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06-07-2010  
(7429-7423)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding  
Judge Solomy Balungi Bossa  
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 6 July 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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DECISION ON PROSECUTION ORAL MOTIONS FOR AMENDMENT OF THE  
CHAMBER'S DECISION ON ALLEGATIONS OF CONTEMPT

**Office of the Prosecutor**

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Ms. Anne-Gaëlle Denier  
Ms. Chloé Gaden

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mparany Rajohnson (the “Chamber”);

**BEING SEIZED** of the Prosecution’s oral motions for an amendment of the Chamber’s Decision on Allegations of Contempt, proffered on 15, 16 and 17 March 2010;<sup>1</sup>

**CONSIDERING** the Defence’s oral submissions of 15, 16 and 17 March 2010;<sup>2</sup>

**CONSIDERING** also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the Motion pursuant to Rules 77 and 91 of the Rules and on the basis of the oral submissions of the Parties.

**INTRODUCTION**

1. On 7 May 2009, the Chamber ordered various protective measures for Prosecution witnesses.<sup>3</sup>

2. On 30 October 2009, after hearing allegations that these protective measures may have been violated as they related to Prosecution Witness ANAF, the Chamber directed the Registry to appoint *amicus curiae* to investigate these allegations.<sup>4</sup>

3. On 28 January 2010, the *amicus curiae* filed its report stating that *prima facie* evidence existed to conclude that Aphrodis Bugimgo violated the protective measures.<sup>5</sup> It also affirmed that there was insufficient evidence “at this time” to instigate proceedings against other individuals.<sup>6</sup>

4. On 12 March 2010, the Chamber initiated contempt proceedings against Bugimgo. The Chamber also directed the Registry to appoint *amicus curiae* to prosecute this matter.<sup>7</sup>

5. On 9, 11 and 15 March 2010, Prosecution Witness ANAU alleged that, on three occasions in 2009, he met with two individuals about his possible testimony in this case. At the first meeting, the Witness alleged that he was promised something if he testified

<sup>1</sup> T. 15 March 2010, pp. 55-58, 63 (CS); T. 16 March 2010, p. 55 (CS); T. 17 March 2010, pp. 62-63 (CS).

<sup>2</sup> T. 15 March 2010, pp. 49-52; T. 15 March 2010, pp. 59-62 (CS); T. 16 March 2010, pp. 53-54 (CS); T. 17 March 2010, pp. 62-63 (CS).

<sup>3</sup> Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), filed 7 May 2009, pp. 6-7.

<sup>4</sup> Decision on Prosecution Oral Motion for Rule 77 Investigation Related to Witness ANAF (TC), 30 October 2009 (“Decision of 30 October 2009”).

<sup>5</sup> Decision on Allegations of Contempt (TC), 12 March 2010 (“Decision of 12 March 2010”), paras. 2, 6.

<sup>6</sup> Report of Amicus Curiae on Rule 77 Investigation Related to Witness ANAF, filed 28 January 2010 (“Report of Amicus Curiae”), p. 13.

<sup>7</sup> Decision of 12 March 2010, p. 4.

without implicating Augustin Ngirabatware or Faustin Bagango. It was later clarified that he would be paid 100,000 Rwandan Francs before testifying, and would receive further compensation afterwards. The second meeting included an additional person, and the Witness claimed that his picture was taken surreptitiously and that he was told again not to mention Ngirabatware or Bagango during his testimony. At the third meeting, Witness ANAU refused to sign a statement prepared by the Defence.<sup>8</sup>

6. On 16 March 2010, Prosecution Witness ANAS testified that two persons had sent messengers warning him not to testify against Ngirabatware.<sup>9</sup>

7. On 17 March 2010, Prosecution Witness ANAT stated that he had learned the identity of another protected witness in this case who had been poisoned to death in Gisenyi prison because of his anticipated testimony against Ngirabatware.<sup>10</sup>

### SUBMISSIONS OF THE PARTIES

#### *Prosecution Submissions*

8. The Prosecution prays that the Chamber amend its 12 March 2010 Decision by expanding the mandate of the *amicus curiae* pursuant to Rules 77 (D) and 91. Initially, the Prosecution requested an investigation into every allegation of misconduct.<sup>11</sup>

9. Later, the Prosecution clarified that it sought an investigation into at least one individual,<sup>12</sup> as well as into any other person deemed appropriate by the Chamber.<sup>13</sup>

10. The Prosecution avers that the *amicus curiae* report, as well as Witnesses ANAU and ANAS, mentioned the same person in connection with alleged misconduct. According to the Prosecution, this constitutes *prima facie* evidence that necessitates further action by the Chamber.<sup>14</sup>

11. After Witness ANAT revealed that he knew the identity of another protected witness, the Prosecution agreed with the Defence's call for an investigation by *amicus curiae*. The Prosecution reiterated its former position that the *amicus curiae*'s mandate should be expanded to investigate fully all allegations of misconduct.<sup>15</sup>

<sup>8</sup> T. 9 March 2010, p. 19; T. 9 March 2010, pp. 19, 22, 24-28, 32-36, 40-44 (CS); T. 11 March 2010, pp. 11-12, 16, 33-41, 64-67, 70, 72-74, 81-83 (CS); T. 15 March 2010, pp. 21, 34-35, 45 (CS); Defence Exhibit 30B (photograph of Witness ANAU).

<sup>9</sup> T. 16 March 2010, p. 53 (CS).

<sup>10</sup> T. 17 March 2010, pp. 45-46; T. 17 March 2010, pp. 61-63 (CS).

<sup>11</sup> T. 15 March 2010, pp. 56-58, 63-64 (CS); T. 16 March 2010, p. 55 (CS).

<sup>12</sup> Because this Decision has been filed publicly, the Chamber has refrained from identifying individuals to the extent possible.

<sup>13</sup> T. 16 March 2010, p. 55 (CS). The Chamber notes that there is a discrepancy between the scope of the Prosecution's request in the English and French versions of the transcripts. See *id.*, p. 56 (French) (CS). In light of the Chamber's analysis in paragraphs 20 and 21 of this Decision, the discrepancy is not relevant to the Chamber's consideration of the submissions.

<sup>14</sup> T. 15 March 2010, p. 53; T. 15 March 2010, pp. 53, 55-58 (CS).

<sup>15</sup> T. 17 March 2010, pp. 62-63 (CS).

### **Defence Submissions**

12. The Defence states that it is odd that Prosecution Witnesses have raised similar allegations of misconduct for the first time at the end of their evidence. This pattern reveals the possibility of a concerted plan to obstruct justice.<sup>16</sup>

13. The Defence states that there should be a presumption that both Parties obey the code of conduct. It further seeks to file affidavits that contradict Witness ANAU's allegations.<sup>17</sup>

14. The Defence agrees that if the Chamber finds Witness ANAU's allegations to be credible, then an investigation into misconduct is appropriate. If, however, the Chamber has strong grounds for believing that Witness ANAU knowingly and wilfully gave false testimony, then the Chamber should direct the Registrar to appoint *amicus curiae* to investigate the matter. The Defence submits that the latter should occur.<sup>18</sup>

15. The Defence disputes that there is a link between the *amicus curiae*'s report and the allegations of Witness ANAU. There is no basis for expanding the scope of the *amicus curiae*'s investigation in the manner suggested by the Prosecution.<sup>19</sup>

16. The Defence characterises Witness ANAT's testimony as *prima facie* evidence of a violation that should lead to investigation by *amicus curiae* into how he learned the identity of a protected witness.<sup>20</sup>

### **DELIBERATIONS**

17. The Chamber notes that Rule 77 (C)(ii) directs that when a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may "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."<sup>21</sup>

18. Under Rule 77 (A)(iv), a person may be in contempt of the Tribunal when that person "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."<sup>22</sup>

19. Furthermore, Rule 91 (B)(ii) provides that if a Chamber "has strong grounds for believing that a witness has knowingly and wilfully given false testimony," then it may have an *amicus curiae* appointed to investigate the matter.

<sup>16</sup> T. 16 March 2010, pp. 53-54 (CS).

<sup>17</sup> T. 15 March 2010, pp. 49, 51-52.

<sup>18</sup> *Id.*, pp. 50-52; *id.*, pp. 59-62 (CS).

<sup>19</sup> *Id.*, pp. 59, 61-62 (CS).

<sup>20</sup> T. 17 March 2010, pp. 62-63 (CS).

<sup>21</sup> Decision of 30 October 2009, para. 8.

<sup>22</sup> *Id.*, para. 10.

20. Although the Prosecution requests an expansion of *amicus curiae*'s mandate, the Chamber notes that the scope of the proposed mandate appears to have changed. The Prosecution has variously submitted that *amicus curiae* should investigate at least one individual and anyone else the Chamber deems appropriate, or else every individual allegedly involved in misconduct.

21. The Chamber recalls that, after hearing new allegations of misconduct by Witness ANAT, the Prosecution demanded a wide-ranging mandate into the accusations of Witnesses ANAU, ANAS and ANAT. This was the Prosecution's final submission on the matter, and the Chamber considers it to state the position taken by the Prosecution in its oral motions.

22. Because the standards for whether the Chamber may order an investigation under Rules 77 and 91 differ, the Chamber will discuss them in turn.

***Allegations of Contempt of the Tribunal***

23. The Chamber recalls that Witness ANAU claims that, when he was a potential witness, two persons tried to influence his testimony before the Tribunal. He also states that a third individual promised to offer a bribe for this testimony, purportedly originating with the Defence. The Chamber considers that these allegations, if true, would constitute acts of contempt of the Tribunal.

24. Witness ANAS states that two individuals sent messengers to threaten him, and the *amicus curiae* reported that someone with a similar name allegedly sent persons to threaten Witness ANAF.<sup>23</sup> Any of these allegations, if true, would qualify as contempt of the Tribunal.

25. Witness ANAT knew the identity of another protected witness in this case. If this knowledge resulted from a disclosure of that witness's identity in knowing violation of an order by the Chamber, it would constitute contempt of the Tribunal pursuant to Rule 77 (A)(ii).

26. Based on the evidence of these witnesses, the Chamber concludes that it has reason to believe that one or more persons may be in contempt of the Tribunal. Given the seriousness of these accusations, as well as the Chamber's duty to protect witnesses who testify before it, the Chamber will exercise its discretion to order an investigation into these allegations.

27. The Chamber recalls that it directed the Registry to appoint *amicus curiae* to prosecute Aphrodis Bugingo,<sup>24</sup> and it considers that an expansion of this mandate to include an investigation into another individual would be impractical. Instead, and in accordance with Rule 77 (C)(ii), the Chamber will direct the Registry to order the appointment of another *amicus curiae* to investigate these matters.

<sup>23</sup> See Report of Amicus Curiae, p. 7.

<sup>24</sup> Decision of 12 March 2010, p. 4.

***Allegations of False Testimony under Solemn Declaration***

28. The Chamber recalls that Witnesses ANAU, ANAS and ANAT have all, while under oath, accused various persons of acts which may amount to contempt of the Tribunal. The Defence has raised the possibility that these Witnesses have knowingly and wilfully given false testimony. If accurate, this would amount to a violation of Rule 91.

29. The Chamber notes that the Defence has questioned the Witnesses' credibility through cross-examination and trial submissions. While the Chamber will assess their evidence and credibility at a later stage, it concludes that there do not currently exist strong grounds for believing that Witnesses ANAU, ANAS or ANAT may have knowingly and wilfully given false testimony. Because the requirements of Rule 91 (B)(ii) have not been met at this time, the Chamber will not order an investigation into Defence allegations of false testimony under solemn declaration.

**FOR THE ABOVE REASONS, THE CHAMBER:**

**DENIES** the Motion to amend the Chamber's Decision of 12 March 2010;

**ORDERS** an investigation into possible violations of Rule 77, in particular:

- (a) The allegation that efforts were made by named individuals to improperly influence Prosecution Witness ANAU's testimony before the Tribunal, including by promising him a bribe;
- (b) The allegation that Prosecution Witness ANAS was warned not to testify against Ngirabatware; and
- (c) The circumstances under which Prosecution Witness ANAT may have learned the identity of another protected witness in this case, as well as whether this may have occurred in knowing violation of an order by the Chamber;

**DIRECTS** the Registrar, pursuant to Rule 77 (C)(ii), to appoint *amicus curiae* to investigate the above matters arising out of the testimony of Witnesses ANAU, ANAS and ANAT;

**DIRECTS** the Registrar to disclose to the appointed *amicus curiae*:

- (a) The testimonies of Witnesses ANAU, ANAS and ANAT, as well as the oral submissions of the Parties, located in the confidential transcripts cited in this Decision, along with a notice of the strictly confidential nature of these transcripts;
- (b) The *amicus curiae* report of 28 January 2010, along with a notice of the strictly confidential nature of this report;
- (c) A copy of the protective measures ordered on 7 May 2009;

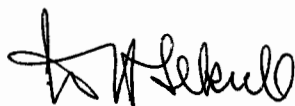


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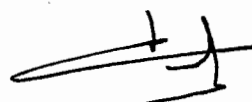
- (d) A copy of this Decision; and
- (e) Any other relevant information that is necessary for the appointed *amicus curiae* to perform its tasks fully; and

**DIRECTS** the Registrar to instruct the appointed *amicus curiae* to report back to the Chamber, in a strictly confidential manner, as to whether there are sufficient grounds for instigating proceedings against any individual for contempt of the Tribunal.

Arusha, 6 July 2010



William H. Sekule  
Presiding Judge



Mparany Rajohnson  
Judge