



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

UNITED NATIONS  
NATIONS UNIES

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Solomy Balungi Bossa, Presiding  
Bakhtiyar Tuzmukhamedov  
Mparany Rajohnson

**Registrar:** Adama Dieng

**Date:** 10 February 2011

**THE PROSECUTOR**

**v.**

**Callixte NZABONIMANA**  
*Case No. ICTR-98-44D-T*

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**DECISION ON PROSECUTOR'S MOTION FOR PROHIBITION OF CONDUCT  
CONTRARY TO RULE 77 (A) (II) OF THE RULES OF PROCEDURE AND EVIDENCE**  
*(Rules 75 (A), 77(A), and 77(C)-(D) of the Rules of Procedure and Evidence)*

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**Office of the Prosecutor**

Paul Ng'arua  
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**Defence Counsel**

Vincent Courcelle-Labrousse  
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## INTRODUCTION

1. On 13 February 2009, the Pre-Trial Chamber ordered a series of protective measures for Prosecution witnesses.<sup>1</sup>
2. On 15 December 2009, the Trial Chamber issued a decision directing the Registry to appoint an *amicus curiae* to investigate allegations that Defence investigator Jean-Claude Misano (“Misano”) disclosed protected information pertaining to Prosecution witnesses CNAL and CNAE, and to provide a report to the Trial Chamber by 29 March 2010 (“Report”).<sup>2</sup>
3. On 30 March 2010, the *amicus curiae* appointed by the Registry filed his Report.<sup>3</sup>
4. On 12 July 2010, the Trial Chamber directed the Registry to disclose the Report to the parties and ordered the parties to file any submissions they may have regarding the Report.<sup>4</sup>
5. The Prosecution filed initial submissions regarding the Report on 23 July<sup>5</sup> and 28 July 2010.<sup>6</sup> The Defence filed its initial submissions on 23 July<sup>7</sup> and 2 August 2010.<sup>8</sup> On 15 November 2010, at the behest of the Trial Chamber,<sup>9</sup> the Prosecution<sup>10</sup> and Defence<sup>11</sup> filed supplemental submissions regarding the Report.

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<sup>1</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-I, Interim Order on Protective Measures for Prosecution Witnesses, 13 February 2009.

<sup>2</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on the Prosecution's Urgent Motion Alleging Contempt of the Tribunal, 15 December 2009.

<sup>3</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Report of Amicus Curiae on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements, 30 March 2010.

<sup>4</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order to Disclose Amicus Curiae Report to the Parties, 12 July 2010.

<sup>5</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Submissions on the Amicus Curiae Report Concerning Alleged Contempt of Tribunal, 23 July 2010 (“Prosecution 23 July Submissions”).

<sup>6</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Reply to Nzabonimana's Submissions on the Report of Amicus Curiae on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements dated 30 March 2010, 28 July 2010 (“Prosecution 28 July Submissions”).

<sup>7</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Submissions on the Report of *Amicus Curiae* on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements dated 30 March 2010, 23 July 2010 (“Defence 23 July Submissions”).

<sup>8</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Response to the Prosecutor's Submissions on the Amicus Curiae Report Concerning Alleged Contempt of Tribunal, 2 August 2010 (“Defence 2 August Submissions”).

<sup>9</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order for Supplemental Submissions in Relation to Report of Amicus Curiae on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements, 9 November 2010.

<sup>10</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Supplemental Submissions on the Amicus Curiae Report Concerning Alleged Contempt of Tribunal Pursuant to the Trial Chamber's Order dated 9 November 2010 and Annexures “A”, “B” and “C”, 15 November 2010.

6. On 19 November 2010, the Trial Chamber issued a decision rejecting the Report and directing the Registry to appoint a new *amicus curiae* ("19 November Decision"), tasked with conducting another investigation into the allegations against Misano and preparing a report containing his or her conclusions as to such allegations ("Second Report"). The Chamber ordered the new *amicus curiae* to file the Second Report by 3 March 2011.<sup>12</sup>
7. On 20 January 2011, the Prosecution filed a motion seeking an expansion of the mandate of the new *amicus curiae* to encompass other members of the Defence team ("Motion").<sup>13</sup>
8. On 25 January 2011, the Defence requested an extension of time to respond to the Motion.<sup>14</sup>
9. On 26 January 2011, the Trial Chamber granted an extension until 28 January 2011.<sup>15</sup>
10. On 28 January 2011, the Defence filed its response to the Motion ("Response").<sup>16</sup>
11. On 1 February 2011, the Prosecution filed a reply to the Defence Response ("Reply").<sup>17</sup>

## **SUBMISSIONS OF THE PARTIES**

### *Motion*

12. The Prosecution Motion seeks two principal forms of relief: 1) "an order directing the Defence to desist from engaging in conduct likely to threaten the safety and security of

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<sup>11</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Supplemental Submission in Relation to Report of *Amicus Curiae* on Investigations Related to the Disclosure of Witnesses CNAL and CNAE's Statements, 15 November 2010.

<sup>12</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Report of *Amicus Curiae* on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements, 19 November 2010.

<sup>13</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Motion for Prohibition of Conduct Contary [sic] to Rule 77 (A) (ii) of the Rules of Procedure and Evidence, 20 January 2011.

<sup>14</sup> Letter from Vincent Courcelle-Labrousse to Trial Chamber dated 25 January 2011.

<sup>15</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Defence Request for Extension of Time to Respond to "Prosecutor's Motion for Prohibition of Conduct Contary [sic] to Rule 77 (A) (ii) of the Rules of Procedure and Evidence", 26 January 2011.

<sup>16</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Réponse de Nzabonimana à la "Prosecutor's Motion for Prohibition of Conduct Contary [sic] to Rule 77 (A) ii of the Rules of Procedure and Evidence", 28 January 2011. The Response was filed after working hours and thus the Defence technically missed the extended deadline granted by the Trial Chamber. However, given the gravity of the issues to be adjudicated, the Trial Chamber considers that it is in the interests of justice to consider the Response.

<sup>17</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Reply to the Defence Response to the Prosecutor's Motion for Prohibition of Conduct Contrary to Rule 77 (A) II of the Rules of Procedure and Evidence, 1 February 2011. In light of the fact that the Defence missed the filing deadline for the Response by a few hours and because the Prosecution consequently did not receive the Response in a timely matter, the Trial Chamber considers it to be in the interests of justice to allow the Prosecution to file its Reply one day after its anticipated deadline of 31 January 2011.

[protected] prosecution witnesses”;<sup>18</sup> and “to extend the investigations of the *amicus curiae* who is investigating the alleged contempt of court of Jean Claude Misano to include the investigation of any member of the Defence team who might have revealed protected information pertaining to [Prosecution] witness CNAL to [Defence witness] Straton Sibomana.”<sup>19</sup> In support of this expanded mandate, the Prosecution avers that Co-Counsel and other members of the Defence team discussed the confidential witness statement of CNAL with Straton Sibomana while visiting him at Gitarama prison in 2009.<sup>20</sup> As evidence, the Prosecution attaches a declaration by Sibomana that was annexed to the first *amicus curiae* Report.<sup>21</sup>

### *Response*

13. The Defence “deplores” the “strategic choices” of the Office of the Prosecutor, noting that the Prosecution knew of the allegations at issue after the Report was released on 12 July 2010,<sup>22</sup> but nevertheless did not file its Motion until two months after the 19 November Decision, at which point more than half the time provided to the second *amicus curiae* to conduct his or her investigations and file the Second Report had elapsed.<sup>23</sup> The Defence maintains that these factors point to an “agenda” on the part of the Prosecution.<sup>24</sup>
  
14. Apart from the issue of timing, the Defence also argues that because the Prosecution engaged in a “virulent criticism” of the Report, which it discredited as “fatally flawed” and “highly unreliable”,<sup>25</sup> the Prosecution cannot credibly now use an isolated document appended to that discredited Report to suit its present purposes.<sup>26</sup> The Defence further submits that the Trial Chamber itself is precluded from relying on any documents that accompanied a Report that the Chamber “totally rejected” when it issued the 19 November Decision, and thus any accompanying documents cannot be dissociated from the impugned Report itself.<sup>27</sup> Alternately, the Defence argues that the Trial Chamber cannot now adjudicate a request to expand the second *amicus curiae*'s mandate because it possessed all

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<sup>18</sup> Motion, para. 1.

<sup>19</sup> Motion, para. 2.

<sup>20</sup> Motion, paras. 19, 22-26.

<sup>21</sup> Motion, paras. 20-21 and Annex ‘A’ to Motion.

<sup>22</sup> Response, paras. 10-11.

<sup>23</sup> Response, paras. 7, 12.

<sup>24</sup> Response, para. 13.

<sup>25</sup> Response, paras. 15-18; citing Prosecution 23 July Submissions and Prosecution 28 July Submissions.

<sup>26</sup> Response, paras. 19-20, 32.

<sup>27</sup> Response, paras. 27-31.

the information it required to do so when the Report was filed, and thus could have initiated *proprio motu* contempt proceedings against the Defence team at that time.<sup>28</sup>

15. Finally, the Defence submits that the issue of whether to extend the mandate of the new *amicus curiae* ought to be adjudicated by a separate Trial Chamber, because to conduct such collateral proceedings before this Chamber would have an impact on its assessment of Sibomana's evidence in the instant proceedings, thus prejudicing the Accused.<sup>29</sup> The Defence further requests that the present proceedings be suspended so long as the allegations against Co-Counsel remain outstanding.<sup>30</sup>

### *Reply*

16. The Prosecution's primary reply is that "[t]he Defence failed to address the cardinal issue that it exposed a protected witness to an unauthorized person",<sup>31</sup> and therefore "the Defence response does not touch on the issue of the conduct that the Prosecutor complains of and therefore should be dismissed".<sup>32</sup> The Prosecution further submits "that there is no time limit for filing a complaint for prohibition of conduct contrary to Rule 77 (A) (ii)",<sup>33</sup> meaning that any arguments "that the Prosecutor has delayed making the complaint to the Trial Chamber [are] therefore of no consequence and should be disregarded".<sup>34</sup> The Prosecution also contests the argument that because it was critical of the Report itself, it cannot rely on documents gathered by the first *amicus curiae* in furtherance of that Report.<sup>35</sup> Finally, the Prosecution contends that "there is no justification for the Trial Chamber to be precluded from determining this motion",<sup>36</sup> as "[t]he issue of contempt is a separate issue which this Chamber has jurisdiction to entertain at this stage of the proceedings".<sup>37</sup>

## **DELIBERATIONS**

### *Applicable Law*

1. Rule 75 of the Rules of Procedure and Evidence ("Rules") provides that:
- (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order

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<sup>28</sup> Response, paras. 22-26.

<sup>29</sup> Response, paras. 34-40.

<sup>30</sup> Response, paras. 43-44.

<sup>31</sup> Reply, para. 1 (emphasis in original omitted).

<sup>32</sup> Reply, para. 2. See also paras. 10-13.

<sup>33</sup> Reply, para. 8.

<sup>34</sup> Reply, para. 9.

<sup>35</sup> Reply, paras. 15-16.

<sup>36</sup> Reply, para. 17.

<sup>37</sup> Reply, para. 18.

appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

2. Rule 77 (A) stipulates that:

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully 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 [...]

3. Rules 77 (C) and 77 (D) stipulate that:

(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; or

(iii) initiate proceedings itself.

(D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may: [...]

(ii) in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an Indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

In *Karemera*,<sup>38</sup> the Appeals Chamber affirmed that “the correct standard for ordering an investigation pursuant to Rule 77 of the Rules... is ‘reason to believe that a person may be in contempt of the Tribunal’”,<sup>39</sup> and that this function lies within the discretion of the Trial Chamber.<sup>40</sup> The Appeals Chamber also affirmed that once an investigation into possible contempt is complete, the Trial Chamber must determine whether “sufficient grounds” exist to initiate contempt proceedings, and that this requirement “is satisfied where the evidence establishes a *prima facie* case.”<sup>41</sup>

*Preliminary Matter*

17. The Trial Chamber notes with growing concern that the instant Response marks the third time<sup>42</sup> that the Defence has filed pleadings during the course of these *amicus curiae*

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<sup>38</sup> *Karemera et al. v. Prosecutor*, ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision not to Prosecute Witness BTH for False Testimony, 16 February 2010.

<sup>39</sup> *Karemera*, para. 23.

<sup>40</sup> *Karemera*, para. 22.

<sup>41</sup> *Karemera*, para. 19.

<sup>42</sup> See Response, paras. 22-24: “Il doit être noté que l'*Amicus Curiae* a déposé confidentiellement son mémoire devant la Chambre le 30 mars 2010: la Chambre est donc en possession de ce document depuis presque un an. Il doit être souligné par ailleurs que c'est la défense qui a demandé lors de la conférence de mise en état du 20 mai

proceedings that appear to intimate that the Trial Chamber has somehow acted improperly by failing to inform the parties of the Chamber's receipt of the Report and by failing to disclose the Report in a timely manner. However, the Chamber recalls that *Butare* has recently reaffirmed that the consistent jurisprudence of this Tribunal holds 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.... 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... [However, w]here the Chamber has transmitted an *amicus curiae* report it appears to have been at the discretion of the trial chamber.<sup>43</sup> (emphasis added)

For these reasons, the apparent attempts by the Defence to insinuate that the Trial Chamber is not being diligent or transparent in its treatment of this important issue are baseless and unacceptable.

### *Analysis*

#### **The Merits of the Prosecution Motion**

##### Expanding the terms of reference of the *Amicus Curiae*

18. The Trial Chamber recalls that Rule 77 (C) (ii) states 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. The Prosecution has attached to its Motion a declaration by Defence Witness Straton Sibomana that was appended to the original Report. In his declaration, Sibomana claims he was visited by members of the Nzabonimana Defence on two occasions at Gitarama prison in 2009: on 3 September 2009 and on another date he could not remember. Sibomana further claimed that

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2010, puis par requête déposée le 24 mai 2010, la divulgation du rapport de l'*Amicus Curiae*; ce qu'a fait la Chambre le 12 juillet 2010. Ainsi, au moment de sa divulgation, la Chambre était en possession du rapport et de ses annexes depuis trois mois." See also Defence 23 July Submissions, paras. 4-6: "On 30 March 2010, Dr. Itsouhou Mbadanga submitted to the Chamber [his Report]... The Chamber did not notify the parties of its receipt of the Report or of the conclusion or content of the Report. On 24 May 2010, May the Defence filed a Motion asking the Chamber to disclose the Report to the parties... On 13 July 2010 – three and a half months after Dr. Itsouhou Mbadanga filed the Report – the parties received a copy of the Report". (emphasis added) (internal citations omitted) See also Defence 2 August Submissions, para. 5, where the Defence, commenting on the fact that the original *amicus curiae* filed his Report one day late, opined that "the one-day delay is trivial in comparison with the Chamber's three-and-a-half month delay in disclosing the Report to the parties". (emphasis added) (internal citations omitted)

<sup>43</sup> *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Decision Regarding Ntahobali, Nyiramasuhuko, and Kanyabashi's Motions to Transmit the Amicus Curiae Report, 4 March 2010, paras. 18-19; citing, e.g., *Prosecutor v. Ntahobali*, ICTR-98-42-T, Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court, 7 November 2008; *Nyiramasuhuko*, 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; *Prosecutor v. Ndindiliyimana*, ICTR-00-56-T, Interim Order on Report of the *Amicus Curiae* Regarding the Alleged Recantation of Prosecution Witness GFR, 19 October 2009.

on both occasions Co-Counsel for the Accused was present and on one occasion Célestin Kagango, another member of the Nzabonimana Defence team, was also present. Sibomana also indicated that other “white” and “Rwandese” people were present at the meetings, but could not identify them. During the first visit, Sibomana claims those present asked him if he knew Prosecution Witness CNAL, using his real name, and then “went ahead and referred to his statement that he made before OTP investigator[s]”.<sup>44</sup>

19. The Trial Chamber finds the evidence proffered by the Prosecution in support of its request to expand the terms of reference for the new *amicus curiae* to be *prima facie* credible, for the following reasons: 1) Sibomana is a Defence witness who has already provided exculpatory evidence for the Accused in these proceedings, making it difficult to conceive why he would falsely implicate members of the Nzabonimana team in prohibited conduct; 2) Sibomana’s revelation appears to have been spontaneous as it did not fall within the terms of reference attaching to the original *amicus curiae*’s investigative mandate; 3) given the circumstances of Sibomana’s interview, the Trial Chamber considers the level of detail proffered about the location and date of the impugned encounters, who was present, and what allegedly transpired to have a considerable degree of specificity, especially given that the original *amicus curiae* was not apparently attempting to elicit this information. For these reasons, the Trial Chamber concludes that there is reason to believe that Co-Counsel for the Accused and/or other members of the Nzabonimana Defence team may be in contempt of the Tribunal and considers that the allegations are serious and require further investigation.

20. Conversely, the Trial Chamber finds the counterarguments advanced by the Defence in its Response to be unpersuasive. First, the Defence contention that the Trial Chamber cannot rely on a document annexed to a Report the Defence claims was “totally rejected” by this Chamber relies upon a serious misreading of the 19 November Decision. When that decision is properly scrutinised, it is clear that while the Trial Chamber took issue with various aspects of the first *amicus curiae*’s investigation and ensuing Report, it did not declare the Report and its accompanying annexes to be totally devoid of merit. This is manifestly evident in the final disposition of that decision, wherein the Chamber instructed the Registry “to make available the previous report of Dr. Moussounga Itsouhou-Mbadinga, former *amicus curiae*... to the new *amicus curiae*, to assist in his/her investigations.”<sup>45</sup> Clearly, if the Trial Chamber considered the Report and its supporting documents to be

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<sup>44</sup> Report, Annex 25, paras. 11-16

<sup>45</sup> 19 November Decision, p. 11.



utterly useless, it would not have provided such material to the second *amicus curiae* to assist the renewed investigation.

21. Second, the Defence argument that the Trial Chamber is presently precluded from adjudicating the Prosecution request, because it declined to institute contempt proceedings upon receipt of the first Report, is equally unfounded. Indeed, as the Defence astutely remarks,<sup>46</sup> the plain wording Rule 77 (C) (iii) unambiguously states that a Trial Chamber may initiate *proprio motu* contempt proceedings if it has reason to believe a person may be in contempt of the Tribunal. How this clearly permissive Rule should be contorted to impose an obligation on the Trial Chamber to initiate *proprio motu* contempt proceedings at that time, under pain of forfeiture of the power to appoint an *amicus curiae* if moved by a party at a later time, receives no elucidation or supporting authority from the Defence. The Chamber finds this argument to be wholly without merit, and dismisses it.

22. Third, the Defence proposal that the present Motion be adjudicated by another Trial Chamber is similarly bereft of merit. Once again, the Defence cites no legal authority whatsoever for this request, nor any precedent where such an extraordinary request has been granted. By contrast, a plain reading of Rule 77 (D) (ii) clearly vests the power to assess the report of an *amicus curiae* and decide whether to order a prosecution for contempt in the Trial Chamber presiding over the main trial whence the contempt allegations arise.

23. Finally, the Trial Chamber finds that the Defence has failed to demonstrate that an investigation into possible misconduct by the Defence team would seriously prejudice the Accused in the ongoing preparation of its defence, absent a suspension of the present proceedings, so long as an *amicus curiae* investigation against his Co-Counsel remains pending. As the Appeals Chamber in *Karemera* has recently declared,

investigations and proceedings pursuant to Rule 77 of the Rules are independent of the proceedings out of which they arise and can be undertaken contemporaneously with those proceedings. As separate proceedings, they give rise neither to concerns regarding inconsistent findings, nor to concerns regarding the expeditiousness of the trial.<sup>47</sup>

Indeed, in that ruling, the Appeals Chamber explicitly quashed the Trial Chamber's decision to postpone an investigation pursuant to Rule 77 (C) "before hearing all of the evidence" in the *Karemera* trial, where the Trial Chamber feared that ordering an investigation "at [that]

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<sup>46</sup> Response, para. 25.

<sup>47</sup> *Karemera*, para. 25.

time” would create “the risk of serious prejudice” to those proceedings. The Appeals Chamber declared that “the Trial Chamber abused its discretion” in reaching that conclusion.<sup>48</sup> Consequently, the request to suspend the present proceedings pending the results of the new *amicus curiae*'s investigation is denied.

#### Order restraining Co-Counsel and other Defence team members

24. The Prosecution also requests “[a]n order restraining Co-counsel and the Defence team members from disclosing the identity and unredacted witness statements of Prosecution witnesses”.<sup>49</sup> However, the Trial Chamber recalls that comprehensive protective measures for Prosecution witnesses have already been issued by this Chamber, which automatically bind all members of the Defence team. The Chamber thus considers that such a supplementary order would be redundant and the request is therefore denied.

#### The Late Filing of the Motion by the Prosecution

25. Notwithstanding its disposition on the merits of the Motion, as detailed above, the Trial Chamber wishes to underscore that it is troubled by the conduct of Prosecution Counsel as it relates to when it elected to file the instant Motion. While the Prosecution is correct in its submission that “that there is no time limit for filing a complaint for prohibition of conduct contrary to Rule 77 (A) (ii)”,<sup>50</sup> it is trite law that Counsel for the Prosecution appearing before this Tribunal are expected to hold themselves to a higher standard than what is dictated by a mere *de minimis* application of the rules and regulations obtaining before this forum. This professional obligation is underscored by Prosecutor's Regulation No. 2,<sup>51</sup> which, demands, *inter alia*, that:

2. In the conduct of investigations, and in the conduct of pre-trial[, trial]<sup>52</sup> and appellate proceedings, prosecution counsel will adopt the highest standards of professional conduct. The Prosecutor expects them, consistent always with the letter and the spirit of the relevant Statute and Rules of Procedures and Evidence [...]

d. to exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith [...] (emphasis added)

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<sup>48</sup> *Karemera*, paras. 22-23, 25.

<sup>49</sup> Motion, para. 28.

<sup>50</sup> Reply, para. 8.

<sup>51</sup> Prosecutor's Regulation No. 2 (1999): Standards of Professional Conduct; Prosecution Counsel, issued by Prosecutor Louise Arbour, 14 September 1999, New York (“Prosecutor's Regulation No. 2”).

<sup>52</sup> While the text of Prosecutor's Regulation No. 2, para. 2, makes no reference to trial proceedings *per se*, given the nature and purpose of the regulation the Trial Chamber construes this omission to be of a typographical nature. Indeed, this interpretation is reinforced by the French text, which reads: “[L]es représentants de l'Accusation adopteront les règles de déontologie les plus rigoureuses que ce soit pendant les enquêtes, la phase préalable au procès, le procès ou l'appel...”. (emphasis added)

26. Turning to the conduct in question, the Prosecution filed its Motion more than two months after the Trial Chamber issued the 19 November Decision ordering a new *amicus curiae* to prepare a Second Report in relation to the allegations against Misano. This significant delay raises a number of serious concerns with the Trial Chamber. First, the Prosecution makes no attempt to justify its very belated filing, but rather cavalierly asserts that there is no specific Rule prohibiting such conduct. Second, the issues the Prosecution seeks to investigate at this time have been well known for months, and such an investigation was even previously requested by the Prosecution in its submissions regarding the first Report;<sup>53</sup> a request this Chamber denied on procedural grounds.<sup>54</sup> Hence, it would have taken little effort or time for the Prosecution to resubmit its procedurally unsound request shortly after the 19 November Decision. Third, despite the significant passage of time, the Prosecution does not adduce a single new allegation or piece of evidence in support of its request. Thus, the Trial Chamber has been given no reason to believe that the delay caused by the Prosecution was occasioned by the need to conduct meaningful investigations, rather than sheer procrastination.

27. In sum, it is apparent to the Trial Chamber that the Prosecution has frittered away the valuable resources of this Tribunal by needlessly waiting months to file a Motion that could have been filed mere days following the 19 November Decision. This lack of diligence has necessitated an utterly avoidable extension of the new *amicus curiae*'s deadline and has consequently disrupted the present proceedings. For these reasons, the Chamber finds the timing of the Motion to be an affront to "the highest standards of professional conduct"<sup>55</sup> demanded of Prosecution Counsel, and hereby cautions the Prosecution not to engage in such conduct.

28. However, the Trial Chamber is of the understanding, through correspondence with the Registry, that the new *amicus curiae* was appointed during the final week of December 2010. The Chamber considers that this mitigates somewhat the delay caused by the late filing of the Prosecution Motion and that the disruption caused can be at least partially remedied by extending the original deadline by one month.

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<sup>53</sup> Prosecution 23 July Submissions, para. 32 (e).

<sup>54</sup> 19 November Decision, para. 31.

<sup>55</sup> Prosecutor's Regulation No. 2, para. 2.

**FOR THESE REASONS, THE TRIAL CHAMBER**

**GRANTS** the Motion in part;

**DIRECTS** the Registry to expand the scope of the investigation presently being undertaken by the new *amicus curiae* with respect to Misano to encompass the allegation that Co-Counsel for the Accused or other members of the Defence team revealed protected information concerning Prosecution Witness CNAL to Defence Witness Straton Sibomana;

**INSTRUCTS** the *amicus curiae* to incorporate any findings regarding this expanded mandate into a single comprehensive report that also includes any findings gathered pursuant to the original mandate issued by this Trial Chamber in its 19 November Decision, and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings based on any of the stipulated allegations, as soon as practicable, and in no case later than 4 April 2011;

**DIRECTS** the Registry to instruct the *amicus curiae* that should he or she require any further instruction from the Chamber during the course of the investigation, including questions arising from the presently expanded investigation, the *amicus curiae* may and should request such instruction through the Registry; and

**DENIES** the remainder of the Motion.

Arusha, 10 February 2011, done in English.

Solomy Balungi Bossa  
Presiding Judge

Bakhtiyar Tuzmukhamedov  
Judge

Mparany Rajohnson  
Judge

[Seal of the Tribunal]