



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 7 July 2009

**THE PROSECUTOR**

**v.**

**Léonidas NSHOGOZA**

**Case No. ICTR-07-91-T**

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**JUDGEMENT**

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**Office of the Prosecutor:**

Richard Karegyesa  
Abdoulaye Seye  
Dennis Mabura  
Marie Ka

**For the Accused:**

Allison Turner

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## CHAPTER I: INTRODUCTION

### 1. THE TRIBUNAL AND JURISDICTION

1. Trial Chamber III of the International Criminal Tribunal for Rwanda, composed of Judges Khalida Rachid Khan, presiding, Lee Gacuiga Muthoga and Aydin Sefa Akay, is seized of the case against Léonidas Nshogoza, charged with contempt of the Tribunal pursuant to Rule 77 of the Rules of Procedure and Evidence.<sup>1</sup>

2. Though not expressly articulated in the Statute, the inherent authority of the Tribunal, as an international court, to exercise jurisdiction over the crime of contempt is firmly established in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>2</sup>

### 2. OVERVIEW OF THE CHARGES

3. The Prosecution alleges that the Accused, during the period beginning on approximately 1 March 2004 and ending on approximately 31 May 2005, repeatedly met with Prosecution Witness GAA, a prosecution witness in the *Kamuhanda* case, and Defence Witness A7/GEX, a potential prosecution witness in the *Kamuhanda* case, and manipulated, incited, instigated, induced or bribed them into signing false statements he had written and to testifying falsely before the Appeals Chamber.<sup>3</sup> According to the Prosecution, the Accused acted in knowing violation of, or with reckless indifference to whether his actions violated protective measures ordered by the *Kamuhanda* Trial Chamber.<sup>4</sup> In addition, the Prosecution alleges that the Accused attempted to procure false statements or testimony from Prosecution Witnesses BUC, GAF, SP003 and SP004. For these acts, the Prosecution charges Nshogoza with two counts of contempt of the Tribunal, and two counts of attempt to commit acts punishable as contempt of the tribunal.

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<sup>1</sup> Unless otherwise specified, all further references to Rules in this Judgement are to the Rules of Procedure and Evidence.

<sup>2</sup> *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin (AC), 31 January 2000 (“Vujin Contempt Judgement”), paras. 13-28; *The Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-R77, Judgement in the Matter of Contempt Allegations Against an Accused and his Counsel (TC), 30 June 2000, (“Simić Contempt Judgement”) para. 91; *The Prosecutor v. Zlato Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile Against a Finding of Contempt (AC), 30 May 2001 (“Nobile Appeal Judgement”), para. 30; *The Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement (AC), 27 September 2006 (“Marijačić Appeal Judgement”), paras. 23-24; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement (TC), 10 March 2006 (“Marijačić Trial Judgement”) para. 13; *The Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations (TC), 27 May 2005 (“Beqaj Contempt Judgement”), para. 9; *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings (AC), 29 August 2005 (“Bulatović Contempt Appeal”), para. 21.

<sup>3</sup> To distinguish between this case and the *Kamuhanda* proceedings, the Chamber has capitalized “Prosecution” and “Defence” when referring to the Parties in this case, and has referred to the prosecution and defence, in lower case, when referring to the *Kamuhanda* proceedings.

<sup>4</sup> The Indictment refers to “reckless disregard”, see para. 8. The Chamber considers this to be the equivalent of “reckless indifference”, which is the more commonly used phrase in the jurisprudence.

### 3. THE ACCUSED

4. Léonidas Nshogoza was an investigator for the defence in the case of *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T. He was born in 1961 in Rukeri, Kyumba, Muhanga, Southern Province, Rwanda. In 1986, Nshogoza graduated from the National University of Rwanda, where he studied law.<sup>5</sup> He began working for the *Kamuhanda* defence team at the end of 2001.<sup>6</sup> According to the Accused, he officially joined the Kigali bar and became a lawyer in April 2005.<sup>7</sup>

### 4. SUMMARY OF PROCEDURAL HISTORY

5. The trial commenced on 9 February 2009 and concluded on 30 March 2009, with a three week break between the presentation of the Prosecutor's evidence and the presentation of the Defence evidence. The Chamber heard the live testimony of five witnesses for the Prosecution, and 11 witnesses for the Defence, including Nshogoza himself. The procedural history is set out in full in Annex I to the Judgement.

## CHAPTER II: PRELIMINARY MATTERS

### 1. ALLEGED PROCEDURAL IRREGULARITIES IN THE CONDUCT OF THE PROCEEDINGS

6. In its Closing Brief, the Defence alleges a number of "procedural irregularities" which it contends amount to a violation of the rights of the Accused and warrant the granting of a remedy by the Chamber.<sup>8</sup> The allegations include disclosure violations, delays in rendering decisions, restrictions placed on the Defence case, and interference with Defence witnesses and the Defence case.

#### 1.1. Alleged Disclosure Violations, including late disclosure

7. The Defence alleges that, in violation of its disclosure obligations under the Rules, a number of documents were not disclosed by the Prosecution.<sup>9</sup> The Defence also alleges that the fairness of these proceedings have been compromised by the late disclosure of two documents, resulting in material prejudice to the Accused suffering.<sup>10</sup>

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<sup>5</sup> *Nshogoza*, T. 30 March 2009 pp. 2-3.

<sup>6</sup> *Nshogoza*, T. 30 March 2009 p. 3.

<sup>7</sup> *Nshogoza*, T. 30 March 2009 p. 28.

<sup>8</sup> Defence Closing Brief, paras. 106-7.

<sup>9</sup> These documents are: (i) a statement given by Witness GAA to the Rwandan CID in 2005: Defence Closing Brief, para. 16; (ii) recordings of a Prosecution interview with Witness GAA on 23 August 2003: Defence Closing Brief, para. 16; (iii) all recordings of Loretta Lynch interviews for the purposes of the *Kamuhanda* investigation: Defence Closing Brief, para. 16; (iv) a statement by Augustin Nyagatare to the Prosecution: Defence Closing Brief, para. 20; and (v) Rwandan judicial materials of the Accused and Witness GAA: Defence Closing Brief, paras. 24-28.

<sup>10</sup> Defence Closing Brief, para. 16. These two documents are: (i) a statement by Straton Nyarwaya to the Prosecution, disclosed on 25 March 2009: Defence Closing Brief, paras. 17-19; and (ii) a fee statement of Léonidas Nshogoza dated 12 September 2003, filed on 25 February 2004, and disclosed on 11 March 2009: Defence Closing Brief, para. 21.

8. The Chamber notes that each of the alleged violations arising from non-disclosures raised by the Defence was already dealt with by the Chamber during the course of these proceedings.<sup>11</sup> The Defence is, accordingly, estopped from raising these same issues *de novo*. Furthermore, as the Defence has not raised any new circumstances or evidence to call into question these prior decisions there is no basis upon which to revisit, or reconsider these decisions.

9. With respect to the first of the two documents the late disclosure of which, the Defence claims, resulted in material prejudice to the Accused, the Chamber recalls its decision concerning the statement of Straton Nyarwaya which specifically found that, despite the Prosecution's violation of its Rule 66 (B) disclosure obligation in respect of that statement, no material prejudice had been suffered by the Accused.<sup>12</sup>

10. Concerning the second of the two documents – the fee statement of the Léonidas Nshogoza dated 12 September 2003 and filed 25 February 2004 - the Chamber notes that the fee statement was disclosed to the Defence on 11 March 2009.<sup>13</sup> Furthermore, the Chamber finds that the Defence has failed to demonstrate prejudice suffered by the Accused.

11. With respect to the Defence allegations that the Prosecution's violation of its disclosure obligations, and the Chamber's failure to ensure compliance, violated the Accused's right to properly prepare for cross-examination and to know the nature and cause of the charges against him,<sup>14</sup> the Chamber finds this submission to be lacking in evidentiary support and specificity as to the prejudice caused and, therefore, need not consider this point further. For the same reasons, the Chamber dismisses the Defence submission that the Prosecution made misleading oral representations in relation to its disclosure violations and thus has forfeited the presumption that it has acted in good faith.<sup>15</sup> Finally, and with regard to the Defence's submissions in relation to the denial of Defence requests for postponement of the trial due to the Prosecution's disclosure violations,<sup>16</sup> the Chamber notes that the Defence failed to substantiate any flaw in the previous

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<sup>11</sup> The Prosecution certified its efforts to locate the 2005 statement by Witness GAA to the Rwandan CID (*see* Prosecutor's Certification on Rwandan Judicial Materials, filed 23 February 2009); In relation to the recording of the 2003 Prosecution interview with Witness GAA, the Chamber notes its decision of 10 February 2009 denying the Defence's submissions on the basis that the Prosecution had certified that it did not have the requested recording in its possession. (Decision on Defence Motion for Order to Prosecutor to Comply with his Disclosure Obligations and Motion for Stay of Proceedings Due to the On-Going Violations of the Prosecutor's Disclosure Obligations (TC), 10 February 2009, para. 12.) The Chamber notes its decision that the Loretta Lynch interviews were not exculpatory and thus did not need to be disclosed (Decision on Defence Motions for Disclosure Under Rule 66 and 68 of the Rules of Procedure and Evidence (TC), 22 December 2008, para. 38). In relation to the statement by Augustin Nyagatare to the Prosecution, the Chamber notes that the Prosecution has certified it has searched for this document and that it is not in its possession (T. 23 March 2009, pp. 18-19). The Chamber notes its prior order in relation to the Rwandan judicial material (T. 19 February 2009, p. 17), and the Prosecution's certification that it has searched for and made attempts to obtain the requested documents (Prosecutor's Certification on Rwandan Judicial Materials, filed 23 February 2009).

<sup>12</sup> Decision on Defence Motion to Admit the Statement of Defence Witness Straton Nyarwaya into Evidence; and for Other Relief (TC), 1 July 2009.

<sup>13</sup> Disclosure Under Rule 66 (B)/InterOffice Memorandum Ern-K045-8604-8609, filed 11 March 2009.

<sup>14</sup> Defence Pre-Defence Brief, para. 10.

<sup>15</sup> Defence Closing Brief, para. 16; Supplementary Closing Brief of Leonidas Nshogoza, filed 18 June 2009 ("Defence Supplementary Closing Brief"), para. 21.

<sup>16</sup> Defence Supplementary Closing Brief, para. 22.

decisions of the Chamber denying postponement, nor has it demonstrated any prejudice. Thus these submissions are dismissed.

## 1.2. Delays in Rendering Decisions

12. The Defence submits that the Chamber failed to render decisions in a timely manner, resulting in prejudice to the Accused.<sup>17</sup> The Defence Closing Brief raises five decisions that were pending at the date of filing.<sup>18</sup> The Chamber notes that all five decisions have since been issued.<sup>19</sup> The Defence also submits that due to the timing of a decision by the Chamber, it was unable to rely upon information in relation to Prosecution visits to Witness GAA while at the UNDF in the preparation of its case.<sup>20</sup>

13. The Chamber notes that “many factors affect the timing of decisions”.<sup>21</sup> It finds the Defence’s argument in relation to its ability to seek review of its decisions unpersuasive. The Chamber also notes that it has allowed the Defence to supplement its Closing Brief, and the Defence did so.<sup>22</sup> Finally, the Chamber considers that the Defence’s submission in relation to having to put on its case while a motion for a stay of proceedings was pending lacks specificity as to how this prejudiced the Accused. Therefore, the Chamber finds that the Defence has failed to articulate any prejudice as a result of the timing of its decisions.

## 1.3. Unreasonable Restrictions on the Presentation of the Defence Case

14. The Defence alleges that certain restrictions were unreasonably imposed upon the Defence Case by the Chamber.<sup>23</sup>

15. The Chamber notes that it has already dealt with all of these issues in prior decisions, providing reasoning for its decision in each case.<sup>24</sup> The Defence has raised no new arguments and has failed to demonstrate any prejudice. Thus, the Chamber need not revisit them here.

<sup>17</sup> Defence Closing Brief, para. 31; Defence Pre-Defence Brief, paras. 12-13.

<sup>18</sup> Defence Closing Brief, para. 30: The motions mentioned are: (i) Defence Urgent Motion for Stay of Proceedings Due to Interference with Defence Witnesses, filed 4 March 2009; (ii) Defence Motion for the Admission of Written Witness Statements of Witnesses A1, A13, A14, A15, A17, A18, A20, A22, A23, A26 and A30 as Evidence in Lieu of Oral Testimony, filed 16 March 2009; (iii) Defence Motion for Order to Registrar to Provide Information to the Nshogoza Defence Regarding Prosecution Visits to GAA at UNDF in 2007, filed 20 March 2009; (iv) Defence Motion for the Admission of Transcripts Pursuant to Rule 92, filed 3 April 2009; (v) Defence Motion to Admit Into Evidence 15 March 2006 OTP Statement Taken from Defence Witness Straton Nyarwaya, [and for Other Relief], filed 7 May 2009.

<sup>19</sup> The relevant decisions are: (i) Decision on Defence Motion for the Admission of Transcripts Pursuant to Rule 92*bis* (TC), 23 April 2009; (ii) Decision on Defence Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GA at UDF (TC), 28 April 2009; (iii) Decision on Defence Motion for the Admission of Written Witness Statements Of Witnesses A1, A13, A14, A15, A17, A18, A20, A22, A23, A26, A28, and A30 as Evidence *in lieu* Of Oral Testimony (TC), 29 April 2009; (iv) Confidential Decision on Defence Motion for Stay of Proceedings (TC), 22 May 2009; (v) Decision on Defence Motion to Admit the Statement of Defence Witness Straton Nyarwaya into Evidence; and for Other Relief (TC), 1 July 2009.

<sup>20</sup> Defence Supplementary Closing Brief, para. 20.

<sup>21</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para. 27.

<sup>22</sup> T. 29 April 2008 p. 2; Defence Supplementary Closing Brief, para. 21.

<sup>23</sup> Defence Closing Brief, paras. 34-47. They are: (i) a forced reduction of testifying Defence witnesses to ten, in addition to the Accused; (ii) a denial of a Defence request to subpoena Ms. Loretta Lynch; and (iii) a denial of a Defence request to amend the Defence witness list after a witness turned hostile during examination.

16. The Defence also submitted that the Chamber's order to the Defence to provide a summary of its witnesses' testimony before the close of the Prosecution's case was contrary to Rule 73 *ter* (B)(iii)(b) and violated the Accused's right to have adequate time and facilities for the preparation of his defence.<sup>25</sup>

17. The Chamber notes that its order to file witness summaries was made pursuant to Rule 54 of the Rules, which empowers the Chamber to make orders "for the preparation or conduct of the trial."<sup>26</sup> The Chamber considers that the Defence has failed to show that the order was *ultra vires*. Furthermore, the Chamber notes that the Rules contemplate the amending of a witness list.<sup>27</sup>

#### **1.4. Interference with Defence Witnesses and Disclosure of Witness Identities by the Registry**

18. The Defence submits that, due to contact between Rwandan authorities and its witnesses, and the provision of information by WVSS to the Rwandan authorities, the Accused has suffered prejudice.<sup>28</sup> The Defence further submits that WVSS has also violated the witness protection measures ordered in this case, and Rule 77 (A).<sup>29</sup>

19. The Chamber notes its prior decision on these issues, wherein it found that no rights violation had occurred, as well as its order to the Registry to review its internal procedures in relation to the protection and dissemination of witness information.<sup>30</sup> Considering the decision, the Chamber finds that the Defence has failed to demonstrate any prejudice not already contemplated by this Chamber.

#### **1.5. Time Allotted to the Defence Case**

20. The Defence details a number of decisions by the Chamber that it alleges interfered with the proper execution of the Defence case by limiting the time between the close of the Prosecution case and start of Defence case, and for the preparation and presentation of the Defence case.<sup>31</sup>

21. The Chamber notes that it has already ruled upon the amount of time between the Prosecution's and Defence case, as well as a motion for reconsideration of that decision.<sup>32</sup> The

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<sup>24</sup> Decision on Defence Motion for Reconsideration of the Chamber's Further Order for the Defence to Reduce its Witness List (TC), 26 February 2009; Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch (TC), 10 February 2009; and T. 25 March 2009 pp. 24-26 (Oral Order).

<sup>25</sup> Defence Pre-Defence Brief, para. 16.

<sup>26</sup> Rule 54.

<sup>27</sup> Rule 73 *ter* (E).

<sup>28</sup> Defence Closing Brief, paras. 48-53.

<sup>29</sup> Defence Closing Brief, paras. 51, 66-69.

<sup>30</sup> Confidential Decision on Defence Motion for Stay of Proceedings (TC), 22 May 2009, paras. 20-22.

<sup>31</sup> They are: (i) the reduction of time between the close of the Prosecution's case and beginning of the Defence case: Defence Closing Brief, paras. 54-55; (ii) the refusal by the Chamber to sit on Fridays: Defence Closing Brief, para. 56; (iii) the denial of a Defence motion asking for a one-week postponement: Defence Closing Brief, para. 59; and (iv) the ultimate provision of nine and a half days for the presentation of the Defence case: Defence Closing Brief, para. 60.

<sup>32</sup> Decision on Defence Motion for Postponement of Defence Case (TC), 26 February 2009, para. 4, wherein the Chamber noted that the scheduling of the Defence case was not premised on the number of weeks between the close

Defence has not submitted any new material that warrants reconsideration of that decision. These submissions are thus dismissed.

22. It further notes that the Defence Closing Brief misrepresents a statement by the Chamber that the justification for its decisions not to sit on Fridays, and to not grant a one-week postponement, was based purely on mathematical equality.<sup>33</sup> In that instance, the Chamber did not limit the amount of time for the Defence to present its case based on mathematical equality, but rather on a considered reasoning of what time would be adequate for the Defence to present its case.

23. The Chamber considers that the Defence has failed to demonstrate how any of these decisions in relation to the scheduling of the trial have prevented the Accused from having “adequate time and facilities for the preparation of his Defence” or meant that the Accused was not able to examine witnesses on his behalf “under the same conditions as witnesses against him”.<sup>34</sup> Neither has the Defence demonstrated how the time allotted to its case prejudice the Accused.

24. Thus, the Chamber considers these submissions to be unsubstantiated and dismisses them.

## **1.6. Alleged Interference with the Defence Case**

### **1.6.1 Interference with Protected Defence Witnesses**

#### **1.6.1.1 Registry Complicity in the Interference by Rwandan Authorities**

25. The Defence reiterates its submissions in relation to the Registry providing protected witness information to the Rwandan authorities, alleging a violation of Rule 77 (A).

#### **1.6.1.2 Repeated WVSS interference with Defence Witnesses**

26. The Defence submits that after instructing WVSS not to contact Defence witnesses, WVSS conducted interviews with five Defence witnesses.<sup>35</sup> The Defence also alleges that WVSS contact influenced one witness to testify, despite her not wanting to, resulting in her turning hostile during examination.<sup>36</sup> The Defence submits that this is a violation of Rule 77 (A)<sup>37</sup> and requests the appointment of an *amicus curiae* to investigate these actions.<sup>38</sup>

27. The Chamber notes that WVSS is tasked with the protection and support of witnesses and victims at this Tribunal.<sup>39</sup> The Chamber considers that to carry out this function, WVSS needs to be in contact with witnesses to ensure that their needs are being met and that they are safe. In this

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of the Prosecutor’s case and the commencement of the Defence case; and Decision on Defence Motion for Reconsideration of the Chamber’s Decision on Motion for Postponement of Defence Case (TC), 4 March 2009.

<sup>33</sup> Defence Closing Brief, para. 56-57.

<sup>34</sup> Defence Closing Brief, para. 54.

<sup>35</sup> Defence Closing Brief, paras. 72-74.

<sup>36</sup> Defence Closing Brief, para. 76.

<sup>37</sup> Defence Closing Brief, paras. 77-78.

<sup>38</sup> Defence Closing Brief, para. 78.

<sup>39</sup> Rule 34 (A).

instance, the Chamber considers that WVSS has followed normal procedure to ascertain whether witnesses had been interfered with and whether they needed any assistance from WVSS staff. Furthermore, the Chamber notes that the Defence offers no evidence that WVSS interfered with the testimony of its witnesses, or did anything untoward or not within its mandate. The Chamber does not consider that the witness testimony of Witness A10 is at all clear as to who spoke to her in Rwanda, or of the effect of the contact, if any, on her testimony.<sup>40</sup> Thus, the Chamber finds the Defence's unfounded accusations of "flagrant interference"<sup>41</sup> by the WVSS with Defence witnesses to be unprofessional and unbecoming of Counsel practicing before this Tribunal.

28. Given the Chamber's findings in relation to this matter, it would be inappropriate and premature to appoint an *amicus curiae* to investigate WVSS or Registry conduct. The Chamber considers its order for an internal review of the procedures of WVSS to be sufficient to ensure that the processes of WVSS fulfil its mandate of witness protection and support and do not result in the unnecessary dissemination of protected witness information.<sup>42</sup>

## **1.6.2 Alleged Interference in the Preparation of the Defence Case**

### **1.6.2.1 Alleged Interference by the Registry**

29. The Defence makes a number of allegations of interference by the Registry in the preparation of the Defence case.<sup>43</sup>

30. The Defence Closing Brief does not submit specific instances of bias by the Registry, beyond one failure to disclose a document upon request,<sup>44</sup> but rather relies on general, vague and unsubstantiated allegations. The Chamber dismisses these submissions as they lack specificity and the Defence has not demonstrated any prejudice.

31. In relation to the employment records, the Chamber also finds the Defence submissions lacking in substance. The Chamber notes that a decision on this point would require additional submissions from the Registry and the Prosecution. As the Defence failed to properly substantiate these submissions in a motion before the Chamber, they are also dismissed.

32. The Chamber considers that the Defence's submissions on the Registry's failure to appoint a Presiding Officer for Rule 92 *bis* statements are rendered moot by the late stage of these proceedings. The Chamber finds that the Defence should have brought this to its attention earlier via a motion for a timely resolution.

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<sup>40</sup> T. 23 March 2009, p. 65-69.

<sup>41</sup> Defence Closing Brief, para. 76.

<sup>42</sup> Confidential Decision on Defence Motion for Stay of Proceedings (TC), 22 May 2009. A public version of this decision was filed by the Chamber on 26 June 2009.

<sup>43</sup> Defence Closing Brief, paras. 79-87. The Defence raises: (i) the Registry's alleged application of different standards for document disclosure to the parties; (ii) the Registry's alleged disclosure of confidential employment records of the Accused to the OTP without authorization; (iii) the Registry's alleged failure to appoint a Presiding Officer to witness a Rule 92 *bis* statement; and (iv) the Registry's alleged failure to provide the Defence with information on Prosecution visits to Witness GAA while he was in the UNDF.

<sup>44</sup> Defence Closing Brief, paras. 21-23.

33. Finally, in relation to the Registry's alleged failure to provide the Defence with requested information on Prosecution visits to Witness GAA while in the UNDF, the Chamber notes its decision ordering the disclosure of this material.<sup>45</sup> The Chamber does not consider the Registry's actions in this case to be obstructive; rather the Registry was unsure of its obligations and thus requested an order of the Chamber to clarify what was required of it. Accordingly the Chamber dismisses these submissions.

#### **1.6.2.2 Alleged Prosecution Interference with the Defence Case**

34. The Defence submits that the Prosecution's failure to allow the Defence to meet with staff of the OTP prevented the Defence from accessing evidence in preparation of its case.<sup>46</sup> The Defence also submits that the Prosecution's failure to allow the Defence to interview Witness BUC, and WVSS to ask Witness BUC if he consented to Defence contact, amounts to obstruction and interference.<sup>47</sup> The Defence submits that this warrants an independent investigation pursuant to Rule 77.<sup>48</sup>

35. The Chamber finds that these Defence's submissions properly belong in a motion before this Chamber, and that the Defence's failure to raise these issues earlier in proceedings has resulted in a waiver of its right to raise them at all. Accordingly, the Chamber rejects these submissions as untimely.

36. Additionally, the Chamber notes the Defence's allegation of a campaign to gather false testimony involving Ms. Moenback.<sup>49</sup> Once again, this should have been filed in a motion before this Chamber with proper substantiation to allow the Chamber to make an informed decision on the basis of submissions from both parties. The Defence's failure to do so makes this request untimely. It is accordingly dismissed.

#### **1.6.3 Improper Contact of Office of the Prosecutor with Protected Defence Witnesses**

37. The Defence submits that on six occasions, members of the OTP contacted and met with protected Defence witnesses in violation of orders from the cases of *Kamuhanda* or *Rwamakuba*.<sup>50</sup>

##### **1.6.3.1 Witness GAA**

38. Witness GAA agreed that Mr. Musonda and Ms. Moenback, two OTP staff members, met with him in 2005, a few days before he testified for the Defence in *Kamuhanda*.<sup>51</sup> Witness

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<sup>45</sup> Decision on Defence Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF (TC), 28 April 2009.

<sup>46</sup> Defence Closing Brief, para. 88.

<sup>47</sup> Defence Closing Brief, paras. 91-95.

<sup>48</sup> Defence Closing Brief, para. 95.

<sup>49</sup> Defence Closing Brief, para. 95.

<sup>50</sup> Defence Closing Brief, paras. 95-104.

<sup>51</sup> T. 18 February 2009 p. 2.

GAA testified that Ms. Moenback told him that he was a protected witness.<sup>52</sup> Furthermore, the Defence entered a number of exhibits under seal, of excerpts of an interview between Witness GAA and Ms. Lynch that took place on 29 September 2005.<sup>53</sup>

### 1.6.3.2 Witness A7/GEX

39. Witness A7/GEX testified that she met with Ms. Moenback along with another gentleman and gave them a statement.<sup>54</sup> The Defence tendered a statement by Witness A7/GEX to the OTP, on 4 August 2008, under seal.<sup>55</sup>

### 1.6.3.3 Witness Fulgence Seminega

40. Fulgence Seminega, who testified that he was a protected Defence witness in *Kamuhanda*,<sup>56</sup> testified that ICTR representatives approached him on 3 August 2008 to set up a meeting.<sup>57</sup> Mr. Seminega was only informed that the meeting was with OTP staff when he arrived for the meeting on 4 August 2008.<sup>58</sup> Mr. Seminega testified that the woman who called him was named Colette, and that a man named Pierre, and Ms. Moenback, were also in the car with him when they met.

### 1.6.3.4 Witness Augustin Nyagatare

41. Augustin Nyagatare, agreed that he was a protected Defence witness in the *Rwamakuba* case,<sup>59</sup> testified that he met with staff of the OTP at his home in August 2008 to discuss the Accused.<sup>60</sup>

### 1.6.3.5 Straton Nyarwaya

42. Straton Nyarwaya testified that he testified for the Defence using a pseudonym in the *Rwamakuba* case, but lived in a hotel;<sup>61</sup> and that after testifying in *Rwamakuba* he was contacted by the OTP in regard to *Kamuhanda*,<sup>62</sup> via the WVSS,<sup>63</sup> and that he gave them a statement.<sup>64</sup>

## 1.6.4 Alleged Prosecution Violation of Witness Protection Orders

43. In relation to Witnesses GAA and A7/GEX, the Chamber notes that they testified as protected prosecution witnesses in the original *Kamuhanda* trial and, due to the Defence's failure

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<sup>52</sup> T. 18 February 2009 p. 9.

<sup>53</sup> T. 18 February 2009 p. 49-52.

<sup>54</sup> T. 18 March 2009 p. 48.

<sup>55</sup> T. 18 March 2009 pp. 49-50; Exhibit D. 48.

<sup>56</sup> T. 19 March 2009 p. 53.

<sup>57</sup> T. 19 March 2009 p. 57.

<sup>58</sup> T. 19 March 2009 p. 57.

<sup>59</sup> T. 23 March 2009 p. 19.

<sup>60</sup> T. 23 March 2009 p. 19.

<sup>61</sup> T. 20 March 2009 p. 4.

<sup>62</sup> T. 20 March 2009 p. 23.

<sup>63</sup> T. 20 March 2009 p. 23.

<sup>64</sup> T. 20 March 2009 p. 23.

to follow proper procedure, were still protected Prosecution witnesses at the time contact took place. Accordingly, the Defence submissions in relation to these two witnesses are dismissed.

44. However, in relation to Witnesses Fulgence Seminega, Augustin Nyagatare and Starton Nyarwaya, the Chamber notes that, according to their own testimonies, these witnesses were all covered by protection orders from *Rwamakuba* or *Kamuhanda* as Defence witnesses in those cases. These protection orders, *inter alia*, prohibited the Prosecution from contacting these witnesses, without first notifying the Defence and having it make the necessary arrangements.<sup>65</sup> The Chamber considers that the witnesses' testimonies *prima facie* indicate that the Prosecution may have acted in violation of witness protection orders.

45. The Chamber thus finds that this conduct may justify an investigation into the conduct of members of the OTP as requested by the Defence.<sup>66</sup> However, prior to giving full consideration to the merits of this request, the Chamber would like to hear from the Parties on this issue. A request for submissions from the Parties will, however, be dealt with by an order separate to this Judgement.

### **1.7. Requested Remedy for Procedural Irregularities**

46. As a remedy for the alleged irregularities, the Defence seeks a reduction in sentence, if the Accused is convicted, or financial compensation, if the Accused is acquitted.<sup>67</sup>

47. As the Chamber has not found any evidence of prejudice to the Accused, there is no need for it to consider an appropriate remedy.

## **2. ALLEGED DEFECTS IN THE INDICTMENT**

48. In closing arguments before the Chamber, the Defence raised the issue of a possible defect in the Indictment, noting that Counts One and Two shared the "common element" of "fabrication of evidence" and submitting that "[t]here is a serious problem with the drafting of these counts and that they cause confusion, more than anything else."<sup>68</sup>

49. The Chamber agrees that there is substantial overlap of allegations in Counts One and Two of the Indictment, in particular concerning the allegations of bribery and the procurement of false statements and false testimony. Concerning Count One, paragraphs six, 10, 11, and 15 of the Indictment allege, respectively and among other things, that the Accused acted with "intent to fabricate evidence"; that the Accused "manipulated, incited, induced, promised a bribe or reward to and persuaded both GAA and GEX to sign false statements prepared by the Accused and accept to give false testimony ..."; that "[t]he Accused fabricated recantation statements"; and "[a]s a result of the meetings with the Accused and his incitement, inducements, and the promise of a bribe or reward of a substantial amount of money, GAA and GEX also gave false testimony...." Paragraph 16 of the Indictment summarizes the alleged criminal conduct of the Accused for Count One, and reads as follows:

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<sup>65</sup> Exhibit D.26; *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Protective Measures (TC), 21 September 2005, para. 12.

<sup>66</sup> Defence Closing Brief, para. 104.

<sup>67</sup> Defence Closing Brief, para. 107.

<sup>68</sup> T. 29 April 2009 p. 18.

The Accused committed the offence of contempt of the Tribunal as he wilfully contacted and repeatedly met with protected prosecution witnesses, in knowing violation of Trial Chamber II's witness protection order, issued on 7 July 2000, with intent to procure false statements which he induced them to sign; and as he knowingly and wilfully induced the witnesses and promised them a substantial bribe or reward in exchange of giving false testimony before the Appeals Chamber, in support of the appeal against sentence and conviction of Jean de Dieu Kamuhanda.

50. With regard to Count Two, paragraphs 18, 20, 22, and 23 of the Indictment allege, respectively and among other things, that "[t]he Accused committed this offence as part of a wide campaign to procure false statements ...", that "the Accused manipulated, instigated, induced and offered a substantial bribe of money for GAA to commit the offences of giving false testimony under solemn declaration and contempt of the Tribunal; that the "Accused knowingly and willfully fabricated evidence, and procured the signatures of protected prosecution witnesses GAA and GEX to the false statements ...", and that "[t]he Accused further knowingly and willfully suborned and persuaded protected prosecution witnesses GAA and GEX to give false testimony on 18 May 2005 ...". Paragraph 27 of the Indictment summarizes the alleged criminal conduct of the Accused for Count 2, and reads:

The Accused committed the offence of contempt of the Tribunal as he knowingly and willfully interfered with the Tribunal's administration of justice and knowingly and willfully attempted to subvert justice with respect to the appeal of Jean de Dieu Kamuhanda, by fabricating false statements, and by inciting, interfering with, and inducing protected prosecution witnesses to commit the offences of giving false testimony under solemn declaration and contempt of the Tribunal.

51. The Chamber finds that the Indictment fails to clearly distinguish the charges in Count One from the charges in Count Two, and is therefore defective.

52. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the indictment so as to provide notice to an accused.<sup>69</sup> Indictments lacking this precision are defective. Defects in an indictment may be "cured" by the provision of "timely, clear and consistent information detailing the factual basis underpinning the charges against" an accused.<sup>70</sup> "The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or [...] whether the trial was 'rendered unfair' by the defect."<sup>71</sup>

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<sup>69</sup> Articles 17 (4), 20 (2), 20 (4)(a) and 20 (4)(b) of the Statute and Rule 47 (C) of the Rules; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-20050-55A-A, Judgement (AC), 29 August 2008 ("*Muvunyi* Appeal Judgement"), para. 18; *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008 ("*Seromba* Appeal Judgement"), para. 27; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007 ("*Simba* Appeal Judgement"), para. 63.

<sup>70</sup> *Muvunyi* Appeal Judgement, para. 20 (citations omitted); *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement") para. 114; *The Prosecutor v. Mladen Naletilić & Vinko Martinović*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006 ("*Naletilić & Martinović* Appeal Judgement"), para. 26.

<sup>71</sup> *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement (AC), 13 December 2004 ("*Ntakirutimana* Appeal Judgement") para. 27 (citing *Kupreškić et al.* Appeal Judgement, para. 122)

53. The Chamber also notes that pursuant to Rule 72 (A), challenges to defects in the Indictment “shall be in writing and be brought not later than thirty days after the disclosure by the Prosecution to the Defence of all materials and statements referred to in Rule 66 (A)(i) ....”

54. In this case, the Chamber notes that the Defence filed a preliminary motion on 24 June 2008, submitting, among other things, that Counts Three and Four of the Indictment were defective.<sup>72</sup> The Defence did not challenge Counts One and Two at that time. The Chamber notes that the Defence has not offered any reason for waiting until closing arguments to raise the lack of a clear distinction between Counts One and Two, and has not alleged any prejudice.<sup>73</sup>

55. In any event, the Chamber does not consider that the Accused has suffered any prejudice in this case. The Chamber notes that this is not a situation where the Prosecution has failed to give the Accused notice of any material facts or charges. All the material facts and charges that the Prosecution sought to prove against the Accused were alleged in the Indictment, but the Prosecution failed to distinguish the material facts and charges in Count One from those in Count Two.

56. Furthermore, in its Pre-Trial Brief, filed on 25 November 2008, the Prosecution clearly alleged that violations of the Protective Measures were the basis for Count One, whereas the allegations of bribery, procurement of false statements and false testimony, and other interference with Witnesses GAA and A7/GEX were the basis for Count Two.<sup>74</sup> The Chamber considers that this timely clarification cured the defects in the Indictment.

### 3. TREATMENT OF PROSECUTION WITNESS GAA’S EVIDENCE

57. Witness GAA is central to the Prosecution’s case, which rests in significant part on his evidence. On 3 December 2007, Witness GAA pleaded guilty to one count of giving false testimony under solemn declaration and one count of contempt of the Tribunal.<sup>75</sup> According to the Indictment, the Prosecution seeks to implicate the Accused in the crimes to which Witness GAA pleaded guilty. Specifically, the Prosecution alleges that the Accused procured Witness GAA’s false testimony. As such, the Chamber considers Witness GAA to be an alleged accomplice of the Accused.<sup>76</sup>

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<sup>72</sup> Preliminary Motions Pursuant to Rule 72, and Alternative Motion under Rule 73 to Dismiss the Indictment, filed 24 June 2008, paras. 18-20.

<sup>73</sup> Compare, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 45. In this decision, the Appeals Chamber, noting that objections to the admission of evidence based on notice grounds should generally be made when the evidence is introduced, held that where such objections are untimely the Chamber may consider whether the burden has shifted to the Defence to show prejudice on the basis of lack of notice. It further stated that, when deciding whether the burden has shifted, Chambers should consider any justification for a late objection.

<sup>74</sup> Prosecution Pre-Trial Brief, paras. 32-50.

<sup>75</sup> Witness GAA, T. 16 February 2009 p. 11-12. See also, *The Prosecutor v. GAA*, Judgement and Sentence (TC), 4 December 2007.

<sup>76</sup> The Appeals Chamber has stated that the ordinary meaning of the term “accomplice” is “an association in guilt, a partner in crime”. *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 (“*Niyitegeka Appeal Judgement*”), para. 98.

58. The Prosecution acknowledges that Witness GAA is, at least to some extent, a former accomplice of the Accused, but submits that his evidence is capable of belief and need not be treated with caution because, at the time of his testimony, Witness GAA was a free man who had pleaded guilty to his crimes and served his full sentence of nine months imprisonment.<sup>77</sup> Therefore, the Prosecution suggests that Witness GAA has no motive or incentive to implicate the Accused.<sup>78</sup>

59. The Defence submits that Witness GAA is not a credible witness, and offers several arguments in support of this submission. In addition to noting that Witness GAA is an accomplice, the Defence submits that Witness GAA has proven to be “willing and capable of lying under oath.” The Defence also argues that his demeanour on the stand was evasive, and that he objected to questions from the Defence on cross-examination. The Defence argues that Witness GAA’s testimony was riddled with inconsistencies, and suggests that he would have faced consequences if his testimony was inconsistent with his plea agreement and guilty plea.<sup>79</sup>

60. Before turning to Witness GAA, specifically, the Chamber notes that, as a general matter, it considered various factors in evaluating *viva voce* evidence, including the witness’s demeanour in court, the plausibility and clarity of the witness’s testimony, and whether there were contradictions or inconsistencies within a witness’s testimony or between his testimony and his prior statements relied upon in court or admitted as exhibits, as well as any explanations for such inconsistencies or contradictions. The Chamber considered whether witness testimony was corroborated by other evidence, as well as the level of detail and specificity of witness evidence. The Chamber was mindful that evidence is not considered in isolation, but rather as a whole, and that Chambers may accept part and reject part of the same witness’s evidence.

61. Chambers are not prohibited from relying on the evidence of convicted persons or accomplices of an accused, or, more generally, the evidence of witnesses who might have motives or incentives to implicate the accused, especially where such witnesses may be thoroughly cross-examined.<sup>80</sup> A Trial Chamber must, however, consider whether accomplice witnesses might have a specific motive or incentive to implicate the accused,<sup>81</sup> as well as the totality of the circumstances surrounding such evidence.<sup>82</sup>

62. Turning to Witness GAA, the Chamber notes that he had already served his sentence at the time of his testimony in this trial, and is satisfied that his testimony was not motivated by a desire for a reduced sentence. The Chamber could not, however, entirely eliminate the possibility that Witness GAA had some improper incentives or motives for testifying against the Accused.

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<sup>77</sup> Prosecution Closing Brief, paras. 35-38.

<sup>78</sup> Prosecution Closing Brief, para. 37.

<sup>79</sup> Pre-Defence Brief, paras. 76-85; Defence Closing Brief, para. 117.

<sup>80</sup> *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement (AC), 17 March 2009, para. 146 (referring to *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 (“*Nahimana Appeal Judgement*”) para. 439); *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement (AC), 9 May 2007, para. 82; *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006 (“*Ntagerura Appeal Judgement*”), para. 204; *Niyitegeka Appeal Judgement*, para. 98.

<sup>81</sup> *Ntagerura Appeal Judgement*, para. 206; *Nahimana Appeal Judgement*, para. 439.

<sup>82</sup> *Niyitegeka Appeal Judgement*, para. 98.

63. The Chamber was troubled by Witness GAA's admitted prior false testimony. That a witness's prior criminal record may be relevant to assessments of credibility is not controversial. This is especially true when the witness's prior crimes involve dishonesty. Witness GAA admits to lying under oath before the Appeals Chamber of this Tribunal.

64. Concerning his prior statements, Witness GAA testified that the statements he made in 2001 were true, but that statements he made and signed from 2005 until the point of his confession in 2007 were mostly untrue or contained lies.<sup>83</sup> The Chamber was not willing to accept this blanket explanation for all inconsistencies in Witness GAA's prior statements. The Chamber considered such inconsistencies, and Witness GAA's explanation for them, on a case-by-case basis.

65. Given these concerns, the Chamber has considered Witness GAA's evidence with particular care, especially in those instances where Witness GAA was the only Prosecution Witness to testify on a given allegation.

## CHAPTER III: FACTUAL FINDINGS

### 1. BACKGROUND

66. By Decision dated 7 July 2000, the *Kamuhanda* Trial Chamber ordered protective measures on behalf of victims and potential prosecution witnesses in that trial.<sup>84</sup> The Protective Measures included measures:

(d) Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of, and any other identifying data in the supporting materials or any other information on file with the Registry or any other information which would reveal the identity of these individuals, and this order shall remain in effect after the termination of this trial;

(e) Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;

(...)

(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 a Judge thereof, with the consent of such protected

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<sup>83</sup> Witness GAA, T. 17 February 2009 p. 52.

<sup>84</sup> *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 7 July 2000 ("Protective Measures Order", or "Protective Measures"). By order dated 26 June 2009, this Chamber admitted the Protective Measures as evidence in this case. *See* Order Admitting the Prosecution Witness Protective Measures from the Kamuhanda Case into Evidence(TC), 26 June 2009.

person or the parents of (sic) guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview;

67. Prosecution Witness GAA testified before the Trial Chamber in the *Kamuhanda* case in 2001 and before the Appeals Chamber in the same case in 2005.<sup>85</sup> He appeared as a witness for the prosecution in the *Kamuhanda* trial, testifying that he had sought refuge at Gikomero Parish, and saw Jean de Dieu Kamuhanda leading attackers who massacred Tutsi refugees there on 12 April 1994. When he testified before the Appeals Chamber, Witness GAA appeared for the defence and recanted his trial testimony, stating that he had not been at Gikomero Parish on the date in question.<sup>86</sup>

68. Witness A7/GEX signed a statement for the prosecution in which she alleged that she had been at Gikomero Parish on 12 April 1994, and had heard people say that Kamuhanda was leading the attack. She disavowed this statement in testimony before the Appeals Chamber on 18 May 2005, testifying that, though she had been at Gikomero Parish on the date in question, she had not heard anyone mention Kamuhanda's name.<sup>87</sup>

69. After hearing Witness GAA's and A7/GEX's recantations, as well as other testimony concerning the possibility that there had been attempts to procure false testimony in connection with the *Kamuhanda* Appeal, the Appeals Chamber directed the prosecution to investigate whether Tribunal employees may have attempted to interfere with witnesses who had given evidence in proceedings before the Tribunal, and to investigate discrepancies in testimony arising from the Rule 115 hearing for possible false testimony.<sup>88</sup>

70. On 11 June 2007, the Tribunal indicted Witness GAA for one count of giving false testimony under solemn declaration, one count of contempt of the Tribunal, and four counts of attempt to commit acts punishable as contempt of the Tribunal. He was subsequently arrested in Kigali, Rwanda, and, on 1 August 2007, transferred to the Tribunal. At his initial appearance on 10 August 2007, Witness GAA pleaded guilty to false testimony, and not guilty to the remaining counts. On 27 November 2007, the prosecution filed a plea agreement and a solemn declaration and statement of admitted facts signed by Witness GAA, along with an application to amend the indictment against him to include one count of giving false testimony under solemn declaration and one count of contempt of the Tribunal.<sup>89</sup> The application for amendment was granted, and, on 3 December 2007, Witness GAA made a further initial appearance where he pleaded guilty to false testimony and contempt.<sup>90</sup> He was subsequently sentenced to nine months imprisonment, and was released from prison on 14 March 2008.<sup>91</sup>

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<sup>85</sup> Witness GAA, T. 16 February 2009 p. 21; T. 18 February 2009 p. 2.

<sup>86</sup> Witness GAA, T. 16 February 2009 p. 21; Exhibits D. 15, D. 46 (Both Exhibits are Extracts of Transcript of *Kamuhanda* Rule 115 Evidentiary Hearing, dated 18 May 2005).

<sup>87</sup> See Witness A7/GEX, T. 18 March 2009 pp. 41-42; Exhibit D. 46 (Extract of Transcript of *Kamuhanda* Rule 115 Evidentiary Hearing, dated 18 May 2005).

<sup>88</sup> Exhibit D. 31 (Extract of Transcript of *Kamuhanda* Appeals Hearing, dated 19 May 2005)

<sup>89</sup> See Exhibits P. 7 (solemn declaration of Witness GAA) and P. 8 (Plea Agreement between Witness GAA and the Office of the Prosecutor).

<sup>90</sup> Witness GAA, T. 16 February 2009 p. 11-12. See also, *The Prosecutor v. GAA*, Judgement and Sentence (TC), 4 December 2007.

<sup>91</sup> Witness GAA, T. 16 February 2009 pp. 20-21.

## 2. MEETINGS AMONG NSHOGOZA, WITNESS GAA AND WITNESS A7/GEX

71. The Prosecution alleges that, as part of a wide campaign to subvert justice in connection with the *Kamuhanda* Appeal, the Accused organized meetings with protected prosecution Witness GAA and potential Witness A7/GEX<sup>92</sup> in knowing violation of or with “reckless disregard” for the witness protection order of 7 July 2000 issued by the *Kamuhanda* Trial Chamber. The Accused allegedly held these meetings in public places and in the presence of third parties. He is alleged to have manipulated these witnesses, through bribery, incitement or instigation, into signing statements which he fabricated and knew to be false. According to the Prosecution, Nshogoza also convinced Witnesses GAA and A7/GEX to testify falsely before the Appeals Chamber.<sup>93</sup>

72. The Accused acknowledges meeting with Prosecution Witness GAA and Defence Witness A7/GEX, but testified that the meetings were initiated by the witnesses. He accepts that Witness GAA was a protected prosecution witness in the *Kamuhanda* case, but denies that Witness A7/GEX was subject to the protective measures ordered by the *Kamuhanda* Trial Chamber at the time of their meetings. While he admits meeting the witnesses in public places, he denies discussing their testimonies in the presence of third parties. The Accused does not deny drafting statements for their signatures, but submits that the statements were taken according to the usual process and denies that they are false. Further, the Defence submits that Witnesses GAA and A7/GEX informed Nshogoza that they had falsely accused Kamuhanda, and that they willingly signed their recantation statements. Nshogoza acknowledges making payments to the witnesses for their transport expenses and the loss of a day’s wages after each meeting, but denies bribing or otherwise interfering with them.

### 2.1. Facts Relevant to the Meetings among the Accused, Witness GAA and Witness A7/GEX

73. Much of the evidence adduced by both Parties regarding the meetings among Nshogoza and Witnesses GAA and A7/GEX is in accord or not in dispute.<sup>94</sup> In 2001, Prosecution Witness GAA testified before this Tribunal as a protected witness for the Prosecution in the *Kamuhanda* trial.<sup>95</sup> Witness A7/GEX signed a statement for the Prosecution in connection with the *Kamuhanda* trial, and this statement was disclosed to the Defence along with her name, but she never testified in that trial.<sup>96</sup> During the relevant time period, Witness GAA and Defence Witness A7/GEX were neighbours and members of the same church.<sup>97</sup> Witness GAA spoke with Witness A7/GEX about his testimony in the *Kamuhanda* trial, and informed her that he had not been at

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<sup>92</sup> This Witness testified as Defence Witness A7 in this case. To avoid any possible confusion, the Chamber will refer to her as Witness A7/GEX throughout this Judgement.

<sup>93</sup> Indictment, paras. 5-27.

<sup>94</sup> The testimony regarding the meetings was not sufficiently clear for the Chamber to determine beyond a reasonable doubt the exact number of meetings or the dates and times of those meetings. The Chamber does not consider that a determination of these issues was necessary.

<sup>95</sup> Witness GAA, T. 18 February 2009 p. 2; Nshogoza, T. 30 March 2009 pp. 48-49; Witness Condé, T. 16 March 2009 pp. 41, 53.

<sup>96</sup> Witness A7/GEX, T. 17 March 2009 p. 86; Exhibit P. 24.

<sup>97</sup> Witness GAA, T. 16 February 2009 p. 25; T. 18 February 2009 p. 35; Witness A7/GEX, T. 18 March 2009 p. 5.

Gikomero on 12 April 1994.<sup>98</sup> Witness A7/GEX arranged a meeting between Witness GAA and Nshogoza, which took place at Stella Bar near the Tribunal offices in Kigali.<sup>99</sup> Witness A7/GEX attended all of the meetings between Witness GAA and Nshogoza.<sup>100</sup> After the meetings, Nshogoza paid the witnesses a sum that he told them was for transport expenses.<sup>101</sup> He paid them both a larger amount at his final meeting with them before they travelled to Arusha to testify before the Appeals Chamber.<sup>102</sup>

74. At their initial meeting, Witness GAA informed Nshogoza that he had not been at Gikomero on 12 April 1994, and had not seen Kamuhanda commit acts of genocide.<sup>103</sup> At their second meeting, which also took place at Stella Bar, Nshogoza showed Witness GAA a statement prepared for his signature.<sup>104</sup> Nshogoza read the contents of the statement to Witness GAA, who then signed it.<sup>105</sup> In March 2004, Nshogoza brought Witnesses GAA, A7/GEX and Augustin Nyagatare to a notary public's office in Kigali to confirm their statements and have them notarized.<sup>106</sup> These statements were submitted to the Appeals Chamber as part of a Rule 115 application to submit additional evidence in connection with Kamuhanda's appeal from his conviction at trial, and Witnesses GAA and A7/GEX testified before the Appeals Chamber on behalf of the Kamuhanda defence.<sup>107</sup>

75. The Chamber accepts these facts as proven beyond a reasonable doubt.

## 2.2. Disputed Factual Issues

76. Apart from these areas of broad agreement between the Parties and their evidence, several contested factual issues arise from the Indictment and the evidence relevant to the meetings. These issues are: (i) what was the state of the Accused's knowledge regarding the protective measures ordered by the *Kamuhanda* Trial Chamber; (ii) did the Accused initiate the meetings; (iii) did the Accused reveal protected information to the public or third parties at the meetings; (iv) did the Accused fabricate the statements or know that they were false; and (v) did the Accused procure Witnesses GAA's and A7/GEX's signatures and testimonies through bribery or other interference. The Chamber will consider the evidence relevant to these contested issues in turn below.

### 2.2.1 The Accused's knowledge regarding the protective measures

<sup>98</sup> Witness GAA, T. 16 February 2009, p. 14; 18 February 2009 pp. 35-36; Witness A7/GEX, T. 18 March 2009 p. 7.

<sup>99</sup> Witness GAA, T. 16 February 2009 p. 26; Nshogoza, T. 30 March 2009 pp. 46-47; Witness A7/GEX, T. 18 March 2009 p. 28.

<sup>100</sup> Witness GAA, T. 16 February 2009 pp. 41-42; Witness A7/GEX, T. 18 March 2009 pp. 23, 28, 33-35.

<sup>101</sup> Witness GAA, T. 16 February 2009 pp. 26-27, 46; Nshogoza, T. 30 March 2009 pp. 31-32, 46-47; Witness A7/GEX, T. 18 March 2009 p. 30, 33, 38-39.

<sup>102</sup> Witness GAA, T. 16 February 2009 p. 41; Witness A7/GEX, T. 19 March 2009 pp. 14-16.

<sup>103</sup> Witness GAA, T. 16 February 2009 pp. 14, 29, 30; Nshogoza, T. 30 March 2009 p. 46; Witness A7/GEX, T. 18 March 2009 p. 30.

<sup>104</sup> Witness GAA, T. 16 February 2009 p. 28; Nshogoza, T. 30 March 2009 p. 53.

<sup>105</sup> Witness GAA, T. 16 February 2009 p. 28; Nshogoza, T. 30 March 2009 p. 53.

<sup>106</sup> Witness GAA, T. 16 February 2009 pp. 33-39; Nshogoza, T. 30 March 2009 p. 53; Witness A7/GEX, T. 18 March 2009 pp. 34-37; Witness Nyagatare, T. 23 March 2009 pp. 14-15, 33-34. The Chamber notes that only Witness GAA's statement was ultimately notarized.

<sup>107</sup> Witness GAA, T. 16 February 2009 p. 21; Witness A7/GEX, T. 18 March 2009 pp. 41-42; Exhibit D. 30.

77. At trial, the Defence challenged the allegation that Defence Witness A7/GEX was a protected prosecution witness in the *Kamuhanda* case, and adduced evidence intended to show that Nshogoza may not have been aware: (i) of the protective measures; (ii) of Prosecution Witness GAA's protected status; or (iii) that his actions violated the protected measures ordered by the *Kamuhanda* Trial Chamber. The Chamber considers these issues to involve both factual and legal questions. It will address the factual issues in this section, and the legal issues in the Legal Conclusions section.

78. Nshogoza testified that the first time he saw the Protective Measures Order for prosecution witnesses in the *Kamuhanda* case was when he was detained in Arusha.<sup>108</sup> Nshogoza also testified, however, that he believed that a prosecution witness whose identity had been disclosed could not be contacted by the Defence.<sup>109</sup> Considering that the Accused was a trained lawyer and had been working as a defence investigator on the *Kamuhanda* case for approximately two years at the time of the relevant events, the Chamber does not accept his testimony that he was ignorant of the existence of the Protective Measures Order or its contents.

#### 2.2.1.1 Witness A7/GEX

79. Regarding Witness A7/GEX's status under the Protective Measures, the evidence shows that Witness A7/GEX informed Nshogoza that she had made a statement to the Prosecution regarding Kamuhanda's presence at Gikomero.<sup>110</sup> The Protective Measures explicitly protect potential witnesses.<sup>111</sup> Nshogoza testified that Defence Witness Condé, who was Lead Defence Counsel in the *Kamuhanda* case, informed him that Witness A7/GEX was not a protected prosecution witness in that case.<sup>112</sup> The Accused further testified that if Witness A7/GEX's identifying information was disclosed to the *Kamuhanda* defence in March 2001, he would not have been aware of it because he was not yet a part of the *Kamuhanda* defence team.<sup>113</sup>

80. In the Rule 115 application before the Appeals Chamber in the *Kamuhanda* case, Witness Condé referred to Witness A7/GEX as a protected prosecution witness.<sup>114</sup> In her testimony before this Chamber, Condé denied that Witness A7/GEX was a protected witness, and explained that just because her motion referred to Witness A7/GEX in this way did not make it so.<sup>115</sup>

81. The Chamber accepts the Accused's testimony that Witness Condé told him that Witness A7/GEX was not a protected witness. The Chamber, however, finds that the Defence evidence also shows that: (i) at least as of their first meeting, the Accused was aware that Witness A7/GEX had given a statement to the prosecution in the *Kamuhanda* case, and (ii) the Rule 115

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<sup>108</sup> Nshogoza, T. 30 March 2009 p. 62.

<sup>109</sup> Nshogoza, T. 31 March 2009 pp. 44-45; Exhibit P. 20.

<sup>110</sup> Nshogoza, T. 30 March 2009 pp. 43-44.

<sup>111</sup> Protective Measures Order, paras. 2, 6, 9.

<sup>112</sup> Nshogoza, T. 31 March 2009 p. 45.

<sup>113</sup> Nshogoza, T. 31 March 2009 p. 45.

<sup>114</sup> Witness Condé, T. 17 March 2009 p. 44; Exhibit D. 30.

<sup>115</sup> Witness Condé, T. 17 March 2009 pp. 45-49.

Application filed by the *Kamuhanda* defence team referred to Witness A7/GEX as a protected prosecution witness.

### 2.2.1.2 Witness GAA

82. With respect to Witness GAA, Nshogoza testified that as a defence investigator in the *Kamuhanda* case, he was not allowed to attend court proceedings and, therefore, did not see any prosecution witnesses testify.<sup>116</sup> Moreover, when Witness A7/GEX told Nshogoza that Witness GAA wanted to meet with him, she used Witness GAA's real name, which Nshogoza had not heard before that time; Nshogoza testified that he had not been a member of the *Kamuhanda* defence team when Witness GAA testified in that trial.<sup>117</sup> Therefore, at their initial meeting, Nshogoza claims he was unaware that Witness GAA had testified as a prosecution witness in the *Kamuhanda* case.<sup>118</sup>

83. Other evidence adduced at trial, however, suggests that the Accused had some reason to believe that Witness GAA was a prosecution witness prior to their initial meeting. Witness A7/GEX testified that she told Nshogoza not only that Witness GAA wanted to meet with him, but also that Witness GAA had expressed that he was burdened by the fact that he had testified falsely against *Kamuhanda* at trial.<sup>119</sup>

84. According to his own testimony, Nshogoza told Condé about his first meeting with Witness GAA, and she told him that Witness GAA was a protected prosecution witness and he should not meet with him again.<sup>120</sup> They decided to discontinue the investigations and Nshogoza did not have any contact with Witness GAA until after January 2004, when the *Kamuhanda* Trial Judgement was delivered.<sup>121</sup> After *Kamuhanda*'s conviction, the *Kamuhanda* defence team revisited the issue and decided that Nshogoza would record the statements of Witnesses GAA and A7/GEX.<sup>122</sup>

85. The evidence adduced at trial proves beyond a reasonable doubt that, at the very latest, Nshogoza was aware that Witness GAA was a protected prosecution witness before meeting with him at the notary's office in Kigali in March 2004. The evidence also shows that, before meeting with him for the first time, Nshogoza was aware that Witness GAA wanted to recant either a statement or testimony in the *Kamuhanda* trial.

### 2.2.2 Initiation of the meetings

86. The Chamber recalls that the uncontested evidence in this case is that Defence Witness A7/GEX arranged the initial meeting between Nshogoza and Prosecution Witness GAA.<sup>123</sup> The Accused acknowledges instructing Witness A7/GEX to arrange this meeting.<sup>124</sup> The remaining

<sup>116</sup> Nshogoza, T. 30 March 2009 p. 27.

<sup>117</sup> Nshogoza, T. 30 March 2009 p. 44.

<sup>118</sup> Nshogoza, T. 30 March 2009 p. 34.

<sup>119</sup> Witness A7/GEX, T. 18 March 2009 p. 5.

<sup>120</sup> Nshogoza, T. 30 March 2009 pp. 48-49.

<sup>121</sup> Nshogoza, T. 30 March 2009 p. 50.

<sup>122</sup> Nshogoza, T. 30 March 2009 p. 50; Condé, T. 16 March 2009, pp. 54-55.

<sup>123</sup> *Supra*, para. 73.

<sup>124</sup> Nshogoza, T. 30 March 2009 p. 44.

question is how Nshogoza came into contact with Witness A7/GEX. The Defence adduced evidence to suggest that Witness A7/GEX initiated contact with the Accused, and told him about Witness GAA's desire to recant.<sup>125</sup> The Prosecution did not adduce any evidence on this issue.

87. The Chamber had some concerns with the Defence evidence and did not accept its explanation as to how the Accused first came into contact with Witness A7/GEX in its entirety. The Chamber notes, however, that its refusal to accept the Defence's evidence concerning the initiation of the meetings does not, of itself, permit it to find that it has been proven beyond a reasonable doubt that the Accused initiated the meeting with Witness A7/GEX, and thus Witness GAA.<sup>126</sup> The Chamber does not consider that the only reasonable conclusion from the evidence and circumstances is that the Accused initiated contact with A7/GEX. Therefore, given that the Prosecution did not adduce any evidence concerning the circumstances of Nshogoza's meeting with Witness A7/GEX, the Chamber cannot safely make any further findings on this issue.

### **2.2.3 Did the Accused disclose protected information?**

88. The Accused does not dispute that he held meetings with Prosecution Witness GAA and Defence Witness A7/GEX in public places, but denies disclosing their identities to anyone.

89. Regarding the presence of third parties at these meetings, the Chamber recalls that Prosecution and Defence evidence shows that Witness GAA and Witness A7/GEX attended their meetings with Nshogoza together; that Witnesses GAA and A7/GEX privately discussed their respective testimony and statements in the *Kamuhanda* trial; and that Witnesses GAA, A7/GEX and Witness Nyagatare all attended the meeting at the notary's office in Kigali, where Witness GAA's statement was disclosed to the notary.<sup>127</sup>

90. Witness GAA testified that Defence Witness A3 was present at two meetings that he had with Nshogoza. He did not provide further detail. The Chamber accepts that one of these meetings was the meeting between Nshogoza and Witness BUC,<sup>128</sup> but notes that Witness GAA's testimony that Witness A3 attended some other unidentified meeting lacks any detail. Witness GAA did not specify when or where this meeting took place, whether anyone else attended the meeting, what was discussed, or any other details. Given this lack of detail, the Chamber does not accept Witness GAA's uncorroborated testimony that Witness A3 was present at a second, unidentified meeting with the Accused.

91. Nshogoza testified that he would hold private conversations with people he needed to talk to, and would move away from other persons who might be at Stella Bar with him.<sup>129</sup> He stated that nobody overheard his conversations or eavesdropped on them, and that this would be frowned upon in Rwandan culture.<sup>130</sup> The Accused testified that his private conversations with

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<sup>125</sup> Witness A7/GEX, T. 18 March 2009 p. 2-3, 5, 64; *see also* Nshogoza, T. 30 March 2009 p. 35, 43-44.

<sup>126</sup> *See Nobile* Appeal Judgement, para. 47.

<sup>127</sup> *Supra*, paras. 73-74.

<sup>128</sup> *Infra*, paras. 128-140.

<sup>129</sup> Nshogoza, T. 30 March 2009 p. 16.

<sup>130</sup> Nshogoza, T. 30 March 2009 pp. 31, 33.

Witnesses A7/GEX and GAA were not held in the presence of or overheard by others, but did acknowledge discussing general issues with both at the same time.<sup>131</sup>

92. Witness GAA testified that Witness A7/GEX was present when Nshogoza read him the recantation statement, and Witness A7/GEX testified that she overheard their conversation at the first meeting.<sup>132</sup> Witness BUC testified that, at her meeting with the Accused, which was held in the presence of Witnesses GAA, A7/GEX, and Defence Witness A3,<sup>133</sup> the Accused did not bring her to a separate part of the room away from the others.<sup>134</sup> Witness GAA testified that he did not overhear Nshogoza's conversation with Witness BUC.<sup>135</sup> Witness A7/GEX claimed that Witness BUC confirmed what Witness GAA had previously told Nshogoza.<sup>136</sup>

93. The Indictment emphasises, and the evidence shows, that Nshogoza held his meetings in public, mostly at Stella Bar. The Chamber considers that, of itself, this evidence is not significant. There was no evidence to suggest that any protected information was revealed to patrons of Stella Bar, or any other persons not party to the meetings.

94. Given the testimonies of Prosecution Witnesses GAA and BUC and Defence Witness A7/GEX, the Chamber is not convinced that Nshogoza took the precautions that he claimed to have taken at his meetings. The Chamber therefore finds that the evidence proves, beyond a reasonable doubt, that the Accused discussed details of Witness GAA's testimony in the presence of Witness A7/GEX.

#### **2.2.4 Did the Accused fabricate statements or know they were false?**

95. The Chamber recalls that the uncontested evidence in the case shows that the Accused prepared Prosecution Witness GAA's and Defence Witness A7/GEX's recantation statements for their signatures, and that he read Witness GAA his statement before obtaining his signature.<sup>137</sup>

96. Nshogoza sought to further explain his statement taking process during his testimony. He testified that he prepared Witness GAA's statement on the basis of notes he took at their first meeting.<sup>138</sup> Witness GAA accepted the statement and said that he was willing and ready to go to the notary to sign the statement.<sup>139</sup> Nshogoza believed that this practice conformed to the statement-taking practices of prosecution and defence representatives at this Tribunal.<sup>140</sup>

<sup>131</sup> Nshogoza, T. 30 March 2009 p. 33.

<sup>132</sup> Witness GAA, T. 16 February 2009 p. 32; Witness A7/GEX, T. 18 March 2009 p. 29.

<sup>133</sup> Witness BUC, T. 12 February 2009 pp. 21-24; Witness GAA, T. 16 February 2009 pp. 51-52 (Witness GAA testified that Defence Witness Augustin Nyagatare was also at this meeting, but this evidence is not in accord with the evidence of Witnesses BUC, Augustin Nyagatare, A3 or A7/GEX); Witness A7/GEX, T. 18 March 2009 pp. 31-33; T. 19 March 2009 pp. 6-8; Witness A3, T. 19 March 2009 pp. 42-47.

<sup>134</sup> Witness BUC, T. 12 February 2009 p. 28.

<sup>135</sup> Witness GAA, T. 16 February 2009 p. 52;

<sup>136</sup> Witness A7/GEX, T. 18 March 2009 p. 33.

<sup>137</sup> *Supra*, para. 74.

<sup>138</sup> Nshogoza, T. 30 March 2009 p. 53.

<sup>139</sup> Nshogoza, T. 30 March 2009 p. 53.

<sup>140</sup> Nshogoza, T. 30 March 2009 pp. 33-34; *see also* Witness Seminega, T. 19 March 2009 pp. 80-81 (discussing the process representatives of the Prosecution followed when taking his statement).

97. The Prosecution failed to adduce any evidence to suggest that the Accused's statement taking process was out of the ordinary, and the Chamber does not consider the fact that Nshogoza prepared the statements for the signatures of Witnesses GAA and A7/GEX, of itself, to be incriminating.

98. The uncontested evidence also shows that Witness GAA informed Witness A7/GEX and the Accused that he had not been at Gikomero, and that his testimony against Kamuhanda at trial was false. During his testimony before this Chamber, Witness GAA said that he lied to both Witness A7/GEX and Nshogoza when he told them that he had not been at Gikomero.<sup>141</sup> Witness GAA did not, however, inform Nshogoza that he had lied to him. Rather he suggested only that Nshogoza was aware that the new statement was inconsistent with his prior testimony in the *Kamuhanda* trial.<sup>142</sup> The Chamber accepts this, but does not consider it probative regarding the issue of whether the Accused knew Witness GAA's recantation to be false. The Prosecution did not adduce any additional evidence regarding the Accused's knowledge of the statements.

99. At trial, Nshogoza denied seeking false testimony from any witnesses, and said he never asked a witness to sign a statement that he believed to be false.<sup>143</sup> He testified that he believes Witness GAA's and Witness A7/GEX's recantation statements and their testimonies before the Appeals Chamber to be truthful.<sup>144</sup> He believes Witness GAA testified falsely in the *Kamuhanda* trial proceedings in 2001, and believes that Kamuhanda was not at Gikomero on 12 April 1994.<sup>145</sup> He testified that the *Gacaca* proceedings concerning events in Gikomero support his beliefs.<sup>146</sup>

100. The Defence adduced additional evidence which suggested that the Accused may have had reason to believe that Witness GAA's recantation was true. Defence Witness Augustin Nyagatare, who personally participated in the killings in Gikomero in 1994, testified that he informed the Accused that Kamuhanda was not present during the attacks.<sup>147</sup> Defence Witness Cyprien Hakizimana, the President of the Appeals Chamber of the *Gacaca* Court in Gikomero *secteur*, testified that the *Gacaca* Court had gathered extensive material concerning the 12 April 1994 massacres at Gikomero parish.<sup>148</sup> He testified that he had examined the materials, and that Kamuhanda was not on the lists of persons charged by the *Gacaca* Court with participating in these massacres.<sup>149</sup>

101. The Prosecution did not adduce any evidence to suggest that Witness A7/GEX's recantation statement was false or that the Accused had any reason to believe it was false. For

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<sup>141</sup> See e.g., Witness GAA, T. 16 February 2009 pp. 14, 18, 29, 31; T. 18 February 2009 pp. 35-36.

<sup>142</sup> Witness GAA, T. 16 February 2009 p. 29.

<sup>143</sup> Nshogoza, T. 30 March 2009 p. 34.

<sup>144</sup> Nshogoza, T. 31 March 2009 p. 57.

<sup>145</sup> Nshogoza, T. 30 March 2009 pp. 62-63.

<sup>146</sup> Nshogoza, T. 31 March 2009 p. 58.

<sup>147</sup> Witness Nyagatare, T. 23 March 2009 pp. 10-11.

<sup>148</sup> Witness Hakizimana, T. 24 March 2009 pp. 6-7.

<sup>149</sup> Witness Hakizimana, T. 24 March 2009 pp. 19, 24-26.

her part, Witness A7/GEX testified that she informed Nshogoza that she had lied in her statement to Prosecution investigators regarding Kamuhanda's presence at Gikomero.<sup>150</sup>

102. The Chamber therefore finds that the Prosecution has failed to prove beyond a reasonable doubt that the Accused fabricated the statements of Witnesses GAA and A7/GEX. Nor has it proved beyond a reasonable doubt that the Accused knew the recantation statements were false, or even that he had reason to know that they were false. Given this conclusion, the Chamber need not consider the additional Defence evidence adduced to show that Witness GAA's recantation statement was true.<sup>151</sup>

### **2.2.5 Bribery or Other interference**

103. There were three areas of evidence concerning bribery and manipulation. First, the evidence of both parties shows that the Accused made payments and offered food and drinks to Witnesses GAA and A7/GEX. Second, Witness GAA testified that Nshogoza promised him one million Rwandan Francs in exchange for his testimony. Third, Witness GAA testified that Nshogoza made misrepresentations about the purpose and consequences of his testimony in order to secure his cooperation.

#### **2.2.5.1 Alleged Payments and Inducements Offered by the Accused**

104. The evidence shows that Nshogoza paid Prosecution Witness GAA and Defence Witness A7/GEX a sum of Rwandan Francs after meeting with them.<sup>152</sup> Nshogoza testified that the payments were for transportation and lost earnings, and the evidence in the case shows that, at least at the first meeting, he told Witnesses GAA and A7/GEX that the purpose of the payment was the reimbursement of transport expenses.<sup>153</sup> Neither witness mentioned being told that the payments were also intended to cover lost earnings.

105. The amount of the payments is disputed. According to Witness GAA, the Accused paid him 10,000 Rwandan Francs for each meeting until the last, when he paid him 20,000 Rwandan Francs.<sup>154</sup> Witness GAA testified his return trip to Stella Bar cost him only 300 Rwandan Francs.<sup>155</sup> Nshogoza said he paid Witnesses GAA and A7/GEX 5,000 Rwandan Francs.<sup>156</sup> He explained that he paid witnesses travelling from Gikomero between 5,000 and 7,000 Rwandan

<sup>150</sup> Nshogoza, T. 30 March 2009 pp. 43-44.

<sup>151</sup> Defence Witnesses A7/GEX, Augustin Nyagatare, Straton Nyarwaya, Cyprien Hakizimana, A25 and A29 testified to the underlying events at Gikomero Parish in April 1994, and/or to the Defence claim that Jean de Dieu Kamuhanda had been framed for his crimes. Defence Witness A10 also provided testimony relevant to these events; the Defence was granted permission to treat her as hostile. In addition to this *viva voce* evidence, the Chamber admitted the written statements of seven witnesses pursuant to Rule 92 *bis* (B), whose evidence concerned the underlying events at Gikomero Parish. *See* Exhibits D. 84 – D. 90 (statements of Defence Witnesses A13, A15, A17, A18, A23, A28 and A30); *see also* Decision on Defence Motion for the Admission of Written Statements of Witnesses A1, A13, A14, A15, A17, A18, A20, A22, A23, A26, A28 and A30 as Evidence *in lieu* of Oral Testimony, 29 April 2009.

<sup>152</sup> *Supra*, para. 74.

<sup>153</sup> Nshogoza, T. 30 March 2009 p. 31; Witness GAA, T. 16 February 2009 p. 26; Witness A7/GEX, T. 18 March 2009 p. 30.

<sup>154</sup> Witness GAA, T. 16 February 2009 p. 41.

<sup>155</sup> Witness GAA, T. 16 February 2009 p. 26.

<sup>156</sup> Nshogoza, T. 30 March 2009 pp. 46-47.

Francs, because this is what it cost him to travel there.<sup>157</sup> Witness A7/GEX testified that Nshogoza paid her 5,000 Rwandan Francs at each meeting, except for (i) a meeting where he gave her and Witness GAA 5,000 Rwandan Francs to share; and (ii) her last meeting with him, when he gave her 10,000 Rwandan Francs.<sup>158</sup> She specified that, at the last meeting, Nshogoza handed her and Witness GAA a total of 20,000 Rwandan Francs to share.<sup>159</sup>

106. Other witnesses also testified concerning payments made after interviews by representatives of the OTP or defence teams working on behalf of accused persons, as well as after meetings with representatives of WVSS in Kigali. Prosecution Witness GAF testified that, after a 2007 interview with representatives of the OTP in Kigali, he was given 4,000 Rwandan Francs by the OTP interpreter.<sup>160</sup> He understood that these funds were given to him for transportation costs and in compensation for the day's labour that he lost.<sup>161</sup> According to Witness BUC, at the end of their meeting, Nshogoza gave her 5,000 Rwandan Francs for transportation. The trip to Remera had cost Witness BUC 600 Rwandan Francs.<sup>162</sup> She was never asked about the cost of the trip, and she did not know whether any of the other persons in attendance at the meeting was paid.<sup>163</sup>

107. Defence Witness Condé testified that when she was on mission in Rwanda, witnesses would be brought by Nshogoza to meet her in a hotel, and they would be reimbursed for their travel expenses.<sup>164</sup> She did not know the amount of money paid to any witnesses.<sup>165</sup> Defence Witness Nyagatare testified that after the meeting at the notary's office, they all went back to Stella bar and Nshogoza gave each of them 5,000 Rwandan Francs for transport expenses.<sup>166</sup> He further testified that before coming to Arusha to testify in this case he met someone from WVSS in Kigali, and that after that meeting he was paid 15,000 Rwandan Francs to cover his transport expenses.<sup>167</sup>

108. Defence Witness A3 testified that after the meeting he attended with Nshogoza, Prosecution Witnesses GAA and BUC, and Defence Witness A7/GEX, he was paid 3,000 Rwandan Francs, but he could not see how much money Nshogoza gave to the other persons.<sup>168</sup> Defence Witness Hakizimana testified that, after a meeting with representatives of WVSS, he was paid 10,500 Rwandan Francs to cover his transport expenses for his travel to and from the Tribunal offices in Kigali.<sup>169</sup> Defence Witness A25 testified that he travelled to the Tribunal offices in Kigali shortly before testifying, where he was asked to sign a document and was given

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<sup>157</sup> Nshogoza, T. 30 March 2009 p. 32.

<sup>158</sup> Witness A7/GEX, T. 18 March 2009 pp. 30, 33, 38-39; T. 19 March 2009 pp. 13-16.

<sup>159</sup> Witness A7/GEX, T. 19 March 2009 p. 16.

<sup>160</sup> Witness GAF, T. 10 February 2009 p. 23.

<sup>161</sup> Witness GAF, T. 10 February 2009 p. 23.

<sup>162</sup> Witness BUC, T. 12 February 2009 p. 26.

<sup>163</sup> Witness BUC, T. 12 February 2009 p. 27.

<sup>164</sup> Witness Condé, T. 17 March 2009 p. 12.

<sup>165</sup> Witness Condé, T. 17 March 2009 p. 12.

<sup>166</sup> Witness Nyagatare, T. 23 March 2009 pp. 15-16.

<sup>167</sup> Witness Nyagatare, T. 23 March 2009 p. 22.

<sup>168</sup> Witness A3, T. 19 March 2009 p. 47.

<sup>169</sup> Witness Hakizimana, T. 24 March 2009 p. 37.

5,500 Rwandan Francs to cover his transportation expenses that day.<sup>170</sup> Defence Witness A29 testified that before coming to testify in Arusha, he went to the Tribunal offices in Kigali where he was asked questions pertaining to his security. At the end of that visit, he was paid 8,000 Rwandan Francs to cover his transport expenses.<sup>171</sup> He was also reimbursed for travel expenses by the Nshogoza Defence team when he travelled to meet with them.<sup>172</sup> In addition, at the request of the Defence, the Chamber admitted a portion of the testimony of Prosecution Witness AMN from the *Karemera et al.* trial pursuant to Rule 92 *bis* (D).<sup>173</sup> In the admitted excerpt, Witness AMN testified that he met with representatives of the Prosecution and was paid 10,000 Rwandan Francs for travel expenses.<sup>174</sup>

109. The Chamber does not accept Witness GAA's uncorroborated evidence regarding the amount of the payments. Witness GAA's testimony was inconsistent with a prior statement he made to Loretta Lynch, counsel appointed by the Prosecution to investigate the allegations of false testimony and witness tampering which arose during Kamuhanda's Appeal proceedings. Witness GAA told Loretta Lynch that Nshogoza gave him 3,000 Rwandan Francs for transport and eating, and did not give him money for his family.<sup>175</sup> During trial, he claimed that he had lied to Loretta Lynch.<sup>176</sup> The Chamber accepts that Witness GAA may have lied to Loretta Lynch about such payments, but notes that Witness GAA did not explain why, if he was trying to prevent discovery of the payments, he mentioned any payment at all.

110. There was also reason to believe that Witness GAA's memory of the payments may not have been exact. During trial, he testified that the payments were made in 2,000 Rwandan Franc notes.<sup>177</sup> Conversely, Witness A7/GEX testified that Nshogoza always gave 5,000 Rwandan Franc notes.<sup>178</sup> By Decision dated 16 April 2009, the Chamber took judicial notice of the fact that 2,000 Rwandan Franc notes were only introduced into circulation in Rwanda in 2007.<sup>179</sup>

111. Regardless of the amount of the payments, the evidence suggests that, with the exception of the final payments to Witnesses GAA and A7/GEX, such payments were made for the purpose of covering transport expenses, and shows that Nshogoza was not alone in making them. Rather, the evidence shows such payments were, at least on occasion, made by representatives of the Prosecution and by WVSS after meetings with witnesses. The evidence also shows that Nshogoza made similar payments to witnesses other than Witnesses GAA and A7/GEX. The conclusion that such payments were made to cover transport costs is bolstered by testimony suggesting that such payments were not made when witnesses were provided transportation to

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<sup>170</sup> Witness A25, T. 25 March 2009 pp. 4-5.

<sup>171</sup> Witness A29, T. 25 March 2009 pp. 52-53.

<sup>172</sup> Witness A29, T. 25 March 2009 p. 59.

<sup>173</sup> Decision on Defence Motion for the Admission of Transcripts pursuant to Rule 92 *bis* (TC), 23 April 2009.

<sup>174</sup> Exhibit D. 83 (*The Prosecutor v. Karemera et al.*, T. 1 October 2007, pp. 49-56).

<sup>175</sup> Exhibit D. 14 (Excerpts from Witness GAA interview with Loretta Lynch).

<sup>176</sup> Witness GAA, T. 18 February 2009 p. 46.

<sup>177</sup> Witness GAA, T. 16 February 2009 p. 46.

<sup>178</sup> Witness A7/GEX, T. 18 March 2009 p. 39.

<sup>179</sup> Decision on Defence Motion for Judicial Notice (TC), 16 April 2009.

and from interviews.<sup>180</sup> The evidence shows that the final payments were made to cover costs while Witnesses GAA and A7/GEX were testifying before the Appeals Chamber.

112. There was also evidence that Nshogoza provided food and drinks at the meetings.<sup>181</sup> The Chamber considers that, of itself, the fact that the Accused provided food and drinks at the meetings was innocuous. There was no more direct evidence to suggest that the Accused expressly offered the refreshments in exchange for anything. Although the Chamber considers that it is the Accused's intention in providing the refreshments that matters, the Chamber notes that none of the recipients of the food and drink testified that he or she believed the refreshments were provided in exchange for testimony.

113. Given this evidence, the Chamber does not find that the Prosecution proved beyond a reasonable doubt that Nshogoza made such payments or provided food and drink with the intent or purpose of bribing or otherwise interfering with Prosecution Witness GAA or Defence Witness A7/GEX.

#### **2.2.5.2 The Alleged Promise of Payment of One Million Rwandan Francs**

114. Prosecution Witness GAA testified that Nshogoza promised to pay him one million Rwandan Francs in exchange for signing his statement and testifying before the Appeals Chamber.<sup>182</sup> He was never paid the promised sum.<sup>183</sup>

115. The Accused denied offering or paying money in exchange for testimony.<sup>184</sup> Defence Witness A7/GEX testified that Nshogoza never offered her any sum of money.<sup>185</sup> She testified that she never heard Nshogoza promise Witness GAA any amount of money. If this happened, it happened in her absence.<sup>186</sup>

116. The Chamber considers Witness GAA's uncorroborated testimony regarding the promise of one million Rwandan Francs to be problematic. Witness GAA's testimony on this issue lacked detail. He stated only that during "the first meetings", Nshogoza promised to give him money without being more specific. He was not informed of the amount until the sixth meeting.<sup>187</sup> The Chamber notes that this general testimony is in contrast to the detail with which Witness GAA testified about his meetings with Nshogoza, in particular the first meeting at Stella Bar and the meeting at the notary's office in Kigali.

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<sup>180</sup> Witness A7/GEX, T. 19 March 2009 pp. 14-15 (noting that she was given food and drink by representatives of the Prosecution, but was not paid transport money when the Prosecution provided transport to and from the interview).

<sup>181</sup> Witness GAA, T. 16 February 2009 pp. 26, 43, 51-52; Witness BUC, T. 12 February 2009 pp. 21, 26; Nshogoza, T. 30 March 2009 pp. 13-16; Witness A7/GEX, T. 18 March 2009 pp. 3, 30, 39, 72, 84; Witness A3, T. 19 March 2009 p. 47; Witness Nyagatare, 23 March 2009 p. 6.

<sup>182</sup> Witness GAA, T. 16 February 2009 p. 41.

<sup>183</sup> Witness GAA, T. 16 February 2009 p. 44.

<sup>184</sup> Nshogoza, T. 30 March 2009 p. 34.

<sup>185</sup> Witness A7/GEX, T. 19 March 2009 pp. 19-20.

<sup>186</sup> Witness A7/GEX, T. 18 March 2009 pp. 47-48.

<sup>187</sup> Witness GAA, T. 16 February 2009 p. 41.

117. Witness GAA did not mention the sum of one million Rwandan Francs in a 14 June 2007 statement given to Rwandan authorities.<sup>188</sup> When asked by the Rwandan authorities why he would not state the amount promised him by Nshogoza, Witness GAA responded:

Honestly, he did not disclose the amount to me. I simply agreed to testify for Kamuhanda, because, in light of the sum that he was giving me for my transport, I believed that Nshogoza would pay me a substantial amount. Later, when we called him on the phone, we could not reach him, but I would not have accepted anything less than 500,000 Rwandan francs.<sup>189</sup>

118. Though Witness GAA now disavows this statement to the Rwandan authorities,<sup>190</sup> the Chamber does not accept his explanation for lying in the context of this statement. Witness GAA testified that, until he came to Arusha and pleaded guilty in August 2007, many of his statements contained lies.<sup>191</sup> The logic of Witness GAA's explanation is that he was trying to hide his wrongdoing. In the excerpts quoted above, which were read onto the trial record, Witness GAA was not trying to hide his contact with Nshogoza from the Rwandan authorities. Nor was he trying to hide that he expected money in exchange for his recantation. Moreover, in his testimony before this Chamber, Witness GAA partially confirmed his statement to the Rwandan authorities when he testified that Nshogoza "had promised to give me money without stating the amount. But given what he gave me on a daily basis, it augured well to me that he would give me much more money."<sup>192</sup>

119. Considering Witness GAA's testimony and his 14 June 2007 statement to Rwandan authorities in conjunction with the testimony of other Prosecution witnesses casts additional doubt on Witness GAA's testimony regarding the promise of payment. Prosecution Witness GAF, a friend and neighbour of Witness GAA whom Witness GAA contacted about possibly recanting his testimony in the *Kamuhanda* trial,<sup>193</sup> testified that Witness GAA never told him about an amount of money or even that he was certain that what was promised was money; rather "he just suspected that it might be an offer in monetary terms. Because as a matter of fact it is money people use in these type[s] of things."<sup>194</sup> Prosecution Witness SP004, another friend and neighbour of Witness GAA, testified that Witness GAA said that he was going to ask for one million Rwandan Francs in order for them to testify for the *Kamuhanda* defence. Witness GAA also told her that, even if they asked for one million Rwandan Francs, the person would be ready to pay.<sup>195</sup>

120. Though Witnesses GAF and SP004 were referring to the money that they might be paid either personally or as a group if they agreed to testify, the Chamber considers that their testimony provides possible insight into Witness GAA's state of mind. Moreover, it is noteworthy that Witness GAA did not tell them that he had been promised a sum of money in exchange for his testimony. Considered in conjunction with his 14 June 2007 statement to the

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<sup>188</sup> Witness GAA, T. 19 February 2009 p. 26.

<sup>189</sup> Witness GAA, T. 19 February 2009 pp. 26-27.

<sup>190</sup> Witness GAA, T. 19 February 2009 p. 27.

<sup>191</sup> Witness GAA, T. 17 February 2009 p. 52.

<sup>192</sup> Witness GAA, T. 16 February 2009 p. 45.

<sup>193</sup> *Infra*, paras. 141-153.

<sup>194</sup> Witness GAF, T. 9 February 2009 p. 31.

<sup>195</sup> Witness SP004, T. 11 February 2009 pp. 70-71.

Rwandan authorities as well as his evidence before this Chamber, this evidence suggests that Witness GAA may have merely expected payment or intended to request payment of 500,000 or one million Rwandan Francs from Nshogoza, and casts doubt on his testimony that Nshogoza ever promised such a payment.

121. Given the lack of corroboration for Witness GAA's testimony regarding the promise of payment, the lack of detail in his evidence surrounding the timing and circumstances of the alleged promise, including the lack of specificity as to what Nshogoza actually said, the inconsistencies with his prior statement to Rwandan authorities, the additional doubt raised by other Prosecution evidence in the case, and the Chambers concerns regarding Witness GAA's evidence described above,<sup>196</sup> the Chamber finds that the Prosecution has failed to prove beyond a reasonable doubt that Nshogoza promised to pay Witness GAA one million Rwandan Francs, or any other amount, in exchange for his statement and testimony.

### **2.2.5.3 Evidence of Misrepresentations by the Accused**

122. Prosecution Witness GAA testified that, at their initial meeting, the Accused informed him that he was writing a book about Kamuhanda and that he wanted Witness GAA to assist him.<sup>197</sup> Witness GAA believed that the statement he signed would be used by the Accused for the book he was supposedly writing about Kamuhanda.<sup>198</sup>

123. Witness GAA testified that he first learned his statement would be used in court at the notary's office because Nshogoza "handed [the] statement to court" at that time. Witness GAA protested and Nshogoza explained that he was counsel working for the Tribunal and that whatever happened from that point forward would rest with him alone in his official capacity.<sup>199</sup> Witness GAA then agreed that his statement could be submitted in court.<sup>200</sup>

124. Defence Witness A7/GEX testified that when she arranged the meeting between Nshogoza and Witness GAA she told Witness GAA that Nshogoza was a member of the *Kamuhanda* defence team.<sup>201</sup> At the meeting, she did not hear any reference to Nshogoza writing a book.<sup>202</sup>

125. The Chamber does not accept Witness GAA's uncorroborated testimony that Nshogoza claimed to be writing a book about Kamuhanda. The Chamber considers that this testimony is logically inconsistent with other aspects of Witness GAA's testimony. Witness GAA did not testify that Nshogoza represented that the purpose of the book was to prove Kamuhanda's innocence. Thus, if Nshogoza had told him that he was writing a book, the Chamber cannot discern, and indeed Witness GAA failed to provide any logical reason why he would have lied to Nshogoza about Gikomero. Witness GAA did not explain why Nshogoza would have wanted his assistance with a book on Kamuhanda after being informed that Witness GAA was not at

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<sup>196</sup> *Supra*, paras. 57-65.

<sup>197</sup> Witness GAA, T. 16 February 2009 pp. 24-26.

<sup>198</sup> Witness GAA, T. 16 February 2009 p. 31.

<sup>199</sup> Witness GAA, T. 16 February 2009 p. 34.

<sup>200</sup> Witness GAA, T. 16 February 2009 p. 34.

<sup>201</sup> Witness A7/GEX, T. 18 March 2009 p. 6.

<sup>202</sup> Witness A7/GEX, T. 18 March 2009 p. 29.

Gikomero and that he knew nothing about Kamuhanda. Moreover, Witness A7/GEX's testimony casts some additional doubt on Witness GAA's story.

126. Given its concerns with Witness GAA's credibility, discussed above,<sup>203</sup> the Chamber does not accept his uncorroborated testimony that Nshogoza represented that there would be no consequences for Witness GAA as a result of his recantation.

127. Therefore, the Chamber finds that the Prosecution has failed to prove beyond a reasonable doubt that Nshogoza represented to Witness GAA that he was writing a book about Kamuhanda or that he represented that there would be no consequences for Witness GAA as a result of his recantation.

### **3. THE MEETING BETWEEN NSHOGOZA AND WITNESS BUC**

128. The Prosecution alleges that, between approximately 1 March 2004 and 20 September 2004, the Accused requested Prosecution Witness GAA to arrange for him to meet with Prosecution Witness BUC in Kigali. Witness GAA arranged the meeting, which took place in a bar in Kigali and was attended by Witness GAA and Defence Witness A7/GEX, in addition to the Accused and Witness BUC. According to the Prosecution, the Accused attempted to procure false testimony from Witness BUC, by inciting her and offering her a bribe or reward to sign a false statement and testify on behalf of Kamuhanda on Appeal, but Witness BUC refused the Accused's offer. Despite this alleged refusal, the Prosecution alleged that Lead Counsel for Kamuhanda filed an undated statement for the Appeals Chamber.<sup>204</sup>

129. The Accused does not deny meeting with Witness BUC, but denies that he attempted to procure false testimony from her.

#### **3.1. Facts Related to the Accused's Meeting with Witness BUC**

130. As with the meetings between the Accused and Witnesses GAA and A7/GEX, much of the evidence of the Parties concerning Nshogoza's meeting with Witness BUC is in agreement or was not disputed at trial. Nshogoza asked Witness GAA to contact Witness BUC on his behalf.<sup>205</sup> Witness GAA and Witness BUC were neighbours and knew each other.<sup>206</sup> Witness GAA told Witness BUC that Nshogoza wanted to meet with her because she was a survivor of the massacres in Gikomero in 1994, and Nshogoza wanted to know more about what happened at Gikomero.<sup>207</sup>

131. Witness BUC eventually agreed to meet with the Accused.<sup>208</sup> They met at Stella Bar.<sup>209</sup> Witnesses GAA, A7/GEX and Defence Witness A3 were also present at the meeting.<sup>210</sup>

<sup>203</sup> *Supra*, paras. 57-65.

<sup>204</sup> Indictment, paras. 28-32.

<sup>205</sup> Witness GAA, T. 16 February 2009 p. 50; Nshogoza, T. 30 March 2009 p. 61 (noting that Lead Counsel Condé asked him to contact with Witness BUC, and not disputing Witness GAA's account); Witness Condé, T. 16 March 2009 pp. 57-58 (testifying that she asked Nshogoza to contact Witness BUC).

<sup>206</sup> Witness BUC, T. 12 February 2009 p. 16.

<sup>207</sup> Witness BUC, T. 12 February 2009 pp. 19-20.

<sup>208</sup> Witness GAA, T. 16 February 2009 p. 51; Witness BUC, T. 12 February 2009 p. 21.

<sup>209</sup> Witness GAA, T. 16 February 2009 p. 51; Witness A3, T. 19 March 2009 p. 46; *see also* Witness BUC, T. 12 February 2009 pp. 21-22 (Witness BUC did not know the name of the place where they met, which she described as

Nshogoza introduced himself as a member of the *Kamuhanda* defence team.<sup>211</sup> Nshogoza asked her questions about the massacres at Gikomero in 1994, and specifically about Kamuhanda.<sup>212</sup> She told him that she did not know Kamuhanda.<sup>213</sup> The Accused took notes at the meeting.<sup>214</sup> At the end of the discussion, Nshogoza asked Witness BUC if she would be willing to go and testify before a court if asked to do so.<sup>215</sup> Witness BUC told him that she was willing to do so.<sup>216</sup> She explained that she accepted to testify because Nshogoza asked her questions about the events at Gikomero and she was there.<sup>217</sup>

132. At the end of the meeting, Nshogoza gave Witness BUC 5,000 Rwandan Francs for transportation.<sup>218</sup> Nshogoza paid for food and drinks during the meeting.<sup>219</sup> The Defence filed a statement from Witness BUC as part of its Rule 115 Application before the Appeals Chamber.<sup>220</sup>

133. The Chamber accepts these facts as having been proved beyond a reasonable doubt.

### 3.2. Other Relevant Evidence

134. In addition to the above undisputed evidence, the Chamber considers the following evidence relevant to its determination of events at this meeting:

- a. Witness BUC testified that the trip to Remera had cost her 600 Rwandan Francs and that she was never asked about the cost of the trip.<sup>221</sup>
- b. Witness GAA testified that Nshogoza presented Witness BUC with documents to sign. Witness GAA did not know the contents of the documents.<sup>222</sup>
- c. Nshogoza testified that Witness BUC gave him a statement of her own free will, which the Accused handwrote and Witness BUC signed.<sup>223</sup>

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“a room” in the Remera section of Kigali); Witness A7/GEX, T. 18 March 2009 p. 31 (Witness A7/GEX testified that the meeting was held at the same place as her prior meeting with Nshogoza and Witness GAA).

<sup>210</sup> Witness GAA, T. 16 February 2009 pp. 51-52; Witness A3, T. 19 March 2009 pp. 44-45; *see also* Witness BUC, T. 12 February 2009 p. 24 (Witness BUC did not know Witness A3, but testified that, in addition to Witnesses GAA and A7/GEX, a man she did not know was present at the meeting); Witness A7/GEX, T. 18 March 2009 pp. 31, 33; T. 19 March 2009 pp. 6-8 (Witness A7/GEX testified that she did not know Witness A3 at the time, but later learned his identity and confirmed it when she travelled to Arusha together for their testimony in this trial).

<sup>211</sup> Witness BUC, T. 12 February 2009 p. 26.

<sup>212</sup> Witness BUC, T. 12 February 2009 p. 22.

<sup>213</sup> Witness BUC, T. 12 February 2009 p. 22.

<sup>214</sup> Witness GAA, T. 16 February 2009 p. 52; Nshogoza, T. 30 March 2009 p. 60 (referring to a statement he handwrote); Witness A7/GEX, T. 18 March 2009 p. 31.

<sup>215</sup> Witness BUC, T. 12 February 2009 p. 23.

<sup>216</sup> Witness BUC, T. 12 February 2009 pp. 23-24.

<sup>217</sup> Witness BUC, T. 12 February 2009 p. 27.

<sup>218</sup> Witness GAA, T. 16 February 2009 p. 52; Witness BUC, T. 12 February 2009 p. 26; Nshogoza, T. 30 March 2009 p. 61.

<sup>219</sup> Witness GAA, T. 16 February 2009 p. 52; Witness BUC, T. 12 February 2009 p. 26; Witness A3, T. 19 March 2009 p. 47.

<sup>220</sup> Exhibit D. 30; *see also* Nshogoza, T. 30 March 2009 p. 59 (recognizing Witness BUC’s statement attached to the Rule 115 Application).

<sup>221</sup> Witness BUC, T. 12 February 2009 pp. 26-27.

<sup>222</sup> Witness GAA, T. 16 February 2009 p. 51.

<sup>223</sup> Nshogoza, T. 30 March 2009 pp. 60-61.

- d. Nshogoza testified that Witness BUC's signature was on the handwritten version of the statement annexed to the 115 Rule Motion filed by Lead Counsel Condé.<sup>224</sup>
- e. Nshogoza testified that he paid Witness BUC 5,000 Rwandan Francs for transport costs and loss of earnings, but did not try to bribe her.<sup>225</sup>

### 3.3. Disputed Factual Issues

135. The Prosecution submits that the only reasonable inference from the above evidence is that “the Accused attempted to procure and place before the Appeals Chamber evidence purportedly from BUC, which would exculpate Jean de Dieu Kamuhanda.”<sup>226</sup> The Chamber considers that procuring evidence, of itself, is not an act punishable as contempt of the Tribunal, and thus, by extension, attempting to procure evidence would not be punishable as attempt to commit an act punishable as contempt of the Tribunal. The Chamber will therefore consider only whether the evidence shows that the Accused attempted to procure false evidence from Witness BUC.

136. The Prosecution adduced no evidence that the Accused asked Witness BUC to provide false testimony or sign a false statement. Rather, the evidence shows that the Accused asked Witness BUC about her knowledge of the massacre at Gikomero and Kamuhanda, she told him what she knew, and he asked her to sign a statement and if she would be willing to testify.

137. Despite having an opportunity to do so, the Prosecution did not ask Witness BUC any questions regarding her statement submitted before the Appeals Chamber. Given this failure, any finding that the statement differed from what Witness BUC told the Accused at their meeting would be unsafe and contrary to basic principles of fairness and due process. For this reason, the Prosecution failed to prove beyond a reasonable doubt that Witness BUC's statement was false or that the Accused had any reason to believe its contents were untrue.

138. The Chamber finds that the evidence proves beyond a reasonable doubt that Witness BUC agreed to testify before the Appeals Chamber. Moreover, Witness BUC did not suggest that she agreed to do so as a result of any incitement or bribery by the Accused. Indeed, Witness BUC stated that she agreed to testify because the Accused asked her questions about the events in Gikomero and she was present there.<sup>227</sup> The Appeals Chamber did not admit Witness BUC's statement as additional evidence on appeal.

139. Witness GAA's testimony that the Accused presented Witness BUC with documents to sign—to the extent that it refers to something other than the handwritten statement or notes, which was unclear from the testimony itself because it lacked detail—was not corroborated by Witness BUC. Indeed, the Prosecution did not question her on this issue. Moreover, it was, at least in part, internally inconsistent, as Witness GAA also testified that Nshogoza took notes. This evidence was also contradicted by the testimonies of Witness A7/GEX and the Accused. Given the lack of clarity and detail in Witness GAA's evidence, the lack of corroboration by

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<sup>224</sup> Nshogoza, T. 30 March 2009 pp. 59-60; Exhibit D. 30.

<sup>225</sup> Nshogoza, T. 30 March 2009 p. 61.

<sup>226</sup> Prosecution Closing Brief, para. 170.

<sup>227</sup> Witness BUC, T. 12 February 2009 p. 27.

Witness BUC, and the inconsistencies and contradictions described above, the Chamber does not accept that the Accused placed documents before Witness BUC that were distinct from the handwritten statement or notes.

140. The Chamber finds that the evidence proves beyond a reasonable doubt that Nshogoza paid Witness BUC 5,000 Rwandan Francs which he stated was for transportation expenses. The Chamber also accepts that this amount exceeded the actual transport costs incurred by Witness BUC, which amounted to 600 or 1,200 Rwandan Francs, that the Accused did not ask Witness BUC about the cost of the trip. The evidence also shows that the Accused provided food and drinks to Witness BUC. Nonetheless, as with the payments and refreshments provided to Witnesses GAA and A7/GEX, the Chamber does not consider that the evidence shows that the payments and refreshments were provided with the intent to induce or bribe Witness BUC into signing a statement or testifying.

#### **4. WITNESS GAA'S MEETINGS WITH WITNESSES GAF, SP003 AND SP004**

141. The Prosecution alleges that, between 1 March 2004 and 31 May 2005, the Accused, acting in concert with relatives of, or persons close to Kamuhanda, asked Prosecution Witness GAA to contact Prosecution Witnesses GAF, SP003 and SP004 on his behalf and ask them to meet with him with the ultimate purpose of procuring false testimony from each of them, in exchange of a substantial amount of money as a bribe or reward.<sup>228</sup>

142. The Accused denies asking Witness GAA to meet with any of these witnesses.

##### **4.1. Disputed Factual Issues**

143. Unlike the other allegations in this case, there are no undisputed facts relevant to these allegations and the evidence of the parties is not in accord. The Chamber considers that the two main issues arising from the Indictment are (i) whether the Accused asked Witness GAA to find other Witnesses to testify falsely on behalf of Kamuhanda; and (ii) whether the Accused promised any payment for other witnesses.

##### **4.1.1 Relevant Evidence**

144. According to Witness GAA, Nshogoza told him that if he could find any other potential witnesses for him, then he should put them in touch with the Accused.<sup>229</sup> Witness GAA said that such persons were supposed to testify that they had not seen Kamuhanda at Gikomero during the massacres.<sup>230</sup> Witness GAA contacted Prosecution Witnesses GAF, SP003 and SP004, but none of them met or spoke with Nshogoza.<sup>231</sup> Witness GAA explained that, after their meeting at the notary where he confirmed his recantation statement, Nshogoza told him not to pursue meetings with Witnesses GAF, SP003 and SP004 because the “witnesses he had already met were

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<sup>228</sup> Indictment, paras. 35, 41, 49.

<sup>229</sup> Witness GAA, T. 16 February 2009 p. 48.

<sup>230</sup> Witness GAA, T. 16 February 2009 p. 49.

<sup>231</sup> Witness GAA, T. 16 February 2009 pp. 49, 53.

sufficient.”<sup>232</sup> Witness GAA also testified that when he disclosed the names of those persons to Nshogoza, the Accused told him that he no longer needed to contact those persons.<sup>233</sup>

145. Witnesses GAF, SP003 and SP004 were all neighbours of Witness GAA.<sup>234</sup> Witness GAA informed each of them that there was someone who was interested in talking to them about Gikomero and Kamuhanda and that the person, whom he did not name, would pay them for their testimony.<sup>235</sup> They all learned that Nshogoza was the person who had promised the money after Witness GAA returned from recanting his testimony in Arusha.<sup>236</sup>

146. Specifically, Witness GAA asked Witness GAF, who had testified on behalf of the Prosecution in the *Kamuhanda* trial, to recant his testimony.<sup>237</sup> Witness GAA told Witness SP003 that he was going to introduce him to someone “so that we would go and testify in the *Kamuhanda* case and testify to the effect that Kamuhanda was not in the massacre site in Gikomero.”<sup>238</sup> Witness GAA asked Witness SP004 to testify on behalf of Kamuhanda and told her that because she had never testified as a prosecution witness against Kamuhanda, she could become a defence witness for him and there would be no trouble for her.<sup>239</sup>

147. With respect to the promise of payment, Witness GAA did not clearly inform Witness GAF that Nshogoza would pay him money until Witness GAA went to Arusha to recant his testimony.<sup>240</sup> Witness GAA told Witness SP003 that he would be given more than one million Rwandan Francs.<sup>241</sup> Witness GAA told Witness SP004 that he was going to ask him to offer them one million Rwandan Francs in order for them to testify for the *Kamuhanda* defence. Witness GAA said that, even if they asked for one million Rwandan Francs, the unidentified person would be willing to pay.<sup>242</sup>

148. Witness GAF testified that he refused to recant because he did not want to lie or testify to anything that he had not witnessed personally.<sup>243</sup> He also stated, however, that he eventually agreed to meet with Nshogoza, but the meeting never occurred.<sup>244</sup> Witness SP003 testified that he agreed to meet the Accused, but only in order to report to the authorities the person who was supposed to give them money.<sup>245</sup> Witness GAA arranged a meeting between Witness SP003 and

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<sup>232</sup> Witness GAA, T. 16 February 2009 p. 55.

<sup>233</sup> Witness GAA, T. 19 February 2009 p. 27.

<sup>234</sup> Witness GAA, T. 16 February 2009 p. 53, 55; Witness GAF, T. 9 February 2009 p. 21; Witness SP003, T. 10 February 2009 p. 46; Witness SP004, T. 11 February 2009 pp. 64-65 (closed session).

<sup>235</sup> Witness GAA, T. 16 February 2009 pp. 53-55; Witness GAF, T. 9 February 2009 pp. 23, 28; Witness SP003, T. 10 February 2009 p. 50-53; Witness SP004, T. 11 February 2009 pp. 68-71.

<sup>236</sup> Witness GAF, T. 9 February 2009 pp. 24-28; Witness SP003, T. 10 February 2009 pp. 48, 51, 54-55; Witness SP004, T. 11 February 2009 p. 69.

<sup>237</sup> Witness GAF, T. 9 February 2009 pp. 21, 23.

<sup>238</sup> Witness SP003, T. 10 February 2009 p. 50.

<sup>239</sup> Witness SP004, T. 11 February 2009 pp. 68-69.

<sup>240</sup> Witness GAF, 9 February 2009, pp. 29-31 (stating that he understood it would be a payment of money because that was what was used in these types of things).

<sup>241</sup> Witness SP003, T. 10 February 2009 pp. 51-53.

<sup>242</sup> Witness SP004, T. 11 February 2009 p. 70-71.

<sup>243</sup> Witness GAF, T. 9 February 2009 pp. 23, 28-29.

<sup>244</sup> Witness GAF, T. 10 February 2009 pp. 25, 35.

<sup>245</sup> Witness SP003, T. 10 February 2009 pp. 55, 57.

Kamuhanda's sister, but Witness SP003 was not interested in meeting with her.<sup>246</sup> No meeting was ever arranged between Witness SP003 and the Accused. Witness SP004 refused Witness GAA's request.<sup>247</sup>

149. Nshogoza testified that he did not know Witnesses GAF, SP003 or SP004, and had never seen them before they testified in this case.<sup>248</sup> He never asked anyone to put him in contact with these witnesses.<sup>249</sup> According to the Accused, Witness GAA never told him that he wanted to put him in touch with Witnesses GAF, SP003 and SP004 and never gave him their names.<sup>250</sup>

#### **4.1.2 Did the Accused request Witness GAA to find more Witnesses?**

150. The Chamber notes that the Prosecution's case concerning these allegations rests on the evidence of Witness GAA, who is the only Prosecution Witness who gave direct evidence of the Accused's alleged request that he find more witnesses.

151. Witness GAA's testimony regarding Nshogoza's alleged request to find more witnesses was inconsistent and contradicted by his prior statement to the Rwandan authorities. Witness GAA first testified that the Accused asked him to find other potential witnesses and to put them in contact with him.<sup>251</sup> Then he said that the Accused requested him to contact only Witness BUC, and he personally contacted other potential witnesses.<sup>252</sup> Witness GAA subsequently testified that the Accused gave him the names of some persons and he contacted them.<sup>253</sup> But he also stated that the Accused asked him to contact some persons, whose names Witness GAA subsequently disclosed to the Accused.<sup>254</sup> Moreover, in a 14 June 2007 statement given to Rwandan authorities, Witness GAA asserted that the Accused never asked him to look for witnesses for Kamuhanda. Witness GAA disavowed this statement, insisting that the Accused gave him names of people to be contacted.<sup>255</sup>

152. Even if the Chamber overlooked these inconsistencies and contradictions and accepted Witness GAA's uncorroborated testimony that the Accused asked him to look for other witnesses, this would not prove beyond a reasonable doubt that the Accused sought to procure false testimony. Witness GAA did not testify that the Accused asked him to find people who would lie or provide false testimony. The Chamber recalls that Witness GAA informed the Accused that he had not been at Gikomero and that his testimony against Kamuhanda was a lie.<sup>256</sup> If the Accused, after hearing this, asked Witness GAA to find other witnesses who could testify that Kamuhanda was not at Gikomero, a reasonable conclusion could be that the Accused was simply seeking evidence to corroborate Witness GAA's recantation. Under these

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<sup>246</sup> Witness SP003, T. 10 February 2009 pp. 55-56.

<sup>247</sup> Witness SP004, T. 11 February 2009 p. 70.

<sup>248</sup> Nshogoza, T. 30 March 2009 p. 61.

<sup>249</sup> Nshogoza, T. 30 March 2009 p. 62.

<sup>250</sup> Nshogoza, T. 30 March 2009 p. 62.

<sup>251</sup> Witness GAA, T. 16 February 2009 p. 48.

<sup>252</sup> Witness GAA, T. 16 February 2009 p. 49.

<sup>253</sup> Witness GAA, T. 19 February 2009 p. 27.

<sup>254</sup> Witness GAA, T. 19 February 2009 p. 27.

<sup>255</sup> Witness GAA, T. 19 February 2009 p. 27.

<sup>256</sup> *Supra*, paras. 95-102.

circumstances, the Chamber finds that the Prosecution has failed to prove beyond a reasonable doubt that the Accused asked Witness GAA to find other witnesses to provide false testimony.

#### **4.1.3 Did the Accused promise payment for other witnesses?**

153. In relation to the alleged promise of a reward in exchange for testimony, the Chamber observes that Witness GAA's testimony lacks detail and specificity in relation to whether the Accused actually promised any money to Witnesses GAF, SP003 or SP004, or, more generally, for other witnesses. When he first testified regarding Nshogoza's alleged request that he find more witnesses, Witness GAA did not refer to a promise of money. When he did eventually testify about a promise of money, it was unclear whether he was referring to the alleged promise of money that Nshogoza made to him, or to a separate promise of payment for other witnesses.<sup>257</sup> Moreover, the Chamber recalls its discussion of Witness GAA's testimony that the Accused promised to pay him for his testimony.<sup>258</sup> The Chamber considers that the doubts raised by Witness GAA's testimony and prior statements as well as the testimonies of Witnesses GAF and SP004 as to whether the Accused promised him payment also raise doubt as to whether the Accused promised payment for other witnesses. For these reasons, the Chamber finds that the Prosecution has failed to prove beyond a reasonable doubt that the Accused promised to pay other witnesses for their testimony.

## **CHAPTER IV: LEGAL CONCLUSIONS**

### **1. OVERVIEW OF THE LAW OF CONTEMPT OF THE TRIBUNAL**

154. Contempt of the Tribunal is described in Rule 77, which reads, in relevant part:

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

...

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

...

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

...

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<sup>257</sup> Witness GAA, T. 16 February 2009 p. 54 ("I told [Witness GAF] what the Accused had told me; namely, that if [Witness GAF] were to accept—to recant his previous testimony, Nshogoza would give him—give him an amount of money.") From this testimony, it is unclear whether Witness GAA meant that he repeated the alleged promise that Nshogoza had made to him, personally, regarding payment, or whether Nshogoza had also promised payment to others.

<sup>258</sup> *Supra*, paras. 114-121.

(B) Any incitement or attempt to commit any of these acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.

155. Rule 77 (A) provides the general *actus reus* and *mens rea* for contempt. The *actus reus* is interference with the administration of justice, and the *mens rea* is the knowledge and will to interfere.<sup>259</sup>

156. The listed punishable acts are non-exhaustive, and do not limit the Tribunal's jurisdiction to punish contempt.<sup>260</sup>

157. Under Rule 77 (A)(ii), the *actus reus* for contempt is the physical act of disclosing confidential information relating to proceedings before this Tribunal in an objective breach of a court order.<sup>261</sup> The *mens rea* for contempt by disclosure of information contrary to Rule 77 (A) (ii) is knowledge by the accused that his disclosure of information was done in violation of a court order.<sup>262</sup> It is sufficient to establish that the act which constitutes the violation is deliberate and not accidental.<sup>263</sup> A misunderstanding of the law, as to whether disclosing the information was unlawful or not, does not excuse a violation of it.<sup>264</sup>

158. The conduct punishable pursuant to Rule 77 (A)(iv) of the Rules includes threatening, intimidating, causing injury, offering a bribe or otherwise interfering with a witness. "Otherwise interfering with a witness" is an open-ended provision which encompasses "any conduct that is intended to disturb the administration of justice by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness' or potential witness' evidence."<sup>265</sup> Besides the general *mens rea* requirement for contempt, for which the Prosecution must also prove that the Accused acted knowingly and wilfully, Rule 77 (A) (iv) also requires that the conduct was carried out with the intent to interfere with the witness or with the knowledge that the conduct was likely to deter or influence the witness.<sup>266</sup>

159. Rule 77 (B) states that "any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties."

## 2. COUNT ONE: CONTEMPT OF THE TRIBUNAL

<sup>259</sup> *The Prosecutor v. Domagoj Margetić*, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt (TC), 7 February 2007 ("Margetić Contempt Judgement"), para. 77.

<sup>260</sup> *Margetić Contempt Judgement*, paras. 13, 14 (citing *Nobilo Appeal Judgement*, para 39 and *The Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77, Decision to Deny the Accused Josip Jović's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment (TC), 21 December 2005, para 28).

<sup>261</sup> *Marijačić Trial Judgement*, para 17; *Margetić Contempt Judgement*, para. 36.

<sup>262</sup> *The Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement (AC), 15 March 2007 ("Jovic Appeal Judgement"), paras. 27, 30; *Marijačić Trial Judgement*, para 18; *The Prosecutor v. Baton Haxiu*, Case No. IT-04-84-R77.5, Judgement on Allegations of Contempt (TC), 24 July 2008 ("Haxiu Contempt Judgement"), para. 11.

<sup>263</sup> *Nobilo Appeal Judgement*, para. 54.

<sup>264</sup> *Jović Appeal Judgement*, para 27; *Bulatović Contempt Appeal*, para. 11; *Haxiu Contempt Judgement*, para. 29.

<sup>265</sup> *Beqaj Contempt Judgement*, para. 21; *Margetić Contempt Judgement*, para. 64; *The Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt (TC), 17 December 2008 ("Haraqija & Morina Contempt Judgement"), para. 18.

<sup>266</sup> *Margetić Contempt Judgement*, para. 66; *Haraqija & Morina Contempt Judgement*, para. 19.

160. Under Count One of the Indictment, the Prosecution charges Nshogoza with committing contempt of the Tribunal pursuant to Rule 77 (A) and (A)(ii), by repeatedly meeting with and disclosing the protected information of Witnesses GAA and A7/GEX, in knowing violation of, or with reckless indifference to the protective measures ordered by the *Kamuhanda* Trial Chamber on 7 July 2000.<sup>267</sup>

### 2.1. Were Witnesses GAA and A7/GEX Protected Prosecution Witnesses?

161. The Defence submits that neither Prosecution Witness GAA nor Defence Witness A7/GEX were protected prosecution witnesses in the *Kamuhanda* case at the time of the meetings. According to the Defence, Witness A7/GEX may have been covered by the protective measures as a potential prosecution witness at some point, but all protections for her ceased on 14 May 2002, when the prosecution closed its evidence in that trial.<sup>268</sup> As for Witness GAA, the Defence argues that he waived his protective measures by approaching or agreeing to meet with the Accused.<sup>269</sup>

162. Pursuant to Rule 75 (G), once ordered, protective measures continue to apply until they are rescinded, varied or augmented pursuant to procedures set out in subsections (G) through (I) of that Rule. Though Rule 75 (G) refers only to protective measures ordered “in respect of a victim or witness”, the Chamber does not consider that this language was intended to explicitly exclude continued protection for potential witnesses. Rule 69, which authorizes protective measures for witnesses and victims generally, does not mention potential witnesses either. At this Tribunal, however, potential witnesses have routinely been granted protection.<sup>270</sup> In two recent decisions, Trial Chambers have rejected the argument that potential witnesses cannot be protected because they are not specifically mentioned in the Rules.<sup>271</sup>

163. In the trial of *The Prosecutor v. Nahimana et al.*, the Trial Chamber addressed the issue of protective measures for potential witnesses in an interlocutory decision:

The Chamber notes that Rule 69 provides that a Protection Order remains in force “until the Chamber decides otherwise”. As the Chamber has not rescinded a Protection Order or made any contrary decision relating to the protection of Prosecution witnesses the Protection Order remains in force. *This is so even in respect of witnesses the Prosecutor or Defence has not called.* The purpose of protective measures is to protect witnesses who may be “in danger or at risk”, as provided by Rule 69, and, more generally, to safeguard their “privacy and security”, as stated in

<sup>267</sup> Indictment, paras. 5-16; *see also, Supra*, paras. 48-56.

<sup>268</sup> Defence Closing Brief, para. 289.

<sup>269</sup> T. 29 April 2009 pp. 19-20 (Defence closing arguments).

<sup>270</sup> *See e.g.*, Decision on Defence Motion for Protective Measures for Victims and Witnesses (TC), 22 January 2009; *The Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on the Prosecutor’s Motion for Special Protective Measures for Prosecution Witnesses and others (TC), 6 May 2009 (“*Ngirabatware* Decision”); *The Prosecutor v. Kalimanzira*, ICTR-2005-88-I, Decision on Defence Motion for Protective Measures (TC), 14 December 2007; *The Prosecutor v. Karemera et al.*, ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

<sup>271</sup> *See Ngirabatware* Decision, para. 21; *The Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s emergency motion for no contact order and “Requete urgente de Matthieu Ngirumpatse aux fins d’interdire au Procureur de contacter toute personne figurant sur la liste de temoins sans l’accord préalable de ses conseils” (TC), 21 August 2008 (The Chamber avoided determining whether Rule 75 covered protective measures for potential witnesses, but ordered protections for such witnesses pursuant to Rule 54).

Rule 75. Once witnesses are covered by a Protection Order, the protection mechanism is triggered. *A witness who has not been called during presentation of a party's case may be called at a later stage, for instance, during rebuttal, appeal or review. Potential witnesses who fall under the Protection Order but never testify in a case may similarly be in need of protection. That the witness initiates contact with Counsel with a view to testifying, as is asserted by Mr Floyd [Defence Counsel for Hassan Ngeze] in the present case, does not negate Counsel's obligation to abide by the Protection Order and notify the Prosecutor, nor eliminate the protective measures granted to the witness.* The Chamber takes seriously its obligation to protect witnesses and is mindful that a Protection Order is an assurance to the witness that his identity and security will be protected.<sup>272</sup>

164. The Chamber considers the reasoning of the *Nahimana et al.* Trial Chamber on this issue to be persuasive.

165. The Defence submissions concerning the dire consequences of a finding that potential witnesses who do not testify remain subject to protective measures are unconvincing. The Defence offers no explanation as to how protective measures for potential witnesses who do not ultimately testify may “dilute the effect of protective measures”<sup>273</sup> of witnesses who do testify, and the Chamber does not consider that granting protective measures to one witness limits or decreases the ability of the Tribunal to issue protective measures for other witnesses. In addition, the suggested “enormous stifling effect”<sup>274</sup> on Defence investigations is unfounded. When ordering protective measures, the general practice before this Tribunal is for Trial Chambers to provide a procedure by which the opposing party may obtain permission to meet with a witness for the opposition.<sup>275</sup> Though contacting a protected witness may take more time and require extra administrative steps than does meeting with an unprotected witness, this does not amount to an “enormous stifling effect” and does not violate the rights of the Accused.

166. Finally, the Defence reference to the Prosecution's failure to object to Witness A7/GEX's admission as a Rule 115 witness before the Appeals Chamber is unavailing.<sup>276</sup> A violation of protective measures cannot be condoned by the opposing party in a case, either explicitly or by omission.

167. Turning to the proven facts of this case, the evidence shows that Witness A7/GEX provided a statement to the *Kamuhanda* prosecution team and that she was identified to the

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<sup>272</sup> *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor's Urgent Motion for a 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 (TC), 17 January 2003, para. 14 (“*Nahimana* Decision”)(internal footnotes omitted) (emphasis added).

<sup>273</sup> Defence Closing Brief, para. 290.

<sup>274</sup> Defence Closing Brief, para. 291.

<sup>275</sup> The *Kamuhanda* Protective Measures required that the Defence give notice to the Prosecution and make a written request to the Chamber to “contact any protected victim or potential Prosecution witnesses or any relative of such a person”. Upon obtaining such permission, the protective measures required the Prosecution to “undertake all necessary arrangements to facilitate such interview.” Protective Measures Decision, para. 2 (i). The Chamber expressly found that this measure did not affect the rights of the Accused. Protective Measures Decision, para. 9.

<sup>276</sup> Defence Closing Brief, para. 295. In any event, the evidence in this case shows that the Prosecution did raise the issue of violation of protective measures issue during the appeal hearing. Exhibit P. 14 (excerpt of appeal hearing in the *Kamuhanda* case, *The Prosecutor v. Kamuhanda*, T. 19 May 2005 p. 41 (French Transcript cited)).

*Kamuhanda* defence team as a potential prosecution witness in that case on 26 March 2001.<sup>277</sup> The Protective Measures explicitly cover potential prosecution witnesses, and do not specify when persons cease to be potential witnesses.<sup>278</sup> The *Kamuhanda* Trial Chamber did not rescind the protective measures for prosecution witnesses, potential or otherwise.

168. For these reasons, the Chamber finds that Defence Witness A7/GEX was a protected potential prosecution witness at the time of the meetings in this case.

169. Concerning Witness GAA, the Chamber did not accept the Defence evidence that he initiated contact with the Accused, but, even if Witness GAA had approached the Accused, the Chamber does not consider that this would amount to a waiver of his protective measures. Rules 69 (A) and 75 (F)(i) state, respectively, that protective measures remain in place “until the Chamber decides otherwise”, and that they “shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ... unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule.” Moreover, the Chamber finds the reasoning of the *Nahimana et al.* Trial Chamber persuasive, and considers that, regardless of who initiates contact, the Parties, including all members of the Defence team, must abide by applicable protective measures.<sup>279</sup>

170. In addition, the Chamber notes that any waiver of protective measures must be knowing and voluntary. The practice before this Tribunal has been for protected witnesses to verify, before the relevant Trial Chamber, that they request a waiver of their protective measures.<sup>280</sup> Indeed, to allow tacit waiver would not be consonant with the safety concerns which warrant the granting of such measures. In this case, four defence witnesses waived their protective measures. In accordance with the practice described above, they came before the Chamber and verified that they wished to waive their protective measures and the Chamber subsequently declared that the relevant protections were lifted.<sup>281</sup> The Chamber, therefore, finds that Prosecution Witness GAA did not waive his protective measures and remained protected by the Protective Measures at the time of the meetings.

## 2.2. Repeated Meetings with Protected Prosecution Witnesses

171. The Prosecution argues that, without regard to whether the Accused disclosed the protected information of Witnesses GAA and A7/GEX to third parties or the public, the Chamber may convict the Accused of contempt for his repeated meetings with the witnesses in

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<sup>277</sup> *Supra*, paras. 68, 73, 79-81.

<sup>278</sup> Protective Measures Decision, para. 2.

<sup>279</sup> *Nahimana* Decision, para. 14.

<sup>280</sup> See e.g., *The Prosecutor v. Pauline Niyamasuhuko et al.*, Case No. ICTR-97-29-T, Decision on Nteziryayo’s Motion for Variation of Protective Measures for Witnesses AND-36, AND-38, and AND-50 (TC), 20 April 2007, para. 11 (the Trial Chamber found that emails from witnesses expressing their desire to reside in a hotel rather than the safe house were insufficient to find that the witnesses had waived their protective measures); *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Bicamumpaka’s Motion to Vary Protective Measures for Certain Defence Witnesses (TC), 18 October 2007, paras. 5-6, (Trial Chamber’s decision to vary the protective measures was based on signed statements of the witnesses and followed an inquiry with WVSS).

<sup>281</sup> See T. 16 March 2009, pp. 22, 33 (in relation to Witness A8- Fulgence Seminega); T. 16 March 2009, p. 34 (with respect to Witness A11-Straton Nyarwaya); T. 16 March 2009, pp. 35-36 (in relation to witness A21-Cyprien Hakizimana) and T. 20 March 2009, p. 46 (with respect to Witness A9-Augustin Nyagatare).

violation of the protective measures ordered by the *Kamuhanda* Trial Chamber on 7 July 2000.<sup>282</sup>

172. The Defence submits that, even if Witnesses GAA and A7/GEX were protected prosecution witnesses in the *Kamuhanda* proceedings, Nshogoza's meetings with them, though in violation of the Protective Measures, do not qualify as contempt because the meetings are not sufficiently serious conduct.<sup>283</sup> The Defence submits that, even if this conduct is punishable as contempt, the Prosecution failed to prove that the Accused possessed the requisite *mens rea*.<sup>284</sup> The Chamber will consider each of these arguments in turn.

### 2.2.1 Sufficiently Serious Conduct

173. The Defence submits that “a complete reading of the [contempt] cases [shows] that the conduct in question must meet a gravity threshold in order to constitute contempt.”<sup>285</sup> In support of this proposition, the Defence refers to two Trial Chamber decisions on interlocutory motions wherein the Chambers found that violations of court orders were not sufficiently serious to amount to contempt.<sup>286</sup> The Defence further submits that the “reality of cases that involve witness protective measures, [is] that these are breached from time to time” and suggests that “[i]t is a regular occurrence in Trial Chambers for witnesses' identities to be revealed inadvertently, and then placed under seal when the breach is brought to the attention of the Chamber.” The Defence further submits that “[i]t is an indisputable fact, and undoubtedly a regrettable one, that the unauthorised meeting of protected Defence witnesses by the Prosecution happens on a regular basis at the ICTR” and refers the Chamber to seven alleged instances of such conduct that the Defence submits came to light in this trial.<sup>287</sup>

174. The Chamber notes that the plain language of Rule 77 makes no mention of a “gravity threshold” or “sufficiently serious conduct”. Rather it states that the Tribunal “may hold in contempt those who knowingly and wilfully interfere with its administration of justice.”<sup>288</sup> The Chamber considers that the plain language of the Rule dictates that any deliberate (knowing and wilful) conduct that interferes with the administration of justice is sufficiently serious to be punished as contempt.

175. In the context of a case concerning Rule 77 (A)(ii), which, in both the ICTY and ICTR Rules, states that the Tribunal may hold in contempt “any person who discloses information ... in knowing violation of an order of a Chamber”, the Appeals Chamber held that “a violation of a court order *as such* constitutes an interference with the International Tribunal's administration of

<sup>282</sup> T. 29 April 2009, pp. 10-11 (Prosecution closing arguments); *see also, supra*, paras. 48-56.

<sup>283</sup> Defence Closing Brief, paras. 278-280, 285, 304-306.

<sup>284</sup> Defence Closing Brief, paras. 296-303.

<sup>285</sup> Defence Closing Brief, para. 278.

<sup>286</sup> *Ibid.* (citing *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T, Decision on Prosecution Motion for Contempt of Court and on two Defence Motions for Disclosure (TC), 16 July 2001, paras 10-12; and *The Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, The Trial Chamber's Formal Complaint to the Prosecutor Concerning the conduct of the Prosecution (TC), 5 June 1998, para. 11.)

<sup>287</sup> Defence Closing Brief, para. 305; T. 29 April 2009 p. 39 (In closing arguments, the Defence submits that there were seven instances instead of the six instances referred to in the Closing Brief).

<sup>288</sup> Rule 77 (A).

justice.”<sup>289</sup> The Appeals Chamber further noted that “[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.”<sup>290</sup> The Chamber considers that the broad language used by the Appeals Chamber was not limited to orders preventing the disclosure of information, and finds that any violation of an order of a Chamber is a sufficient *actus reus* for contempt.<sup>291</sup>

176. With regard to the Defence argument that violations of protective measures occur from time to time, the Chamber notes that cases of inadvertent disclosures of protected witness information would be highly unlikely to meet the requirement that, in order to be held liable for contempt, one’s conduct must be knowing and wilful. The Chamber also notes that the language of Rule 77 is discretionary. The Tribunal *may* hold persons in contempt who knowingly and wilfully interfere with the administration of justice, but the fact that a Trial Chamber has reason to believe that a person is in contempt does not oblige it to order an investigation or prosecution. The Chamber does not consider it necessary to explore the variety of factors that may influence a Chamber’s decision whether or not to order an investigation or prosecution for contempt once its discretion to do so is enlivened. It is sufficient to note that decisions taken pursuant to Rule 77 are discretionary.

177. The Chamber has already addressed the allegations of Prosecution violations of protective measures raised in this case.<sup>292</sup> In addition, the Chamber notes that evidence that other persons may have committed similar acts to those alleged in the Indictment is irrelevant to these proceedings, as it does not tend to prove or disprove any of the allegations in the Indictment against the Accused.

178. The Chamber, therefore, rejects the Defence’s submission that the jurisprudence on contempt requires the Chamber to make an inquiry into the seriousness of the conduct in question that is independent of the elements expressed in Rule 77 (A). The Chamber considers that the knowing and wilful violation of protective measures ordered by a Trial Chamber is punishable as contempt of the Tribunal.

### **2.2.2 Defence Arguments related to *mens rea***

179. The Defence submits that in order for the Chamber to convict the Accused under Count One, “the Prosecution must have established that Mr Nshogoza knew he was violating a witness protection order in meeting GAA and GEX, and that he did so with a specific intent to interfere with the administration of justice.”<sup>293</sup> In the Chamber’s view, the Defence mischaracterizes the requisite *mens rea* for acts of contempt arising out of violations of a Chamber’s orders. Since, as held by the Appeals Chamber, any violation of a Chamber’s order interferes with its administration of justice, it follows that any knowing and wilful conduct in violation of a

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<sup>289</sup> *Jović* Appeal Judgement, para. 30 (quoting the *Marijačić* Appeal Judgement, para. 44) (emphasis added by Appeals Chamber in *Jović*).

<sup>290</sup> *Jović* Appeal Judgement, para. 30 (citations omitted).

<sup>291</sup> It is clear from the plain language of Rule 77 and the jurisprudence on contempt that the acts enumerated in Rule 77 (A)(i) through (v) are non-exhaustive.

<sup>292</sup> *Supra*, paras. 37-45.

<sup>293</sup> Defence Closing Brief, para. 296.

Chamber's order meets the requisite *mens rea* for contempt, that is, it is committed with the requisite intent to interfere with the administration of justice. As the ICTY Appeals Chamber noted, "[i]t is not for a party or a third person to determine when an order is serving the International Tribunal's administration of justice."<sup>294</sup>

180. As noted above,<sup>295</sup> the Defence makes several other arguments relevant to *mens rea*, none of which the Chamber accepts. The Defence submits that (i) at least at their initial meeting, the Accused did not know that Witness GAA was a protected prosecution witness; (ii) after that point, the Accused was instructed to meet with Witness GAA by Lead Counsel Condé and was simply doing his job; (iii) the Accused was unaware of the circumstances in which an investigator can meet with a protected witness and he relied on Lead Counsel Condé's instruction regarding the use of a notary.<sup>296</sup>

181. With regard to the Accused's knowledge of Witness GAA's status at their first meeting, the Chamber recalls its finding that the Accused was aware that Witness GAA wanted to recant a prior statement or testimony.<sup>297</sup> The Chamber further recalls that it did not accept the Accused's evidence that he was ignorant of the contents of the Protective Measures, and notes that they clearly described the requisite procedure before any member of the *Kamuhanda* defence team could meet with a protected prosecution witness, and made no mention of a notary public exception.<sup>298</sup> With respect to the Defence submissions regarding the Accused's misunderstanding regarding who was covered by the Protective Measures and the effect of visiting a notary, the Chamber notes that it is well-established in the ICTY's jurisprudence on contempt that mistake of law is not a valid defence.<sup>299</sup> For these reasons, the Chamber rejects the Defence argument that the Accused's conduct with respect to Witness GAA was not made with knowledge that, or at least reckless indifference to whether, the witness was a protected prosecution witness.

182. Turning to Witness A7/GEX, the Defence argues that, even if the Chamber finds that Witness A7/GEX was, in fact, a protected witness, the Accused was informed by Lead Counsel Condé that Witness A7/GEX was not a protected prosecution witness, and thus did not knowingly and wilfully violate the Protective Measures with respect to her. This argument must be rejected for the same reasons as those described in the two paragraphs directly above. The Protective Measures explicitly covered potential witnesses, and mistake of law is not an accepted defence to contempt. The Chamber also considers that, by following Condé's instructions under

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<sup>294</sup> *Marijačić* Appeal Judgement, para. 44 (internal quotation omitted).

<sup>295</sup> *Supra*, para. 77.

<sup>296</sup> Defence Closing Brief, paras. 297-301.

<sup>297</sup> *Supra*, para. 85.

<sup>298</sup> *Supra*, para. 78. In Closing Arguments the Defence suggested that, as a defence investigator, the Accused necessarily relied on Lead Counsel Condé to obtain authorization to meet with prosecution witnesses because the relevant provision of the Protective Measures did not explicitly authorise Nshogoza to obtain such permission, but referred only to defence counsel and Kamuhanda himself. The evidence is clear, however, that Condé informed Nshogoza that the use of the notary was meant to supersede the need to obtain authorisation pursuant to the Protective Measures.

<sup>299</sup> See e.g., *Jović* Appeal Judgement, para. 27.

these circumstances, the Accused displayed reckless indifference to whether his actions were in violation of the Protective Measures order.

183. With regard to the Accused's initial meetings with Witnesses GAA and A7/GEX, the Defence submits that these meetings were initiated by Witness A7/GEX, and that this eliminates the possibility that the Accused acted with the requisite *mens rea*. The Chamber considers that, if accepted,<sup>300</sup> this fact may have been relevant to the *mens rea* of the Accused under different circumstances. For example, if the Accused had initially met with the witnesses unaware of their protected status and then immediately cut off contact after learning that they were, in fact, protected witnesses.<sup>301</sup> But the Chamber does not consider it to assist the Accused under the particular circumstances of this case. Here, the evidence proven beyond a reasonable doubt shows that before meeting with Witnesses A7/GEX and GAA, the Accused knew that both witnesses had provided statements to the prosecution in the *Kamuhanda* case. The Chamber considers such information to have been sufficient to put the Accused on notice that the Witnesses may be protected prosecution witnesses. Under such circumstances, the Chamber finds the Accused's decision to meet with the witnesses, apparently without any further consideration of their possible status as witnesses, was taken with reckless indifference as to whether his actions were in violation of the Protective Measures.<sup>302</sup>

### 2.3. Disclosure of Protected Information to Third Parties or the General Public

184. The Prosecution also submits that the Accused committed contempt pursuant to Rule 77 (A)(ii) by "disclosing information ... in knowing violation of" the Protective Measures Order.

185. The Appeals Chamber has held that any wilful disclosure of information in knowing violation of an order of a Chamber is sufficient for the purposes of contempt under Rule 77(A)(ii).<sup>303</sup> It need not be shown that such disclosures actually interfered with the Tribunal's administration of justice.<sup>304</sup>

186. The Chamber has found that, by bringing Witnesses GAA, A7/GEX and Augustin Nyagatare to the notary's office, the Accused disclosed Witness GAA's identity as a prosecution witness in the *Kamuhanda* case and Witness A7/GEX's identity as someone who had given a statement to the Prosecution, or a potential witness, to Augustin Nyagatare and to the notary.

187. The proven evidence shows that that the Accused discussed the substance of Witness GAA's testimony in the presence of Witness A7/GEX. The evidence also shows that Witnesses GAA and A7/GEX discussed their respective testimonies prior to their meetings with the Accused. The Chamber notes, however, that, pursuant to the contempt jurisprudence of the ICTY, the prior disclosure of protected information does not authorize or exempt subsequent disclosures.<sup>305</sup> The Chamber considers that, pursuant to this jurisprudence, the prior disclosure of

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<sup>300</sup> *Supra*, para. 87.

<sup>301</sup> *See, Beqaj Contempt Judgement*, para. 40.

<sup>302</sup> *See Nobilo Appeal Judgement*, para. 54 (acting with reckless indifference to whether one's actions are in violation of a court is sufficiently culpable conduct for punishment as contempt).

<sup>303</sup> *See e.g., Jović Appeal Judgement*, para. 30; *Marijačić Appeal Judgement*, para. 44.

<sup>304</sup> *See e.g., Marijačić Trial Judgement*, para. 19.

<sup>305</sup> *See e.g., Jović Appeal Judgement*, para. 30.

their identities as prosecution witness and a potential prosecution witness, respectively, did not entitle the Accused to further violate the Protective Measures.

## 2.4. Conclusion

188. Recalling its factual findings regarding the knowledge of the Accused as to the protected status of Witnesses GAA and A7/GEX, the Chamber finds, that for his initial meeting with Witness GAA and all of his meetings with Witness A7//GEX, the Accused acted with reckless indifference to whether his actions were in violation of the Protective Measures. For all subsequent meetings with Witness GAA, including the meeting at the notary's office, the Accused knowingly and wilfully violated the Protective Measures, specifically the measure listed in paragraph 2 (i) of the Protective Measures Order, which required that the *Kamuhanda* defence inform the *Kamuhanda* prosecution and obtain authorisation from the *Kamuhanda* Trial Chamber before meeting with any protected persons. The Chamber further recalls finds the Accused disclosed the protected information of these witnesses to third parties as described above in violation of paragraph 2 (e) of the Protective Measures order, which prohibited the *Kamuhanda* defence from disclosing information that could reveal the identity of protected persons to anyone not on the defence team.

189. By these acts, the Accused committed contempt of the Tribunal. The Chamber therefore finds Nshogoza guilty pursuant to Count One of the Indictment.

## 3. COUNT TWO: CONTEMPT OF THE TRIBUNAL

190. Under Count Two of the Indictment, the Prosecution charges Nshogoza with committing contempt of the Tribunal pursuant to Rule 77 (A), (A)(ii), (A)(iv) and (B) by knowingly and wilfully procuring false statements and inciting, manipulated, instigated, offering inducements or promising a bribe to Prosecution Witnesses GAA and A7/GEX to sign false statements and give false testimony, or by otherwise interfering with them.<sup>306</sup>

191. According to Rule 77 (A)(iv), any person who knowingly and wilfully interferes with the administration of justice by “threaten[ing], intimidat[ing], caus[ing] any injury or offer[ing] a bribe to, or otherwise interfer[ing] with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness ...” may be punished for contempt of the Tribunal.

192. With regard to “offering a bribe”, the Chamber adopts the liberal definition of ‘bribe’ as set out by a Trial Chamber of the ICTY in the *Beqaj* Contempt Judgement:

The word “bribe” is liberally construed as an inducement offered to procure illegal or dishonest action or decision in favour of the giver. It is also defined as a price, reward, gift or favour bestowed or promised with a view to pervert the judgement of or influence the action of a person in a position of trust.<sup>307</sup>

193. In relation to “otherwise interferes with a witness or a potential witness”, the Chamber also finds persuasive the *Beqaj* Trial Chamber's treatment of the phrase:

<sup>306</sup>Indictment, paras. 17-27; *see also, supra*, paras. 48-56.

<sup>307</sup>*Beqaj* Contempt Judgement, para. 18 (internal citations omitted).

The expression “otherwise interfering with a witness or a potential witness” is an indication that Rule 77 gives a non-exhaustive list of modes of commission of contempt of the Tribunal. In view of the *mens rea* indicated in Rule 77 (A), the Chamber considers that otherwise interfering with witnesses encompasses any conduct that is intended to disturb the administration of justice by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness’ or potential witness’ evidence. There is nothing to indicate that proof is required that the conduct intended to influence the nature of the witness’s evidence produced a result.<sup>308</sup>

194. The Chamber will consider the Prosecution’s allegations that the Accused procured false statements from Witnesses GAA and A7/GEX, as well as the allegations that the Accused manipulated or instigated Witnesses GAA and A7/GEX to sign false statements and give false testimony according to these principles.

195. Rule 77 (B) states that “any incitement [...] to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.” The Trial Chamber in the trial of *The Prosecutor v. Akayesu* stated that “[i]ncitement is defined in Common law systems as encouraging or persuading another to commit an offence”, and that Civil law systems punished “act[s] intended to directly provoke another to commit a crime or a misdemeanour.”<sup>309</sup> In order to be punishable as contempt, an act of incitement would also have to be knowing and wilful pursuant to Rule 77(A).

### **3.1. Manipulating and Instigating Witnesses**

196. The Prosecution failed to prove beyond a reasonable doubt that there was anything out of the ordinary about the Accused’s process of taking statements from Witnesses GAA and A7/GEX or that he knew that the statements were false or that Witness GAA’s or A7/GEX’s testimony before the Appeals Chamber was false. The Chamber, therefore, finds that the Prosecution failed to prove beyond a reasonable doubt that the Accused knowingly procured false statements, or knowingly incited, manipulated, or instigated Witnesses GAA or A7/GEX to give false testimony.

### **3.2. Offer of a Bribe**

197. The Chamber considers that the definition of bribe that it has adopted is broad enough to include inducements, and, therefore, it will not separately consider the Prosecution’s allegation that the Accused offered inducements.

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<sup>308</sup> *Beqaj* Contempt Judgement, para. 21 (internal citations omitted). The Chamber does not consider that the phrase “otherwise interfering with a witness or a potential witness” relieves the Prosecution of the obligation to plead the specific conduct of the Accused for which it alleges he should be held liable. *See Beqaj* Contempt Judgement, para. 19. The Prosecution cannot simply plead that the Accused has “otherwise interfered with a witness or potential witness” and then mold its case to fit this general phrase based on the evidence it adduces. *See Nobile* Appeal Judgement, para. 41. The Chamber considers that, in this case, the allegations that the Accused procured false testimony from the witnesses and that he manipulated and instigated them into signing false statements and testifying falsely fall under the category of “otherwise interfering with a witness or potential witness.”

<sup>309</sup> *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, para. 555.

198. The Chamber recalls that the Prosecution failed to prove beyond a reasonable doubt that the Accused promised Witnesses GAA or A7/GEX payment in exchange for their signatures or testimony.

199. The evidence in this case shows that the Accused (i) gave Witnesses GAA and A7/GEX money, food and drink at the meetings he held with them; (ii) that the Accused did not give any money to Witnesses GAA and A7/GEX until after they informed him that they had provided false statements, and in Witness GAA's case, that he had given false testimony in connection with the *Kamuhanda* trial; (iii) that the Accused informed the witnesses that the money provided was for transport, or for their families while they were away from home testifying in Arusha; and (iv) that payments of similar amount were, at least on occasion, made to witnesses by representatives of the Prosecution and WVSS. Under the circumstances, the Chamber finds that the Prosecution failed to prove beyond a reasonable doubt that such payments and offers of food and drink were made with the intent to influence the nature of Witness GAA's or A7/GEX's evidence.

### **3.3. Manipulation of Witness GAA**

200. The Chamber recalls that the Prosecution failed to prove beyond a reasonable doubt that the Accused told Witness GAA that he was writing a book about Kamuhanda or that he informed Witness GAA that there would be no consequences if he gave a statement or testified before the Appeals Chamber.

### **3.4. Incitement to Sign False Statements or Give False Testimony**

201. As noted above, the Prosecution failed to prove beyond a reasonable doubt that the Accused knew that recantation statements or testimonies of Witnesses GAA and A7/GEX were false. As such, the Prosecution failed to prove that the Accused knowingly incited the punishable acts in question.

### **3.5. Conclusion**

202. For these reasons, the Chamber finds the Accused not guilty of Contempt of the Tribunal as alleged in Count Two of the Indictment

## **4. COUNT THREE: ATTEMPT TO COMMIT ACTS PUNISHABLE AS CONTEMPT OF THE TRIBUNAL**

203. Under Count Three of the Indictment, the Prosecution charges Nshogoza with committing the offence of Attempt to Commit Acts Punishable as Contempt of the Tribunal by attempting to suborn false testimony from Witness BUC.<sup>310</sup>

204. The Chamber recalls that Rule 77 (B) states that "any [...] attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties."

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<sup>310</sup>Indictment, paras. 28-32. The Chamber notes that the Indictment also alleges that the Accused offered a bribe to Witness BUC, or otherwise interfered with her. If proven, these acts would be punishable as contempt of the Tribunal, and not attempt. Nonetheless, the Chamber notes that it cannot convict the Accused of a crime other than the one charged, and, in any event these allegations were not proved beyond a reasonable doubt.

205. The *Beqaj* Trial Chamber considered the concept of ‘attempt’ under international law:

Article 25(3)(f) of the International Criminal Court Statute reflects a recent international codification of the concept of attempt. This provision combines the definitions of “attempt” found in most civil law and common law legal systems and provides that a person is criminally responsible if he or she “attempts to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions”. What is required for the attempt to be punishable is: (i) conduct consisting of a significant commencement of the criminal action, (ii) the intention to commit a crime, (iii) the failure of that intention to take effect owing to external circumstances.<sup>311</sup>

206. The Chamber recalls that the Prosecution failed to prove beyond a reasonable doubt that the Accused sought false testimony from Witness BUC, or that the payments made and refreshments offered to Witness BUC were made with the intent to induce or bribe her to testify.

207. The Chamber therefore finds the Accused not guilty of Count Three.

#### **5. COUNT FOUR: ATTEMPT TO COMMIT ACTS PUNISHABLE AS CONTEMPT OF THE TRIBUNAL**

208. Under Count Four of the Indictment, the Prosecution charges Nshogoza with Attempt to Commit Acts Punishable as Contempt of the Tribunal by attempting to procure false statements or false testimony from Witnesses GAF, SP003 and SP004.<sup>312</sup>

209. The Chamber recalls that the Prosecution failed to prove beyond a reasonable doubt that the Accused asked Witness GAA to procure false statements or testimony from Witnesses GAF, SP003 and SP004, or that he offered them a bribe or instructed Witness GAA to offer them a bribe.

210. In the Chamber’s view, even if the Prosecution had proven these material facts beyond a reasonable doubt, the Accused would still be found not guilty of the crime of Attempt to Commit Acts Punishable as Contempt of the Tribunal. The Prosecution evidence shows that, after the meeting at the notary’s office, the Accused informed Witness GAA that he was not interested in meeting with Witnesses GAF, SP003, and SP004. Thus, even if the Accused had initially requested Witness GAA to act on his behalf, he also instructed Witness GAA to cease such actions. In other words, the non-occurrence of acts possibly punishable as contempt of the Tribunal was a direct result of the Accused’s intentions.

211. For these reasons, the Chamber finds the Accused not guilty of Attempt to Commit Acts Punishable as Contempt of the Tribunal.

## **CHAPTER V: SENTENCING**

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<sup>311</sup> *Beqaj* Contempt Judgement, para. 25.

<sup>312</sup> Indictment, paras. 33-50. The Chamber notes that, as with Count Three, the Indictment also alleges that the Accused offered a bribe to or otherwise interfered with Witnesses GAF, SP003 and SP004. The Chamber did not consider these allegations, but, in any event, notes that the Prosecution failed to support them with sufficient evidence.

## 1. INTRODUCTION

212. Having found Nshogoza guilty on Count One of the Indictment for Contempt of the Tribunal, the Chamber must determine the appropriate sentence.

213. Rule 77 (G) of the Rules provides that the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding five years, or a fine not exceeding USD 10,000, or both.

214. Pursuant to Rule 101 (B), in determining the sentence, the Trial Chamber shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person, as mentioned in Article 23 (2) of the Statute.<sup>313</sup> In addition, Rule 101 (B) provides a non-exhaustive list of factors that Chambers shall take into account, including aggravating and mitigating circumstances.<sup>314</sup> Rule 101 (C) provides that credit shall be given for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

## 2. DETERMINATION OF THE SENTENCE

215. The Prosecution submits that Nshogoza should be sentenced to four years imprisonment for Count One of the Indictment.<sup>315</sup> The Defence submits that the Accused should be acquitted on every count and that the time already served by him at the UN Detention Facility (“UNDF”) far exceeds any sentence handed down by either the ICTR or the ICTY for even the most grave contempt convictions.<sup>316</sup>

216. The Chamber recalls that with regard to the crime of contempt, the most important factors to be taken into account of in determining the appropriate penalty are the gravity of the contempt and the need to deter repetition and similar conduct by others.<sup>317</sup>

### 2.1. Gravity of the Offence

217. The Chamber recalls that there has only been one conviction for contempt of the Tribunal before the ICTR, namely, in the *Prosecutor v. GAA*, in which case Witness GAA pleaded guilty and was sentenced to nine months imprisonment.<sup>318</sup> In reaching its conclusion, the Chamber,

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<sup>313</sup> Article 23 (2) states “In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”

<sup>314</sup> Rule 101 (B) states “In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23 (2) of the Statute, as well as such factors as: (i) Any aggravating circumstances; (ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) The general practice regarding prison sentences in the courts of Rwanda; (iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.

<sup>315</sup> Prosecutor’s Closing Brief, p. 67-68.

<sup>316</sup> Defence Closing Brief, p. 148, para. 366.

<sup>317</sup> *Marijačić* Trial Judgement, para. 46; *The Prosecutor v. Dragan Jokić*, Case No. IT-05-88-R77.1, Judgement on Allegations of Contempt (TC), 27 March 2009, para. 26.

<sup>318</sup> *The Prosecutor v. GAA*, Case No. ICTR-07-90-R77-I, Judgement and Sentence, 4 December 2007 (“GAA Judgement”).

mindful of the specific facts of the present case, has reference to the sentences imposed in cases before the ICTY where accused persons have been convicted of contempt of that Tribunal.<sup>319</sup>

218. The Chamber recalls that contempt of the Tribunal is a grave offence, constituting a “direct challenge to the integrity of the trial process.”<sup>320</sup> Maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences. Indeed, the Chamber is mindful that,

“the nature of the crimes under the jurisdiction of the Tribunal and the context in which they were committed necessitate substantial reliance upon oral evidence. That fact entails appropriate measures for the protection of the integrity of witnesses and their testimony....”<sup>321</sup>

As noted by the ICTY, “any deliberate conduct which creates a real risk that confidence in the Tribunal’s ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice.”<sup>322</sup> It is fundamental to the fulfilment of the Tribunal’s mission that individuals who come to give evidence before the Tribunal, often about traumatic or difficult experiences, may do so with the security provided by protective measures.<sup>323</sup> It is therefore necessary for general deterrence and denunciation to be given high importance in sentencing policies.<sup>324</sup>

219. The Accused’s conduct in the present case amounted to a determination that he would contact protected witnesses on his own conditions, that is, he would control the circumstances in which he met with the protected witnesses. He thus defied the authority of the court by breaching the protective measures that were in place. The Chamber considers that breach of the protective measures order undermined the authority of the *Kamuhanda* Trial Chamber, as well as confidence in the effectiveness of protective measures, and the administration of justice.<sup>325</sup> Such

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<sup>319</sup> See e.g., *Marijačić* Trial Judgement, where the two accused persons were each fined 15,000 euros for publishing information subject to witness protection orders (the sentence was upheld by the Appeals Chamber but for a *proprio motu* order that payments be made in instalments. See *Marijačić* Appeal Judgement); *Jović* Trial Judgement, where the accused was fined 20,000 euros for publishing, in a newspaper, excerpts of a witness’ closed session testimony (the sentence was upheld by the Appeals Chamber but for a *proprio motu* order that payments may be made in instalments. See *Jović* Appeal Judgement); *Haxhiu* Contempt Judgement, where the accused was fined 7,000 euros for publishing, in a newspaper, the identity of a protected witness; *Beqaj* Contempt Judgement, where the accused was sentenced to four months for interfering with a potential witness who was in a witness protection programme; *Margetić* Contempt Judgement, where the accused was sentenced to three months imprisonment and fined 10,000 Euros for publishing on the internet a confidential list of witnesses that revealed their identities; *Haraqija and Morina* Contempt Judgement, where the accused persons were convicted of interfering with witnesses. Morina’s conduct was found to constitute “intimidation”, an interference proscribed by Rule 77 (A) (iv) of the Rules and Haraqija was found to have instructed Morina to dissuade the witness from testifying before the ICTY, contrary to Rule 77 (A) (iv) of the Rules; they were sentenced to three and five months imprisonment, respectively.

<sup>320</sup> *GAA* Judgement, para. 10.

<sup>321</sup> *Beqaj* Contempt Judgement, para. 60.

<sup>322</sup> *Marijačić* Trial Judgement, para. 50 (judgement upheld by Appeals Chamber); *Margetić* Contempt Judgement, para. 87 (judgement upheld by Appeals Chamber); *Jović* Trial Judgement, para. 26 (judgement upheld by Appeals Chamber).

<sup>323</sup> *Haxhiu* Contempt Judgement, para. 34.

<sup>324</sup> *GAA* Judgement, para. 10.

<sup>325</sup> See also, *Prosecutor v. Slobodan Milošević, Contempt Proceedings against Kosta Bulatović*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005, para. 17.

conduct not only defies the authority of the Tribunal but may also have the effect of dissuading witnesses from testifying before it. To deter this type of conduct, and to express the Chamber's disapproval of the same, a custodial sentence is merited

## 2.2. Individual Circumstances of the Accused

220. The Chamber has wide discretion in determining what constitutes mitigating and aggravating circumstances and the weight to be accorded to such circumstances. While aggravating circumstances need to be proven beyond reasonable doubt, mitigating circumstances need only be established on a "balance of probabilities".<sup>326</sup>

### 2.2.1 Aggravating Circumstances

221. The Chamber has considered the Prosecution submissions on aggravating circumstances set out in its Closing Brief.<sup>327</sup> The Defence did not make any submissions with regard to aggravating circumstances.

222. The Chamber considers that Nshogoza's meetings with the protected witnesses on more than one occasion, demonstrates a continued disregard for the protective measures and is an aggravating circumstance. The Chamber further recalls its finding that the Accused met with protected witness in the presence of third parties. The Chamber notes that in committing this offence, the Accused was acting upon the instructions of his Lead Counsel, Witness Aicha Condé, and with the motive of earning fees for this work.

223. In addition, the Chamber notes that Nshogoza is an educated man who graduated from the National University of Rwanda where he studied law.<sup>328</sup> He started working with the *Kamuhanda* defence team at the end of 2001, and was admitted to the Kigali Bar in April 2005.<sup>329</sup> The Chamber recalls that Nshogoza was also working as a defence investigator in the *Rukundo* case,<sup>330</sup> at the time when the unauthorised meetings with the protected witnesses

<sup>326</sup> See e.g., *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgement (AC), para. 328; *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Judgement (AC), para. 1038.

<sup>327</sup> Prosecutor's Closing Brief, paras. 211-212. The Prosecution submits that the aggravating circumstances in this case include that the Accused acted intentionally and showed reckless disregard for the Witness Protection Order and the safety of Witnesses GAA and A7/GEX, when he met them repeatedly, in public, and in the presence of third parties, including members of the *Kamuhanda* family. The Prosecution further submits that aggravating circumstances of the Accused include the fact that he: (i) has familial relations with *Kamuhanda* but concealed this fact from the Tribunal at recruitment and thereafter; (ii) is an educated man, trained as a lawyer or jurist; (iii) by the time of the commission of the offences, already worked as an investigator for about two years in the *Kamuhanda* defence team, and was therefore familiar with the Rules and practice of the Tribunal; (iv) was no longer entrusted with any contract in relation to the *Kamuhanda* case at the time of the commission of the offence; (v) was an investigator, paid under the Tribunal Legal Aid Program in relation to other cases, at the time of the commission of the offence; (vi) submitted to the Tribunal a fraudulent claim of fees and expenses; (vii) similar findings of violations have been made against him in the *Rukundo* Trial Judgement, showing a total disregard of the witness protection orders of the Tribunal; and (viii) the targeting of specific witnesses, after the Trial Chamber's findings on credibility in the *Kamuhanda* trial; the fabrication of several false statements, are evidence of the Accused's deliberate interferences with due administration of justice.

<sup>328</sup> Witness Nshogoza, T. 30 March 2009 pp. 2-3.

<sup>329</sup> Witness Nshogoza, T. 30 March 2009 pp. 3 and 28-29.

<sup>330</sup> *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T.

occurred.<sup>331</sup> The Chamber considers that Nshogoza's background of having studied law, and his position as an investigator in the *Kamuhanda* defence team, as well as in the *Rukundo* case, placed him in a position to know and appreciate the importance of respecting the orders of the Tribunal, and in particular, the purpose of protective measures, and the probable consequences of his actions in breaching such orders. Accordingly, the Chamber finds that Nshogoza's legal background, and work as a defence investigator, is an aggravating circumstance.

224. Further, the Chamber has taken into account, as an aggravating circumstance, the fact that Nshogoza, as a defence investigator in the employ of the Tribunal, stood in a relationship of trust with the Tribunal. Courts and tribunals necessarily rely upon the honesty and propriety of investigators. As part of a legal team, they are endowed with important privileges by law, such as the knowledge of protected witnesses' identities, justified only upon the basis that they can be trusted not to abuse them.<sup>332</sup>

225. The Chamber further recalls Nshogoza's acknowledgement that he submitted, to the Tribunal, a false claim for fees in the *Kamuhanda* case.<sup>333</sup> The explanation offered by Nshogoza for this false claim, namely, that August 2003 was his last month of official employment as a defence investigator in the *Kamuhanda* case, does not detract from the seriousness of his conduct. The Chamber considers that Nshogoza, in submitting the false claim, abused his position as a defence investigator and thus finds this to be an aggravating circumstance.

226. Finally, in its Closing Brief, and closing arguments, the Prosecution invited the Chamber to take into account the finding of the Trial Chamber in the *Rukundo* case, that Nshogoza had breached protective measures in circumstances not dissimilar to those in this case.<sup>334</sup> The Trial Chamber's finding in the *Rukundo* case was not, however, put into evidence in the present case, and the Defence has never had an opportunity to make representations with regard to these findings.<sup>335</sup> Moreover, the Chamber notes that the *Rukundo* Trial Judgement's finding in respect of Nshogoza's conduct was not a finding beyond reasonable doubt. Rather, it was a finding based on an independent *amicus* report in the context of considering a witness' credibility.<sup>336</sup> In view of these considerations, the Chamber considers that it would be improper and unfair to the Accused to take any such finding into consideration as an aggravating circumstance.

### 2.2.2 Mitigating Circumstances

<sup>331</sup> Witness Nshogoza, T. 31 March 2009 p. 38.

<sup>332</sup> See for example, *Prosecutor v. Tadić and Vujin*, Case No. IT-94-1-A-R77, Judgement (AC), para. 166.

<sup>333</sup> In his claim for fees, Nshogoza had stated that he met with Witness GAA on 9 and 12 August 2003 but during his testimony, maintained that he only met with Witness GAA once in August 2003. See Nshogoza, T. 31 March 2009 pp. 31-32. See also Exhibit P. 15.

<sup>334</sup> Prosecution Closing Brief, para. 211; and T. 29 April 2009 p. 37 (Prosecution's closing arguments).

<sup>335</sup> See, *Nshogoza*, Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct, 20 February 2009, in which the Chamber found that it was not in the interests of justice to admit evidence of the Accused's conduct in the *Rukundo* case and denied the Prosecutor's Motion, brought to pursuant to Rule 93, to admit evidence of a consistent pattern of conduct

<sup>336</sup> *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T, Judgement (TC), paras. 141-142. The *Rukundo* Trial Chamber accepted the independent *amicus* report which found that Witness BLP's alleged recantation was due to pressure exerted by Nshogoza, and a Father Ndagijimana and that Nshogoza continued to meet with Witness BLP in violation of protective measures.

227. The Defence submits that the Chamber should consider the following mitigating circumstances in the determination of Nshogoza's sentence: (i) Nshogoza has a wife and young children, for whom he is the sole provider; (ii) his cooperation with the Prosecution and the Tribunal has been "overt and consistent", starting with his surrender on 8 February 2008; (iii) his good character has been confirmed by Defence Witnesses Aicha Conde and Fulgence Seminega, both of whom know him well; and (iv) he has no prior criminal record.<sup>337</sup>

228. The Prosecution does not make any submissions regarding mitigating circumstances.

229. The Trial Chamber has taken into account the family circumstances of the Accused, who has three children aged 14, 15 and 17.<sup>338</sup> The Chamber has also taken into consideration the fact that the Accused has no past criminal record. Furthermore, the Chamber takes into account the fact that the Accused surrendered voluntarily to the Tribunal on 8 February 2008, as a mitigating factor.

230. With regard to the Accused's good character, the Chamber notes that in the course of evidence adduced before it, two matters arose which the Chamber cannot fail to consider when determining the weight to be attached to the good character evidence of Aicha Condé.<sup>339</sup> First, the Accused worked under Condé and her testimonial of the Accused's good character must be seen in that light. Indeed, Condé, an assigned counsel before this Tribunal, saw nothing wrong with the Accused contacting protected witnesses if done so in the quest for seeking justice for her convicted client, Kamuhanda. Second, Condé, like the Accused, saw nothing wrong with the Accused, with her assistance, submitting a false claim of expenses. The Chamber takes into consideration these two matters when considering the weight to be attributed to Condé's evidence of the Accused's good character.

231. The Chamber further notes that the good character evidence of Fulgence Seminega was limited. Indeed, his testimony was that he had known the Accused for approximately 10 years.<sup>340</sup> The Chamber therefore attaches limited weight to the evidence of Condé and Seminega with respect to Nshogoza's good character.

### **2.3. Credit for Time Served**

232. Nshogoza has been detained in custody at the UNDF since 8 February 2008. Pursuant to Rule 101(C) of the Rules, Nshogoza is therefore entitled to credit for time served as of 8 February 2008.

## **3. CONCLUSION**

233. Taking into account all the relevant circumstances as discussed above, having ensured that the Accused is not being punished twice for the same offence, and noting that Rule 77 (G) of the Rules provides a maximum penalty of imprisonment for a term not exceeding five years or a

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<sup>337</sup> Defence Closing Brief, para. 360.

<sup>338</sup> Witness Nshogoza, T. 30 March 2009 p. 5.

<sup>339</sup> Witness Condé, T. 16 March 2009 at p. 40 where Condé testified that she had a "good impression" of Nshogoza and that "He was the best investigator; he was good; he was intelligent; he was alert."

<sup>340</sup> See also Seminega, T. 19 March 2009 at p. 53. Fulgence Seminega had known Nshogoza for approximately 10 years.

fine not exceeding USD 10,000, or both, the Chamber sentences Léonidas Nshogoza for Contempt of the Tribunal to:

**Ten (10) Months Imprisonment**

234. Given that the Accused is to be given credit for time served, the Chamber directs that Nshogoza be released from the custody of the Tribunal, forthwith, unless he is otherwise lawfully held.

Arusha, 7 July 2009

Khalida Rachid Khan  
Presiding Judge

Lee Gacuiga Muthoga  
Judge

Aydin Sefa Akay  
Judge

[Seal of the Tribunal]

## ANNEX: PROCEDURAL HISTORY OF THE CASE

1. The indictment against Léonidas Nshogoza (“Indictment”) was confirmed by Judge Dennis C.M. Byron on 4 January 2008 and placed under seal.<sup>341</sup> On 28 January 2008, Judge Byron issued a confidential and *ex-parte* warrant of arrest and order for transfer and detention.<sup>342</sup>

2. The Indictment charges the Accused with four counts:

COUNT 1: Contempt of the Tribunal, punishable under this Tribunal’s inherent power and Rules 77 (A), (A)(ii) and 77 (G) of the Rules of Procedure and Evidence of the Tribunal,

COUNT 2: Contempt of the Tribunal, punishable under this Tribunal’s inherent power and Rule 77 (A), (A)(ii), (A)(iv), and (B) and (G) of the Rules of Procedure and Evidence of the Tribunal,

COUNT 3: Attempt to Commit Acts Punishable as Contempt of the Tribunal, punishable under this Tribunal’s inherent power and Rule 77 (A), (A)(iv), (B) and (G) of the Rules of Procedure and Evidence of the Tribunal,

COUNT 4: Attempt to Commit Acts Punishable as Contempt of the Tribunal, punishable under this Tribunal’s inherent power and Rule 77 (A), (A)(iv), (B) and (G) of the Rules of Procedure and Evidence of the Tribunal.

3. On 4 February 2008, Judge Byron granted the Prosecution’s motion for the lifting of the confidentiality of the arrest warrant and order for transfer and detention issued.<sup>343</sup> On 19 February 2008, Judge Byron also ordered the lifting of the confidentiality of the Indictment.<sup>344</sup>

### 1. Composition of the Chamber

4. On 2 May 2008, the case was assigned to Trial Chamber III composed of Judge Khalida Khan (Presiding), Judge Lee Gacuiga Muthoga and Judge Emile Francis Short.<sup>345</sup>

### 2. The Defence Team

5. On 8 February 2008, the Accused assigned Power of Attorney to Ms. Allison Turner to represent him in these proceedings.<sup>346</sup> On 16 May 2008, the Defence filed an urgent motion requesting the Chamber to order the Registrar to immediately assign Defence Counsel to the Accused.<sup>347</sup>

<sup>341</sup> Confirmation of the Indictment and Witness Protection Orders, 4 January 2008.

<sup>342</sup> Warrant of Arrest and Order for Transfer and Detention Addressed to All States, 28 January 2008

<sup>343</sup> Order Lifting the Confidentiality of the Warrant of Arrest and Order for Transfer and Detention Addressed to All States, 4 February 2008.

<sup>344</sup> Order Lifting the Confidentiality of the Redacted Indictment, 19 February 2008.

<sup>345</sup> Order Assigning the Case to Trial Chamber III, 2 May 2008.

<sup>346</sup> “Urgent Motion for Assignment of Counsel”, filed on 16 May 2008 (“Motion to Assign Counsel”), Annex A “Power of Attorney signed by Leonidas Nshogoza,” dated 8 February 2008.

<sup>347</sup> “Urgent Motion for Assignment of Counsel,” filed 16 May 2008.

6. On 15 May 2008, DCDMS sent Ms. Turner a letter offering to assign her as counsel for the Accused (“Offer to Assign of 15 May 2008”).<sup>348</sup> However, there was a disagreement between Ms. Turner and the Registrar over the terms of remuneration.

7. On 2 June 2008, the Defence filed an addendum to its motion for the assignment of Counsel, noting communications from the Registrar and asking the Chamber to direct the Registrar to communicate all correspondence and filings to the Accused in a timely manner.<sup>349</sup> On 9 June 2009, the Defence filed an additional addendum, containing two more documents and advising the Chamber that Counsel would suspend all work until her assignment was formalized as per the terms and conditions stipulated in the Offer to Assign of 15 May 2008.<sup>350</sup>

8. Ms. Turner continued to act for the Accused on a *pro bono* basis until 9 June 2008, when she informed the Registry that she would be suspending all work on the file until she was formally assigned as Counsel.<sup>351</sup>

9. On 10 June 2008, the Registrar wrote to the Accused stating that it would not assign Ms. Turner as Defence Counsel.<sup>352</sup> On 12 June 2008, the Defence filed a notice to suspend its extremely urgent motion for assignment and appealing the Registrar’s decision.<sup>353</sup> The Defence also wrote to the President of the Tribunal to ask for review of the decision by the Registrar not to assign Ms. Turner as Counsel to the Accused.<sup>354</sup>

10. On 1 July 2008, the Registrar made submissions on the Defence’s motion for assignment of Counsel.<sup>355</sup> The Registrar asked the Chamber to dismiss the motion, arguing that Defence Counsel lacked standing and that the Chamber lacked jurisdiction.

11. The Defence replied to the Registrar’s submissions on 7 July 2008,<sup>356</sup> arguing that the Registrar had abused its discretion, and that, as a result, the Accused’s right to a fair trial had

<sup>348</sup> Supplementary Defence Submissions to Leonidas Nshogoza’s “*Requete pour la commission d’un Conseil de defense*” filed on 19 August 2008 (“Submissions of 19 August 2008”), Annexure C “Offer of Assignment as Counsel for the Accused Leonidas Nshogoza” dated 15 May 2008 (“Communication of 15 May 2008”). The Communication of 15 May 2008 stated that Ms. Turner would be paid up to \$50,000 to cover legal fees and that the Registrar would *also meet other expenses* related to the proceedings.

<sup>349</sup> “Addendum – Extremely Urgent Motion for Assignment of Counsel,” filed 2 June 2008; “Re-filing of Annexes F, G and H – Extremely Urgent Motion for Assignment of Counsel,” filed 2 June 2008.

<sup>350</sup> “Addendum 2 – Extremely Urgent Motion for Assignment of Counsel,” filed 9 June 2008

<sup>351</sup> “*Requete au fins de constat d’entrave a la justice, Article 77 du RPP du TPIR*”, filed 13 August 2008 (“Accused’s Request of 13 August 2008”), annexed letter dated 9 June 2008 from Ms. Turner to DCDMS stating “While the undersigned continues to treat the Contract as valid and act as assigned counsel for Mr. Nshogoza, in view of the aforementioned breaches she is suspending all work on this file until the assignment as counsel has been formalized as stipulated in the Contract.”

<sup>352</sup> “Request for Review of Decision by Registrar 10 June 2008 pursuant to Rules 19 and 33 ICTR Rules of Procedure and Evidence,” filed 13 June 2008, annexed letter dated 10 June 2008 from Mr. Mwaungulu of DCDMS to the Accused.

<sup>353</sup> “Notice to Suspend – Extremely Urgent Motion for Assignment of Counsel,” filed 12 June 2008.

<sup>354</sup> “Request for Review of Decision by Registrar 10 June 2008 pursuant to Rules 19 and 33 ICTR Rules of Procedure and Evidence,” filed 13 June 2008.

<sup>355</sup> “The Registrar’s Submission under Rule 33 (B) of the Rules of Procedure and Evidence on Léonidas Nshogoza’s ADDENDUM 2 – EXTREMELY URGENT MOTION FOR ASSIGNMENT OF COUNSEL,” filed 1 July 2008.

<sup>356</sup> “Defence Response to Registrar Submissions Filed 1 July 2008,” filed 7 July 2008.

been violated. The Registrar replied to this on 23 July 2008,<sup>357</sup> reiterating the Chamber's lack of jurisdiction and further explaining why it had not assigned Ms. Turner as Defence Counsel.

12. On 24 July 2008, the Chamber ordered the Registrar to assigned Ms. Turner as Counsel to the Accused without any further delay.<sup>358</sup> On 25 July 2008, DCDMS wrote to Ms. Turner offering her assignment as Counsel for the Accused.<sup>359</sup> However, Ms. Turner was not formally assigned as Counsel due to disagreement regarding terms of remuneration.<sup>360</sup>

13. On 5 August 2008, the Accused filed a confidential motion requesting the assignment of Ms. Turner as his Defence Counsel and complaining about the Registrar's actions.<sup>361</sup>

14. On 13 August 2008, DCDMS circulated a communication seeking Counsel to represent the Accused.<sup>362</sup> On the same day, the Defence filed a motion asking the Chamber to find that the Registrar's actions seriously impeded the course of justice and caused grievous prejudice to the Accused.<sup>363</sup> On 18 August 2008, the Chamber, noting that the Registry had failed to assign Counsel to the Accused, ordered the Registrar to give effect to the Chamber's Order of 24 July 2008 within ten days.<sup>364</sup> On 20 August 2008, the Registrar assigned Mr. Philippe Greciano as Lead Counsel for the Accused.<sup>365</sup>

15. On 21 August 2008, the Defence filed an extremely urgent motion asking the Chamber to order the Registrar to assign the Accused his Counsel of choice.<sup>366</sup> On 26 August 2008, the Defence filed an extremely urgent request for a hearing on its motion to assigned Ms. Turner as Defence Counsel.<sup>367</sup>

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<sup>357</sup> "The Registrar's Submission under Rule 33 (B) to Defence Response to Registrar's Submission Filed 1 July 2008," filed 23 July 2008.

<sup>358</sup> Order to Assign Counsel, filed 24 July 2008.

<sup>359</sup> "Requete pour la commission d'un Conseil de defense," 5 August 2008 ("Accused's Request of 5 August 2008"), annexed letter from DCDMS dated 25 July 2008.

<sup>360</sup> See "Supplementary Defence Submissions to Léonidas Nshogoza's "Requete pour la commission d'un Conseil de defense",," filed 19 August 2008. On 29 July 2008, Ms. Turner wrote to DCDMS accepting the assignment as per the terms of the offer in the Communication of 15 May 2008. On 30 July 2008, DCDMS replied stating: "We do not want to understand that your reference to the offer letter of 15 May 2008 is a rejection of the actual assignment of 25 July 2008 with its terms" and sought clarification from Ms. Turner. On 1 August 2008, Ms. Turner confirmed to DCDMS that she accepted the assignment to act for the Accused on the terms set out in the original offer of 15 May 2008. These communications are annexed to "Supplementary Submissions to "Defence Extremely Urgent Motion (...)" and to "Defence Extremely Urgent Request (...)" filed 20 and 26 August 2008," filed 1 September 2008, Annexure D.

<sup>361</sup> "Request for the Assignment of Defence Counsel," filed 5 August 2008.

<sup>362</sup> "Motion for the Purpose of a Finding of Perversion of the Court of Justice," filed 13 August 2008, attachment.

<sup>363</sup> "Motion for the Purpose of a Finding of Perversion of the Court of Justice," filed 13 August 2008.

<sup>364</sup> Order for Immediate Assignment of Counsel, 18 August 2008.

<sup>365</sup> "Commission D' Office De Me Philippe Greciano a Titre de Conseil dans L'Interet de la Justice pour la defense des interest de M. Leonidas Nshogoza, Accuse Devant Tribunal Penal International Pour le Rwanda," dated 20 August 2008 ("Registrar's Notification of Assignment of Greciano").

<sup>366</sup> "Extremely Urgent Motion for Order to Registrar to Assign Counsel of Choice Pursuant to Article 20(4)(d) ICTR Statute," filed 21 August 2008.

<sup>367</sup> "Defence Extremely Urgent Request for Hearing on Motion to Assign Counsel of Choice Allison Turner and Amended Prayer of Relief," filed 26 August 2008; "Supplementary Submissions to "Defence Extremely Urgent Motion (...)" and to "Defence Extremely Urgent Request (...)" filed 20 and 26 August 2008," filed 1 September 2008 containing supplementary documentation.

16. On 1 September 2008, the Prosecution replied to the Defence's extremely urgent request,<sup>368</sup> opposing the motion on the basis that Ms. Turner was no longer assigned as Duty Counsel to the Accused and was not acting in any capacity for the Accused; it also argued that the right of an indigent defendant to effective representation did not entitle him to choose his own counsel.

17. On 13 October 2008, the Chamber directed the Registrar to withdraw the assignment of Mr. Greciano and assign Ms. Turner as counsel for the Accused.<sup>369</sup> The Registrar withdrew the assignment of Mr. Greciano on 13 October 2008.<sup>370</sup>

### 3. Initial Appearance

18. On 11 February 2008, the Accused made his initial appearance and pled not guilty to all charges contained in the Indictment.<sup>371</sup>

### 4. Detention

19. The Accused voluntarily surrendered to the Tribunal on 8 February 2008.

20. On 14 April 2008, the Defence filed a motion for review of the 28 January 2009 orders for detention and alternatively for provisional release.<sup>372</sup> The Prosecution responded on 21 April 2008, arguing that the Defence failed to meet the threshold for reconsideration and failed to satisfy the requirements for provisional release.<sup>373</sup> The Defence replied on 28 April 2008, contesting, among other things, the Prosecution's characterization of the relevant facts and the test for reconsideration.<sup>374</sup>

21. On 2 September 2008 and 20 October 2008, the Defence filed supplementary submissions to their motion, adding that, upon release, the Accused would be amenable to residing in Tanzania, Kenya or Uganda in addition to the originally specified Canada.<sup>375</sup>

22. On 29 October 2008, the Defence filed a motion again requesting, among other things, the provisional release of the Accused.<sup>376</sup> The Prosecution responded to this motion on 3

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<sup>368</sup> "Prosecutor's Response to 'Defence Extremely Urgent Request for Hearing on Motion to Assign Counsel of Choice Allison Turner and Amended Prayer for Relief,'" filed 1 September 2008.

<sup>369</sup> Decision on Motions Requesting Assignment of Counsel of Choice, 13 October 2008.

<sup>370</sup> Decision on Withdrawal of the Assignment of Mr. Phillippe Greciano, Counsel for the Accused Leonidas Nshogoza, 13 October 2008.

<sup>371</sup> T. 11 February 2008 p. 5-6.

<sup>372</sup> "Motion for Review of Provisional Measures and Alternatively for Provisional Release," filed 14 April 2008.

<sup>373</sup> "Prosecutor's Response to Defence – "Motion for Review of Provisional Measures and Alternatively for Provisional Release"," filed 21 April 2008.

<sup>374</sup> "Defence Reply to Prosecutor's Response to Defence Motion for Review or Provisional Release," filed 28 April 2008.

<sup>375</sup> "Defence Supplementary Submission to "Motion for Review of Provisional Measures and Alternatively for Provisional Release"," filed 20 October 2008; "STRICTLY CONFIDENTIAL (UNDER SEAL) and Ex Parte Supplementary Submission to "Motion for Review of Provisional Measures and Alternatively for Provisional Release" filed 14 April 2008," filed 2 September 2008.

<sup>376</sup> "Defence Motion for Order to the Prosecution to Complete Rule 66(A)(ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza," filed 29 October 2008.

November 2008, reiterating its earlier submissions on provisional release.<sup>377</sup> The Defence replied on 10 November 2008, submitting that the Prosecution had not advanced any reason for the continued detention of the Accused and that they had met the requirements for provisional release.<sup>378</sup>

23. On 17 November 2008, the Chamber denied the Defence request for reconsideration of its order for the Accused's detention and requested Canada, Kenya, Tanzania and Uganda to make submissions on their willingness to receive the Accused pending trial.<sup>379</sup> On 11 December 2008, the Government of Canada filed submissions on this issue, outlining the process that the Accused would need to undertake to be received by Canada, and informing the Tribunal that Canada could not guarantee that he would appear for trial.<sup>380</sup>

24. On 17 December 2008, the Chamber denied the Defence motion for provisional release, as it did not meet the requirements for release.<sup>381</sup>

25. On 3 February 2009, the Defence filed a motion asking for reconsideration of the decision to deny provisional release, submitting, among other things, that the Accused was now willing to be moved to a UN safe house and that the original decision incorrectly relied on the case of *Haixu*.<sup>382</sup> This was denied by the Chamber on 12 February 2009, which found that the Accused's willingness to be moved to a safe house was not new information in relation to the pre-existing motion to justify reconsideration, and that its reliance on *Haixu* was not erroneous.<sup>383</sup>

## 5. Evidence

### a. Witnesses

26. On 26 August 2008, the Prosecution made a confidential submission containing five witness statements.<sup>384</sup>

27. On 22 October 2008, the Chamber made an oral order for the Prosecution to file a list of witnesses they planned to call by Monday 27 October 2008.<sup>385</sup> The Prosecution complied with

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<sup>377</sup> "Prosecutor's Response to "Defence Motion for Order to the Prosecution to Complete Rule 66(A)(ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza"," filed 3 November 2008.

<sup>378</sup> "Defence Reply to Prosecutor's Response to Defence Motion Filed 29 October 2008 on Disclosure Violations and Provisional Release," 10 November 2008.

<sup>379</sup> Decision on Defence Motion for Review of Provisional Measures, or Alternatively, for Provisional Release, 17 November 2008.

<sup>380</sup> "Submission of the Government of Canada on the Issue of Accepting Leonidas Nshogoza into Our Jurisdiction Pending Trial," filed 11 December 2008.

<sup>381</sup> Decision on Defence Motion for Provisional Release, 17 December 2008.

<sup>382</sup> "Motion for Reconsideration of the Trial Chamber's "Decision on Defence Motion for Provisional Release" of 17 December 2008," filed 3 February 2009.

<sup>383</sup> Decision on Motion for Reconsideration of the Trial Chamber's Decision on Provisional Release, 12 February 2009.

<sup>384</sup> "Redacted Disclosure of Additional Witness Statements," filed 26 August 2008.

<sup>385</sup> T. 22 October 2008, p. 15.

this order and filed a list of witnesses and exhibits on 27 October 2008.<sup>386</sup> The Prosecution intended to call seven witnesses.

28. On 29 October 2008, the Defence filed a motion to have Witness BLP removed from the Prosecution's list of witnesses,<sup>387</sup> arguing that there was no legal or factual basis for the Prosecution to call Witness BLP as a witness.

29. On 10 November 2008, the Chamber declared the request for removal of Witness BLP from the Prosecution's witness list to be moot, as the Prosecution had already indicated it would not be calling Witness BLP.<sup>388</sup>

30. On 27 November 2008, the Defence filed a further motion for the Chamber to order the Prosecution to remove Witness BLP from its witness list and for a postponement of the trial.<sup>389</sup> The motion noted that the Prosecution had failed to file a motion seeking leave to remove Witness BLP from his list of witnesses and that the Prosecution's pre-trial brief contained references to Witness BLP.

31. The Prosecution responded to the Defence motion on 28 November 2008,<sup>390</sup> submitting that it did not intend to call Witness BLP and requesting leave from the Chamber to formally withdraw BLP from its list of witnesses. The response also noted its entitlement to use evidence of patterns of conduct, including the use of documents in relation to Witness BLP from previous trials. The Defence responded to this, disputing the Prosecution's proposed use of Witness BLP's recantation as evidence of consistent pattern of conduct pursuant to Rule 93.<sup>391</sup>

32. On 2 January 2009, the Chamber denied the Defence motion, finding that Rule 93 does apply to contempt proceedings and that the trial did not need to be postponed.<sup>392</sup> On 9 January 2009, the Defence sought certification to appeal this decision,<sup>393</sup> submitting, among other things, that the Chamber erred in its conclusion on Rule 93. The Prosecution responded on 14 January 2009,<sup>394</sup> arguing that the Defence failed to satisfy the conditions for certification to appeal to be granted under Rule 73 (B). The Chamber denied the motion on 3 February 2009,<sup>395</sup> finding that the conditions for certification had not been met.

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<sup>386</sup> "Prosecutor's Filing of a List of Witnesses and Exhibits," filed 27 October 2008.

<sup>387</sup> "Defence Motion to Have Witness BLP Removed from Prosecution List of Witnesses and for Prosecution to File Pre-Trial Brief," filed 29 October 2008.

<sup>388</sup> Decision on Defence Motion to Have Witness BLP Removed from Prosecution List of Witnesses and for the Prosecution to File a Pre-Trial Brief, 10 November 2008.

<sup>389</sup> "Defence Further Motion for a Court Order to the Prosecutor to Remove Witness BLP from his Witness List," filed 27 November 2008.

<sup>390</sup> "Prosecutor's Response to "Defence Further Motion for a Court Order to the Prosecutor to Remove Witness BLP from his Witness List",," filed 28 November 2008.

<sup>391</sup> "Defence Reply to Prosecutor's Response to "Defence Further Motion (...)",," filed 4 December 2008.

<sup>392</sup> Decision on Defence Further Motion for the Prosecutor to Remove Witness BLP from His Witness List, 2 January 2009.

<sup>393</sup> "Defence Application for Certification to Appeal Decision on Defence Further Motion for the Prosecutor to Remove Witness BLP from His Witness List on Application of Rule 93," filed 9 January 2009.

<sup>394</sup> "Prosecutor's Response to "Defence Application for Certification to Appeal Decision on Defence Further Motion for the Prosecutor to Remove Witness BLP from his List on (sic) Application of Rule 93",," filed 14 January 2009.

<sup>395</sup> Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 2 January 2009, 3 February 2009.

33. On 31 December 2008, the Chamber ordered the Defence to file its list of witnesses no later than 9 January 2009.<sup>396</sup> On 9 and 16 January 2009, the Defence filed a list of witnesses with more than 40 names on it.<sup>397</sup> On 28 January 2009, the Chamber ordered the Defence to file a summary of anticipated witness testimony for each witness.<sup>398</sup> On 2 February 2009, the Defence filed a motion seeking clarification of the Chamber's order or an extension of time.<sup>399</sup> This motion was found to be without merit and was denied by the Chamber.<sup>400</sup>
34. On 4 February 2009, the Defence filed a preliminary list of Defence witness summaries.<sup>401</sup>
35. On 12 February 2009, the Chamber made an *ex parte* order for the Defence to file a reduced list of witnesses by 16 February 2009.<sup>402</sup> On 16 February 2009, the Defence filed its list of witnesses with three names struck out.<sup>403</sup> On 17 February 2009, the Chamber made another order for the Defence to "significantly reduce" its list of witnesses by 18 February 2009.<sup>404</sup> On 18 February 2009, the Defence filed submissions explaining its inability to comply with the Chamber's order.<sup>405</sup>
36. The Chamber made an oral order on 19 February 2009 for the Defence to file a revised witness list by 20 February 2009.<sup>406</sup> On 20 February 2009, the Defence filed a revised list of witnesses containing 20 witnesses under the heading "Oral Testimony", ten witnesses under the heading "92 *bis* statements" and 10 witnesses under various other headings.<sup>407</sup> On 23 February 2009, the Chamber issued an order for the Defence to reduce its witness list to ten witnesses who would give oral testimony.<sup>408</sup> On 25 February 2009, the Defence sought a reconsideration of the order, submitting it violated the Accused's right to a fair trial, was manifestly unreasonable and would have no practical effect on the expeditious conduct of the proceedings.<sup>409</sup> On 26 February 2009, the Chamber denied the motion, but allowed the Accused to testify in addition to the ten witnesses.<sup>410</sup>

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<sup>396</sup> Order for the Defence to File a List of Witnesses, 31 December 2008.

<sup>397</sup> "Defence Strictly Confidential, *Ex Parte* and Under Seal Filing," filed 9 January 2009; "Defence Further Strictly Confidential, *Ex Parte* and Sealed Filing," filed 16 January 2009.

<sup>398</sup> Order for the Defence to File a Summary of Anticipated Witness Testimony, 28 January 2009.

<sup>399</sup> "Motion for Clarification and Request for an Extension of Time," filed 2 February 2009.

<sup>400</sup> Decision on Defence Motion for Clarification and Request for an Extension of Time, 3 February 2009.

<sup>401</sup> "*Ex Parte* Preliminary List of Defence Witness Summaries Filed Pursuant to Court Order of 28 January 2009," 4 February 2009.

<sup>402</sup> *Ex Parte* Order for the Defence to Reduce its List of Witnesses, 12 February 2009.

<sup>403</sup> "*Ex Parte* Revised Preliminary List of Defence Witness Summaries Filed Pursuant to Court Order of 12 February 2009," filed 16 February 2009.

<sup>404</sup> *Ex Parte* Order for the Defence to Further Reduce its List of Witnesses, 17 February 2009.

<sup>405</sup> "*Ex Parte* Submissions Filed Pursuant to Court Order of 17 February 2009," filed 18 February 2009.

<sup>406</sup> T. 19 February 2009, p. 105.

<sup>407</sup> "[CONFIDENTIAL] Preliminary List of Defence Witnesses and Motion for One Week Postponement of Defence Case," filed 20 February 2009.

<sup>408</sup> Further Order for the Defence to Reduce its List of Witnesses, 23 February 2009.

<sup>409</sup> "Defence Request for Reconsideration of the 'Further Order for the Defence to Reduce its List of Witnesses'," filed 25 February 2009.

<sup>410</sup> Decision on Defence Motion for Reconsideration of the Chamber's Further Order for the Defence to Reduce its Witness List, 26 February 2009.

37. On 2 March 2009, the Defence filed an urgent application to the Appeals Chamber for leave to request a review of the Chamber's decision to affirm its order to reduce the number of witnesses the Defence would bring for oral testimony.<sup>411</sup> The Defence submitted, among other things, that the decision was manifestly unreasonable and *ultra vires*; violated the fair trial rights of the Accused; and would have no practical effect on the expeditious conduct of the proceedings. The Prosecution responded on 5 March 2009,<sup>412</sup> arguing that the Defence did not have a right of review by the Appeals Chamber of a Trial Chamber's decision denying certification to appeal and that the motion should be dismissed in its entirety as being frivolous and vexatious. The Appeals Chamber assigned Judges to the case on 6 March 2009.<sup>413</sup> On 17 March 2009, the Defence requested leave to file further submissions on its motion.<sup>414</sup> The Defence submitted, among other things, the Registrar's submissions in regards to providing witness information to Rwandan authorities to obtain travel documents and the sanctions imposed on Defence Counsel. The Appeals Chamber dismissed the Defence's application and request to file further submissions, finding that it was not properly seized of the Application.<sup>415</sup>

38. On 2 March 2009, the Defence filed a list of witnesses with 22 witnesses listed to give oral testimony.<sup>416</sup> On 3 March 2009, the Defence filed a corrigendum to their list of witnesses with modifications to the summaries of some of the witnesses.<sup>417</sup> On the same day, the Chamber ordered the Defence to comply with its orders of 23 February 2009 and 26 February 2009, no later than 4 March 2009.<sup>418</sup>

39. On 4 March 2009, the Defence filed an urgent motion for a stay of proceedings due to interference with Defence witnesses.<sup>419</sup> The motion alleged contact between Rwandan authorities and Defence witnesses, and that this contact violated the fair trial rights of the Accused under Article 20 (4)(e). On 6 March 2009, the Chamber ordered the Registry to file submissions on the Defence motion.<sup>420</sup>

40. The Prosecution responded to the Defence motion for stay of proceedings on 6 March 2009,<sup>421</sup> submitting that the alleged facts were filed in the incorrect form. The Prosecution also

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<sup>411</sup> "Urgent Defence Application for Leave to Request a Review of a Trial Chamber Decision Denying the Accused a Fair Trial," filed 2 March 2009.

<sup>412</sup> "Prosecutor's Response to "Urgent Defence Application for Leave to Request a Review of Trial Chamber Decision Denying the Accused a Fair Trial" filed on 02 March 2009," filed 5 March 2009; "Corrigendum to Prosecutor's Response to "Urgent Defence Application for Leave to Request a Review of Trial Chamber Decision Denying the Accused a Fair Trial" filed on 02 March 2009," filed 9 March 2009.

<sup>413</sup> Order Assigning Judges to a Case Before the Appeals Chamber (AC), 6 March 2009.

<sup>414</sup> "Defence Request for Leave to File Further Submissions," filed 17 March 2009.

<sup>415</sup> Decision on Léonidas Nshogoza's Application for Leave to Request Review of a Trial Chamber Decision (AC), 25 March 2009.

<sup>416</sup> "Defence Strictly Confidential List of Witnesses," filed 2 March 2009.

<sup>417</sup> "Defence Strictly Confidential List of Witnesses (corrigendum)," filed 3 March 2009.

<sup>418</sup> Order for the Defence to Comply with the Chamber's Order of 23 February 2009 and the Chamber's Decision of 26 February 2009 for the Defence to Reduce its List of Witness, 3 March 2009.

<sup>419</sup> "Urgent Motion for Stay of Proceedings Due to Interference with Defence Witnesses," filed 4 March 2009.

<sup>420</sup> Order for the Registry to File Rule 33 (B) Submissions on the Defence Motion for Stay of Proceedings Due to Interference with Defence Witnesses, 6 March 2009.

<sup>421</sup> "Prosecutor's Response to "Urgent Motion for Stay of Proceedings Due to Interference with Defence Witnesses" Filed on 4 March 2009," filed 6 March 2009.

asked for, among other things, an order directing the Registrar to verify the allegations and an order sanctioning Defence Counsel for failing to comply with the Chamber's orders to file a reduced witness list.

41. On 6 March 2009, the Defence filed an urgent submission explaining its failure to comply with the orders of the Chamber.<sup>422</sup>

42. On the same day, the Registrar filed a submission on a request made by the Defence to the Registrar for waiver of immunity of certain UN staff members the Defence wished to call as witnesses.<sup>423</sup>

43. On 9 March 2009, the Defence filed a reply to the Prosecution's response to the Defence urgent motion for a stay of proceedings,<sup>424</sup> attaching a statement of one of the witnesses who had been contacted. On the same day, the Defence also filed additional submissions to its original motion.<sup>425</sup> These related to the information provided in Court on 9 March 2009 by the representative of WVSS, in relation to how travel is arranged for witnesses from Rwanda.<sup>426</sup>

44. On the same day, the Registrar also made confidential submissions in respect of the Defence motion for a stay of proceedings.<sup>427</sup> It further detailed how travel was arranged for witnesses from Rwandan and contained witness statements of two witnesses who had been contacted by Rwandan authorities.

45. On the same day, the Defence also made submissions in relation to the Chamber's orders to file a reduce witness list, explaining why each witness was required for its case and asking the Chamber to reduce the witness list itself, if it so desired.<sup>428</sup> On the same day the Chamber made an oral order for the Defence to file its reduced list of witnesses.<sup>429</sup> The Defence then filed submissions on the Chamber's oral order, explaining that, among other things, the confirmation by WVSS that it provides protected witness details to Rwandan authorities had resulted in severe disruption to the Defence case preparation.<sup>430</sup>

46. On 11 March 2009, the Defence filed a response to the Registrar's submissions in respect of the Defence's motion for a stay of proceedings.<sup>431</sup> The response contained a list of questions

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<sup>422</sup> "Urgent Defence Submissions Further to Court Order of 3 March 2009 and on the Status of Defence Preparations," filed 6 March 2009.

<sup>423</sup> "Registrar's Submission under Rule 33 (B) of the Rules on Counsel's Request for Waiver of Immunity of UN Staff Members," filed 6 March 2009.

<sup>424</sup> "Defence Reply to "Prosecutor's Response to 'Urgent Motion for Stay of Proceedings Due to Interference with Defence Witnesses'"", filed 9 March 2009.

<sup>425</sup> "Defence Additional Submissions to "Urgent Motion for Stay of Proceedings Due to Interference with Defence Witnesses'", filed 9 March 2009.

<sup>426</sup> T. 9 March 2009 pp. 5-7.

<sup>427</sup> "[CONFIDENTIAL] Registrar's Submissions in Respect of Defence Motion for Stay of Proceedings Due to Interference with Defence Witnesses," filed 9 March 2009.

<sup>428</sup> "Defence Further Submissions on the Trial Chamber's Order Dated 3 March 2009," filed 9 March 2009.

<sup>429</sup> T. 9 March 2009 p. 10.

<sup>430</sup> "Defence Submissions Further to the Trial Chamber's Oral Order of 9 March 2009," filed 9 March 2009.

<sup>431</sup> "Defence Response to "Registrar's Submissions in Respect of Defence Motion for Stay of Proceedings Due to Interference with Defence Witnesses" and Motion for Order to the Registrar to Respond to the Defence Questions," filed 11 March 2009; "Defence Response to "Registrar's Submissions in Respect of Defence Motion for Stay of

for the Registrar and requested the Chamber to order the Registrar to answer the questions and provide a list of security measures in place for witnesses who have testified and returned to Rwanda. The Registrar made additional confidential submissions on 12 March 2009,<sup>432</sup> containing witness statements of some defence witnesses, stating, among other things, that no Rwandan authorities had contacted them, that they did not experience any fear, threats or harassment and that they were willing to travel to Arusha to testify.

47. On 11 March 2009, due to the Defence's failure to comply with the Chamber's orders, the Chamber issued an order sanctioning the Defence Counsel by imposing a fine of \$5,000.00 and directing the Registrar to seek the President's approval to communicate her misconduct to the professional body that regulates the conduct of counsel in Defence Counsel's State of admission.<sup>433</sup>

48. On 12 March 2009, the Chamber again ordered the Defence to comply with its orders to file a reduced list of witnesses by 13 March 2009.<sup>434</sup> On 13 March 2009, the Defence filed a list of ten witnesses to testify in addition to the Accused.<sup>435</sup>

49. On 16 March 2009, the Chamber made an oral order sanctioning Defence Counsel and inviting her to file a written apology for her conduct.<sup>436</sup>

50. On 23 March 2009, the Registrar made further submissions on the Defence motion for a stay of proceedings,<sup>437</sup> further explaining how it obtains travel documents for witnesses and containing more statements from witnesses.

51. On 24 March 2009, the Defence filed a motion for leave to vary its witness list following a witness's change in testimony during examination.<sup>438</sup> The Prosecution files its response on 24 March 2009, to which the Defence replied.<sup>439</sup> The motion was denied in an oral ruling of the Chamber on 25 March 2009.<sup>440</sup>

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Proceedings Due to Interference with Defence Witnesses" and Motion for Order to the Registrar to Respond to the Defence Questions – STRICTLY CONFIDENTIAL Annexure A," filed 11 March 2009

<sup>432</sup> "Strictly Confidential Registrar's Additional Submissions in Respect of Defence Motion for Stay of Proceedings Due to Interference with Defence Witnesses," filed 12 March 2009.

<sup>433</sup> Decision to Sanction the Defence for Failure to Comply with the Chamber's Orders, 11 March 2009.

<sup>434</sup> Further Orders for the Defence to Comply with the Chamber's Orders and File its Reduced List of Witnesses, 12 March 2009.

<sup>435</sup> "Defence Submissions Further to "Further Orders for the Defence to Comply with the Chamber's Orders and File its Reduced List of Witnesses"," filed 13 March 2009.

<sup>436</sup> T. 16 March 2009 pp. 1-2.

<sup>437</sup> "Strictly Confidential Registrar's Further Submissions in Respect of Defence Motion for Stay of Proceedings Due to Interference with Defence Witnesses," filed 24 March 2009; *Nshogoza*, "Strictly Confidential and *Ex Parte* Annexes to the Registrar's Further Submissions in Respect of Defence Motion for Stay of Proceedings Due to Interference with Defence Witnesses," filed 24 March 2009.

<sup>438</sup> "Extremely Urgent Defence Motion for Leave to Vary its Witness List," filed 24 March 2009.

<sup>439</sup> "Prosecutor's Response to Extremely Urgent Defence Motion for Leave to Vary its Witness List," filed 24 March 2009; "Defence Reply to "Prosecutor's Response to Extremely Urgent Defence Motion for Leave to Vary its Witness List"," filed 24 March 2009

<sup>440</sup> T. 25 March 2009 pp. 24-26.

52. On 3 February 2009, the Defence filed an urgent motion requesting a subpoena to Ms. Loretta Lynch.<sup>441</sup> The Prosecution opposed the motion on 6 February 2009,<sup>442</sup> submitting, among other things, that the Defence had failed to provide any reason to justify the ordering of a subpoena and that any material produced by Ms. Lynch was not subject to disclosure under Rule 70. The Defence replied to the Prosecution's response on 9 February 2009,<sup>443</sup> submitting, among other things, that the response contained misrepresentations and that the material was exculpatory and therefore Rule 70 did not apply.

53. On 10 February 2009, the Chamber denied the Defence request for a subpoena.<sup>444</sup> The Chamber found that the Defence had not shown that the information would materially assist in determining whether the Accused had suborned witnesses. The Defence request certification to appeal the Chamber's decision on 16 February 2009.<sup>445</sup> The Chamber denied the Defence request on 19 February 2009,<sup>446</sup> finding that the decision did not involve an issue that would affect the expeditious conduct of proceedings.

#### **b. Exhibits**

54. On 27 October 2008, the Prosecution filed a list of 27 exhibits.<sup>447</sup> On 3 March 2009, the Defence filed a list of 21 possible exhibits.<sup>448</sup> An addendum to this was filed on 16 March 2009, containing three additional exhibits.<sup>449</sup> The Prosecution adduced 28 exhibits at trial, and the Defence adduced 96.

55. On 16 June 2009, the Chamber ordered the production of the Prosecution witness protection measures in *Kamuhanda* and asked the parties for their submissions in regard to their admission into evidence.<sup>450</sup> The Prosecution complied with this order on 18 June 2009.<sup>451</sup> And the Defence filed its response on 19 June 2009.<sup>452</sup> The Chamber admitted the protective measures into evidence on 26 June 2009.<sup>453</sup>

#### **c. Statements and Transcripts under Rule 92 bis**

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<sup>441</sup> "Urgent Defence Request for a Subpoena to Ms. Loretta E. Lynch," filed 3 February 2009.

<sup>442</sup> "Prosecutor's Response to "Urgent Defence Request for a Subpoena to Ms. Loretta E. Lynch"," filed 6 February 2009.

<sup>443</sup> "Defence Reply to "Prosecution Response to 'Urgent Defence Request for a Subpoena to Ms. Loretta E. Lynch,'" filed 9 February 2009.

<sup>444</sup> Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch, 10 February 2009.

<sup>445</sup> "Defence Motion for Certification of the Trial Chamber's "Decision on the Defence's Urgent Motion for a Subpoena to Ms Loretta Lynch"," filed 16 February 2009.

<sup>446</sup> Decision on Defence Motion for Certification of the Trial Chamber's 'Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch',' filed 19 February 2009.

<sup>447</sup> "Prosecutor's Filing of a List of Witnesses and Exhibits," filed 27 October 2008.

<sup>448</sup> "Defence Strictly Confidential List of Possible Exhibits," filed 3 March 2009.

<sup>449</sup> "Defence Strictly Confidential List of Possible Exhibits (Addendum)," filed 16 March 2009.

<sup>450</sup> Order for the Production of Prosecution Witness Protective Measures from the Kamuhanda Case, 16 June 2009.

<sup>451</sup> "Prosecutor's Filing in compliance with the Trial Chamber's "Order for the Production of Prosecution Witness Protective Measures from the Kamuhanda Case, Rule 98 of the Rules of Procedure and Evidence," filed 18 June 2009.

<sup>452</sup> "Defence Response to Order for the Prosecution Witness Protective Measures from the Kamuhanda Case and to the Prosecutor's Filing," filed 19 June 2009.

<sup>453</sup> Order Admitting the Prosecution Witness Protective Measures from the Kamuhanda Case into Evidence, 26 June 2009.

56. On 16 March 2009, the Defence filed a motion for the admission of 12 statements in lieu of oral testimony of witnesses it was denied from bringing before the Chamber.<sup>454</sup> On 30 March 2009, the Defence filed further submissions to the motion.<sup>455</sup> On 29 April 2009, the Chamber granted in part the Defence motion for the admission of statements in lieu of oral testimony, allowing the admission of statements by Witnesses A13, A15, A17, A18, A23, A28 and A30.<sup>456</sup> The Defence requested certification to appeal the Chamber's decision to not admit some of the witness statements,<sup>457</sup> and was denied on 8 June 2009.<sup>458</sup>

57. On 3 April 2009, the Defence filed a motion for the admission of transcripts from the case of *The Prosecutor v. Karemera et al.* (ICTR-98-44-T).<sup>459</sup> On 23 April 2009, the Chamber granted the motion.<sup>460</sup>

## 6. Disclosure

58. On 22 March 2008, the Defence filed an urgent motion for the Trial Chamber to order the Prosecution to disclose all Rule 66 (A) supporting material and rule that the Rule 72 30-day period would begin at either the date of receipt by the Defence of the Rule 66 supporting material, or the date of the decision to be rendered on the urgent motion if it denied the Defence request.<sup>461</sup>

59. On 28 March 2008, the Prosecution filed a clarification on documents disclosed, in response to the Defence's 22 March 2008 urgent motion.<sup>462</sup> The Prosecution submitted that it had disclosed all supporting materials to the Defence in one binder on 12 March 2008, and that the materials the Defence argued were missing were in the public domain. The Defence responded to the Prosecution's clarification on 2 April 2008, asking the Chamber not to consider the clarification as it was time-barred and did not serve to clarify the matter.<sup>463</sup>

60. On 3 April 2008, the Defence filed an addendum to its response containing a table of documents listing whether or not they were publicly available.<sup>464</sup>

<sup>454</sup> “[CONFIDENTIAL] Defence Motion for the Admission of Written Witness Statements of Witnesses A1, A13, A14, A15, A18, A20, A22, A23, A26, A28, and A30 as Evidence *in lieu* of Oral Testimony,” filed 16 March 2009.

<sup>455</sup> “Additional Submissions to the Defence Motion for the Admission of 92 *bis* Witness Statements,” filed 30 March 2009.

<sup>456</sup> Decision on Defence Motion for the Admission of Written Statements of Witnesses A1, A13, A14, A15, A17, A18, A20, A22, A23, A26, A28, and A30 as Evidence in lieu of Oral Testimony, 29 April 2009.

<sup>457</sup> “Defence Motion for Certification of the Trial Chambers Decision to Deny the Admission of the Statements of Witnesses A1, A14, A20, A22 and A26,” filed 6 May 2009.

<sup>458</sup> Decision on Defence Motion for Certification of the Trial Chamber's Decision on the Admission of Evidence Pursuant to Rule 92 *bis*, 8 June 2009.

<sup>459</sup> “Motion for the Admission of Transcripts Pursuant to Rule 92 *bis*,” filed 3 April 2009.

<sup>460</sup> Decision on Defence Motion for the Admission of Transcripts Pursuant to Rule 92 *bis*, 23 April 2009.

<sup>461</sup> “Urgent Defence Motion for Trial Chamber to Order the Prosecutor to Disclose all Rule 66 (A) Supporting Material,” filed 26 March 2008.

<sup>462</sup> “Prosecutor's Clarifications on Documents Disclosed to the Defence on 12 March 2008,” filed 28 March 2008.

<sup>463</sup> “Defence Response to Prosecutor's ‘Clarification on Documents Disclosed to the Defence on 12 March 2008’,” filed 2 April 2008.

<sup>464</sup> “Addendum – Defence Response to Prosecutor's ‘Clarifications on Documents Disclosed to the Defence on 12 March 2008’” filed 3 April 2008.

61. On 8 April 2008, the Prosecution disclosed a redacted version of Witness GAA's solemn declaration, apologising for the oversight and late disclosure.<sup>465</sup> On the same day, the Prosecution replied to the addendum filed by the Defence on 3 April 2008,<sup>466</sup> reiterating that, with the exception of one document that had been disclosed in redacted form, the documents requested did not constitute supporting material for the purposes of Rule 66 (A)(i). The Prosecution also added that all but two of the listed documents were public records and submitted that to the extent that any material was material to the preparation of the Defence case, Defence Counsel was entitled to request them for inspection.

62. On 10 April 2008, the Defence filed an urgent request that the Chamber declare that the 30-day period under Rule 72 would begin running on either the date of the pending decision on Prosecutorial disclosure or the date of disclosure of the Prosecution of the remaining support material.<sup>467</sup>

63. On 16 April 2008, the Prosecution opposed the urgent Defence request regarding the commencement of the Rule 72 30-day delay.<sup>468</sup> The Prosecution requested the time limit for the filing of eventual Rule 72 applications to end 30 days after completion of the Prosecution's disclosure pursuant to Rule 66 (A)(i).

64. On 22 April 2008, the Defence filed an addendum and reply to the Prosecution's response, asserting that the Prosecution was incorrect about certain documents being in the public domain and had failed to address the issues that gave rise to the doubts as to whether all Rule 66 (A) materials have been disclosed.<sup>469</sup> The Defence also submitted that the Prosecution had had unauthorised contact with the Accused by communicating Witness GAA's solemn declaration directly to the Accused and not to Defence Counsel. The Defence submitted that an inter-office memo to the Accused did not constitute disclosure for the purposes of calculating the Rule 72 deadline and that Defence Counsel had still not, at the date of filing received the inter-office memo. The Defence asked the Chamber to deny the relief sought by the Prosecution, direct the Prosecution to disclose the inter-office memo through official channels and to postpone the commencement of the Rule 72 deadline.

65. On 5 September 2008, the Prosecution made a redacted disclosure of five additional statements.<sup>470</sup> This was followed on 15 September 2008 with the disclosure of a translation of the Accused's file before the Rwandan Gasabo Court of First Instance, with additional translations filed on 17 and 25 September 2008.<sup>471</sup>

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<sup>465</sup> "Redacted Disclosure of 'Solemn Declaration and Statement of GAA,'" filed 8 April 2008.

<sup>466</sup> "Prosecutor's Reply to 'Addendum-Defence Response to Prosecutor's 'Clarifications on Documents Disclosed to the Defence on 12 March 2008,'" filed 8 April 2008.

<sup>467</sup> "Urgent Defence Request Regarding the Commencement of the Rule 72 30-Day Delay," filed 11 April 2008.

<sup>468</sup> "Prosecutor's Response to 'Urgent Defence Request Regarding the Commencement of the Rule 72 30-Day Delay,'" filed 16 April 2008.

<sup>469</sup> "Addendum and Reply to 'Prosecutor's Response to 'Urgent Defence Request Regarding the Commencement of the Rule 72 30-day Delay,'" filed 21 April 2008.

<sup>470</sup> "Redacted Disclosure of Translations of 5 Additional Witnesses Statements," filed 5 September 2008.

<sup>471</sup> "Redacted Disclosure – Translation of Nshogoza's File of the Rwandan Gasabo Court First Instance RP 0531/07/TGI/GASABO," filed 15 September 2008; *Nshogoza*, "Redacted Disclosure – French Translation Nshogoza File of the Rwandan Gasabo Court First Instance RP/0531/07/TGI/GASABO," filed 17 September 2008;

66. On 1 October 2008, the Chamber rendered its decision on the Defence motion of 22 March 2008 requesting disclosure of supporting materials and of 10 April 2008 regarding the Rule 72 30-day delay.<sup>472</sup> The Chamber ordered the Prosecution to file a declaration stating that it had fully complied with its Rule 66 (A)(i) obligations and to provide a description of any material it claimed fell within an exception to that rule. The Chamber also ordered the Prosecution to ensure that the Defence had access to any supporting materials that were claimed to be in the public domain. The Chamber declared that the 30-day period provided for in Rule 72 (A) would run from either the date on which the Prosecution's declaration was filed or the date of last disclosure, whichever was later. The Chamber stayed any decision on the merits of the Defence's first and second Rule 72 motions until the 30-day period had elapsed and permitted the Defence to amend its pending Rule 72 preliminary motions, or file new ones, within the 30-day period.

67. On 6 October 2008, the Defence filed a motion asking the Chamber to make a number of orders to the Prosecution to disclose various documents of supporting materials.<sup>473</sup>

68. On 9 October 2008, the Prosecution filed a confidential declaration and disclosure following the Chamber's order of 1 October 2008.<sup>474</sup>

69. The Defence filed its response to the Prosecution filing on 20 October 2008,<sup>475</sup> noting that Prosecution's filing did not contain a declaration that the Prosecution had fully complied with its Rule 66 (A)(i) obligations and contesting the accuracy of the filing.

70. On the same day the Defence also filed a motion requesting the Prosecution to produce the videotape of an interview with Witness BUC.<sup>476</sup> The Defence motion was denied by the Chamber on 31 December 2008, as the Defence failed to present evidence in support of its assertion that the Prosecution had the video in his possession.<sup>477</sup>

71. On 24 October 2008, the Prosecution filed a confidential clarification of the disclosures made to that date, to assist the Chamber and the Defence in determining what had been disclosed.<sup>478</sup>

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"Redacted Disclosure – Further Translations of Nshogoza File of the Rwandan Gasabo Court First Instance RP/0531/07/TGI/GASABO," filed 25 September 2008.

<sup>472</sup> Decision on Defence Motions for Disclosure of Supporting Materials; and Clarification on Rule 72 30-Day Period, 1 October 2008.

<sup>473</sup> "Defence Motion Filed Pursuant to Rules 66 (A) and (B) of the Rules of Procedure and Evidence," filed 6 October 2008.

<sup>474</sup> "Prosecutor's [CONFIDENTIAL] Declaration and Disclosure Pursuant to Rules 66 and 75 of the Rules of Procedure and Evidence, Following Trial Chamber III's Order of 1 October 2008," filed 9 October 2008.

<sup>475</sup> "Defence Request for 5-Day Delay to Respond from Date of Receipt of Prosecution Filing of October 2008," filed 14 October 2008; "Defence Request for 5-Day Delay to Respond from Date of Receipt of Prosecution Motion of 9 October 2008," filed 15 October 2008; "Defence Response to Prosecution Declaration on Rule 66 (A) (i) Disclosure," filed 20 October 2008.

<sup>476</sup> "Defence Response to Prosecution Extremely Urgent Motion for Protective Measures and Motion for Request to Prosecutor to Produce Video Tape of Interview with Witness BUC," filed 20 October 2008.

<sup>477</sup> Decision on Defence Motion for the Prosecutor to Produce Video Tape of Interview with Witness BUC, 31 December 2008.

<sup>478</sup> "Prosecutor's [CONFIDENTIAL] Clarification of Disclosures Made to Date, Pursuant to Rules 66 and 75 of the Rules of Procedure and Evidence," filed 24 October 2008.

72. On 3 November 2008, the Prosecution confidentially disclosed two witness statements.<sup>479</sup> On the same day, the Defence filed a motion, arguing that the deadline to file preliminary motions should be on either 13 or 14 November 2008.<sup>480</sup>
73. On 7 November 2008, The Chamber rendered its decision on the Defence Rule 72 deadline motion, ordering that the 30-day period would run from 14 October 2008.<sup>481</sup>
74. On 10 November 2008, the Prosecution made a confidential disclosure of a French translation of a statement by Witness BUC (SP-018).<sup>482</sup> On 13 November 2008, the Prosecution confidentially disclosed an English translation of statements by Witness BUC (SP-018).<sup>483</sup>
75. On 27 November 2008, the Registrar made confidential and *ex-parte* disclosure of certain Registry documentation of the Accused, and requested guidance from the Chamber as to whether it had to disclose the same information to the Prosecution.<sup>484</sup> The Registrar submitted that the Defence indicated it did not want the documents given to the Prosecution, as it would reveal the nature of the Defence investigations.
76. On 2 December 2008, the Prosecution made submissions on the Registrar's submission, arguing that the principle of the equality of arms and adversarial trial dictated that the material also be disclosed to the Prosecution.<sup>485</sup> On 11 December 2008, the Defence also made submissions on this point,<sup>486</sup> arguing the Registrar was under no legal obligation to provide the documents to the Prosecution, though was able to if it so desired. On the same day, the Prosecution made additional confidential disclosure of more witness statements.<sup>487</sup>
77. On 10 December 2008, the Chamber ordered the Defence to file detailed submissions as to how the disclosure to the Prosecution of the Registrar's documentation of the Accused, would reveal the nature of the Defence investigations.<sup>488</sup> The Defence filed submissions pursuant to this Chamber order on 12 December 2008,<sup>489</sup> noting its submissions of 5 December 2008 and reiterating its non-objection to the Registrar disclosing the documents at issue.

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<sup>479</sup> [CONFIDENTIAL] "Un-Redacted Disclosure of BUC (SP-018) Witness Statements," filed 3 November 2008.

<sup>480</sup> "Defence Request Concerning the Deadline for Rule 72 Preliminary Exceptions Motion," filed 3 November 2008.

<sup>481</sup> Decision on Defence Request Concerning the Deadline for Rule 72 Preliminary Exceptions Motions, 7 November 2008.

<sup>482</sup> "Disclosure of French Translation of BUC (SP-018) Statement of 11 October 1995," filed 10 November 2008.

<sup>483</sup> "Disclosure of English Translations of BUC (SP-018) Statements," filed 13 November 2008.

<sup>484</sup> "Registrar's Submissions Under Rule 33 (B) of the Rules on the Disclosure of Registry Documents," filed 28 November 2008; "[EX PARTE & CONFIDENTIAL] Annex to Registrar's Submission Under Rule 33 (B) of the Rules on the Disclosure of Registry Documents," filed 28 November 2008; "Registrar's Further Submissions under Rule 33 (B) of the Rules on the Disclosure of Registry Documents," filed 8 January 2009.

<sup>485</sup> "Prosecutor's Submissions Concerning 'Registrar's Submissions under Rule 33 (B) of the Rules on the Disclosure of Registry Documents,'" filed 2 December 2008.

<sup>486</sup> "Defence Submissions on Registrar Submissions of 28 November 2008 and Prosecution Submissions of 2 December 2008," filed 11 December 2008.

<sup>487</sup> "Disclosure of Relevant Documents Pursuant to Rule 66 (B) and 75 (F)(ii)," filed 5 December 2008.

<sup>488</sup> Order for Submissions from the Defence Regarding Registrar's Rule 33 (B) Submissions on Disclosure, 10 December 2008.

<sup>489</sup> "Defence Further Submissions Pursuant to Court Order of 10 December 2008," filed 12 December 2008.

78. On 17 December 2008, the Chamber ordered the Registrar to assess the Prosecution's request for a copy of the relevant documents and to take any action it deemed appropriate.<sup>490</sup>

79. On 22 October 2008, the Defence filed a motion requesting the Chamber to order disclosure by the Prosecution.<sup>491</sup> On 29 October 2008, the Defence also requested time to investigate and for provisional release of the Accused.<sup>492</sup>

80. On 22 December 2008, the Chamber granted in part these motions for disclosure, ordering the Prosecution to disclose to the Defence a number of the requested documents.<sup>493</sup> On 29 December 2008, the Defence sought certification to appeal the decision, and alternatively requested a review of the decision.<sup>494</sup> On 5 January 2009, the Prosecution filed a response to the application for certification, arguing that the Defence had not met the legal threshold to merit certification or to justify review of the decision.<sup>495</sup> On 14 January 2009, the Defence filed its reply, submitting that the Prosecution had failed to demonstrate why the Defence had not met their burden for certification or review.<sup>496</sup> The reply also set out evidence for the existence of documents that the Defence alleged were in the Prosecution's possession and needed to be disclosed. It further asked the Chamber to order the Prosecution to disclose a number of witness statements and for the Chamber to order the Prosecution to disclose to the Defence all existing Kinyarwanda versions of all Prosecution witness statements. On 19 February 2009, the Chamber granted a Defence request for an order to the Prosecution to allow the Defence to inspect witness statements arising from the investigation conducted by Ms. Lynch and denied the remainder of the motion.<sup>497</sup>

81. On 5, 13, 19, 20 and 21 January 2009, the Prosecution made further confidential disclosures of certain materials in relation to Witness GAA and other confidential documents and materials.<sup>498</sup>

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<sup>490</sup> Order Regarding Registrar's Rule 33 (B) Submissions on Disclosure, 17 December 2008.

<sup>491</sup> "Defence Motion for Disclosure under Rules 66 and 68 of the ICTR R.P.E.," filed 22 October 2008.

<sup>492</sup> "Defence Motion for Order to the Prosecution to Complete Rule 66 (A)(ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza," filed 29 October 2008.

<sup>493</sup> Decision on Defence Motions for Disclosure under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008.

<sup>494</sup> "Defence Application for Certification to Appeal Decision of 22 December 2008 and Alternative Request for Review," filed 29 December 2008.

<sup>495</sup> "Prosecutor's Response to "Defence Application for Certification to Appeal Decision of 22 December 2008 and Alternatively for Review"," filed 5 January 2009; "Notice of Intent to File Reply to Prosecution Response Dated 5 January 2009 to Defence Application for Certification," filed 12 January 2009.

<sup>496</sup> "Defence Reply to Prosecution Response to Defence Application for Certification to Appeal Decision of 22 December 2008 (...)," filed 14 January 2009.

<sup>497</sup> Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 December 2008 on Disclosure, 19 February 2009.

<sup>498</sup> "[CONFIDENTIAL] Disclosure of Rule 66 (B) Documents," filed 5 January 2009; "[CONFIDENTIAL] Additional Disclosure of Translations of Witness Statements," filed 13 January 2009; "[CONFIDENTIAL] Disclosure of GAA Audio Cassettes," filed 19 January 2009; "[CONFIDENTIAL] Disclosure of Transcription Translation of GAA Audio Cassette Interview of 11 May 2005," filed 20 January 2009; "[CONFIDENTIAL] Disclosure of Translation of Transcription of GAA Audio Cassette of Interview of 11 May 2005 – English," filed 21 January 2009.

82. On 21 January 2009, the Defence filed a motion requesting access to a confidential defence motion in *Kamuhanda*, the first written record that references the recantation of Witness GAA.<sup>499</sup> The Prosecution replied on 22 January 2009,<sup>500</sup> disclosing the requested document. On 14 May 2009, the Chamber found the request to be moot, as the disclosure had occurred.<sup>501</sup>
83. On 26 January 2009, the Prosecution confidentially disclosed a Will Say Statement of Witness GAA, a Kinyarwanda statement of Witness GAA and a transcription of an audio cassette of Witness GAA.<sup>502</sup> On 28 January the Prosecution also disclosed a number of audio interviews with Witness GAA.<sup>503</sup>
84. On 29 January 2009, the Defence filed an extremely urgent motion asking for an order to the Prosecution to fully and immediately comply with the Chamber's 22 December 2008 disclosure order and other disclosure obligations.<sup>504</sup>
85. On 3 February 2009, the Prosecution confidentially disclosed a French translation of Witness GAA's statement.<sup>505</sup>
86. On 4 February 2009, the Prosecution responded to the extremely urgent Defence motion for an order to the Prosecution to fully comply with the Chamber's order for disclosure of 22 December 2008,<sup>506</sup> asking that the Defence motion be dismissed, submitting that the Defence had made general assertions and failed to establish any material prejudice as a result of the alleged disclosure failures. On 9 February 2009, the Defence filed a reply to the Prosecution's response to the Defence's 29 January 2009 motion on disclosure. The Defence replied that the Prosecution had only partially addressed the breaches set out in the Defence motion and argued that it was not required to demonstrate material prejudice.<sup>507</sup>
87. On 5 February 2009, the Prosecution made another confidential disclosure of a handwritten document of Witness GAA.<sup>508</sup>

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<sup>499</sup> "Defence Motion for Access to Confidential Kamuhanda Defence Motion for Admission of Additional Evidence," filed 21 January 2009.

<sup>500</sup> "[CONFIDENTIAL] Prosecutor's Reply to "Defence Motion for Access to Confidential Kamuhanda Defence Motion for Admission of Additional Evidence"," filed 22 January 2009.

<sup>501</sup> Decision on Defence Motion for Access to Confidential Kamuhanda Defence Motion, 14 May 2009.

<sup>502</sup> "[CONFIDENTIAL] Additional Disclosure of GAA Will Say Statement, Kinyarwanda Statement Ern K045-7554-7557 and GAA Audio Cassette Transcription Translations," filed 26 January 2009.

<sup>503</sup> "Disclosure of GAA Audio Interviews KT00-1679, KT00-1680, KT00-1681 and KT00-1682," filed 28 January 2009.

<sup>504</sup> "Extremely Urgent Defence Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and Other Disclosure Obligations," filed 29 January 2009.

<sup>505</sup> "[CONFIDENTIAL] French Translation of GAA Statement /ERN K-045-7803-7808," filed 3 February 2009.

<sup>506</sup> "Prosecutor's Response to "Extremely Urgent Defence Motion to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and other Disclosure Obligations Pursuant to Rules 41, 54, 66, 68 and 73 of the ICTR Rules of Procedure and Evidence"," filed 4 February 2009.

<sup>507</sup> "Defence Reply to the Prosecutor's Response to 'Extremely Urgent Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and Other Disclosure Obligations'," filed 9 February 2009.

<sup>508</sup> "Disclosure Hand written document/ Ern K045-7888," filed 5 February 2009.

88. On the same day, the Chamber ordered the Prosecution to conduct a thorough review of his materials to ensure full compliance with its disclosure obligations and to certify in writing that it had conducted the search by 9 February 2009.<sup>509</sup>

89. Following the Chamber's order, the Prosecution made two confidential disclosures on 6 February 2009 of transcripts of interviews with Witness GAA and intercepts of conversations between Witness GAA and others.<sup>510</sup>

90. On 6 February 2009, the Registrar also made a confidential and *ex parte* disclosure of a transcription of an excerpt from Witness GAA's initial appearance, and translation into English and French of an excerpt in Kinyarwanda of the same hearing.<sup>511</sup> The Registrar also asked the Chamber for direction as to whether it should also disclose the documents to the Prosecution.

91. On 5 February 2009, the Defence filed an urgent motion for stay of proceedings due to the on-going violations of the Prosecution's disclosure obligations.<sup>512</sup> On 9 February 2009, the Prosecution filed its response,<sup>513</sup> arguing that the Defence had failed to establish material prejudice and had not demonstrated that the Prosecution had failed to disclose specific materials in its possession. On the same day, the Prosecution filed a certification of compliance with the Chamber's order of 5 February 2009 regarding disclosure obligations.<sup>514</sup>

92. On 10 February 2009, the Chamber issued its decision on the Defence motion of 29 January 2009 alleging the Prosecution was in violation of its disclosure obligations and the Defence motion of 5 February 2009 for a stay of proceedings due the Prosecution's violation of its disclosure obligations.<sup>515</sup> The Chamber denied both motions, noting the further disclosures by the Prosecution since the filing of the motion and finding that the Defence had not demonstrated that the Accused had suffered prejudice as a result of the delayed disclosures.

93. On 12 February 2009, the Defence filed a request for reconsideration of, or in the alternative certification to appeal, the Chamber's oral decision of 9 February 2009 not to postpone the proceedings and to allow the Prosecution to begin his case.<sup>516</sup> The motion alleged

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<sup>509</sup> Order for the Prosecution to Conduct a Thorough Review and Certify that it has Complied with its Disclosure Obligations, 5 February 2009.

<sup>510</sup> “[CONFIDENTIAL] Disclosure of Transcription of GAA Interviews of 29 September 2005 – KT00-1679, KT00-1680, KT00-1681 and KT00-1682,” filed 6 February 2009; “[CONFIDENTIAL] Disclosure of “GAA conversation intercept with Emmanuel Bajenza dated 23 August 2005” –“ KT00-1676 Part I and KT-1677 Part I,” filed 6 February 2009.

<sup>511</sup> “[CONFIDENTIAL] Registrar's Submissions under Rule 33 (B) of the Rules on the Disclosure of Registry Documents,” filed 6 February 2009.

<sup>512</sup> “Urgent Motion for Stay of Proceedings due to the On-going Violations of the Prosecutor's Disclosure Obligations,” filed 5 February 2009.

<sup>513</sup> “Prosecutor's Response to “Urgent Motion for Stay of Proceedings Due to On-going Violation of the Prosecutor's Disclosure Obligations”,” filed 9 February 2009.

<sup>514</sup> “Prosecutor's Certification of Compliance with Trial Chamber's Orders of 5 February 2009 Regarding Disclosure Obligations,” filed 9 February 2009.

<sup>515</sup> Decision on Defence Motion for Order to Prosecutor to Comply with His Disclosure Obligations and Motion for Stay of Proceedings Due to the On-Going Violations of the Prosecutor's Disclosure Obligations, 10 February 2009.

<sup>516</sup> T. 9 February 2009 pp. 3-8; “Defence Request for Reconsideration, or, in the Alternative, Certification to Appeal the Trial Chamber's Oral Decision of 9 February 2009 Denying a Postponement of Proceedings Due to Disclosure Violations,” filed 12 February 2009.

that there remained undisclosed statements of Witness GAA and that the Defence had not been afforded an opportunity to prepare for the testimony of Witness GAA. The Defence requested, among other things, a postponement of the testimony of Witness GAA until 15 days after the Prosecution had disclosed the documents requested.

94. The Prosecution responded on 16 February 2009,<sup>517</sup> submitting that the Defence had failed to satisfy the threshold for reconsideration. The Chamber denied the Defence motion on 18 February 2009,<sup>518</sup> finding there were no new material circumstances to justify reconsideration and that the decision did not meet the requirements for certification.

95. On 13 February 2009, the Prosecution confidentially disclosed audio cassettes containing interviews with Witness GAA.<sup>519</sup>

96. On 2 March 2009, the Prosecution filed confirmation that Defence Counsel had inspected witness statements from Ms. Lynch's investigation and had received a CD-ROM containing witness statements the Defence had selected.<sup>520</sup>

97. On 11 March 2009, the Prosecution confidentially disclosed a statement of fees and expenses from the *Kamuhanda* case.<sup>521</sup>

98. On 16 March 2009, the Registrar filed submissions regarding documents that had been disclosed *ex parte* to the Defence.<sup>522</sup> The Registrar sought instructions as to whether the documents needed to be disclosed to the Prosecution. The Prosecution responded on the same day.<sup>523</sup> The Chamber issued its order on 14 May 2009,<sup>524</sup> directing the Registry to take such action as it deemed appropriate.

99. On 18 March 2009, the Prosecution confidentially disclosed Rwandan judicial documents it had recently received from the Rwandan authorities, along with English translations.<sup>525</sup> On 25 March 2009, the Prosecution confidentially disclosed an extract from 26 March 2001 from the *Kamuhanda* case.<sup>526</sup>

100. On 27 March 2009, the Prosecution made confidential submissions regarding the disclosure and existence of statements from Defence Witness Straton Nyarwaya, which the

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<sup>517</sup> "Prosecutor's Response to "Defence Request for Reconsideration, or, in the Alternative, Certification to Appeal the Trial Chamber's Oral Decision of 9 February 2009 Denying a Postponement of Proceedings Due to Disclosure Violation"," filed 16 February 2009.

<sup>518</sup> Decision on Defence Motion for Certification to Appeal the Chamber's Oral Decision of 9 February 2009 Denying an Adjournment of the Proceedings, 18 February 2009.

<sup>519</sup> "Inspection of GAA Audio Cassettes/ Waiver Forms and Evidence Receipts Form," filed 13 February 2009.

<sup>520</sup> "Inspection of Loretta Lynch Folder & CD Rom with Rule 66 (B) Statements," filed 3 March 2009.

<sup>521</sup> "Disclosure under Rule 66 (B) / InterOffice Memorandum Ern-K045-8604-8609," filed 11 March 2009.

<sup>522</sup> "Registrar's Submissions under Rule 33 (B) of the Rules on the Disclosure of Registry Documents," filed 16 March 2009.

<sup>523</sup> "Prosecutor's Submissions Concerning "Registrar's Submissions under Rule 33 (B) of the Rules on the Disclosure of Registry Documents"," filed 16 March 2009.

<sup>524</sup> Order Regarding the Registrar's Rule 33 (B) Submissions on Disclosure, 14 May 2009.

<sup>525</sup> "Disclosure under Rule 66 (B) Rwandan Judicial Documents (Ern K051-2274-2277) & English Translations (Ern K051-2278-2282)," filed 18 March 2009.

<sup>526</sup> "Extract from a disclosure, dated 26 March 2001, made in the *Kamuhanda* case, concerning former Protected Prosecution Witness GEX (A7)," filed 25 March 2009.

Prosecution had previously denied it possessed.<sup>527</sup> The Prosecution also submitted that the Defence had not suffered any material prejudice from its failure to disclose the document. The Defence responded on 1 April 2009,<sup>528</sup> arguing that it had suffered material prejudice and asking the Chamber to, among other things, find that the Prosecution had violated Rule 68, admit the statement, issue a warning to the Prosecution and order the Prosecution to permit the Defence to inspect all the documents contained in the container where the statement was found.

101. On 7 May 2009, the Defence filed a motion requesting, among other things, the admission of the Straton Nyarwaya statement, an order to the Prosecution to allow the Defence to inspect the carton in which the statement was found, and for sanctions to be imposed on the Prosecution for their disclosure violation.<sup>529</sup> The Chamber granted the Defence motion in part, finding the Prosecution was in violation of its disclosure obligations and reminding the Prosecution of the importance of those obligations under the Rules.<sup>530</sup>

### **7. Protective measures for witnesses**

102. When issuing the Indictment the Chamber noted that the protection orders from the *Kamuhanda* case remained in effect and extended a limited protection from the public to all witnesses in connection with the case.<sup>531</sup>

103. On 9 October 2008, the Prosecution filed an extremely urgent motion asking for protective measures for its witnesses.<sup>532</sup> On 20 October 2009, the Defence responded to the motion, objecting to protective measures being granted to one witness that it claimed was a Defence witness.<sup>533</sup> On 24 November 2008, the Chamber granted the Prosecution's motion.<sup>534</sup>

104. On 27 October 2008, the Defence filed a motion to examine an affidavit relied upon by the Prosecution when applying for protective measures.<sup>535</sup> This was denied by the Chamber on 20 November 2008, which also ordered the Registry to withhold the payment of costs associated with its filing.<sup>536</sup> The Defence made an oral motion on the same issue on 12 February 2009,<sup>537</sup> which was denied on 17 February 2009.<sup>538</sup>

<sup>527</sup> "Prosecutor's Submissions Regarding Defence Witness Stratton Nyarwaya's Statements to the Office of the Prosecutor dated 15 March 2006," filed 27 March 2009.

<sup>528</sup> "Defence Submissions in Response to "Prosecutor's Submissions Regarding Defence Witness Stratton Nyarwaya's Statements to the Office of the Prosecutor dated 15 March 2006"," filed 1 April 2009.

<sup>529</sup> "Defence Motion to Admit into Evidence 15 March 2009 OTP Statement Taken from Defence Witness Starton Nyarwaya, for Access to Documents Contained in a "Carton" Found in Kigali in which the Nyarwaya Statement was Found, to Sanction the Prosecution for Withholding Exculpatory Evidence and to Order the Prosecution to File a Report on the Inquiry into the Unprocessed OTP Evidence Found in Kigali," filed 7 May 2009.

<sup>530</sup> Decision on Defence Motion to Admit the Statement of Defence Witness Straton Nyarwaya into Evidence; and for Other Relief, 1 July 2009.

<sup>531</sup> Confirmation of the Indictment and Witness Protection Orders, 4 January 2008, para. 7.

<sup>532</sup> "Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses," filed 9 October 2008, para. 3.

<sup>533</sup> "Defence Response to Prosecution Extremely Urgent Motion for Protective Measures and Motion for Request to Prosecutor to Produce Video Tape of Interview with Witness BUC," filed 20 October 2008.

<sup>534</sup> Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008.

<sup>535</sup> "Defence Motion to Examine on Affidavit," filed 27 October 2008.

<sup>536</sup> Decision on Defence Motion to Examine on Affidavit, 20 November 2008.

105. On 27 November 2008, the Defence filed a motion for protective measures for its witnesses.<sup>539</sup> The Prosecution responded to this on 2 December 2008.<sup>540</sup> The Defence replied to this response 10 December 2008.<sup>541</sup> The Chamber granted the Defence motion in part on 22 January 2009, providing the same witness protection measures to the Defence that it provided to the Prosecution.<sup>542</sup>

106. On 12 December 2008, the Defence filed an urgent *ex parte* application for clarification and variance of the 24 November 2008 witness protection order, asking the Chamber to limit the interpretation of “family members” to only immediate family members and a variation of the order in relation to a family member of one of the witnesses.<sup>543</sup> This was followed by a motion on 18 December 2008, reiterating the request.<sup>544</sup> On the same day the Defence filed another motion seeking variance of the Chamber’s protection order for a family member of a protected witness.<sup>545</sup> The Prosecution objected to the motion on 22 December 2008, arguing that the family member was a potential prosecution witness.<sup>546</sup> The Prosecution also responded to the Defence’s 18 December 2008 urgent application for clarification of the 24 November 2008 witness protection order, opposing the motion to limit the interpretation of “family members”.<sup>547</sup> On 26 January 2009, the Chamber denied the Defence motion to limit the meaning of the term “family members” to immediate family members only.<sup>548</sup>

107. On 23 January 2009, the Chamber ruled on the Defence motion of 18 December 2008 to vary a protection measure in relation to a family member of one of the Prosecution witnesses, and ordered the Defence to provide the Chamber with a signed consent stating that the witness had agreed to testify on behalf of the Defence.<sup>549</sup> The Defence filed the requested statement on 5 February 2009.<sup>550</sup> On 6 February 2009, the Chamber granted the Defence order for variation of the Protective Measures Order following the consent of the relevant witness.<sup>551</sup>

## 8. Pre-trial

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<sup>537</sup> T. 12 February 2009 p. 6.

<sup>538</sup> T. 17 February 2009 p. 28.

<sup>539</sup> Defence Motion for Protective Measures for Victims and Witnesses,” filed 27 November 2008.

<sup>540</sup> “Prosecutor’s Response to “Defence Motion for Protective Measures for Victims and Witnesses”,” filed 2 December 2008.

<sup>541</sup> “Defence Reply to Prosecutor’s Response to Defence Motion for Protective Measures for Victims and Witnesses,” filed 10 December 2008.

<sup>542</sup> Decision on Defence Motion for Protective Measures for Victims and Witnesses, 22 January 2009.

<sup>543</sup> “[CONFIDENTIAL] Urgent Ex Parte Application for Clarification and Variance of 24 November 2008 Witness Protection Order,” filed 12 December 2008.

<sup>544</sup> “Urgent Application for Clarification of 24 November 2008 Witness Protection Order,” filed 18 December 2008.

<sup>545</sup> “Urgent and Confidential Application for Variation of 24 November 2008 Witness Protection Order,” filed 18 December 2008.

<sup>546</sup> “Prosecutor’s Response to Defence “Urgent and Confidential Application for Variance of 24 November 2008 Witness Protection Order”,” filed 22 December 2008.

<sup>547</sup> “Prosecutor’s Response to Defence “Urgent Application for Clarification of 24 November 2008 Witness Protection Order”,” filed 22 December 2008.

<sup>548</sup> Decision on Defence Motion for Clarification of 24 November 2008 Witness Protection Order, 26 January 2009.

<sup>549</sup> Decision on Defence Motion to Vary 24 November 2008 Witness Protection Order, 23 January 2009.

<sup>550</sup> “Defence Filing of Written Consent of Defence Witness Further to Court Order of 23 January 2009,” filed 5 February 2009.

<sup>551</sup> Order Varying Witness Protection Order, 6 February 2009.

108. On 11 March 2008, the Prosecution made its Rule 66 (A) disclosure of supporting materials.<sup>552</sup>

109. On 19 March 2008, the Defence filed a motion to make public the transcript of the 11 February 2008 Status Conference and to make the Registry make the case available to the public by placing the public documents on the ICTR website and the ICTR's Public Judicial Records Database ("TRIM").<sup>553</sup> On 16 April 2009, the Chamber granted this motion in part,<sup>554</sup> lifting the confidentiality of the Transcript of the Status Conference held on 11 February 2008, and finding the request to list the case on the ICTR website and in TRIM to be moot, as this had already been done.

110. On 26 March 2008, the Defence filed an urgent application seeking deferral in favour of the ICTR and asking the Chamber to, among other things, direct the Registrar to formally advise the Rwandan government that the Accused has functional immunity, that the pending criminal charges against him must be withdrawn and that the matter must be deferred to the ICTR.<sup>555</sup> On 2 April 2008, the Prosecution lodged a response to the motion requesting it to be dismissed and arguing it lacked any foundation, was frivolous, unwarranted and amounted to an abuse of process.<sup>556</sup> On 7 April 2008, the Defence filed a reply to the Prosecution's response.<sup>557</sup>

111. On 5 November 2008, the Chamber issued its decision on the Defence motion for deferral in favour of the ICTR, denying the motion in its entirety and ordering the Registry to withhold the payment of any costs associated with its filing.<sup>558</sup>

112. On 11 April 2008, the Defence filed a preliminary *pro forma* submission in support of preliminary motions pursuant to Rule 72 in case the Chamber denied earlier Defence motions for extension of the Rule 72 deadline.<sup>559</sup> The Defence challenged the jurisdiction of the Prosecution to charge Léonidas Nshogoza; submitted that the Prosecution had a conflict of interest due to Witness GAA being a prosecution witness before recanting; submitted that the indictment was defective as two charges of attempted contempt did not exist under the ICTR Statute nor the Rules of Procedure and Evidence; and submitted that the Accused had been incarcerated for seventy days without being assigned counsel. The Defence also reserved the right to supplement

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<sup>552</sup> "Disclosure of Redacted Supporting Materials Pursuant to Rule 66 (A) of the Rules," filed 11 March 2008.

<sup>553</sup> "Motion to Make Public the Transcript of 11 February 2008 Status Conference and Related Motion for Directive to the Registry to Make Case Available to the Public," filed 19 March 2008 and "Corrigendum – Defence Motion to Make Public the Transcript of 11 February 2008 Status Conference (...) Filed 19 March 2008," filed 26 March 2008.

<sup>554</sup> Decision on the Defence Motion to make Public the Transcripts of 11 February 2008 and the Case File in General, 16 April 2009.

<sup>555</sup> "Urgent Defence Judicial and Administrative Application for Deferral in Favour of the ICTR," filed 28 March 2008.

<sup>556</sup> "[CONFIDENTIAL] Prosecutor's Response to "Urgent Defence Judicial and Administrative Application for Deferral in Favour of the ICTR"," filed 2 April 2008.

<sup>557</sup> "Reply to Prosecutor's Response to Urgent Application of Deferral," filed 7 April 2008.

<sup>558</sup> Decision on Defence Judicial and Administrative Application for Deferral in Favour of the ICTR, 5 November 2008.

<sup>559</sup> "Preliminary Pro Forma Submissions in Support of Preliminary Motions Pursuant to Rule 72 of the ICTR Rules of Procedure and Evidence," filed 11 April 2008.

the submissions and advance new submissions following the resolution of some pending Defence motions.

113. The Prosecution responded to the Defence preliminary pro forma submission on 16 April 2008, arguing that Rule 71 (A)(i) and (D) did not apply to contempt proceedings; that Article 17 of the Statute confers general authority on the Prosecution to investigate and indict; that Rule 77 (C) and (D) specifically confer on the Prosecution the power to investigate, indict and prosecute persons for contempt subject to the direction of a Chamber; and that the Prosecution was acting pursuant to the order of the Appeals Chamber in *Kamuhanda*.<sup>560</sup> In relation to the alleged defects in the indictment, the Prosecution responded that Rule 77 (A) is not an exhaustive list of the forms of the forms of contempt and that Rule 77 (B) provides for the punishment of attempts to commit the acts listed in Rule 77 (A). Based on these submissions, the Prosecution asked that the Defence motion be dismissed as being without merit.

114. On 22 April 2008, the Defence filed a reply to the Prosecution's response submitting that it would defer replying to the Prosecution's response until it filed its Rule 72 motion, following a ruling by the Chamber on when the Rule 72 deadline starts to run.<sup>561</sup>

115. On 24 June 2008, the Defence filed preliminary motions pursuant to Rule 72 and an alternative motion under Rule 73 to dismiss the indictment.<sup>562</sup> These motions replaced their earlier preliminary *pro forma* motions. The Defence challenged the authority of the Prosecution to prosecute the Accused in the current case, alleging that the Prosecution had not received a directive from any Chamber to investigate or prosecute the Accused. The Defence also requested the withdrawal of counts three and four in the Indictment, arguing that attempt to commit acts punishable as contempt is not a violation of the Statute or Rules and the counts should be struck due to their lack of coherence. Finally, the Defence also brought to the attention of the Chamber that the Accused had not been assigned counsel despite 120 days of detention, reserving the Defence's right to request relief from the Chamber in the form of judicial review for the Registrar's decision not to assign the Accused's chosen counsel to his case.

116. On 14 November 2008, the Defence filed a preliminary challenge to the Prosecution's jurisdiction and subsidiary motion to dismiss the indictment, arguing that the Prosecution had not been directed by any Chamber to prosecute the Accused for contempt.<sup>563</sup>

117. On 17 November 2008, the Prosecution filed an urgent request asking the Accused to admit certain facts in order to clarify the issues that needed to be addressed at trial.<sup>564</sup> The Defence responded on 19 November 2008, indicating it would be not be able to respond until

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<sup>560</sup> "Prosecutor's Response to Nshogoza – Preliminary Pro Forma Submissions in Support of Preliminary Motions Pursuant to Rule 72 of the ICTR Rules of Procedure and Evidence Filed on 14 April 2008," filed 16 April 2008.

<sup>561</sup> "Defence Reply to Prosecutor's Response to Defence Preliminary Submissions Pursuant to Rule 72," filed 22 April 2008.

<sup>562</sup> "Preliminary Motions Pursuant to Rule 72, and Alternative Motion under Rule 73 to Dismiss the Indictment," filed 25 June 2008.

<sup>563</sup> "Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment," filed 14 November 2008.

<sup>564</sup> "Prosecutor's Urgent Request to Admit Certain Facts," filed 17 November 2008.

after 24 November 2008, and noting that the request had not been translated into French yet.<sup>565</sup> On 17 December 2008, the Defence filed the Accused's answers to the Prosecution's request.<sup>566</sup>

118. The Prosecution responded to the Defence challenge to the Prosecution's jurisdiction on 19 November 2008.<sup>567</sup> It argued that the Appeals Chamber had made a specific order to the Prosecution to perform an investigation, and that when confirming the Indictment the Confirming Judge allowed the trial to proceed, thereby authorizing the Prosecution to prosecute the Accused.

119. The Defence replied to the Prosecution's response on 24 November 2008,<sup>568</sup> disputing the Prosecution's submission that the Appeals Chamber directed the Prosecution to investigate and indict the Accused for contempt.

120. The Chamber denied the Defence challenge to the Prosecution's jurisdiction on 17 December 2008, noting that the Appeals Chamber had authorized the Prosecution to conduct investigations and to take the steps it deemed necessary and appropriate under the circumstances.<sup>569</sup>

121. On 25 November 2008, the Prosecution filed its pre-trial brief.<sup>570</sup>

122. On 11 December 2008, the Chamber issued a Scheduling Order ordering that the trial would commence on 9 February 2009, that the Prosecution's case would run until 13 February 2009, that the Defence's case would run from 9 March to 13 March 2009, and that following the close of the Prosecution's case, a Pre-Defence Conference would be held.<sup>571</sup>

123. On 24 December 2008, the Defence filed an application for certification to appeal the Chamber's denial of the Defence preliminary challenge to the Prosecution's jurisdiction, and a subsidiary motion to dismiss the indictment.<sup>572</sup> The Chamber denied the motion on 4 February 2009,<sup>573</sup> as it was not satisfied that the Defence had satisfied the requirements for certification.

124. On 6 February 2009, the Defence filed a motion for the translation of official filings in French,<sup>574</sup> submitting that there have been serious and continuous violations of the rights of the Accused as multiple decisions and orders of the Chamber, and documents filed by the Prosecution, had not been translated into Kinyarwanda or French. The Chamber denied the

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<sup>565</sup> "Defence Preliminary Response to Prosecution Request to Admit Certain Facts," filed 19 November 2008.

<sup>566</sup> "Mr Nshogoza's Response to Prosecutor's Urgent Request to Admit Certain Facts," filed 17 December 2008.

<sup>567</sup> "Prosecutor's Response to 'Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment,'" filed 19 November 2008.

<sup>568</sup> "Defence Reply to Prosecutor's Response to Defence Motion under Rule 72 and Alternatively, Rule 73," filed 24 November 2008.

<sup>569</sup> Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment, 17 December 2008.

<sup>570</sup> "Prosecutor's Pre-Trial Brief," filed 25 November 2008.

<sup>571</sup> Scheduling Order, 11 December 2008.

<sup>572</sup> "Defence Application for Certification of Trial Chamber Decision on Defence Preliminary Challenge to Prosecutor's Authority and Subsidiary Motion to Dismiss the Indictment," filed 24 December 2008.

<sup>573</sup> Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, 4 February 2009.

<sup>574</sup> "Defence Motion for Translation of Official Filings into French," filed 6 February 2009.

motion on 12 February 2009,<sup>575</sup> as it was not satisfied that the Defence could not resolve the matter directly with the Registrar, nor had the Defence shown how the unavailability of the translations impacted upon the trial or affected the rights of the Accused.

## 9. Trial

125. At a Status Conference on 28 August 2008, the Chamber vacated the original trial date, and advised parties that a new date would be found.<sup>576</sup>

126. The trial commenced on 9 February 2009 and the Prosecution presented its opening statement.<sup>577</sup> The Prosecution called a total of 6 witnesses and the Defence called a total of 11 witnesses.

127. On 9 February 2009, the Chamber made an oral order that the Defence make all Rule 98 *bis* submissions immediately after the close of the Prosecution case.<sup>578</sup> The next day the Defence filed a motion requesting reconsideration of this decision, submitting that it was erroneous.<sup>579</sup> In an oral decision, the Chamber again ordered that all Rule 98 *bis* submissions would be made orally three days after the close of the Prosecution's case.<sup>580</sup>

128. On 12 February 2009, the Prosecution filed an urgent and confidential motion requesting the admission of evidence of a consistent pattern of conduct, pursuant to Rules 54, 77, 89 (C) and 93.<sup>581</sup> The Defence filed its response on 17 February 2009.<sup>582</sup> The Defence argued, among other things, that Rule 93 only applied to evidence of serious violations of international humanitarian law and that the evidence to be admitted is not evidence of a consistent pattern of conduct.

129. On 20 February 2009, the Chamber denied the Prosecution's motion to admit evidence of a consistent pattern of conduct,<sup>583</sup> not being satisfied that the evidence put forward by the Prosecution amounted to evidence of a consistent pattern of conduct and that any probative value of the evidence was substantially outweighed by its prejudicial affect.

130. On 18 February 2009, the Chamber made an oral ruling, overruling an objection by the Prosecution to a line of questioning the Defence had taken against Witness GAA.<sup>584</sup> The Chamber found that the Defence was allowed to question Witness GAA regarding his prior statements and presence at Gikomero parish.

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<sup>575</sup> Decision on the Defence Motion for Urgent Translation of Official Filings into French, 12 February 2009.

<sup>576</sup> T. 28 August 2008 p. 11 (closed session).

<sup>577</sup> T. 9 February 2009 p. 9-15.

<sup>578</sup> T. 9 February 2009 p. 2.

<sup>579</sup> "Defence Request for Reconsideration of the Trial Chamber's Oral Decision on the Time for Filing a Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*," filed 10 February 2009.

<sup>580</sup> T. 11 February 2009 p. 48-49.

<sup>581</sup> "[CONFIDENTIAL] Extremely Urgent Prosecutor's Motion for the Admission of Evidence of Consistent Pattern of Conduct," filed 12 February 2009.

<sup>582</sup> "Defence Response to Extremely Urgent Prosecutor's Motion for the Admission of Evidence of Consistent Pattern of Conduct," filed 17 February 2009; "Defence Notice of Intention to File Response to the "Extremely Urgent Prosecutor's Motion for the Admission of Evidence of Consistent Pattern of Conduct"," filed 16 February 2009.

<sup>583</sup> Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct, 20 February 2009.

<sup>584</sup> T. 18 February 2009 pp. 26-27.

131. On 19 February 2009, the Chamber ordered the Prosecution to certify that it had done his best to get certain judicial documents from the Rwandan authorities and other sources.<sup>585</sup> On 23 February 2009, the Prosecution certified that disclosure had been completed and reiterated that it was under no obligation to obtain judicial material in relation to his witnesses from Rwanda.<sup>586</sup>

132. On 20 February 2009, the Defence filed a motion requesting a one-week postponement of the Defence case, due to the Prosecution's case lasting longer than originally scheduled.<sup>587</sup> The Chamber denied the motion on 26 February 2009,<sup>588</sup> finding that the scheduling of the Defence case was not premised on the amount of time passing between it and the Prosecution's case.

133. On 2 March 2009, the Defence filed a request for reconsideration of the Chamber's 26 February 2009 decision and for postponement of the filing of the pre-defence brief.<sup>589</sup> The motion submitted, among other things, that the Defence had recently received confirmation from DCDMS of a 6-day work programme in Rwanda, that this amounted to a new material circumstance justifying reconsideration and that it indicated that the trial preparation would take at least six days. The Chamber denied reconsideration 4 March 2009,<sup>590</sup> finding that the approval of the Defence work programme did not constitute new material circumstances warranting reconsideration and that the Defence had not demonstrated an abuse of law or error of discretion. The Chamber did grant the Defence request for an extension of time to file a pre-defence brief.<sup>591</sup>

134. On 6 March 2009, the Defence requested certification to appeal the Chamber's decision denying reconsideration,<sup>592</sup> submitting, among other things, that the Chamber erred in not finding the approval of a work programme a new material circumstance warranting reconsideration and erred in finding that the denial of postponement violated the rights of the Accused. The Chamber denied the request on 11 March 2009,<sup>593</sup> finding that the Defence had not demonstrated that the decision satisfied the requirements for certification.

135. On 23 February 2009, the Defence filed a motion requesting the Chamber to take judicial notice of the fact that Rwanda first issued a 2,000 franc note in 2007.<sup>594</sup> The motion was granted on 16 April 2009.<sup>595</sup>

136. On 25 February 2009, the parties made oral arguments on a Defence motion for judgement of acquittal pursuant to Rule 98 *bis*. On 25 February 2009, the Defence filed

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<sup>585</sup> T. 19 February 2009 p. 17.

<sup>586</sup> "Prosecutor's Certification on Rwandan Judicial Materials," filed 23 February 2009.

<sup>587</sup> "[CONFIDENTIAL] Preliminary List of Defence Witnesses and Motion for One Week Postponement of Defence Case," filed 20 February 2009.

<sup>588</sup> Decision on Defence Motion for Postponement of Defence Case, 26 February 2009.

<sup>589</sup> "Defence Request for Reconsideration of the 'Decision on Defence Motion for Postponement of the Defence Case' and Request to Postpone the Filing of the Pre-Defence Brief," filed 2 March 2009.

<sup>590</sup> Decision on Defence Motion for Reconsideration of the Chamber's Decision on Motion for Postponement of Defence Case, 4 March 2009.

<sup>591</sup> Decision on Defence Request for an Extension of Time to File a Pre-Defence Brief, 4 March 2009.

<sup>592</sup> "Defence Motion for Certification of the Trial Chamber's 'Decision on Defence Motion for Reconsideration of the Chamber's Decision on Motion for Postponement of Defence Case'," filed 6 March 2009.

<sup>593</sup> Decision on Defence Motion for Certification to Appeal the Chamber's Decision Denying a One Week Postponement of the Defence Case, 11 March 2009.

<sup>594</sup> "Defence Motion for Judicial Notice," filed 23 February 2009.

<sup>595</sup> Decision on Defence Motion for Judicial Notice, 16 April 2009.

supplementary submissions of case law that it relied upon in its oral arguments for an acquittal.<sup>596</sup> The Chamber denied the motion for judgement of acquittal in respect of all counts of the indictment on 27 February 2009.<sup>597</sup>

137. On 9 March 2009, the Defence filed its confidential pre-defence brief.<sup>598</sup>

138. On 12 March 2009, the Defence filed submissions on the commencement of the Defence case,<sup>599</sup> submitting that the Defence would be ready to proceed with its case on 16 March 2009.

139. During opening statements on 16 March 2009, Defence Counsel orally moved the Chamber to reconsider its decision on sanctions.<sup>600</sup> This was denied on 23 April 2009. The Chamber found that the Defence had not raised any new material circumstances, did not demonstrate the decision was erroneous or an abuse of discretion and did not demonstrate that it had caused prejudice or injustice to the Accused.<sup>601</sup>

140. On 17 March 2009, the Chamber issued an authoritative written version of its oral decision of 16 March 2009,<sup>602</sup> sanctioning Defence Counsel for misconduct.<sup>603</sup> The Chamber found that the conduct of Defence Counsel had led to unnecessary delay, had been contrary to the interests of justice and was inconsistent with the Code of Conduct for Defence Counsel. It further found that the conduct was not in the interest of the Accused and was not consistent with the Accused's right to a fair and expeditious trial. The Chamber fined Defence Counsel and directed the Registrar to seek the President's approval to communicate the misconduct to the professional body that regulates the conduct of counsel in her State of admission.

141. On 20 March 2009, the Defence filed a motion asking the Chamber to order the Registrar to provide information to the Defence regarding visits by the Prosecution to Witness GAA in 2007, following denial of Defence requests for the information by the Registry.<sup>604</sup> The Registrar filed submissions on the motion on 23 March 2009,<sup>605</sup> stating that it considered it was unable to release the requested documents without an order from the Chamber. The Chamber granted the Defence request on 28 April 2009, and ordered the Registrar to provide the requested information.<sup>606</sup> The Registrar disclosed the information on 29 April 2009.<sup>607</sup>

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<sup>596</sup> "Defence Supplementary Submissions under Rule 98 *bis*," filed 25 February 2009.

<sup>597</sup> T. 27 February 2009 pp. 1-7.

<sup>598</sup> "[CONFIDENTIAL] Pre-Defence Brief of Léonidas Nshogoza," filed 9 March 2009.

<sup>599</sup> "Defence Submissions on Commencement of Defence Case," filed 12 March 2009.

<sup>600</sup> T. 16 March 2009 p. 3.

<sup>601</sup> Decision on Oral Motion for Reconsideration of Sanctions, 23 April 2009.

<sup>602</sup> T. 16 March 2009 pp. 1-2.

<sup>603</sup> Further Decision to Sanction Defence Counsel for Misconduct, 17 March 2009.

<sup>604</sup> "Defence Motion for Order to Registrar to Provide Information to the Nshogoza Defence Regarding Prosecution Visits to GAA at UNDF in 2007," filed 20 March 2009.

<sup>605</sup> "Registrar's Submissions under Rule 33 (B) of the Rules on the Defence Motion for Order to Registrar to Provide Information to the Nshogoza Defence Regarding Prosecution Visits to GAA at UNDF in 2007," filed 23 March 2009.

<sup>606</sup> Decision on Defence Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF, 28 April 2009.

<sup>607</sup> "Registrar's Submissions under Rule 33 (B) of the Rules on the Decision of Defence Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF," filed 29 April 2009.

142. On 8 May 2009, the Defence filed further submissions on the Registrar's disclosure of Prosecution visits to Witness GAA at the UNDF.<sup>608</sup> The Defence submitted that the Registrar's disclosure was incomplete and erroneous and requested the Chamber to order the Registrar to complete its disclosure and to order the Prosecution to disclose the purpose of its visits to Witness GAA. The motion also requested the Chamber to sanction the Prosecution for violating its disclosure obligations. The motion was denied on 8 June 2009.<sup>609</sup>

143. On 25 March 2009, Defence Counsel filed an appeal to the Appeals Chamber of the decision of the Trial Chamber to sanction Defence Counsel, asking the Appeals Chamber to suspend the obligation to pay the fines imposed.<sup>610</sup> The appeal argued, among other things, that the imposed fine amounted to a penal sanction, that the sanction had no legal basis, that the Chamber abuse its discretion by imposing the sanction and that the fine was manifestly excessive.

144. The Prosecution responded on 6 April 2009,<sup>611</sup> submitting that Defence Counsel had no standing to make the appeal and that therefore the appeal was not properly before the Appeals Chamber. The Defence replied to the response on 16 April 2009,<sup>612</sup> submitting, among other things, that the Prosecution had no standing to file his response and contesting the Prosecution's argument that the Defence Counsel had no standing to bring her motion.

145. The Appeals Chamber assigned judges to the motion on 23 April 2009.<sup>613</sup> On 8 June 2009, the Defence filed its Entry of Appearance and requested an extension of time to file its brief and other materials.<sup>614</sup> The Appeals Chamber rendered its decision on 26 June 2009, denying the request for an extension of time, quashing the pecuniary sanctions imposed on Defence Counsel and instructing the Registrar to pay Defence Counsel the fine extracted from her last payment instalment.<sup>615</sup>

146. On 8 April 2009, the Defence filed a motion requesting the Trial Chamber to take judicial notice of the value of the Rwandan currency in United States dollars at the times relevant to the indictment and its current value.<sup>616</sup> On 14 April 2009, the Chamber denied this motion.<sup>617</sup>

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<sup>608</sup> "Defence Further Motion to Order Registrar to Provide Complete Information on OTP Visits to GAA and Motion to Order Prosecutor to Provide Information and to Comply with Rule 66 and 68 Disclosure Obligations," filed 8 May 2009.

<sup>609</sup> Decision on Defence Further Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF, 8 June 2009.

<sup>610</sup> "Defence Counsel Appeal as of Right from Sanctions Decision," filed 25 March 2009.

<sup>611</sup> "Prosecutor's Response to 'Defence Counsel Appeals as of Right from Sanctions Decision,'" filed 6 April 2009.

<sup>612</sup> "Defence Counsel Reply to Prosecution Response to Appeal as of Right from Sanctions Decisions," filed 16 April 2009.

<sup>613</sup> Order Assigning Judges to a Case Before the Appeals Chamber (AC), 23 April 2009.

<sup>614</sup> "Entry of Appearance and Request for Extension of Time to File Brief and/or Other Materials Concerning Defence Counsel Appeal of 25 March 2009," filed 8 June 2009.

<sup>615</sup> Decision on Appeal Concerning Sanctions (AC), 26 June 2009.

<sup>616</sup> "Defence Request that the Trial Chamber Take Judicial Notice of the Value of Rwandan Currency," filed 8 April 2009.

<sup>617</sup> Decision on Defence Motion for the Trial Chamber to Take Judicial Notice of the Value of the Rwandan Currency, 16 April 2009.

147. On 18 June 2009, the Defence filed a confidential motion requesting the Chamber to issue a public version of its confidential decision on the Defence motion for a stay of proceedings.<sup>618</sup> The Chamber granted the motion on 26 June 2009.<sup>619</sup>

148. On 17 April 2009, the Prosecution filed its confidential closing brief.<sup>620</sup> The Defence filed its confidential closing brief on the same day.<sup>621</sup> On 18 June 2009, the Defence filed its supplemental closing brief.<sup>622</sup>

149. On 12 June 2009, the Chamber scheduled the public hearing of the delivery of its judgement for 2 July 2009.<sup>623</sup>

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<sup>618</sup> “Defence Motion Requesting that the Chamber Issues a Public Version of the ‘Confidential Decision on the Defence Motion for a Stay of Proceedings,’” filed 18 June 2009.

<sup>619</sup> Decision on Defence Motion to Make Public the Confidential Decision on Defence Motion for Stay of Proceedings; and Annexure Comprising Redacted Version of Said Decision for Public Consumption, 26 June 2009.

<sup>620</sup> “[CONFIDENTIAL] Prosecutor’s Closing Brief,” filed 17 April 2009.

<sup>621</sup> “[CONFIDENTIAL] Closing Brief of Léonidas Nshogoza,” filed 17 April 2009; “Closing Brief of Léonidas Nshogoza Filed 17 April 2009 Annexure C,” filed 20 April 2009; “Closing Brief of Léonidas Nshogoza – Corrigendum,” filed 28 April 2009.

<sup>622</sup> “Supplemental Closing Brief of Léonidas Nshogoza,” filed 19 June 2009.

<sup>623</sup> Scheduling Order, 12 June 2009.