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UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-7
28-10-2011

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(8867-5863)

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 28 October 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON PPSC MOTION FOR DISCLOSURE OF THE AMICUS CURIAE
REPORT**

(Pursuant to Article 28 (1) of the Statute of the Tribunal ("Statute"))

**Public Prosecution Service of
Canada**

Luc Boucher
Geneviève de Passillé
Timothy Radcliffe

Counsel for Jacques Mungwarere

Philippe Larochelle
Christian Deslauriers
Marc Nerenberg

Office of the Prosecutor

Paul Ng'arua
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Defence Counsel

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Philippe Larochelle, Co-Counsel

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INTRODUCTION

1. On 21 October 2011, the counsel for the Public Prosecution Service of Canada (“PPSC”), acting on behalf of the Attorney General of Canada, filed a motion (“PPSC Motion”)¹ for access to the report by the *amicus curiae* filed on 1 April 2011 (“*Amicus Curiae* Report”).²
2. On 26 October 2011, Nzabonimana filed its Response to the PPSC Motion (“Nzabonimana Response”),³ as did the Defence of Mungwarere (“Mungwarere Response”).⁴

SUBMISSIONS OF THE PARTIES

PPSC Motion

3. The PPSC requests disclosure of a redacted copy of the *Amicus Curiae* Report in order to prepare for the cross-examination of Justry Patrick Lumumba Nyaberi in November 2011, in the case against Jacques Mungwarere before the Superior Court of Justice in the Province of Ontario, Canada.⁵ The PPSC refers to the principles of state cooperation envisaged by the completion strategy in United Nations (“UN”) Security Council Resolutions 1503 and 1534, in line with Article 28 (1) of the Statute.⁶ This disclosure would be in the overall interests of justice.⁷
4. The PPSC is prosecuting Mr Mungwarere for his alleged involvement during the genocide, in Kibuye *préfecture* from April – June 1994, which was scheduled to begin on 10 April 2011 in Ottawa, Ontario, Canada.⁸
5. The PPSC submits that counsel for Mr Mungwarere submitted an affidavit from Mr Nyaberi dealing with the matter of witness tampering, bribing and intimidation in Rwanda, and concludes that most Prosecution witnesses “do not fear if the community knows their status and there are no repercussions at all.” These conclusions run contrary to the practice of the Tribunal upon which its protective measures jurisprudence is built.

¹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Motion by the PPSC for Disclosure of the *Amicus Curiae* Report, 21 October 2011.

² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Report of the *Amicus Curiae* on Allegations of Contempt of Tribunal by Witness CNAI and/or a Member of the Prosecution Office Pertaining to Defence Witness T36, 1 April 2011.

³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Response to Motion by the PPSC for Disclosure of the *Amicus Curiae* Report, 26 October 2011.

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Mungwarere Response to Motion by the PPSC for the Disclosure of the *Amicus Curiae* Report, 26 October 2011.

⁵ PPSC Motion, paras. 2, 11, 17, 20.

⁶ PPSC Motion, paras. 12-14.

⁷ PPSC Motion, para. 19.

⁸ PPSC Motion, para. 2.

Mr Nyaberi identified that his research in this regard was reported to Trial Chamber III on 1 April 2011 in the *Nzabonimana* case.⁹

6. The PPSC seeks the opportunity to review the *Amicus Curiae* Report to understand the justifications of the conclusions reached.¹⁰ The Office of the Prosecutor (“OTP”) at the International Criminal Tribunal for Rwanda (“ICTR”) advised that the Report is classified as strictly confidential and that the PPSC should file a motion for disclosure directly to the Chamber.¹¹
7. The PPSC submits that pursuant to an order on 13 May 2011 (“13 May 2011 Order”), the *Amicus Curiae* Report was disclosed to the parties of the *Nzabonimana* case, including Mr Philippe Larochelle, counsel for Mr Nzabonimana and representative of Mr Mungwarere. He therefore possesses an “informational advantage” on this issue.¹²

Nzabonimana Response

8. Callixte Nzabonimana does not oppose the disclosure of the Report. The Nzabonimana Defence submits, however, that given the confidential nature of the Report, the protective measures put in place by the Chamber through the Protective Measures Decisions of 13 February 2009 and 18 February 2010 should be respected.¹³

Mungwarere Response

9. Mr Mungwarere supports the PPSC Motion. However, the Mungwarere Defence notes that the OTP encouraged the PPSC to submit its Motion directly to the Chamber, rather than seeking relief itself. The Mungwarere Defence therefore submits that Mungwarere recently brought a motion before the ICTR with regards to disclosure of materials and the OTP in that case took the position that Mr Mungwarere had no standing to bring such a motion.¹⁴ The Mungwarere Defence requests that parties involved in Mr Mungwarere’s prosecution in Canada are treated consistently and fairly.¹⁵

⁹ PPSC Motion, paras. 4-8, 15; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T (“*Nzabonimana* Case”).

¹⁰ PPSC Motion, para. 9.

¹¹ PPSC Motion, para. 10.

¹² PPSC Motion, para. 18.

¹³ *Nzabonimana* Response, paras. 2-3; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Interim Order on Protective Measures for Prosecution Witnesses, 13 February 2009; Decision on Urgent Defence Motion for Protective Measures, 18 February 2010 (“Protective Measures Decisions”).

¹⁴ Mungwarere Response, paras. 3-5; *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case Nos. ICTR-96-10 and ICTR-96-17, Mungwarere Motion for Access to Material, 17 August 2011.

¹⁵ Mungwarere Response, para. 6.

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DELIBERATIONS

Applicable Law

10. Article 28 (1) of the Statute provides that:

“States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

11. Rule 54 of the Rules of Procedure and Evidence (“Rules”) states that:

“At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”

Analysis

12. The Chamber understands that the *Amicus Curiae* Report could facilitate the proceedings of the Superior Court of Justice in the Province of Ontario, Canada, in connection to alleged crimes committed by Jacques Mungwarere in Rwanda in 1994.

13. The Chamber recalls that the guiding principles of state cooperation under Article 28 (1) of the Statute also apply to requests for cooperation or judicial assistance from States to the Tribunal, in their investigation or prosecution of persons accused of committing serious violations of international humanitarian law.¹⁶ Moreover, the Chamber notes that the Superior Court of Justice in the Province of Ontario, Canada, requires the *Amicus Curiae* Report for the purposes of the investigation and eventual prosecution of crimes committed in Rwanda in 1994, in line with the principles of state cooperation envisaged by the completion strategy in Security Council Resolutions 1503 and 1534.¹⁷

14. The Trial Chamber recognises the uniqueness of the present Motion, as disclosure of the *Amicus Curiae* Report is requested for by a party who is not a party to any proceedings before the Tribunal.

15. The Trial Chamber, however, notes that the PPSC is a State organ. In line with Article 28 (1) of the Statute, which provides for mutual cooperation and judicial assistance of

¹⁶ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution’s Motion to Unseal the Transcripts of Witness WDUSA, 1 November 2006, para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Re-Filing of Prosecutor’s *Ex-Parte* Motion to Vary Protective Measures for Witnesses, 1 September 2011, para. 7.

¹⁷ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Re-Filing of Prosecutor’s *Ex-Parte* Motion to Vary Protective Measures for Witnesses, 1 September 2011, para. 7.

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States and the Tribunal,¹⁸ the Chamber finds, *proprio motu*, that it is in the interest of justice to disclose a redacted version of the *Amicus Curiae* Report. The Chamber therefore refers the matter to and directs the Registry to provide the PPSC with a copy of an appropriately redacted version of the *Amicus Curiae* Report, for the purpose of facilitating the prosecution of Jacques Mungwarere before the Superior Court of Justice in the Province of Ontario, Canada.

16. The Chamber further orders that the protective measures granted to the witnesses in the *Amicus Curiae* Report shall continue to have effect *mutatis mutandis* in any proceedings before the Superior Court of Justice in the Province of Ontario, Canada unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in Rule 75 of the Rules of Procedure and Evidence.

FOR THESE REASONS, THE TRIAL CHAMBER

GRANTS the Motion;

REFERS the PPSC Motion to the Registry;

DIRECTS the Registry to disclose a redacted version of the *Amicus Curiae* Report to the PPSC;

ORDERS that the protective measures granted to the witnesses in the *Amicus Curiae* Report shall continue to have effect *mutatis mutandis* in any proceedings before the Superior Court of Justice in the Province of Ontario, Canada;

DIRECTS the Registry to notify the PPSC of the content of the present Decision.

Arusha, 28 October 2011, done in English.



Solomy Balungi Bossa

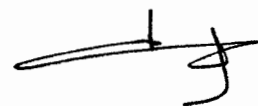
Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge

(absent at time of signature)



Mparany Rajohnson

Judge



¹⁸ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-44-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA, 1 November 2006, para. 15; *Prosecutor v. Karamera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA, 22 March 2007, paras. 17, 19; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution Motion to Unseal and Disclose to Canadian Authorities the Transcripts of the Testimonies of Witnesses TA, QCB, TK, SJ, FAI, QY, and QBQ, 19 March 2007, paras. 11-13.