additional proof of harm to the Tribunal's administration of justice is required.[153] The Appeals Chamber is not convinced that the *defiance* of a Chamber's order conveys any different connotation than a knowing and wilful *violation* of one.[154]

57. 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.[155] Bearing this in mind, the Appeals Chamber considers that the various statements by Trial Chambers, cited by Nshogoza, which take into account the minimal gravity surrounding a violation of a Chamber's order should be understood, not as a finding that the conduct was not contempt, but as an exercise of the discretion of the Chamber not to initiate proceedings in such circumstances. The fact that other persons might also have engaged in similar conduct is not a defence.

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[149] Appeal Brief, para. 24.
[150] Response Brief, paras. 43-45, 50-52.
[151] Trial Judgement, para. 160.
[152] *Prosecutor v. Josip Jovi}*, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007, para. 30 ("*Jovi}* Appeal Judgement"). *See also Prosecutor v. Ivica Marijači} and Markica Rebi}*, Case No. IT-95-14-R.77.2-A, Judgement, 27 September 2006, para. 44 ("The language of Rule 77 shows that a violation of a court order as such constitutes an interference with the International Tribunal's administration of justice. […] It has already been established in the jurisprudence that any defiance of an order of the court interferes with the administration of justice.") ("*Marijači} and Rebi}* Appeal Judgement").
[153] *Jovi}* Appeal Judgement, para. 30.
[154] *Jovi}* Appeal Judgement, para. 30 (using "defiance" and "violation" interchangeably in describing the *actus reus* of a violation of Rule 77(A) of the Rules). *See also Marijači} and Rebi}* Appeal Judgement, para. 44.
[155] *Jovi}* Appeal Judgement, para. 41 (noting that the Trial Chamber correctly considered in mitigation the fact that some of the witness protection measures which were violated were unnecessary). *Cf. also Blagojevi} and Joki}* Appeal Judgement, para. 202; *Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 269.

58. Consequently, Nshogoza has not demonstrated that the Trial Chamber erred in finding that he committed the *actus reus* of contempt by holding unauthorized meetings with Witnesses GAA and A7/GEX and disclosing their identifying information to third parties, acts which were prohibited by the *Kamuhanda* Witness Protection Order.

59. Accordingly, this sub-ground of appeal is dismissed.

2. Status as Protected Witnesses

60. Nshogoza argues that the Trial Chamber erred in law and in fact in finding that Witnesses GAA and A7/GEX were protected witnesses at the relevant time when Nshogoza was in contact with them.[156] He disputes the Trial Chamber's conclusion that Witness A7/GEX could be protected as a *potential* Prosecution witness even after the completion of the trial.[157] Nshogoza argues that maintaining such a position creates a stifling effect on Defence investigations as it imposes a cumbersome process on the Defence to consult with the Prosecution on whether a given individual is a potential Prosecution witness and, if so, request the relevant Chamber to vary protective measures.[158]

61. Nshogoza further notes that paragraph 1 of the *Kamuhanda* Witness Protection Order does not expressly stipulate that protection is sought for "potential" Prosecution witnesses who reside in Rwanda; the order thus does not, in his view, apply to Witness A7/GEX.[159] Nshogoza argues that to the extent that there is any ambiguity in this respect, he should benefit from the most favourable interpretation.[160]

62. In addition, Nshogoza contends that Witnesses GAA and A7/GEX implicitly waived any witness protection measures by initiating contact with him.[161] According to Nshogoza, the Trial Chamber adopted an impractical and unreasonable requirement that protected witnesses who wish to recant must inform the Prosecution that they lied and then go before the relevant Chamber and formally request a waiver before contacting the Defence.[162] Finally, Nshogoza submits that the Appeals Chamber's silence on the issue of protective measures in its decision allowing the admission of additional evidence of Witnesses GAA and A7/GEX effectively amended the

[156] Appeal Brief, paras. 38-48.
[157] Appeal Brief, para. 39.
[158] Appeal Brief, para. 40.
[159] Appeal Brief, paras. 48, 49.
[160] Reply Brief, para. 20.
[161] Appeal Brief, paras. 41-46, 49; Reply Brief, paras. 18, 21.
[162] Appeal Brief, para. 43.

Kamuhanda Witness Protection Order and implicitly recognized that these witnesses waived protection.[163]

63. The Prosecution responds that the Trial Chamber correctly determined that Witnesses GAA and A7/GEX were protected witnesses.[164]

64. The Appeals Chamber finds no merit in Nshogoza's contention that Witness A7/GEX, as a potential Prosecution witness residing in Rwanda, was not covered by the *Kamuhanda* Witness Protection Order. Although paragraph 1 of the Order does not include the term "potential" as a qualifier for "Prosecution witnesses who reside in Rwanda" in the summary of the Prosecution's submissions,[165] a reading of the Prosecution's actual submissions indicates that the omission was inadvertent.[166] Paragraph 2 of the order which sets out the specific protection measures sought by the Prosecution correctly refers to all three categories of persons as "potential Prosecution witnesses."[167] The term "potential Prosecution witnesses" is also clearly used in the relevant provision prohibiting the Defence from contacting witnesses without authorization.[168] The protection of potential witnesses in Rwanda equally follows from the reference in the order to the risk to "potential Prosecution witnesses" based on its review of the "security situation prevalent *in Rwanda* and neighboring countries".[169] As such, the Appeals Chamber considers that the Trial Chamber properly concluded that the *Kamuhanda* Witness Protection Order covers potential Prosecution witnesses who reside in Rwanda.

65. Furthermore, the fact that the trial had concluded or that the protected witnesses may have approached Nshogoza did not in any way terminate their protected status. Rule 75(F) of the Rules

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[163] Appeal Brief, para. 46; Reply Brief, para. 19.
[164] Response Brief, paras. 53-62, 66.
[165] *Kamuhanda* Witness Protection Order, para. 1 ("The Prosecution argues that the persons for whom protection is sought fall into the following three categories: victims and Prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential Prosecution witnesses who are in other countries in Africa and who have not affirmatively waived this right; victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted such protective measures.").
[166] A review of the underlying witness protection motion reflects that the Prosecution equally referred to witnesses residing in Rwanda as "potential Prosecution Witnesses". *See The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-I, Prosecutor's Motion for the Protection of Witnesses, 9 March 2000, para. 2.
[167] *Kamuhanda* Witness Protection Order, para. 2 ("For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue the following orders articulated at point 3 of its Motion: […].").
[168] *Kamuhanda* Witness Protection Order, para. 2(i) ("Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or Judge thereof, Ғ…ǧ that the Prosecution shall undertake all necessary arrangements to facilitate such interview; […]."). The Appeals Chamber notes that the French original version places the requirements at para. 2(i) on "*la Défense* ***et*** *l'Accusé*" ["the Defence **and** the accused"] (emphasis added), but considers this difference in translation to be immaterial in the present case. *See The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-I, *Décision relative à la requête du Procureur en prescription de mesures de protection en faveur des témoins,* signed 7 July 2000, filed 10 July 2000.

states that protective measures once ordered continue to have effect in any proceeding before the Tribunal until rescinded, varied, or augmented.[170] In addition, the *Kamuhanda* Witness Protection Order clearly states that "the [protected] witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely."[171] This measure was added by the Trial Chamber *proprio motu* and was not challenged by the *Kamuhanda* Defence.

66. Although in some circumstances such a measure might be considered onerous, the Appeals Chamber is unable to determine that it was unreasonable or unjustified as a means of ensuring that any waiver is fully informed and voluntary given the information submitted by the Prosecution to the Trial Chamber at the time and the prevailing security climate. Furthermore, Nshogoza has failed to demonstrate why, in the particular circumstances of this case, it would have been impractical or particularly onerous to seek a variation of the *Kamuhanda* Witness Protection Order before proceeding with further contact with the protected witnesses. Indeed, at the relevant time of the contact, this case remained before either the Trial Chamber or the Appeals Chamber and thus an urgent, and even *ex parte*, application could have been made.[172]

67. The Appeals Chamber recognizes that such measures might stifle effective Defence investigations where the Prosecution qualifies an excessive number of individuals as potential Prosecution witnesses, in particular without even ascertaining their willingness to appear. However, the Appeals Chamber is not satisfied that this was the case here. Witness A7/GEX was clearly identified to the *Kamuhanda* Defence as a potential witness willing to appear for the Prosecution on 26 March 2001 shortly before the trial.[173] Nshogoza's contention that the witness protection measures for Witness A7/GEX should have lapsed at the conclusion of the trial fails to appreciate the Tribunal's interest in protecting individuals who have agreed to cooperate and provide statements on a confidential basis. Potential witnesses who did not eventually testify may face

[169] *Kamuhanda* Witness Protection Order, para. 6 (emphasis added).
[170] *See also Jovi}* Appeal Judgement, para. 30 ("[A]n order remains in force until a Chamber decides otherwise.").
[171] *Kamuhanda* Witness Protection Order, para. 12. *See also Kamuhanda* Witness Protection Order, p. 6 ("MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.").
[172] Nshogoza brought Witnesses GAA and A7/GEX to the notary along with Augustin Nyagatare in March 2004. *See* Trial Judgement, para. 74. At the time, the *Kamuhanda* case was pending on appeal. The Trial Judgement does not specify when the earlier meetings occurred. However, the Trial Chamber in the *Kamuhanda* case was actively seized of this case until it delivered its Judgement on 22 January 2004. *See Kamuhanda* Appeal Judgement, paras. 1, 440.
[173] Trial Judgement, para. 161. A review of the specific disclosure in the *Kamuhanda* case reflects that Witness A7/GEX was named among eight other witnesses in a confidential disclosure alluding to the *Kamuhanda* Witness Protection Order. The cover memo clearly indicates that the unredacted statements are "highly confidential" and the cover page of Witness A7/GEX's statement is also marked in large bold type with the word "confidential". *See The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-I, Interoffice Memorandum, Subject: Disclosure of unredacted witness statements in the case *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-54-I [*sic*], dated 26 March 2001, paras. 1, 3, 5, p. 514.

similar risks as those who did, for instance by virtue of their cooperation with either party. Those who decided not to testify out of fear might also require continued anonymity, depending on the circumstances. In any case, even if Nshogoza were correct that the prohibitions on contact with this particular witness were no longer applicable, it cannot reasonably be argued that he had the right to disclose information, which had been consistently treated as confidential, to third parties without official sanction from a Chamber.

68. Finally, the Appeals Chamber's decision to hear additional evidence from these witnesses in no way sanctioned Nshogoza's conduct.[174] In this respect, the *Kamuhanda* Appeals Chamber recognized the possibility that Witness GAA's statement may have been procured by questionable means which could ultimately affect the credibility and reliability of the evidence, but determined it was nonetheless admissible at that stage.[175]

69. Accordingly, this sub-ground of appeal is dismissed.

3. Interpretation of the *Kamuhanda* Witness Protection Order

70. Paragraph 2(i) of the *Kamuhanda* Witness Protection Order reads as follows:

> Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring when such interview has been granted by the Chamber or Judge thereof, Ғ…ğ that the Prosecution shall undertake all necessary arrangements to facilitate such interview;

71. Nshogoza submits that the Trial Chamber erred in finding that he was bound by this provision since it imposed an obligation only on Kamuhanda and on his Defence Counsel to make a written request if they wished to meet with a protected witness.[176] Nshogoza argues that to the extent that there is any ambiguity in this respect, he should benefit from the most favourable interpretation.[177]

72. The Prosecution responds that the Trial Chamber correctly determined that Nshogoza was bound by the *Kamuhanda* Witness Protection Order.[178]

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[174] *See Haraqija and Morina* Appeal Judgement, paras. 24-28 (holding that admissibility of evidence is a separate consideration from the methods by which it was obtained).
[175] *Jean de Dieu Kamuhanda v. The Prosecutor,* Case No. ICTR-99-54A-A, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, confidential, 12 April 2005, para. 48.
[176] Appeal Brief, paras. 47, 49.
[177] Reply Brief, para. 20.
[178] Response Brief, paras. 63-65.

73. Nshogoza's argument fails to appreciate that, as a member of the Defence team, he was meeting with Witnesses GAA and A7/GEX *on behalf of* Kamuhanda and the Lead Counsel. As such, the Appeals Chamber is not convinced by Nshogoza's restrictive reading of paragraph 2(i) of the order, which would defeat the entire object and purpose of the protective measure.[179] Although the provision itself does not afford Nshogoza the standing to personally seek a variation of the protective measures, he was obligated to refrain from meeting with protected witnesses or to terminate contact with an individual upon learning of their protected status until the Lead Counsel in the *Kamuhanda* case obtained the appropriate authorization for the meeting. Consequently, Nshogoza has failed to identify any error on the part of the Trial Chamber in interpreting paragraph 2(i) of the *Kamuhanda* Witness Protection Order as barring his contact with Witnesses GAA and A7/GEX.

74. Accordingly, this sub-ground of appeal is dismissed.

4. Conclusion

75. For the foregoing reasons, the Appeals Chamber dismisses Nshogoza's Second Ground of Appeal.

B. Alleged Errors Related to the *Mens Rea* (Ground 3)

76. Nshogoza submits that the Trial Chamber erred in law and in fact in finding that he possessed the *mens rea* of contempt.[180] He argues that the Trial Chamber erred in stating and applying the *mens rea* requirements for contempt,[181] failing to consider that the witnesses initiated contact with him and that he acted on the Lead Counsel's instructions,[182] and attributing Lead Counsel's knowledge of the *Kamuhanda* Witness Protection Order to him.[183]

[179] *Cf. Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008, para. 11 ("[T]he Appeals Chamber considers that the orders of protective measures apply to all persons coming into possession of protected information. This is necessary, in particular, in order to comply with the Tribunal's obligation pursuant to Article 21 of the Statute to protect witnesses on whose behalf protective measures have been ordered. Such orders would be meaningless if third parties were allowed to disclose confidential information on the sole ground that the orders were not expressly directed to them.").
[180] Notice of Appeal, paras. 24-29; Appeal Brief, paras. 51-57.
[181] Notice of Appeal, paras. 24, 25; Appeal Brief, paras. 51-53.
[182] Notice of Appeal, para. 26; Appeal Brief, para. 55.
[183] Notice of Appeal, para. 28; Appeal Brief, paras. 27, 28, 56.

1. Legal Requirements

77. The Trial Chamber found that the *mens rea* for a violation of Rule 77(A) of the Rules is "the knowledge and will to interfere [with the administration of justice]."[184] In view of the Trial Chamber's conclusion that any violation of a Chamber's order interferes with the administration of justice, it further held that "any knowing and wilful conduct in violation of a Chamber's order meets the requisite *mens rea* for contempt".[185] With respect to a violation of Rule 77(A)(ii) of the Rules, the Trial Chamber stated that the *mens rea* is "knowledge by the accused that his disclosure of information was done in violation of a court order."[186]

78. Nshogoza submits that the Trial Chamber erred in articulating the legal standard for the *mens rea* of contempt by departing from the appropriate standard, "knowing and wilful *interferences with the administration of justice*", and by erroneously applying a different test, "knowing and wilful *violations of protective measures ordered by the Tribunal*".[187] He claims that the standard applied by the Trial Chamber precludes a defence that non-compliance is reasonably justified.[188]

79. The Prosecution responds that the Trial Chamber correctly stated the *mens rea* requirements for contempt.[189]

80. As discussed in connection with the Second Ground of Appeal, the Trial Chamber did not err in determining that any violation of a court order interferes with the administration of justice.[190] Consequently, it correctly stated that the *mens rea* requirement for contempt under Rule 77(A) of the Rules is satisfied by proof of "any knowing and wilful conduct in violation of a Chamber's order".[191]

81. Accordingly, this sub-ground of appeal is dismissed.

2. Failure to Consider Evidence

82. Nshogoza submits that the Trial Chamber failed to consider or properly weigh evidence demonstrating that the witnesses initiated contact with him and that he was acting on the

[184] Trial Judgement, para. 155.
[185] Trial Judgement, para. 179.
[186] Trial Judgement, para. 157.
[187] Appeal Brief, paras. 51-53 (emphasis in original). *See also* Reply Brief, para. 22.
[188] Appeal Brief, para. 52; Reply Brief, para. 22.
[189] Response Brief, paras. 67, 68.
[190] *See supra* Section IV.A.1 (Ground 2: Alleged Errors Relating to the *Actus Reus*: Legal Requirements).
[191] *See* Trial Judgement, para. 179.

instructions of the Lead Counsel in the *Kamuhanda* case in meeting with them and having their statements notarized.[192] Furthermore, according to Nshogoza, if he had intended to commit a crime, then it would have been "palpably unwise" for him to bring witnesses to the offices of the Rwandan notary, located within the Rwandan Ministry of Justice, in order to authenticate their statements.[193] He claims that this evidence, when properly considered, shows that he did not have the requisite *mens rea*.[194]

83. The Prosecution responds that the Trial Chamber correctly determined that Nshogoza had the requisite *mens rea* for contempt.[195]

84. Contrary to Nshogoza's submissions, the Trial Chamber did consider whether Nshogoza initiated the meetings with Witnesses GAA and A7/GEX and ultimately concluded that it has not been proven beyond reasonable doubt that it was Nshogoza who initiated contact.[196] Therefore, it follows that the Trial Chamber accepted that the witnesses may have initiated contact with him. In this respect, the Trial Chamber noted that these circumstances would have been relevant to his *mens rea* if Nshogoza terminated contact with the witnesses upon learning of their status as protected witnesses.[197] The Appeals Chamber can identify no error in this approach. Nshogoza fails to appreciate the repeated nature of his conduct, continuing to meet with the witnesses even when he knew their protected status.

85. Furthermore, the Trial Chamber also fully considered the fact that Nshogoza was acting on the instructions and advice of the Lead Counsel.[198] However, the fact that he was following orders of a superior has no bearing on whether he possessed the requisite *mens rea,*[199] which, as stated above, is simply the knowing and wilful violation of a court order. Consequently, Nshogoza has failed to demonstrate any error in the Trial Chamber's findings relating to the *mens rea*.

86. Accordingly, this sub-ground of appeal is dismissed.

3. Knowledge of the *Kamuhanda* Witness Protection Order

87. The Trial Chamber found that Nshogoza was aware of the *Kamuhanda* Witness Protection Order at the time of his contact with Witnesses GAA and A7/GEX based on his legal training and

[192] Appeal Brief, para. 55.
[193] Appeal Brief, para. 25.
[194] Appeal Brief, para. 55.
[195] Response Brief, paras. 69-71.
[196] Trial Judgement, paras. 87, 183.
[197] Trial Judgement, para. 183.
[198] Trial Judgement, paras. 180-182.

two years of work as an investigator on the *Kamuhanda* case.[200] It further noted that he acknowledged that a Prosecution witness whose identity had been disclosed to the Defence could not be contacted by the Defence.[201]

88. Nshogoza submits that the Trial Chamber erroneously attributed the Lead Counsel's knowledge of the *Kamuhanda* Witness Protection Order to him and thus unreasonably determined that he knowingly and wilfully defied it.[202] Nshogoza contends that the Trial Chamber failed to appreciate that his legal training was based on Rwandan law and that his work as an investigator did not require him to become acquainted with legal documents.[203] Furthermore, he emphasizes that "he first set eyes on the [*Kamuhanda* Witness Protection Order] when he was in detention in Arusha" and that he believed that "the Defence could contact a prosecution witness whose identity had not been disclosed."[204]

89. The Prosecution responds that, as an experienced Defence investigator, Nshogoza must have been aware of the procedure for contacting protected witnesses.[205]

90. The Appeals Chamber finds that Nshogoza did not show that no reasonable trier of fact could have concluded that he was aware of the *Kamuhanda* Witness Protection Order when he had contact with the witnesses. As an investigator, Nshogoza's primary task was identifying and meeting with witnesses, where knowledge of witness protection measures is of central importance. Given his approximately two years of experience in this work with the *Kamuhanda* Defence as well as his general legal training at the time of the relevant events, factors which the Trial Chamber took into account,[206] it was reasonable to expect that Nshogoza would have been apprised of how to deal with protected witnesses in the *Kamuhanda* case.

91. Accordingly, this sub-ground of appeal is dismissed.

4. Conclusion

92. For the foregoing reasons, the Appeals Chamber dismisses Nshogoza's Third Ground of Appeal.

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[199] *Cf. Haraqija and Morina* Appeal Judgement, para. 53.
[200] Trial Judgement, para. 78.
[201] Trial Judgement, para. 78.
[202] Appeal Brief, para. 56; Reply Brief, para. 25.
[203] Appeal Brief, para. 27; Reply Brief, para. 11.
[204] Appeal Brief, para. 28. *See also* Reply Brief, para. 11.
[205] Response Brief, paras. 46-49, 72, 73.
[206] Trial Judgement, para. 78.

V. ALLEGED ERRORS IN SENTENCING (GROUND 4)

93. Having found Nshogoza guilty of contempt, the Trial Chamber sentenced him to 10 months of imprisonment.[207] Nshogoza argues that the Trial Chamber erred in assessing the gravity of his offence and the aggravating and mitigating factors relating to his conduct.[208] Nshogoza requests that the Appeals Chamber review and reduce his sentence.[209]

94. The Appeals Chamber recalls that Trial Chambers are vested with broad discretion in determining appropriate sentences.[210] In general, the Appeals Chamber will not revise a sentence unless the appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[211]

A. Gravity of the Offence

95. With respect to the gravity of the offence, the Trial Chamber first noted the sentencing practice of the Tribunal and that of the ICTY in contempt cases.[212] The Trial Chamber then found that "[Nshogoza'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."[213] The Trial Chamber considered that his breach of the protective measures "undermined the authority of the *Kamuhanda* Trial Chamber, as well as confidence in the effectiveness of protective measures, and the administration of justice."[214] In addition to defying the authority of the Tribunal, the Trial Chamber concluded that it "may also have the effect of dissuading witnesses from testifying before it."[215] To deter this type of conduct and to express its disapproval of it, the Trial Chamber determined that a custodial sentence was merited.[216]

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[207] Trial Judgement, para. 233.
[208] Appeal Brief, paras. 58-63.
[209] Notice of Appeal, p. 12; Appeal Brief, p. 29; Reply Brief, p. 12. Nshogoza also submits in his Notice of Appeal that his sentence was excessive. *See* Notice of Appeal, para. 32. He did not develop this point in his Appeal Brief. The Prosecution submits that this argument has therefore been abandoned. *See* Response Brief, para. 75. In his Reply Brief, Nshogoza claims that he did not abandon the argument, but did not develop it in view of the word limitations in his Appeal Brief. *See* Reply Brief, para. 28. The Appeals Chamber dismisses this argument given the cursory submissions in the Notice of Appeal as well as Nshogoza's failure to address it in his Appeal Brief. *See supra* Section II (Standards of Appellate Review).
[210] *Haraqija and Morina* Appeal Judgement, para. 71. *See also François Karera v. The Prosecutor,* Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 385 ("*Karera* Appeal Judgement").
[211] *Haraqija and Morina* Appeal Judgement, para. 71. *See also Karera* Appeal Judgement, para. 385.
[212] Trial Judgement, para. 217.
[213] Trial Judgement, para. 219.
[214] Trial Judgement, para. 219.
[215] Trial Judgement, para. 219.
[216] Trial Judgement, para. 219.

96. Nshogoza submits that the Trial Chamber committed a number of errors in assessing the gravity of his offence and, thus, in concluding that a custodial sentence was merited.[217] In particular, Nshogoza argues that the evidence suggesting that Witnesses GAA and A7/GEX initiated contact with him and that he acted on the instructions of the Lead Counsel runs contrary to the Trial Chamber's finding that he contacted the protected witnesses on his own terms.[218] In his view, the evidence that it was they who initiated contact with him, as well as the fact that they were recanting a prior statement and testimony, also undermine the Trial Chamber's determination that his offence would dissuade witnesses from testifying.[219] In this respect, he further notes that the Trial Chamber made no findings that Witnesses GAA and A7/GEX lost confidence in their protective measures or that other witnesses were dissuaded from appearing before the Tribunal.[220] Furthermore, he challenges the Trial Chamber's finding that contempt as such is a grave crime while at the same time declining to consider whether his specific conduct was grave.[221] Finally, he claims that the Trial Chamber erred in considering its own disapproval of Nshogoza's conduct as a factor to be taken into account in sentencing.[222]

97. The Prosecution responds that Nshogoza has failed to demonstrate either that the Trial Chamber's finding on his conduct was erroneous or that it occasioned a miscarriage of justice.[223] It submits that breaching protective measures is a serious offence given the nature of the crimes under the Tribunal's jurisdiction and the reliance placed upon oral evidence.[224] The Prosecution argues that Nshogoza's particular conduct was grave because it was "premeditated, repetitive and included the knowing and wilful disclosure of protected information to third parties."[225] It also contends that the Trial Chamber was not required to assess whether Witnesses A7/GEX or GAA had lost confidence in the effectiveness of their protective measures in order to justify the importance of deterring would-be contemnors from violating protective measures.[226]

98. The Appeals Chamber recalls that the gravity of the offence is the primary consideration to be taken into account in imposing a sentence.[227] The gravity of a crime does not refer only to a

[217] Appeal Brief, paras. 58-62.
[218] Appeal Brief, para. 59; Reply Brief, para. 26.
[219] Appeal Brief, para. 61.
[220] Appeal Brief, para. 61.
[221] Appeal Brief, para. 60; Reply Brief, para. 26.
[222] Appeal Brief, para. 62.
[223] Response Brief, para. 77.
[224] Response Brief, para. 81.
[225] Response Brief, para. 81.
[226] Response Brief, para. 83.
[227] *See Ferdinand Nahimana et al. v. The Prosecutor,* Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 1038. *See also Haraqija and Morina* Appeal Judgement, para. 81; *Mikaeli Muhimana v. The Prosecutor*, Case No.

crime's objective gravity, but also to the particular circumstances surrounding the case and the form and degree of the accused's participation in the crime.[228]

99. The Appeals Chamber considers, Judges Robinson and Güney dissenting, that the Trial Chamber properly considered the particular circumstances surrounding Nshogoza's specific conduct. The Trial Chamber did not merely focus on contempt as an inherently grave offence, but addressed the gravity of the particular way in which Nshogoza committed contempt. It found that, by breaching the *Kamuhanda* Protective Measures Order, Nshogoza "undermined the authority of the *Kamuhanda* Trial Chamber, as well as confidence in the effectiveness of protective measures, and the administration of justice."[229] The Trial Chamber did not merely focus on Nshogoza's defiance of the authority of the Tribunal, but considered more specifically that his conduct "may also have the effect of dissuading witnesses from testifying before it."[230] The Appeals Chamber does not deem that it was necessary for the Trial Chamber to have found that Witnesses GAA and A7/GEX lost confidence in their protective measures or that other witnesses were dissuaded from appearing before the Tribunal for it to consider that a breach of a protective measures order may have the effect of dissuading witnesses from testifying before the Tribunal.

100. The Trial Chamber further found that Nshogoza's particular conduct "amounted to a determination that he would contact protected witnesses on his own conditions".[231] The Appeals Chamber does not consider this finding to imply that Nshogoza initiated contact with the witnesses. Rather, the Trial Chamber specified that its finding related to "the circumstances in which he *met* with the protected witnesses".[232] Such meetings would have occurred after contact was initiated, or following Lead Counsel's general instructions to meet with the witnesses and have their statements notarized. As such, the Trial Chamber's finding does not contradict evidence suggesting that Witnesses A7/GEX and GAA initiated contact with Nshogoza, or the Trial Chamber's finding that he was acting on Lead Counsel's instructions.

ICTR-95-1B-A, Judgement, 21 May 2007, para. 234 ("*Muhimana* Appeal Judgement"); *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 442 ("*Gali}* Appeal Judgement").

[228] *Cf. Prosecutor v. Mile Mrk{i} and Veselin [ljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009, para. 375. *See also Gali}* Appeal Judgement, paras. 442, 443 ("No difference in sentence can be inferred from the category in which a crime falls, as the level of gravity in any particular case must be fixed by reference to the circumstances of the case. […] Again, the gravity of a crime must be determined by reference to the particular circumstances of the case and the form and degree of the accused's participation in the crime."); *Muhimana* Appeal Judgement, para. 234.

[229] Trial Judgement, para. 219.

[230] Trial Judgement, para. 219.

[231] Trial Judgement, para. 219.

[232] Trial Judgement, para. 219 (emphasis added).

101. Finally, Nshogoza does not demonstrate how the Trial Chamber erred in imposing a custodial sentence to express its disapproval of his conduct. Such considerations are well within the Trial Chamber's discretion to tailor appropriate sentences to individual cases.

102. As such, the Appeals Chamber finds, Judges Robinson and Güney dissenting, that the Trial Chamber did not err in assessing the gravity of Nshogoza's offence.

B. Aggravating Factors

103. In aggravation, the Trial Chamber noted Nshogoza's continued disregard for protective measures by repeatedly meeting with Witnesses GAA and A7/GEX and by meeting with them in the presence of third parties.[233] It also noted the fact that he acted on instructions from the Lead Counsel of the *Kamuhanda* Defence, and with the motive of earning fees.[234] In addition, the Trial Chamber took into account as an aggravating circumstance the fact that Nshogoza was an experienced Defence investigator, who stood in a relationship of trust with the Tribunal, at the time of the incident.[235] Finally, it also took into account his submission of a false claim for fees in the *Kamuhanda* case.[236]

104. Nshogoza submits that the Trial Chamber failed to provide a reasoned analysis explaining why acting on the instructions of the Lead Counsel with the motive to earn fees constitutes an aggravating circumstance in sentencing.[237] The Prosecution responds that the Trial Chamber did not find these facts as such to be aggravating factors, but rather relied on them to further support its finding that Nshogoza's legal background and experience as a Defence investigator were aggravating factors.[238]

105. The Appeals Chamber considers, Judges Robinson and Güney dissenting, that Nshogoza misrepresents the Trial Chamber's findings, which merely "noted" that he acted under Lead Counsel's instructions and with the motive of earning fees. In contrast, the Trial Chamber made explicit those factors which it considered to be aggravating,[239] including the fact that he had studied law and was an experienced Defence investigator who "stood in a relationship of trust" with the Tribunal.[240] In the Appeals Chamber's view, the Trial Chamber "noted" the impugned factors as a

[233] Trial Judgement, para. 222.
[234] Trial Judgement, para. 222.
[235] Trial Judgement, paras. 223, 224.
[236] Trial Judgement, para. 225.
[237] Appeal Brief, para. 63.
[238] Response Brief, para. 87.
[239] Trial Judgement, paras. 222-225.
[240] Trial Judgement, para. 223.

means of introducing and buttressing those which it subsequently and explicitly found to have aggravated Nshogoza's guilt.

106. As such, the Appeals Chamber finds, Judges Robinson and Güney dissenting, that Nshogoza has failed to demonstrate any error in the Trial Chamber's assessment of the aggravating factors surrounding his offence.

C. Mitigating Factors

107. In mitigation, the Trial Chamber noted Nshogoza's family circumstances, lack of prior criminal record, and voluntary surrender to the Tribunal.[241] The Trial Chamber also noted the evidence of Nshogoza's good character provided by former Lead Counsel for Kamuhanda, Ms. Aicha Condé, as well as by a long-term acquaintance, Fulgence Seminega, but accorded it limited weight.[242]

108. Nshogoza submits that the Trial Chamber erred in failing to accord appropriate weight to his mitigating evidence.[243] The Prosecution responds that the Trial Chamber properly considered this evidence.[244]

109. A review of the Trial Judgement reflects that the Trial Chamber clearly explained why it accorded limited weight to Nshogoza's character evidence. The Trial Chamber took Witness Condé's position as his superior into account, as well as her statement that she saw nothing wrong with Nshogoza contacting protected witnesses or submitting a false claim of expenses to the Tribunal.[245] With respect to Fulgence Seminega, the Trial Chamber noted that the only evidence of good character he provided was that he had known Nshogoza for 10 years.[246]

110. Accordingly, the Appeals Chamber finds that Nshogoza has not demonstrated that the Trial Chamber committed a discernible error in its assessment of the mitigating factors.

D. Conclusion

111. For the foregoing reasons, the Appeals Chamber, Judges Robinson and Güney dissenting, finds no discernible error in the Trial Chamber's assessment of the gravity of Nshogoza's offence or

[241] Trial Judgement, para. 229.
[242] Trial Judgement, paras. 230, 231.
[243] Appeal Brief, para. 63; Reply Brief, para. 27.
[244] Response Brief, para. 89.
[245] Trial Judgement, para. 230.
[246] Trial Judgement, para. 231.

in considering the relevant aggravating and mitigating factors. Nshogoza's Fourth Ground of Appeal is accordingly dismissed.

VI. DISPOSITION

112. For the foregoing reasons, the Appeals Chamber,

PURSUANT to Article 24 of the Statute and Rules 77, 117, and 118 of the Rules;

NOTING the submissions of the parties;

DISMISSES the First, Second, and Third Grounds of Appeal;

DISMISSES, Judges Robinson and Güney dissenting, the Fourth Ground of Appeal; and

AFFIRMS Nshogoza's conviction for contempt of the Tribunal under Count 1 of the Indictment and, Judges Robinson and Güney dissenting, the sentence imposed by the Trial Chamber.

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

Judge Patrick Robinson Presiding	Judge Mehmet Güney	Judge Fausto Pocar

Judge Liu Daqun	Judge Andrésia Vaz

Judge Robinson appends a partially dissenting opinion.

Judge Güney appends a partially dissenting opinion.

Done this fifteenth day of March 2010, at The Hague, The Netherlands.

[Seal of the Tribunal]

VII. PARTIALLY DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. I respectfully dissent from the decision of the majority that the Trial Chamber did not commit any error in determining the gravity of Nshogoza's offence and the aggravating factors.[1]

Gravity of the Offence

2. The majority concluded that the Trial Chamber properly considered the particular circumstances surrounding Nshogoza's specific conduct when determining the gravity of the offence. It is with this conclusion that I respectfully disagree. Other than finding that Nshogoza's particular conduct "amounted to a determination that he would contact protected witnesses on his own conditions",[2] the Trial Chamber focused exclusively on the inherent gravity of contempt in assessing the gravity of Nshogoza's offence.[3] In my view, it did not properly consider the particular circumstances surrounding Nshogoza's violation of the *Kamuhanda* Witness Protection Order. The Trial Chamber also failed to consider any factors tending to reduce the gravity of Nshogoza's offence, for instance, the fact that Nshogoza was acting on Lead Counsel's instructions, that the protected witnesses had previously discussed their evidence, that Witness A7/GEX initiated contact, and that the scope of the disclosure was limited.

3. Taking into account these circumstances, it is apparent to me that the Trial Chamber's analysis of the gravity of Nshogoza's particular offence was incomplete and failed to properly reflect the actual circumstances surrounding Nshogoza's violation of the *Kamuhanda* Witness Protection Order. Accordingly, the Trial Chamber erred in assessing the gravity of Nshogoza's crime by failing to assess the specific surrounding circumstances.

Aggravating Factors

4. The majority has found that Nshogoza has failed to demonstrate any error in the Trial Chamber's assessment of the aggravating factors surrounding his offence. The majority considers that the Trial Chamber merely "noted" that Nshogoza acted under Lead Counsel's instructions and with the motive of earning fees and made explicit those factors it considered to be aggravating,[4] including the fact that Nshogoza had studied law and was an experienced Defence investigator who

[1] I agree with the majority that the Trial Chamber did not err in the assessment of the mitigating factors.
[2] Trial Judgement, para. 219.
[3] Trial Judgement, paras. 217-219.
[4] Trial Judgement, paras. 222-225.

"stood in a relationship of trust" with the Tribunal.[5] In the view of the majority, the Trial Chamber dealt with these factors as a means of introducing and buttressing those which it subsequently and explicitly found to have aggravated Nshogoza's guilt. Respectfully, it is difficult for me to concur with this reading of the Trial Judgement. There is no reasonable explanation for the Trial Chamber noting these factors other than that it considered them in aggravation. Proceeding thus, it was erroneous for the Trial Chamber to consider Nshogoza's acting upon the instructions of Lead Counsel as an aggravating circumstance, regardless of whether there was any separate financial motive.

5. I therefore find that the Trial Chamber considered as an aggravating circumstance the fact that Nshogoza was acting upon the instructions of Lead Counsel and, in doing so, committed a discernible error.

Impact of Errors upon Sentence

6. These errors impacted the sentence, in particular because the Trial Chamber's consideration of the gravity of the offence was the primary reason for determining that the conviction warranted a custodial sentence. Properly considered, the gravity of the offence should have been reduced because Nshogoza was acting on the instructions of Lead Counsel, the protected witnesses had previously discussed their evidence and initiated the contact with him, and the scope of the disclosure was limited.

7. Further, the 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 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.

8. For the foregoing reasons, I find that the Trial Chamber erred in the assessment of the gravity of Nshogoza's crime as well as the attending aggravating circumstances. I therefore respectfully dissent from the decision of the majority to dismiss Nshogoza's Fourth Ground of Appeal in its entirety and to affirm his sentence.

Judge Patrick Robinson
Presiding

[5] Trial Judgement, para. 223.

Done this fifteenth day of March 2010, at The Hague, The Netherlands.

[Seal of the Tribunal]

VIII. PARTIALLY DISSENTING OPINION OF JUDGE MEHMET GÜNEY

1. I respectfully dissent from the decision of the majority that the Trial Chamber did not err in its analysis in relation to the sentence. I therefore support the partially dissenting opinion of Judge Robinson, except in relation to the impact of the errors upon the sentence.

2. Although I am of the opinion that the Trial Chamber erred in the assessment of the gravity of Nshogoza's crime as well as the attending aggravating circumstances, I consider that these errors have only a limited impact upon the sentence determined by the Trial Chamber. I believe that the Trial Chamber failed to properly reflect the particular circumstances of Nshogoza's offence and erroneously considered the fact that Nshogoza was acting on Lead Counsel's instructions as an aggravating factor, instead of having considered it as a mitigating factor.[1] However, it remains that Nshogoza, in violation of the *Kamuhanda* Witness Protection Order, determined that he would control the circumstances in which he met with protected witnesses and that, by meeting with them on more than one occasion and in the presence of third parties, he demonstrated a continued disregard for the protective measures ordered by the Tribunal. I also note that the Trial Chamber identified a number of other aggravating factors, such as Nshogoza's legal background, his experience as a Defence investigator and the fact that, in submitting a false claim, he abused his position as a Defence investigator.[2] I also note that the Trial Chamber could not safely find that Nshogoza initiated contact with Witness A7/GEX.[3] In those circumstances, I do not find a custodial sentence to be necessarily an abuse of discretion, however, in light of the jurisprudence of the *ad hoc* Tribunals, the imposition of 10 months of imprisonment could be considered excessive.

_____
Judge Mehmet Güney

Done this fifteenth day of March 2010, at The Hague, The Netherlands.

[Seal of the Tribunal]

[1] Article 6(4) of the Statute.
[2] Trial Judgement, paras. 223-225.
[3] Trial Judgement, para. 87.