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13355
Mwamba

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramarason
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 4 March 2010

The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

The PROSECUTOR v Sylvain NSABIMANA & Alphonse NTEZIRYAYO

Case No. ICTR-97-29A&B-T

The PROSECUTOR v Joseph KANYABASHI

Case No. ICTR-96-15-T

The PROSECUTOR v Élie NDAYAMBAJE

Case No. ICTR-96-8-T

Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS ARCHIVED
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**DECISION REGARDING NTAHOBALI, NYIRAMASUHUKO, AND KANYABASHI'S
MOTIONS TO TRANSMIT THE AMICUS CURIAE REPORT**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of :

1. the "*Requête de Arsène Shalom Ntahobali en communication du rapport d'un amicus curiae,*" filed 29 January 2010;
2. the "*Requête de Pauline Nyiramasuhuko en vue de la communication du rapport d'un amicus curiae,*" filed 5 February 2010; and
3. the "*Requête de Joseph Kanyabashi demandant la communication du rapport d'un amicus curiae,*" filed 9 February 2010;

CONSIDERING :

1. the "*Réponse de Joseph Kanyabashi à la requête de Arsène Shalom Ntahobali en communication du rapport d'un amicus curiae,*" filed 1 February 2010;
2. the "*Réponse de Sylvain Nsabimana à la requête de Pauline Nyiramasuhuko en vue de la communication du rapport d'un amicus curiae,*" filed 5 February 2010; and
3. the "*Réponse de Alphonse Ntezirayo à la requête de Pauline Nyiramasuhuko en vue de la communication du rapport d'un amicus curiae,*" filed 9 February 2010;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 7 November 2008, the Chamber issued a decision directing the Registrar to appoint an independent *amicus curiae* to investigate the alleged false testimony of Witness QA and related allegations of contempt.¹
2. On 19 March 2009 the Chamber issued a decision directing the Registrar to appoint an independent *amicus curiae* to investigate the alleged false testimony of Witnesses QY and SJ and related allegations of contempt.²

¹ *Prosecutor v. Ntahobali*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court, 7 November 2008.

² *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for an Investigation into False testimony and Kanyabashi's Motion for an Investigation into Contempt of Court Relative to Prosecution Witnesses QY and SJ, 19 March 2009.



3. On 1 July 2009, the *amicus curiae* filed a report (the "First Amicus Report"), that the Chamber received the following day.

4. On 30 October 2009, the Chamber issued an Order noting multiple omissions in the First Amicus Report, including a failure to conduct and/or report investigations on subjects addressed by the Chamber's Decisions of 7 November 2008 and 19 March 2009 and in which the Chamber directed the Registrar to appoint a new *amicus curiae* to conduct a thorough investigation and to present a report to the Chamber (the "Second Amicus Report").³

SUBMISSIONS OF THE PARTIES

Ntahobali, Nyiramasuhuko and Kanyabashi's Motions

5. The Defence for Ntahobali, Nyiramasuhuko and Kanyabashi each move the Chamber to direct the Registrar to transmit a copy of the First Amicus Report to them.

6. The Ntahobali Defence submits that following the Chamber's 30 October 2009 Order, it requested a copy of the First Amicus Report from the Registrar and that on 21 January 2010, the Registrar indicated that it could not transmit a copy of the report to the Ntahobali Defence. It submits that the First Amicus Report does not belong exclusively to either the Chamber or the Registry and that it should be provided a copy of the report. Based on its own research of the prior practice of the ICTR Trial Chambers, an accused has never been refused a copy of an *amicus curiae* report. It cites in particular the reports of *amici curiae* provided to the parties in *Prosecutor v. Karemera et al.* and *Prosecutor v. Ndindiliyimana et al.*

7. The Ntahobali Defence argues that the First Amicus Report will serve the Chamber in determining the credibility of the witnesses concerned and therefore implicates the innocence or guilt of the Accused. It argues that the First Amicus Report is by definition neutral/independent and the Chamber cannot reject the conclusions within the report without reporting the conclusions to the parties.

8. The Ntahobali Defence refers, in their entirety, to Articles 19 and 20 of the Statute, regarding the commencement and conduct of trial proceedings and the Rights of the Accused respectively. It suggests that the report must be disclosed in the interests of a fair and expeditious proceeding. It also cites to Rule 74 which relates to the participation of States, organizations or persons as *amicus curiae*.

9. The Nyiramasuhuko Defence argues that it must be given a copy of the First Amicus Report because the report relates directly to the credibility of the evidence presented and on the issue of her trial. It further adopts the legal arguments presented by the Ntahobali Defence in its motion of 29 January 2010.

10. The Kanyabashi Defence submits that it requested the First Amicus Report from the Registrar on 9 November 2009 and that on 10 November 2009, the Registrar responded by stating that the First Amicus Report had been communicated to the Chamber exclusively pursuant to the Chamber's instructions.

³ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Order Rules 77 and 91 of the Rules of Procedure and Evidence, 30 October 2009.

11. The Kanyabashi Defence argues that the transparency of the judicial process militates in favour of transmitting the First Amicus Report to the Parties. It further argues that the Parties should have access to the same information that is before the judges in their deliberations.

12. The Kanyabashi Defence argues that the First Amicus Report likely contains information that it should know, including investigations into the allegations of false testimony of Witness QA, QY and SJ. It asks (1) whether the First Amicus Report contains information concerning allegations of false testimony; (2) whether Witnesses QA, QY and SJ were contacted by the *amicus curiae* in the process of making his report; (3) whether other persons were contacted regarding the same subject; and (4) whether the report contains information that could contradict information in the Second Amicus Report.

Nsabimana Response

13. The Nsabimana Defence adopts the arguments of Nyiramasuhuko in her request for the First Amicus Report. It reminds the Chamber that it has always maintained the necessity of an investigation of Witnesses QA, SJ and QY. It states that it has done everything within its means to obtain a copy of the report and suggests that it would be judicious to transmit the report.

Nteziryayo Response

14. The Nteziryayo Defence argues that the First Amicus Report has a bearing on the interests of Nteziryayo and adopts the arguments of Nyiramasuhuko and Ntahobali in their respective motions.

DELIBERATIONS

15. The Chamber notes that although contempt and false testimony proceedings are not specifically addressed by the Statute, the Chamber has inherent power to deal with conduct that interferes with its administration of justice, including by presiding over proceedings for contempt and false testimony.⁴ The initiation of such proceedings is governed by Rules 77 and 91.

16. Pursuant to Rule 77 regarding Contempt of the Tribunal:

- (C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
 - (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings;

17. Likewise, pursuant to Rule 91 regarding False Testimony under Solemn Declaration:

- (B) If a Chamber has strong grounds for believing that a witness has knowingly

⁴ *Prosecutor v. Tadic*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 13.

and wilfully given false testimony, it may:

- (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

18. The Chamber notes that based on the plain language of Rules 77 and 91, the *amicus curiae* is directed to report back to the Chamber as to the results of his or her investigation. Rules 77 and 91 do not indicate that the report must be transmitted to the Parties. Therefore, the Chamber's Decisions directing the appointment of the first *amicus curiae* and the preparation of the First Amicus Report, reflected the language of the Rules in directing the Registrar to communicate the report to the Chamber.⁵

19. The Chamber notes that certain Trial Chambers have seen fit to transmit *amicus curiae* reports to the Parties before a decision on the report was made.⁶ The question of whether or not Parties to the case were entitled to transmission of the *amicus curiae* report was not at issue in any of these cases. Where the Chamber has transmitted an *amicus curiae* report it appears to have been at the discretion of the trial chamber.⁷

20. The issue of whether an Accused is entitled to a copy of an *amicus curiae* report was squarely addressed in the case of *Prosecutor v. Brima*, at the Special Court for Sierra Leone (SCSL).⁸ In that case, the Trial Chamber denied the Accused's motion for transmission of the report for several reasons. First, the Chamber noted that pursuant to its Rule 77(C) (similar to Rule 77(C) of the ICTR Rules), the Trial Chamber is under no obligation to disclose the contents of the independent counsel's report or its deliberations thereon. It noted that it had not instituted contempt proceedings against any of the Accused and that the Accused were not acting on behalf of any of the alleged contemnors in the

⁵ *Prosecutor v. Ntahobali*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court, 7 November 2008; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for an Investigation into False testimony and Kanyabashi's Motion for an Investigation into Contempt of Court Relative to Prosecution Witnesses QY and SJ, 19 March 2009.

⁶ *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T, Final Report of Jean Haguma with Annexes, 11 October 2007; *Prosecutor v. Ndingilyimana*, Case No. ICTR-00-56-T, Interim Order on Report of the *Amicus Curiae* Regarding the Alleged Recantation of Prosecution Witness GFR, 19 October 2009; *Prosecutor v. Ndingilyimana*, Case No. ICTR-00-56-T, Interim Order Concerning the Registrar's Report on the Identity of Witness GFR and Other Matters, 23 December 2009; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Order to the Amicus Curiae Investigating the Allegation of False Testimony of Witness BTH to File His Final Report, 8 April 2009; *Prosecution v. Karemera et al.*, Case No. ICTR-98-44-T, Final Report of Amicus Curiae of the Investigations into the False Testimony of Prosecution Witness BTH/GFA in The Prosecutor v Edouard Karemera et al. and The Prosecutor v. Casimir Bizimungu et al., 16 April 2009;

⁷ For example, the Trial Chamber in *Ndingilyimana* issued an Interim Order to disclose an *amicus report* because it found it necessary to do so and to seek submissions from the Parties. *Prosecutor v. Ndingilyimana*, Case No. ICTR-00-56-T, Interim Order on Report of the *Amicus Curiae* Regarding the Alleged Recantation of Prosecution Witness GFR, 19 October 2009, para. 4. It appears that the decision was based on the Chamber's discretion and not on the Statute or the Rules.

⁸ *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)iii and 77(D) of the Rules of Procedure and Evidence, 29 April 2005. The Trial Chamber had directed the Registrar to appoint an independent counsel (i.e. *amicus curiae*) to investigate allegations that a defence investigator had disclosed the identity of a protected witness and that family members of the Accused had harassed and intimidated the witness. On the basis of the report, the Trial Chamber issued two Orders in Lieu of an Indictment and directed the independent counsel to prosecute the matters. The Accused in the case subsequently filed a motion for disclosure of the independent counsel's report.

contempt proceedings. Finally, the Trial Chamber ruled that the Accused had not demonstrated standing to request disclosure of the report or how the non-disclosure of the report would prejudice their case.⁹

21. The Chamber agrees with the reasoning of the Decision in *Prosecutor v. Brima* and notes that, like in *Brima*, Rules 77 and 91 do not require the Chamber to disclose the contents of an *amicus curiae* report. The Chamber also notes that the Accused here have not been indicted for Contempt of the Tribunal or False Testimony. The Accused do not purport to represent the interests of a potential indictee in a contempt or false testimony proceeding and therefore have not established that they would have standing in such a proceeding.

22. In the only legal argument presented to the Chamber, each of the Accused argues that the *amicus curiae* report relates to the credibility of Witnesses QA, SJ and QY and such information relates to the guilt or innocence of the Accused. They argue, therefore, that they should have access to the information in the report. The Chamber notes that an assessment of a witness's credibility and the prosecution of a witness for false testimony are separate inquiries.¹⁰ In this regard, the Appeals Chamber has held:

A credibility determination may be based, but does not necessarily depend, on a judicial finding that a witness has given false testimony. The testimony of a witness may lack credibility even if it does not amount to false testimony within the meaning of Rule 91. Thus, an investigation for false testimony is ancillary to the proceeding and does not impact on the accused's right to a fair trial.¹¹

23. The *amicus curiae* reports were not commissioned to evaluate the credibility of Witnesses QA, SJ, and QY. The purpose of the reports is to guide the Trial Chamber in addressing conduct that interferes with its administration of justice.

24. Moreover, the Chamber notes that the Parties have had ample opportunity to raise issues of credibility regarding the testimony of Witnesses QA, SJ and QY before the Chamber. In order to give the Accused an adequate opportunity to bring forth these issues, the Chamber ordered that these witnesses be recalled to testify.¹² Upon recall, each of the Accused had an opportunity to cross-examine the Witnesses on these issues. The evidentiary portion of these proceedings is now concluded. The Parties have presented their evidence, examined or cross-examined all witnesses, presented closing briefs and made their closing arguments. They have had an adequate opportunity to direct the Chamber's attention to any issues of import, including issues related to the credibility of Witnesses QA, SJ and QY. In

⁹ *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Decision on Confidential Defence Request for Disclosure of Independent Investigator's Report on Contempt of Court Proceedings and Request for Stay of Proceedings, 30 June 2005.

¹⁰ *Karemera et al v. Prosecutor*, Case No. ICTR-98-44-AR9I.2, Confidential Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision not to Prosecute Witness BTH for False Testimony, 16 February 2010, para. 20.

¹¹ *Id.*, citing *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Decision on Appeals of the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC," 8 June 1998, para. 28.

¹² *Prosecutor v. Kanyabashi*, Case No. 96-15-T, Decision on Kanyabashi's and Nsabimana's Motions to Cross-examine Prosecution Witness QA on Additional Topics, 28 October 2008; *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ and Others, 3 December 2008.

light of these circumstances, the Chamber finds the report does not affect the fair trial rights of the Accused in this case.¹³

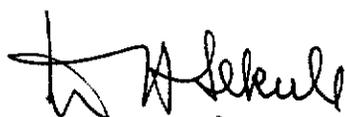
25. The Ntahobali Defence cites Articles 19 and 20 of the Statute regarding the conduct of proceedings and the rights of the Accused, but it fails to cite any particular provision or to argue why the failure to transmit to it the First Amicus Report is unfair to the Accused. For the reasons stated above, the Chamber finds that the non-disclosure of the report does not prejudice the Accused.

26. The Chamber notes that it has not yet issued a decision with regard to whether or not there are sufficient grounds to initiate proceedings for contempt or false testimony as it is awaiting the Second Amicus Report. The Chamber deems it premature to release the First Amicus Report to the Parties until such time as the Chamber has a complete and thorough amicus report and has decided on the proper course of action. Upon receipt and review of the Second Amicus Report, and after making its decision thereon, the Chamber may consider whether to disclose both reports to the Parties.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motions in all respects.

Arusha, 4 March 2010



William H. Sekule
Presiding Judge



Arlette Pattinson
Judge



Solomy Balungi Bossa
Judge

¹³ *Karmera et al v. Prosecutor*, Case No. ICTR-98-44-AR91.2, Confidential Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision not to Prosecute Witness BTH for False Testimony, 16 February 2010, para. 20 citing *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Decision on Appeals of the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC," 8 June 1998, para. 28.