UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

11/H

IN THE APPEALS CHAMBER

ICTR-01-69-A
ICTR-2010-92
01st June 2010
{11/H – 07/A}

Before: **Judge Liu Daqun, Presiding**
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Decision of: **1 June 2010**

ICTR Appeals Chamber
Date: 01 June 2010
Action: R. Jurno
Copied To: Counsel, Judges, SLO's, LO's, ALO's, Parties, CMS, LSS.

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case Nos. ICTR-01-69-A
ICTR-2010-92

PUBLIC

Re: Léonard Safari and Rémi Mazas

DECISION ON REGISTRAR'S SUBMISSION PURSUANT TO RULE 33(B)

Office of the Prosecutor
Hassan Bubacar Jallow
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Emmanuel Altit
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Interested Parties
Rémi Mazas
Léonard Safari

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME/NOM: KOFFI KUMELIO A. AFANDE
SIGNATURE: DATE: 01 JUNE 2010

10/H

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Registrar's Submission on the Decision on Submissions by the Defence Team of Hormisdas Nsengimana" filed by the Registrar on 14 May 2010 ("Submission") pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules").

A. Background

2. On 18 January 2010, Trial Chamber I issued a confidential decision[1] in which it declined to exercise its discretion pursuant to Rule 77(A) of the Rules to initiate contempt investigations or proceedings against two former Defence Team investigators for Hormisdas Nsengimana, Rémi Mazas and Léonard Safari ("Investigators"), for their alleged improper contact with Prosecution witnesses.[2]

3. Subsequently, the Prosecution appealed the 18 January 2010 Decision pursuant to Rule 77(J) of the Rules[3] and the Nsengimana Defence Team filed responses to the Prosecution Notice of Appeal and to the Appellant's Brief ("Defence Team Submissions").[4] On 15 February 2010, the Prosecution filed a motion, requesting that the Appeals Chamber reject the Response to the Notice of Appeal ("15 February 2010 Motion").[5]

4. On 19 April 2010, the Appeals Chamber rejected the Defence Team Submissions as the Defence Team as such has no standing before this Tribunal in the present proceedings.[6] In addition,

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[1] *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, Confidential Decision on Prosecution and Defence Requests Concerning Improper Contact with Prosecution Witnesses, confidential, 18 January 2010 ("18 January 2010 Decision").
[2] *Id.*, paras. 55, 59, Disposition.
[3] Prosecutor's Notice of Appeal, 2 February 2010 ("Notice of Appeal"); Prosecutor's Appellant's Brief, 17 February 2010 (confidential) ("Appellant's Brief").
[4] *Réponse de l'Équipe de Défense du Père Hormisdas Nsengimana à l'acte d'appel (77J) déposé par le Procureur le 2 février 2010*, 9 February 2010 ("Response to the Notice of Appeal"); *Réponse de l'Équipe de Défense du Père Hormisdas Nsengimana au Mémoire d'appel (77J) déposé par le Procureur le 17 février 2010*, 1 March 2010 (confidential) ("Response to the Appellant's Brief"). The Prosecution filed its reply on 5 March 2010. *See* Prosecutor's Reply To [*sic*] the *« Réponse de l'Équipe de défense du Père Hormidas* [*sic*] *au Mémoire d'appel (77J) déposé par le Procureur le 17 février 2010 »*, 5 March 2010 (confidential) ("Reply").
[5] Prosecutor's Motion For [*sic*] Rejection of the "*Réponse de l'Équipe de Défense du Père Hormidas* [*sic*] *Nsengimana à l'Acte d'appel (77J) déposé par le Procureur le 2 février 2010*", 15 February 2010 ("Prosecution Motion for Rejection").
[6] Decision on Submissions by the Defence Team of Hormisdas Nsengimana, confidential, 19 April 2010 ("19 April 2010 Decision"), para. 5, Disposition.

it invited the Investigators to file a response to the Prosecution Appellant's Brief within 10 days of the date of the 19 April 2010 Decision.[7]

5. By decision of 7 May 2010, the Investigators were allowed to file their response(s) to the Appellant's Brief within 10 days of being served the French translation of the 18 January 2010 Decision, the Appellant's Brief, and the 19 April 2010 Decision.[8]

6. In his Submission, the Registrar seeks clarification from the Appeals Chamber regarding its 19 April 2010 Decision.[9]

B. Discussion

7. The Registrar notes that the remedy sought by the Prosecution in appealing the 18 January 2010 Decision is a determination on whether the Trial Chamber abused its discretion in deciding not to pursue possible contempt.[10] He seeks guidance on whether the 19 April 2010 Decision allowed the Investigators "to enter into th[e] legal dispute regarding the abuse of discretion by the Trial Chamber or just provide facts for their defence in anticipation of possible prosecution for contempt."[11]

8. The Appeals Chamber recalls that the decision of whether to order an investigation or prosecution of alleged false testimony or contempt pursuant to Rules 77 and 91 of the Rules is a discretionary one.[12] Where an appeal is filed against a discretionary decision of a Trial Chamber, the issue on appeal is confined to the question of whether the Trial Chamber has correctly exercised its discretion in rendering the decision.[13] Consequently, the Trial Chamber's exercise of discretion will only be reversed where it is demonstrated that the Trial Chamber committed a discernible error in rendering the impugned decision, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the impugned decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[14] The Appeals Chamber considers that this defines the scope of the arguments in such appeal proceedings.

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[7] *Id.*, Disposition.
[8] Decision on Investigators' Request for Extension of Time Pending Translation of Appeals Submissions, confidential, 7 May 2010 ("Decision on Investigators' Request"), Disposition.
[9] Submission, para. 3.
[10] *Ibid.*
[11] *Ibid.*
[12] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR.91, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009 ("*Karemera et al.* Decision on False Testimony"), para. 13; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 31.
[13] *Karemera et al.* Decision on False Testimony, para. 13.
[14] *Ibid.*

9. The Appeals Chamber recalls that in its 19 April 2010 Decision, it allowed, on an exceptional basis, the Investigators "to make representations in response to the Prosecution's appeal".[15] Further, the Appeals Chamber notes that generally, a response to an appeal from a decision "shall clearly state whether or not the appeal is opposed and the grounds therefor".[16] Thus, a response to an appeal may oppose and discuss any contention made by the appealing party in its submissions.[17]

10. In light of the above, the Appeals Chamber considers that the scope of any response by the Investigators to the Appellant's Brief should be confined to responding to the arguments presented by the Prosecution in its submissions on appeal of the 18 January 2010 Decision.[18]

11. Further, the Appeals Chamber notes that while a number of submissions in this appeal were filed publicly,[19] other submissions as well as the decisions of the Appeals Chamber were filed confidentially.[20] The Appeals Chamber recalls that all submissions filed before this Tribunal shall be public unless there are exceptional reasons for keeping them confidential and that parties shall file public redacted versions of all confidential briefs submitted on appeal.[21] The Appeals Chamber considers that neither the Investigators' Request nor the Appeals Chamber's decisions in this appeal contain any confidential information. Further, it considers that the Prosecution should file a public redacted version of its Appellant's Brief or indicate that there is no basis for maintaining the confidentiality thereof.

[15] 19 April 2010 Decision, para. 6.
[16] *See* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006, Section II, para. 2.
[17] *See supra*, para. 8. The Appeals Chamber notes, however, that a response should be limited in scope to arguments made in response to the original brief. *See also generally* Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, Section II, para. 5.
[18] This may include, *inter alia*, the presentation of arguments regarding the abuse of the Trial Chamber's discretion under Rule 77(D) of the Rules, as contended by the Prosecution in its Appellant's Brief. *See* Appellant's Brief, para. 3.
[19] *See, inter alia*, Notice of Appeal; Response to the Notice of Appeal; Prosecution Motion for Rejection; Registrar's Submission.
[20] *See* Appellant's Brief; Response to the Appellant's Brief; Reply; 19 April 2010 Decision; *Objet: Demande de Nomination d'un Conseil et Demande de Traductions en Francais* (dated 22 April 2010), confidential, 26 April 2010 ("Investigators' Request"); Decision on Investigators' Request.
[21] *Cf.* Rule 78 of the Rules. *See also The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-A, Decision on Tharcisse Renzaho's Appellant's Brief, 16 March 2010, para. 4; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Order to Appellant Hassan Ngeze to File Public Versions of his Notice of Appeal and Appellant's Brief, 30 August 2007, p. 2.

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Pursuant to Rules 54 and 107 of the Rules, the Appeals Chamber therefore

DIRECTS the Registrar to change the status of the Investigators' Request as well as all hitherto confidentially filed decisions of the Appeals Chamber in this appeal to public;

ORDERS the Prosecution to file a public redacted version of its Appellant's Brief, or to indicate that there is no basis for maintaining the confidentiality thereof, within 10 days of the filing of this decision;

ORDERS that any changes to the confidential version of the Appellant's Brief shall be limited to necessary redactions of confidential information, including the identities of protected witnesses, and not consist of any additions, deletions, or other amendments;

INSTRUCTS the Prosecution to clearly mark the redactions in the text of the public version of its Appellant's Brief or to file a confidential annex thereto identifying all redactions paragraph by paragraph.

Done in English and French, the English version being authoritative.

Done this first day of June 2010
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Judge Liu Daqun
Presiding Judge