MICT-13-40-R90
18-07-2013
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UNITED NATIONS

Mechanism for International Criminal Tribunals

Cases No. MICT-13-40-R90
MICT-13-41-R90

Date: 17 July 2013

Original: English

SINGLE JUDGE

Before: Judge Vagn Joensen, *Single Judge*

Registrar: John Hocking

In Re.

DEOGRATIAS SEBUREZE

and

MAXIMILIEN TURINABO

PUBLIC REDACTED VERSION OF

DECISION ON ALLEGATIONS OF CONTEMPT OF THE ICTR

Rule 90 of the Rules of Procedure and Evidence

For Deogratias Sebureze
Christopher Gosnell

For Maximilien Turinabo:
Stéphane Bourgon

Received by the Registry
Mechanism for International Criminal Tribunals
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INTRODUCTION

1. On 6 July 2010, Trial Chamber II of the International Criminal Tribunal for Rwanda ("Trial Chamber" and "ICTR" or "Tribunal", respectively) directed the Registrar of the ICTR to appoint an *amicus curiae* (the "Amicus") to investigate possible violations of Rule 77 of the ICTR Rules of Procedure and Evidence ("ICTR Rules") related to protected witnesses in the case of *The Prosecutor v. Augustin Ngirabatware* ("*Ngirabatware*").[1] The report was filed by the Amicus on 29 November 2010 in response to the 6 July 2010 Order ("Amicus Report").[2]

2. On 4 March 2013, I was designated as Single Judge to rule, *inter alia*, on the matter of whether, based upon the Amicus Report, sufficient grounds exist for the Mechanism for International Criminal Tribunals ("MICT" or "Mechanism") to prosecute any persons for contempt of the Tribunal pursuant to the MICT Rules of Procedure and Evidence ("MICT Rules").[3]

3. Deogratias Sebureze filed a confidential submission on 2 April 2013 requesting the ability to be heard on the issue of whether sufficient grounds exist to indict him for contempt before the Mechanism ("Submissions").[4] The ICTR Prosecution responded on 15 April 2013 ("Prosecution Response"),[5] and Sebureze filed for leave to reply on 18 April 2013 ("Sebureze Reply").[6]

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[1] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T ("*Prosecutor v. Ngirabatware*"), Decision on Prosecution Oral Motions for Amendment of the Chamber's Decision on Allegations of Contempt, 6 July 2010 ("Ngirabatware Decision of 6 July 2010"), paras. 23-29, operative para. 2 (a)-(c).

[2] *Prosecutor v. Ngirabatware*, Strictly Confidential Report of Amicus Curiae on Investigations Related to the Allegations of Contempt, 29 November 2010 ("Amicus Report").

[3] The ICTR Trial Chamber in the *Ngirabatware* case decided on 21 February 2013 that sufficient grounds exist for prosecution of Deogratias Sebureze and Maximilien Turinabo for Contempt of the Tribunal, issued an order in lieu of an indictment against Sebureze and Turinabo, and directed the Registrar to refer the matter to the Mechanism for International Criminal Tribunals ("MICT" or "Mechanism") to conduct and complete the proceedings. On 26 and 27 February 2013, respectively, Defence Counsel for Deogratias Sebureze and Maximilien Turinabo filed submissions challenging, *inter alia*, the jurisdiction of the Trial Chamber to issue the 21 February 2013 Decision and order in lieu of an indictment, and requesting the MICT President to declare that the Impugned Decision has no legal effect before the MICT. The President thereafter appointed me as Single Judge to rule on the two motions and "the matter" which refers to the Amicus Report and whether sufficient grounds exist to prosecute based thereupon. *See In Re Deogratias Sebureze and Maximilien Turinabo*, Cases No. MICT-13-40-R90 and MICT-13-41-R90 *("In Re Sebureze and Turinabo")*, Order Assigning a Single Judge (P), 4 March 2013. I decided on 20 March 2013 to grant the parts of the motions by Sebureze and Turinabo related to the challenge of the legal effect of the Tribunal's decision before the MICT, stating that I would subsequently issue a separate decision on whether sufficient grounds exist to prosecute any persons for contempt based upon the Amicus Report. *See In Re Sebureze and Turinabo*, Decision on Deogratias Sebureze and Maximilien Turinabo's Motions on the Legal Effect of the Contempt Decision and Order Issued by the ICTR Trial Chamber (SJ), 20 March 2013.

[4] *In Re Sebureze and Turinabo*, Confidential Submission by Deogratias Sebureze on the Single Judge's Deliberations Pursuant to Rule 90 (D), filed on 2 April 2013 ("Sebureze Submissions").

[5] *In Re Sebureze and Turinabo*, Confidential Prosecution Response Regarding Sebureze's Submission Pursuant to Rule

DELIBERATIONS

Preliminary Issues

Confidentiality of this decision

4. This decision contains information from closed session transcripts and from the confidential Amicus Report. The decision shall, therefore, be filed confidentially. By decision of the ICTR Trial Chamber, the Amicus Report has been disclosed to Sebureze and Turinabo who, thus, are familiar with the full identities of the concerned protected witnesses. Furthermore, Sebureze, as part of the *Ngirabatware* Defence Team, has attended the relevant closed sessions. I therefore consider that Sebureze and Turinabo should receive an un-redacted version of this decision, including information from closed session transcripts that they may not have had access to. For the reasons enumerated herein with respect to his involvement as a party to the underlying matter and rights related thereto, I also consider that the ICTR Prosecutor should be served a copy of the un-redacted version of this decision.

5. Since the public dissemination of most of the evidence referred to herein would not compromise any protected witnesses, a redacted version of this decision shall be filed publicly.

Standing to make submissions with respect to deliberations pursuant to Rule 90 (D)

6. The Prosecutor contends that the suspect of an investigation is not afforded the right to be heard under the MICT Rules.[7] Deogratias Sebureze submits a) the Prosecutor's claim that he does not have the right to be heard is ironic in light of "the manifest lack of standing of the Prosecution to make submissions;" b) the Prosecutor responded to a confidential document (Sebureze's 2 April 2013 Submissions) which he should not have been in possession of since he is not a party to the contempt proceedings; and c) Sebureze has standing as a matter of "natural justice" since he is now in the same position as the Prosecution when it is permitted to make *ex parte* submissions

90 (D), filed on 15 April 2013 ("Prosecution Response").
[6] *In Re Sebureze and Turinabo,* Confidential Reply to Prosecution's Response to Submission by Deogratias Sebureze on the Single Judge's Deliberations Pursuant to Rule 90 (D), filed on 18 April 2013 ("Sebureze Reply")
[7] Prosecution Response, para. 5. In support of his assertion, the Prosecution points to MICT Rule 2 whereby an Accused is defined as a person who has already been indicted.

under [ICTR] Rule 47 (F) with respect to confirmation of an indictment.[8]

7. I agree with Deogratias Sebureze to the extent that he argues that the ICTR Prosecutor should not have been in possession of Sebureze's Submissions before the MICT, as the submissions were filed confidentially and the ICTR Prosecutor is not a party to the contempt proceedings. However, I consider that Sebureze, not the Registry, is responsible for the filings being supplied to the Prosecution in this particular case, and as such the Submissions were not *improperly* received by the Prosecution. While the Prosecution is not, strictly speaking, a party to this contempt case, I do not find that it was unreasonable for the Registry to have provided it with a copy of Sebureze's Submissions, in light of the Prosecution's heavy involvement in the litigation thus far in the case and the dearth at that time of any judicial instructions as to who the parties were.[9]

8. Moreover, I note that it is the obligation of the party that transmits documents to the Registry for filing and circulation to precisely indicate limitations, if any, as to the exact persons to which the material shall be circulated.[10] This is especially true where it may not be abundantly clear to the Registry who should receive a filing. In this case, Sebureze claims that his Submissions were filed pursuant to the same ability to make *ex parte* submissions that the Prosecution has under ICTR Rule 47 (F) with respect to confirmation of an indictment.[11] If Sebureze intended to file his Submissions on an *ex parte* basis, which is the foundation of his contention for the grounds upon which he had standing to file the Submissions, the MICT transmission sheet provided him the appropriate means to ensure that the Registry understood this, i.e. by checking the box marked "*Ex Parte Prosecution Excluded.*" I reiterate that the Prosecution had already filed several submissions with respect to various aspects of the present case, including whether the Prosecution had standing to intervene due to the absence of an *amicus curiae* prosecutor, all of

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[8] Sebureze Reply, paras. 1, 3, 4, 6-8.
[9] The Prosecutor is defined by Rule 2 (A) of the MICT Rules as "The Prosecutor appointed pursuant to Article 14 of the Statute." A "Party" under Rule 2 (A) of the MICT Rules is defined as "*unless the context otherwise requires* [...] The Prosecutor or the Defence" (emphasis added). In the context of contempt matters where the ICTR and/or MICT Prosecutor is considered to have a conflict of interest, I consider that the Rule 2 reference to the "Prosecutor" m be understood to refer to the Amicus Curiae Prosecutor. However, I recall that no Amicus Curiae prosecutor had been appointed at the time of Sebureze's filing. Therefore, in the unique circumstances of this case, including the Prosecution's repeated filings and Sebureze and Turinabo's responses to them, I find that it was not unreasonable for the Registry to believe that the Prosecution may be a party to the matter. *See also In Re Sebureze and Turinabo,* Decision on Prosecution Motion for Reconsideration of the Decision of 20 March 2013 (SJ), 17 July 2013.
[10] *The Prosecutor v. Jean-Baptiste Gatete*, Case No. MICT-13-42, Confidential Decision in Respect to the Application for Variation of Protective Measures (SJ), 15 May 2013, para. 19.
[11] Sebureze Reply, paras. 6-8.

which were pending at the time of Sebureze's Submissions. Indeed, no judge had determined yet whether the Prosecution was a party to the contempt case. Therefore, Sebureze was or should have been aware that the Registry may consider that the "parties" which are normally defined as the Prosecutor or the Defence, may include the ICTR and/or MICT Prosecutor. If Sebureze intended to file his Submissions *ex parte*, he should have taken the proper steps to ensure the limited distribution he claims to have intended.

9. Having found that the Prosecution did not *improperly* receive Sebureze's Submissions, I now turn to whether Sebureze had standing to file the 2 April 2013 Submissions in the first place. I note that Sebureze did not provide any basis in his Submissions with respect to the legal grounds upon which he was requesting to be heard. It was only in response to the Prosecution Reply that Sebureze argued that a suspect in a contempt case should have the right to make submissions in line with the Prosecution's abilities to do so under ICTR Rule 47 (F) in the case of confirmation of indictments. I do not find this argument to be persuasive. The corresponding MICT Rule is Rule 48 (F) which does not apply to a suspect and only allows the Prosecutor to present additional evidence at the request of the Single Judge. Furthermore, the Rules on confirmation of indictments do not apply to an order in lieu of an indictment.

10. In the context of consideration of whether to investigate or prosecute alleged contempt, once the matter has been raised by a party in the underlying proceedings, no right to make further submissions exists, save for when such submissions are ordered by the Chamber.[12] It is only because of the unique situation whereby the MICT is responsible for considering allegations of contempt of an ICTR Trial Chamber that Sebureze as a suspect is in possession of the Amicus Report which is the basis for my consideration under Rule 90 (D). Moreover, I recall that when deciding whether to investigate, the parties to the original case were heard by the *Ngirabatware* Trial Chamber.[13] Having reviewed the trial record, I determined that it was not necessary to order further submissions by the parties to the original proceedings. I consider that neither the parties to

[12] *See e.g. Leonidas Nshogoza v. The Prosecutor,* Case No. ICTR-07-91-AR77, Decision on Nshogoza's Appeal of Decision on Allegations of Contempt by Members of the Prosecution (AC), 7 July 2011 ("Nshogoza Appeals Chamber Decision"), para. 13.; *c.f. The Prosecutor v. Callixte Nzabonimana,* Case No. ICTR-98-44D-T (*"Prosecutor v. Nzabonimana"),* Decision Following Amicus Curiae Report Pertaining to Allegations of Contempt of the Tribunal by Prosecution Witness CNAI and/or a Member of the Prosecution Office (TC), 21 October 2011, ("Nzabonimana Decision of 21 October 2011"), paras. 11-12. I note that the *Nzabonimana* Chamber requested submissions at the stage considering whether to order prosecution based upon an investigative report. However, this is not the norm, and in any event, although I agree that the Single Judge may request submissions from the Parties whenever the Judge deems appropriate in specific circumstances, no such request was made in the present case.

[13] *See* Ngirabatware Decision of 6 July 2010.

the underlying case nor persons under investigation for contempt under Rule 90 (D) have a right to make submissions on the merits of an ongoing investigation before a MICT Single Judge under Rule 90 (D) except when such submissions are expressly requested by the Single Judge. In the present case I do not find it appropriate to hear submissions from the Prosecution or persons under investigation on the merits of the determination under Rule 90 (D) of whether sufficient grounds exist to prosecute.

11. However, in light of the unique circumstances of this case including the jurisdictional and other prevailing issues, and in the interests of justice, I will consider the 2 April 2013 Submissions, the 15 April 2013 Prosecution Response, and Sebureze's 18 April 2013 Reply to the extent that they raise issues pertinent to discerning the legal standards to be applied to determinations under Rule 90 (D), but not with respect to the arguments presented on the merits of whether to order prosecution.

Applicable Law

12. Rule 90 (A) (iv) of the MICT Rules, which parallels Rule 77 (A) (iv) of the ICTR Rules and Rule 77 (A) (iv) of the International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence ("ICTY" and "ICTY Rules", respectively), states that the Mechanism may "hold in contempt those who knowingly and wilfully interfere with the administration of justice, including any person who 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 Single Judge, or a potential witness."

13. Pursuant to Rule 90 (D) of the MICT Rules, if the Single Judge assigned to consider an investigative report by an *amicus curiae* assesses that there are sufficient grounds to proceed against a person for contempt, the Single Judge may issue an order in lieu of an indictment and prosecute, or direct that an *amicus curiae* be appointed to prosecute the matter.

14. The standard for determining whether sufficient grounds exist to prosecute an individual for contempt of the Tribunal has been well established in both the ICTR and the ICTY, upon whose rules and jurisprudence the MICT Rules are based. I therefore apply the ICTR and ICTY standards *mutatis mutandis* to determination under Rule 90 (D). Accordingly, the determination of whether sufficient grounds exist to order prosecution requires a decision that the evidence

gives rise to a *prima facie* case of contempt.[14] The *prima facie* standard for contempt is the same as the standard employed by Trial Chambers in confirming an indictment, namely "a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused."[15] Upon determination that the *prima facie* standard has been met, the Chamber, or under the Mechanism, the Single Judge, is entitled to determine, within the bounds of his or her discretion, whether or not to initiate proceedings against the suspect(s).[16]

15. In determining whether to initiate proceedings for false testimony or contempt, where a credible *prima facie* case exists, the Single Judge may take into consideration certain mitigating factors including the gravity of the alleged perpetrator's conduct, as well as the penal goals to be served by initiating contempt proceedings.[17] I note that the Appeals Chamber has held that the Chamber, which equates to the Single Judge in the Mechanism, ought to carefully consider whether proceedings for contempt are the most effective and efficient way to ensure compliance with the obligations flowing from the Statute or the Rules in the specific circumstances of the case.[18] Also, although not considered to be a defence, the personal motives of the alleged perpetrators may be considered in connection with a decision whether to initiate contempt proceedings.[19]

Submissions on prima facie standard

16. The definition of the *prima facie* standard and what degree of analysis is available to the Single Judge to determine whether to proceed under Rule 90 (D) have been disputed by Sebureze and the Prosecutor. Sebureze contends that a *prima facie* case is distinct from *prima facie* evidence in that the *prima facie* case standard requires looking at the totality of the evidence. While Sebureze concedes that establishing a *prima facie* case does not equate to a final finding, he presents examples where Trial Chambers have scrutinised allegations carefully before concluding on allegations of contempt, and therefore posits that the Single Judge should do the same in this

[14] Nsengimana Decision of 16 December 2010, para. 14 (and authorities cited therein); Seselj Decision, para. 16 (and authorities cited therein).
[15] Nzabonimana Decision of 21 October 2010, paras. 14, 15, citing *The Prosecutor v. Édouard Karemera et. al.*, Case No. 98-44-AR.91 (*"Prosecutor v. Karemera et. al."*), Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [A] Prosecution Witness for False Testimony" and on Motion for Oral Arguments (AC), 22 January 2009 ("Karemera et al. Decision of 22 January 2009"), para. 19 *and* The Prosecutor v. Slobodan Milosevic, Case No. IT-01-51-1, Decision on Review of Indictment, 22 November 2001.
[16] Nsengimana Decision of 16 December 2010, paras. 8, 17.
[17] *The Prosecutor v. Leonidas Nshogoza*, Case No. ICTR-07-91-A, Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010 paras. 20-24.
[18] *Prosecutor v. Nzabonimana*, Decision on Motion for Contempt Proceedings against [an] OTP Investigator, 18 November 2011, para. 12, citing Karemera et al. Decision of 22 January 2009, para. 21.
[19] Nshogoza Appeals Chamber Decision, para. 19.

case.[20] The Prosecution asserts that Sebureze is requesting the Single Judge to make a final determination on whether the evidence is sufficient for a conviction, which is not required under the sufficient grounds standard, and claims that the question is instead whether the Amicus Report establishes a *prima facie* case; whether or not the evidence is credible and reliable is to be determined at trial.[21]

17. While I note that the Prosecution has stated the correct legal standard, Sebureze has, in turn, presented several cases where the Trial Chamber's assessments included various levels of analysis of the evidence available before determining whether to order proceedings for contempt.[22] Although I note that the cases cited by Sebureze generally refer to cases which are factually distinct from the present one, the jurisprudence is clear that the *prima facie* standard requires a careful review of all evidence, and if such evidence establishes a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused, the Trial Chamber or Single Judge has the discretion to determine whether to order contempt proceedings. I therefore consider that my review should include careful consideration of whether all of the evidence available on its face amounts to a sufficient basis on which to convict the accused.

Allegations related to Witness ANAU

6 July 2010 Order

18. In its 6 July 2010 Order the Trial Chamber, in the introduction, summarises Witness ANAU's testimony as follows: "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 without implicating Augustin Ngirabatware or [*redacted*]. It was later clarified that he would be paid 100.000 Rwandan Francs (RWF) before testifying, and would receive further compensation

[20] Sebureze Submissions, para. 8.
[21] Prosecution Response, paras. 10, 11.
[22] Sebureze Submissions, para. 7. *See also e.g.* Nsengimana Decision of 16 December 2010; *Prosecutor v. Karemera et. al.*, Decision on Remand Following Appeal Chamber's Decision of 16 February 2010, 18 May 2010; *Prosecutor v. Seselj*, Case No. IT-03-67-T, Decision on Motions by the Prosecution and the Accused to Instigate Contempt Proceedings Against Ms. Dahl (From the Office of the Prosecution) and Mr. Vucic (Associate of the Accused) Dated 10 June 2008, 8 July 2008; *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (TC), 15 November 2002. ("Kajelijeli Decision").

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 [*redacted*] during his testimony. At the third meeting, Witness ANAU refused to sign a statement prepared by the Defence."[23] Later in the order 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."[24]

19. I note that it is apparent from the transcripts that the two individuals ANAU claimed to have met on three occasions were Sebureze and Turinabo, and the additional person who attended the second meeting was Ngirabatware's then Co-Counsel, currently his Lead Appeals Counsel.

20. The order directed the Amicus to investigate "possible violations of [ICTR] Rule 77, in particular "[t]he 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."[25]

The Amicus' Conclusions

21. In his conclusions the Amicus states that "[w]itness ANAU's statement is basically in agreement with the information he revealed before the Trial Chamber that is equally covered in the Trial Chamber's Decision of 6 July 2010 at pages 2 and 3 as well as the pertinent judicial transcripts."[26] The Amicus thereafter finds "that a reasonable trier of fact could emerge against Mr. Maximilien Turinabo for this threat against Witness ANAU and also the issue of bribe in violation of [ICTR] Rule 77."[27] I note that the Amicus makes no findings with respect to Sebureze or the then Co-Counsel. In the following section I will consider the evidence in relation to all three persons.

ANAU's evidence

22. As summarised in the 6 July 2010 Order, ANAU testified about three meetings with the

[23] Ngirabatware Decision of 6 July 2010, para. 5.
[24] Ngirabatware Decision of 6 July 2010, para. 23.
[25] Ngirabatware Decision of 6 July 2010, p. 6.
[26] Amicus Report, para. 27a).
[27] Amicus Report, para. 28.

Ngirabatware Defence; the first meeting with Sebureze alone ("Investigator Meeting"), the second meeting with the Co-Counsel and Sebureze ("Co-Counsel Meeting"), and the third meeting, a few days after the Co-Counsel Meeting, with Sebureze and Turinabo where ANAU was requested to sign his statement, but declined.[28] The *Ngirabatware* Defence at the trial maintained that there was no meeting after the Co-Counsel Meeting,[29] as does Sebureze in his affidavit.[30] ANAU, in his affidavit, seems to agree, but claims that he had two meetings prior to the Co-Counsel Meeting, one month apart, where Turinabo brought him to meet the investigator, Sebureze, adding up to a total of three meetings.[31]

23. With respect to the Investigator Meeting ANAU testified that Sebureze, at the single meeting, warned ANAU not to implicate Ngirabatware or [*redacted*] if called to testify, and promised ANAU "something" if he agreed to testify under those terms for the Defence.[32] On their way home from the meeting, Turinabo told him that Sebureze had referred to money and that ANAU would be paid 100.000 RWF before departure to Arusha and an unspecified sum upon return from Arusha.[33] ANAU did not indicate to either Sebureze or Turinabo if he accepted.[34]

24. In his affidavit, ANAU claims that he, at the first Investigator Meeting, was warned not to testify against Ngirabatware. At the second Investigator Meeting, Sebureze warned him not to testify against Ngirabatware or [*redacted*] and Sebureze and promised him "a bribe" that he would give him through Turinabo. ANAU didn't talk with Turinabo until two days later when Turinabo sent for him. Turinabo then told him that the bribe Sebureze had promised him would be 100.000 (RWF) to be paid before departure to Arusha. There is no mention of any further payments. ANAU indicated his "acceptance of the bribe" to both Sebureze and Turinabo.[35]

25. As to the Co-Counsel Meeting, it is ANAU's evidence that the bribe issue was not brought up. According to ANAU's testimony, Sebureze repeated the warning not to implicate Ngirabatware or [*redacted*] if called to testify for the Defence. Sebureze spoke to ANAU in Kinyarwanda.

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[28] Amicus Report, Annex A ("Affidavit of [redacted]"), paras. 4-6, 8 November 2010, p.12-13 (ANAU).
[29] T. 11 March 2010, p. 82, lines 25-27 (ANAU) [closed session].
[30] Amicus Report, Annex G ("Affidavit of Deogratias Sebureze"), para. 3, 22 November 2010, p.26.
[31] Amicus Report, Annex A ("Affidavit of [redacted]"), para. 5, 8 November 2010, p.13 (ANAU).
[32] T. 9 March 2010, p. 28, lines 8-11 (ANAU) [closed session]; T. 11 March 2010, p. 35, lines 34-36 (ANAU) [closed session].
[33] T. 9 March 2010, p. 32, lines 25-28 (ANAU) [closed session]; T. 11 March 2010, p. 40, lines 17-23 (ANAS) [closed session].
[34] T. 9 March 2010, p. 34, lines 9-10 (ANAU) [closed session].
[35] Amicus Report, Annex A ("Affidavit of [redacted]"), paras. 4-6, 8 November 2010, p.12-13 (ANAU).

There was no interpreter present, and it doesn't appear from ANAU's testimony that Sebureze translated to the Co-Counsel that he warned ANAU.[36] ANAU's affidavit doesn't mention anything about a warning at that meeting.

[Redacted]'s evidence

26. [*Redacted*] in his affidavit states that "[b]efore [*redacted*] proceeded to Arusha he told me last year that a Rwandan *Ngirabatware* Defence Lawyer [*redacted*], Mr. Maximilien (a focal point individual for *Ngirabatware* Defence witnesses [*redacted*]) had promised him copious bribe but the exact amount was not known if he could consent to testify for the defence of Ngirabatware."[37]

What does the evidence show on its face?

27. With respect to the *Ngirabatware* Defence Team's then Co-Counsel, I note that neither ANAU's testimony nor his affidavit implicate this person in the alleged attempt to bribe ANAU or to improperly interfere with his possible trial testimony by warning him not to implicate Ngirabatware or [*redacted*].

28. With respect to the issue of improper interference, other than by bribing, I disagree with the conclusion in the Amicus Report in that I fail to find that the evidence suggest that Turinabo's conduct amounted to a threat against ANAU. ANAU testified that he was reluctant to meet with the *Ngirabatware* Defence, but gave in to Turinabo's insistence because Turinabo was [*redacted*] and he respected him [*redacted*]. That, however, falls short of "threats" or other improper interference.

29. With respect to the alleged warning not to implicate Ngirabatware or [*redacted*] if called to testify, I note that ANAU, both in his testimony and in his affidavit, states that Sebureze warned him not to implicate Ngirabatware or [*redacted*] if called to testify. However, according to ANAU's evidence Turinabo was not present when the warning took place.

30. With respect to the alleged bribing I note that ANAU, both in his testimony and in his affidavit, states that Sebureze made indications at their meeting which ANAU took to mean that he was promised a bribe and that Turinabo later followed up by explaining to him that the bribe would

[36] T. 15 March 2010, p. 34, lines 24-37, p.35, lines 1-6 (ANAU) [closed session].
[37] Amicus Report, Annex B ("Affidavit of [redacted]"), para 3, 14 November 2010, p.15.

be 100.000 RWF to be paid through Turinabo before departure to Arusha.

Does the evidence on its face establish a credible case?

31. I note that it seems to follow from ANAU's testimony that the alleged bribe and the alleged testimony were linked in the sense that the bribe was offered to persuade him to give testimony that would not implicate Ngirabatware or [*redacted*]. However, it is not apparent from ANAU's testimony or his affidavit that the Defence had reason to believe that ANAU would have evidence which could harm Ngirabatware's case. Thus, ANAU's testimony and affidavit show that he was primarily interviewed about the killing of [*redacted*] and that his evidence would tend to rebut Prosecution evidence. It further appears that although he had evidence on other events that might incriminate Ngirabatware, he didn't reveal this to the Defence. In his affidavit, he stated that he was specifically interviewed about the killings of [*redacted*] and his [*redacted*], "but I decided not to disclose how they died."[38] Furthermore, ANAU averred that he was not contacted by the Prosecution until a few hours after his meeting with the Defence Co-Counsel and Sebureze.[39]

32. In addition, I note that, according to ANAU's testimony and affidavit, at the meeting(s) following the meeting between ANAU and Sebureze the issue of a bribe was not brought up again, nor, according to his affidavit, was the warning not to incriminate Ngirabatware or [*redacted*].

33. I find it relevant also to consider whether ANAU could have misunderstood the indications he perceived as a bribe and a warning not to incriminate Ngirabatware or [*redacted*].

34. With respect to the alleged warning, I note that it is legitimate, and probably common, that a defence investigator who interviews a potential witness to determine whether he or she should be called to testify seeks to ascertain not only whether the potential witness has evidence that may tend to rebut the prosecution evidence but also whether the witness has evidence which, if adduced under cross-examination, could harm the defence case. Hence, what ANAU understood as an admonishment not to implicate Ngirabatware or [*redacted*], if called to testify, could have been an inquisitive way of making certain that he did not possess incriminating evidence which could be adduced on cross-examination if called to testify for the *Ngirabatware* Defence.

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[38] Amicus Report, Annex A ("Affidavit of [redacted]"), para. 5, 8 November 2010, p.12 (ANAU).
[39] Amicus Report, Annex A ("Affidavit of [redacted]"), para. 7, 8 November 2010, p.14 (ANAU).

35. With respect to the alleged bribe, I note that 100.000 RWF was twenty times the compensation for lost income for a full day ANAU was paid for submitting to an interview with the Defence, and, thus, would have been a considerable sum to him. It was the equivalent of approximately 174 USD in 2010, a sum comparable to the compensation he, as a protected witness, would receive from the Tribunal as Daily Subsistence Allowance ("DSA") for 6 nights spent in Arusha and something he would have been made aware of before travelling to Arusha.[40] ANAU's affidavit doesn't mention any promise of a further payment after he had testified. However, the alleged indication that the sum would be paid through Turinabo and before departure to Arusha suggests that the indications allegedly made by Sebureze and Turinabo were not a reference to the compensation ANAU would receive from the Tribunal. I consider that the evidence surrounding this allegation is rife with contradictions, and therefore, I cannot find that a sufficient basis exists to proceed on charges of bribery.

Conclusion

36. Thus, taking all factors into account, I find that the evidence does not on its face amount to a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused, wherefore sufficient grounds do not exist to proceed against anybody for contempt with respect to the events surrounding ANAU. However, I consider that the evidence does tend to show lack of diligence on the part of the *Ngirabatware* Defence with respect to making certain that persons employed by or assisting the Defence do not make indications to potential witnesses which may be misunderstood and admonish the *Ngirabatware* Defence accordingly.

Allegations related to Witness ANAS

The 6 July 2010 Order

37. The Trial Chamber summarised ANAS's testimony "that two persons had sent messengers warning him not to testify against Ngirabatware"[41] and later in the Order "that two individuals

[40] In 2010, the DSA rate for Arusha was approximately 149 USD per day. A witness testifying without protective measures would receive this sum for each day spent in Arusha. A witness testifying under protective measures and staying in a safe house would receive 20 percent of this sum (approximately 30 USD) for each day spent in Arusha. 100,000 RWF would therefore have been roughly equivalent to one night DSA for an unprotected witness or to 6 nights DSA for a protected witness. *See* Registrar's Submissions Pursuant to Rule 31 (B) of the Rules, filed on 15 March 2013.
[41] Ngirabatware Decision of 6 July 2010, para. 6.

sent messengers to threaten him."[42] The Chamber instructed the Amicus to investigate the allegation "that Prosecution Witness ANAS was warned not to testify against Ngirabatware".[43] It appears from the transcripts that the "two persons" referred two were Sebureze and [*redacted*].[44]

The Amicus' Conclusions

38. In his concluding remarks the Amicus suggests that he believes that there are "sufficient grounds for commencing proceedings against Mr. Maximilien Turinabo for his threat on Witness ANAS not to testify against Mr. Ngirabatware in violation of [ICTR] Rule 77."[45]

39. I note that ANAS in his affidavit to the Amicus complains about a number of other incidents of harassment and that the Amicus has obtained an affidavit from ANAS's counsel about one of these other incidents. However, the Amicus makes no findings in relation to these other incidents. Nor does he make any finding in relation to [*redacted*]. In the following section, I will address the evidence in relation all of the incidents.

Evidence with respect to the initial complaint

40. It appears from ANAS's testimony that he was in direct contact with Turinabo while they were [*redacted*]. Turinabo requested ANAS to testify for the *Ngirabatware* Defence and ANAS declined. ANAS doesn't complain about any threats in that connection. However, when Turinabo learned that ANAS met members of the Prosecution team "he and [*redacted*]continued to send [ANAS] messages or messengers to tell [ANAS] that if [he] dared go to Arusha to testify against Ngirabatware [he] would be faced with difficult consequences". The testimony doesn't go into further detail.[46]

41. In his affidavit to the Amicus, ANAS states that "on noting [ANAS's] refusal" to testify in defence of Ngirabatware, Turinabo collaborated with [*redacted*] to threaten ANAS that unless he moved [*redacted*] he would run into serious security problems with his family members.[47] It is not clear whether ANAS is referring to the same acts of harassment as described above in para. 40.

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[42] Ngirabatware Decision of 6 July 2010, para. 24.
[43] Ngirabatware Decision of 6 July 2010, p. 6.
[44] T. 16 March 2010, p. 53, lines 11-17 (ANAS) [closed session].
[45] Amicus Report, para. 29.
[46] T. 16 March 2010, p. 53, lines 13-16 (ANAS) [closed session].
[47] Amicus Report, Annex D ("Affidavit of [redacted]"), para. 3, 10 November 2010, p. 19 (ANAS).

42. The Amicus report doesn't clarify the discrepancy between ANAS's testimony and his affidavit as to whether the harassment was triggered by him being seen to cooperate with the Prosecution (testimony) or by his refusal to testify for the Defence (affidavit). Nor does the report clarify whether the harassment started while Turinabo and ANAS were [*redacted*] or only later, and if the former, whether [*redacted*]. Furthermore, the report does not clarify the basis for ANAS's allegation that Turinabo and [*redacted*] were behind the threats, whether the messengers said so, whether it was apparent from the content of the threats, or whether the allegation against them is based on ANAS's speculations.

43. Thus, I conclude that the evidence does not on its face amount to a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused. Therefore, sufficient grounds do not exist to proceed on the allegations that Turinabo and/or [*redacted*] were involved in threatening Witness ANAS.

Evidence with respect to other allegations.

44. ANAS makes the following further complaints in his affidavit:

(i) "As a result of [*redacted*] influence with [*redacted*]", ANAS was detained on the flimsy excuse that he did not take part in his TIG duty.[48] He was released following the intervention of his counsel, [*redacted*], who confirmed his involvement in his affidavit. [*Redacted*] was allegedly present when such incident took place. [49]

(ii) In April 2010, after ANAS's return from Arusha, he was attacked by [*redacted*] who demanded the money he had received while in Arusha. ANAS was "convinced that the said [*redacted*] must have been sent by" Turinabo because he knew that all threats were organised by either Turinabo or [*redacted*].[50]

(iii) Shortly after the events described above, ANAS was arrested by [*redacted*] and taken to the police office. [*Redacted*], who was present, told the police commander that ANAS had escaped from the TIG Camp. This was not the case since ANAS had purportedly been granted the necessary permission to leave the Camp, but his

[48] TIG ("Travaux d'intérêt général" / Works of general interest) Duty, according to the affidavit of [redacted] (Amicus Report, Annex E, para 3), "was a general public duty that was assigned to all ex-prisoners like ANAS.
[49] Amicus Report, Annex D ("Affidavit of [redacted]"), para. 3, 10 November 2010, p. 19, (ANAS).
[50] Amicus Report, Annex D ("Affidavit of [redacted]"), para. 4, 10 November 2010, p. 20 (ANAS).

explanations were not accepted and he was consequently detained for four days.[51]

45. I note that none of the incidents appear to directly involve Turinabo and that ANAS does not explain the basis for his assumption that Turinabo or [*redacted*] were indirectly involved in the incident under (ii). Nor does the report clarify whether the incidents in which [*redacted*] was directly involved were related to ANAS's decision not to testify for the Defence, his decision to testify for the Prosecution, or whether they could instead be related to his TIG duties, noting that none of the involved persons, apart from ANAS's counsel, have been interviewed by the Amicus.

46. In sum, the Amicus Report does not present evidence on its face amounting to a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused and therefore sufficient grounds do not exist to proceed against Maximilien Turinabo or anybody else for involvement in improper interference with ANAS as a Prosecution witness.

47. Furthermore, considering that the alleged events took place approximately three years ago, I do not find it appropriate to order that an additional *amicus curiae* investigation be conducted at this time.

Allegations related to Witness ANAT

The 6 July 2010 Order

48. The Trial Chamber instructed the Amicus to investigate "[t]he circumstances under which Prosecution Witness ANAT may have learned the identity of another protected witness in his case, as well as whether this may have occurred in knowing violation of an order by the Chamber."[52]

The Amicus' Conclusions

49. In his concluding remarks, the Amicus opines that there are insufficient grounds for instigating proceedings for contempt of the Tribunal against Witness ANAT and recommends measures to avoid ICTR vehicles being spotted at the prison.[53]

50. I note that the fact that Witness ANAT got to know the identity of a protected witness does not

[51] Amicus Report, Annex D ("Affidavit of [redacted]"), para. 4, 10 November 2010, p. 20 (ANAS).
[52] Decision of 6 July 2010, p. 6.
[53] Amicus Report, para. 30.

suggest necessarily that ANAT would be in contempt of court, but that another person or other persons privy to confidential witness information could have divulged this information to ANAT in violation of the order granting witness protection suggests that such other persons could potentially be in contempt of court. I will, therefore, consider whether anyone could be in contempt of court.

The evidence

51. ANAT testified that a fellow inmate, [*redacted*], was poisoned, and ANAT believed that it was because [*redacted*] was about to testify as a Prosecution witness in the *Ngirabatware* trial. He knew that [*redacted*] was a Prosecution witness because they were in the same wing of the [*redacted*] prison and because [*redacted*] was pursued by inmates who were believed to be "Ngirabatware agents."[54]

52. I note that ANAT, in his affidavit, states that he got to know that [*redacted*] was a Prosecution witness because [*redacted*] was his friend and told him.[55] He also knew because [*redacted*] received threats from a prisoner who pursued witnesses who testified against Ngirabatware. But otherwise it was no secret in the prison when people travelled to Arusha and returned because the ICTR vehicles would appear in the compound of the prison.[56] [*Redacted*], in his affidavit, gave a similar account about spotting ICTR vehicles in the prison compound.[57]

53. Based upon ANAT's statement that he learned from [*redacted*] himself that he was a Prosecution witness in the *Ngirabatware* trial, I find that sufficient grounds do not exist to prosecute anyone for contempt of the Tribunal for divulging confidential information to ANAT. I note that the presence of ICTR vehicles at the prison cannot explain why other persons got to know that [*redacted*] was a Prosecution witness because [*redacted*] was allegedly poisoned before he could leave for Arusha. However, I do not find it appropriate at this time to order a further investigation to clarify that issue.

CONCLUSION

[54] T. 17 March 2010, p. 61, lines 30-37, p. 62, lines 1-7, 30-37, p. 63, line 1 (ANAT) [closed session].
[55] Amicus Report, Annex H ("Affidavit of[redacted]"), para. 3, 11 November 2011, p. 28.
[56] Amicus Report, Annex H ("Affidavit of [redacted]"), para. 4, 11 November 2011, p. 28.
[57] Amicus Report, Annex I ("Affidavit of [redacted]"), para. 3, 12 November 2010, p. 30.

54. Although some of the evidence I have examined may point to potential conduct that is punishable under Rule 90 (D) as contempt of the Tribunal, after examining the totality of the evidence available, I do not find that, when considered together, it amounts to a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict any of the involved persons. Even accepting all available evidence as true, the inconsistencies and ambiguity in nearly all of the recorded statements combines to create a record which I cannot find amounts to sufficient grounds upon which to proceed with any charges of contempt in these circumstances.

FOR THE FOREGOING REASONS, I

I. **DECLINE** to initiate contempt proceedings or to order further investigations pursuant to Rule 90 (D) against any of the persons referred to in the Amicus Report.

II. **ADMONISH** the *Ngirabatware* Defence to instruct anyone employed by it or assisting it not to make indications to potential witnesses which can be misinterpreted as improper interference with their potential testimony.

Arusha, 17 July 2013, done in English.

Judge Vagn Joensen
Single Judge

[Seal of the Mechanism]

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From/ *De*:	☒ Chambers/ *Chambre* **Duty Judge**	☐ Defence/ *Défense*	☐ Prosecution/ *Bureau du Procureur*	☐ Other/ *Autre :*	
Case Name/ *Affaire*:	**In Re Sebureze & Turinabo**		**Case Number/ *Affaire No*:**	**MICT-13-40** **MICT-13-41**	
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