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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 30 November 2001

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T),

Sylvain NSABIMANA & Alphonse NTEZIRYAYO
(Case No. ICTR-97-29-T),

Joseph KANYABASHI
(Case No. ICTR-96-15-T)

and Élie NDAYAMBAJE
(Case No. ICTR-96-8-T)

DECISION ON THE PROSECUTOR'S FURTHER ALLEGATIONS OF CONTEMPT

Rules 46, 54, 73 and 77 of the Rules of Procedure and Evidence

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal");

SITTING as Trial Chamber II of the Tribunal, composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

NOTING the "Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel" and the "Order on the Prosecutor's *Ex Parte* Further Allegations of Contempt" rendered in the present cases, respectively, on 10 July 2001 and 19 July 2001 (the "Decision of 10 July 2001" and the "Order of 19 July 2001");

BEING SEIZED, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), of the "Prosecutor's Extremely Urgent *Ex parte* Motion to Initiate Proceedings of Contempt of the Tribunal" filed on 12 July 2001 (the "Motion");

CONSIDERING the Responses to the Prosecutor's Motion filed by Counsel for Kanyabashi on 10 August 2001 ("Kanyabashi's Response") and by Counsel for Nsabimana on 15 August 2001 ("Nsabimana's Response") as well as the Prosecutor's Reply to the Defence Responses and the "Statement of Samuel Akorimo" attached thereto, filed on 17 August 2001 (the "Prosecutor's Reply");

HAVING HEARD the Parties on 26 October 2001;

CONSIDERING the Statute of the Tribunal and the Rules, specifically Rules 46 and 77 of the Rules which state, in their relevant dispositions:

> **Rule 46: Misconduct of Counsel**
>
> (A) A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. [...]
>
> **Rule 77: Contempt of the Tribunal**
>
> [...]
>
> (C) Any person who attempts to interfere with or intimidate a witness may be found guilty of contempt and sentenced [to a fine not exceeding USD 10,000 or a term of imprisonment not exceeding six months].
>
> [...]

HEREBY RENDERS ITS DECISION.

I. INTRODUCTION and PARTIES' SUBMISSIONS

1. The Chamber notes, in respect of the Prosecutor's Motion, that:

(i) In a Motion filed on 14 June 2001 (the "initial Motion"), the Prosecution accused of contempt Mr Diabira and Mr Morgan, whom they identified as members of the Defence for the Accused Kanyabashi, and Mr Diabira, a member of the Defence for the Accused Nsabimana, along with other unidentified individuals. The Prosecution alleged that these individuals had interfered with its witnesses and attempted to steal documents from a *Commune* Office in Butare *Préfecture*;

(ii) On 22 June 2001, the Prosecution withdrew all allegations against Mr Diabira, on the basis of "new information that there was an error with regard to [him]" (Prosecutor's Reply to the Defence Responses to the initial Motion, filed on 22 June 2001, § 42);

(iii) On 10 July 2001, having heard the Parties and reviewed their written submissions, the Chamber unanimously dismissed the original Prosecutor's Motion for Contempt on the basis, primarily, of the absence of direct *prima facie* evidence adduced in support of such grave allegations (*See* Decision of 10 July 2001, at § 8 (ii));

(iv) Having thus concluded that it "[was] not satisfied that the contemptuous conduct alleged may have taken place, and/or may be attributed to the Defence [team] concerned" (Id., § 9), the Chamber, considering the presumption of innocence, and "recalling the gravity of allegations of contempt, especially in respect of witnesses," stated that, "should any such allegations be brought in the future by a party, this must be done on the basis of properly prepared and substantiated submissions" (Id., § 12);

(v) On 12 July 2001, the Prosecution filed, *ex parte*, a new Motion pertaining to the above allegations of Contempt with regard to the aforementioned members of the Defence for the Accused Kanyabashi and other unidentified individuals;

(vi) Seven unredacted witness statements in support of their allegations were attached to this Motion, material presented as newly received on 11 July 2001, in so far as its collection by the Prosecutor's services in Kigali was "unknown to the OTP-Arusha staff earlier" (Motion, § 5);

(vii) The Prosecutor submitted that, since "Article 15 of the Statute and Rule 77 [of the Rules] *require* a Chamber to initiate proceedings" (Id., § 9, our emphasis) "the Trial Chamber should initiate proceedings immediately, issue appropriate orders, summon the necessary witnesses under Rules 54 and 98, and, if appropriate, pronounce a decision, impose penalties and sanctions under Rules 46 and 77" (Id, § 11);

(viii) On 19 July 2001, the Chamber ordered the Prosecution "to serve the Defense with the Motion with Annexure [...] as soon as possible and in any case before Thursday, 26 July 2001" and set deadlines for any replies by the Defence and further submissions by the Prosecutor (*See* Order of 19 July 2001);

(ix) Having redacted the statements attached to the Motion so as to protect the witnesses' identity, and although its title appears to indicate the contrary, the Prosecutor timely filed the said Motion *inter partes* on 25 July 2001.

2. In reply to the Motion, Counsel for Kanyabashi reiterated their submissions in reply to the initial Motion for Contempt (*See* "Réponse à la Requête du Procureur en extrême

urgence demandant une enquête pour outrage au Tribunal" filed on 20 June 2001 ; "[...] document supplémentaire au soutien de la[dite] Réponse [...]", filed on 9 July 2001 as part of a Motion for leave to file said document). Counsel for the Accused Kanyabashi further presented extensive written and oral submissions in respect of the present Motion. The Chamber will refer in detail to these submissions, along with those of Counsel for the Accused Nsabimana and Ntahobali, in the course of its deliberations.

II. DELIBERATIONS

(1) Competence With Regard To Contempt

3. The Prosecutor maintained that the Chamber alone has jurisdiction in respect to contempt and that, as a consequence, the Prosecution does not have the authority to investigate in respect of suspected contemptuous conduct.

4. The Chamber held that a party may not accuse of contempt another party, or an individual, without adducing *prima facie* evidence of such allegations (Decision of 10 July 2001, §§ 6 & 7). Therefore, were the Chamber to embrace the Prosecutor's argument, the parties would be barred from gathering *prima facie* evidence in support of the allegations on which their cases are based. Motions for contempt would, as a result, become untenable. It may be noted in this respect that, notwithstanding her argument regarding lack of competence, the Prosecutor adduced written statements collected by her services in support of both her Motions for Contempt.

5. The Prosecution's argument, as to the merits, relies on the limited definition of her competence under Article 15.1 of the Statute, which reads "[t]he Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994". According to the Prosecution, this definition does not, in the present case or generally, encompass the investigation in respect of contemptuous conduct or the prosecution of alleged contemnors.

6. The Chamber agrees that investigation in respect of contemptuous conduct or prosecution of alleged contemnors would ordinarily exceed the competence *ratione temporis*, *materiae* or *personae* of the Prosecutor, as defined under Article 15.1 of the Statute. However, the Prosecutor's competence under Article 15.1 of the Statute derives from the competence of the Tribunal pursuant to Article 1 of the Statute. In the view of the Chamber, the Prosecutor's statutory competence, if any, with regard to contemptuous conduct, also needs to be construed in the light of the Tribunal's statutory jurisdiction with respect to contempt.

7. The Statute does not explicitly refer to the Tribunal's jurisdiction in respect of contempt. Neither does the Statute of the International Criminal Tribunal for the former Yugoslavia (the "ICTY"), as emphasised by its Appeals Chamber, ruling in the first

instance (*See* ICTY Appeals Chamber, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A-R77, "Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin", 31 January 2000, the "*Tadić* Judgment on Contempt" -, § 13). However, the said Appeals Chamber held in this regard that "[t]he Tribunal does [...] possess an inherent jurisdiction, deriving from its judicial function, [...] to deal with conduct which interferes with its administration of justice" (Ibid.). The Chamber considers that this finding, which was upheld on appeal, (*See* ICTY Appeals Chamber, *The Prosecutor v. Dusko Tadić*, "Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin", 27 February 2001) is persuasive authority, *mutatis mutandis*, with regard to this Tribunal's inherent competence under the Statute to address contempt.

8. The Chamber considers, in reply to the Prosecutor's argument, that the Tribunal's competence to address contempt is not exclusively vested in its Chambers. The parties also benefit from this competence. Indeed, as officers of the court, they have a duty not only to report to the Chamber on conduct affecting the administration of justice which comes to their notice, but also to carry on investigations in order to support their allegations by facts. This is especially true, in the view of the Chamber, with regard to suspected contemptuous conduct which affects their witnesses, as in the present case.

9. The Prosecutor further submitted that "the Office of the Prosecutor operates as an independent organ [and that, accordingly, her] investigators are those of the Prosecutor's Office, not those of the Tribunal" (Transcript of 26 October 2001 – hereinafter, "Transcript" -, p. 24). The Chamber notes that Article 15.2 of the Statute cannot be construed to restrict the Prosecution, as far as contemptuous conduct is concerned, from producing *prima facie* evidence to substantiate such allegations. Indeed, the purpose of this disposition is principally to prohibit affiliations that might compromise the Prosecutor's independence.

(2) Preliminary Objections Raised By The Defence

10. Counsel for Kanyabashi objected to the *ex parte* filing, on 12 June 2001, of the Motion, in violation of the *audi alteram partem* principle. This fundamental principle of law protects the right of all parties to a dispute to be heard prior to any judicial decision. Black's Law Dictionary, 5th Ed., 1979 equates the principle in criminal law to the maxim, "No man should be condemned unheard". The Chamber however notes in the present case:

i) That the Prosecutor submitted that this course of action was chosen "out of an abundance of caution, and in the interests of witness protection and justice" (Motion, § 6), in so far as unredacted witness statements were attached to the Motion;

ii) That, as said Counsel acknowledges, the Chamber thereupon ordered the Prosecutor, in view of "the gravity of the allegations made", to file the Motion *inter partes* as soon as possible, while allowing her to "use pseudonyms for [her] witnesses, and/or redact their statements" (*See* Order of 19 July 2001);

iii) That, once the Motion was filed *inter partes*, the Defence was granted an opportunity to submit both written and oral replies; that Counsel for Kanyabashi exercised this right, along with other counsel; and that these

replies were carefully considered by the Chamber, as well as all other submissions, upon rendering this decision;

The Chamber therefore concludes that the Accused's right to be heard was respected and, accordingly, dismisses this objection.

11. Counsel for Kanyabashi further questioned the Prosecutor's account that the witness statements adduced had been newly received on 11 July 2001 by her services in Arusha, and that the latter did not know, prior to that date, that her services in Kigali had been collecting these statements. According to Counsel for Kanyabashi, the statements should have been produced before 10 July 2001, while the Chamber was still deliberating on the Prosecutor's initial Motion. According to the Defence, the Prosecutor's delay in submitting these statements amounts to a lack of diligence. Indeed, it is obvious to the Chamber that the Prosecution should have gathered and disclosed all relevant evidence during the course of the Chamber's deliberations on the initial Motion, if not before. However, in a statement attached to the Prosecution's reply, Mr Akorimo, Commander of Investigations at the Office of the Prosecutor, declared that the witness statements were to be entered into the Evidence Unit database before transmission to the Prosecutor's services in Arusha. Commander Akorimo further explained that, "although some statements were taken as early as 25 June 2001, it was not until a later date that these were forwarded to Arusha"; and that, "[a]s soon as the last statement was received, [he] forwarded all seven statements to Arusha". Although the Chamber regrets that the statements were not produced earlier, the Defence did not satisfy the Chamber that these statements were known to or were in the custody of the Prosecutor in Arusha prior to 11 July 2001. The Chamber, accordingly, dismisses this Defence objection.

12. The Chamber further dismisses Counsel for Nsabimana's objection to the Motion as being *res judicata*. Indeed, since the original Prosecutor's Motion was not dismissed on the merits, the Prosecution was entitled to raise her allegations again, in light of newly obtained material supposedly constituting *prima facie* evidence of the said allegations.

13. Counsel for Kanyabashi questioned whether the "true intention" of the Prosecutor's Motion might be to further delay disclosure of witness identities and unredacted witness statements, or to "destabilize, [...] the only defence team that has an investigator [...] permanently staying in Rwanda" (Transcript, p. 61). Said Counsel even referred to a wider strategy aimed at hampering the work of several Defence teams in different cases currently on trial. Similarly, Counsel for Ntahobali's view is that the present allegations are indicative of the Prosecutor's strategy to "let clouds hover on the Accused and their investigators and rain beat them", a strategy which affects his Client as well (Transcript, pp. 79 & 80). According to both Counsel, such conduct is highly prejudicial to the Defence and undermines the interests of justice. However, considering the nature of the allegations made by the Prosecution and the necessity to safeguard witnesses at all times, the Chamber considers such general statements to be unwarranted and dismisses the aforementioned Defence objections. The Chamber further requests all parties to these proceedings to fully cooperate in the interests of a just and expeditious trial.

14. In its Decision of 10 July 2001, the Chamber noted that the Prosecutor should have formulated the nature of the charges in her original Motion with the precision expected of

an indictment, and cited as authority the "Judgment on Appeal by Anto Nobilo Against Finding of Contempt" rendered by the ICTY Appeals Chamber in the Case *The Prosecutor v. Aleksovski*, No. IT-95-14/1, on 30 May 2001 (the "*Aleksovski* Appeal Judgement on Contempt" - *See* Decision of 10 July 2001, § 8 (i) *in fine*). Counsel for Kanyabashi referred to this holding and submitted that neither does the present Motion formulate the charges with the precision expected of an indictment. The Defence emphasised in this regard that it was not sufficient for the Prosecutor to state in the Motion that "[the seven] statements themselves provide the Trial Chamber with allegations of contempt, with specificity and precision, like that of an indictment" (Motion, § 8). At the hearing, the Prosecution replied that its lack of authority, under the Statute, to initiate proceedings of contempt, prevented it from drawing up such an indictment. The Chamber disagrees with the Prosecutor's argument for the reasons set out at §§ 3 to 8 *supra*. The Prosecutor should have summarised and detailed the allegations made in the witness statements. However, the Chamber considers that the Defence and the individuals concerned were informed in detail of the nature and the cause of the charges against them, as envisioned, *mutatis mutandis*, under Article 20.4(a) of the Statute. The Chamber, accordingly, dismisses Counsel for Kanyabashi's objection.

(3) The Prosecutor's Allegations of Contempt

(3.1) Individuals and Defence Team(s) Concerned

15. The Chamber does not agree with Counsel for Nsabimana's argument that the allegation of "attempted contempt and/or contempt of the Tribunal [...] by Mr Boubou Diabira and Mr Lawrence Morgan, two Defence investigators, *and possibly others*" (Motion, § 7, our emphasis) casts further suspicion on their investigator, Mr Nzabirinda. Such reference to the possible involvement of other individuals is not, in the Chamber's view, directed at a particular Defence team. While, on the basis of the witness statements submitted, it may be assumed by the Prosecutor that other unidentified individuals interacted with the two named individuals, there is no mention or suggestion of Mr Nzabirinda's involvement in the alleged activities. This, in the Chamber's opinion, confirms the withdrawal of all allegations against Mr Nzabirinda. This objection is therefore dismissed.

16. With regard to Mr Morgan, Counsel for Kanyabashi maintained that the latter was not working for the Accused's Defence at the time of the alleged events (*See* Statement by Mr Morgan attached to Kanyabashi's Reply to the initial Motion and Kanyabashi's Reply to the present Motion, §§ 106-113). The Chamber, at this stage, does not need to address this issue. Firstly, the Chamber has to consider whether it is satisfied that contemptuous conduct occurred. Only at a later stage, if the Chamber considers that *prima facie* evidence has been established in this regard, will it be necessary to determine whether the concerned individuals may have acted knowingly and wilfully in the manner alleged as members of one or more Defence team(s) in the course of their investigations, and whether other representatives of the concerned Defence team(s) may have shared the intention to act in contempt of the Tribunal or otherwise may have known, at the time, of such an intention.

(3.2) Alleged Conduct

17. The Prosecutor specified at the hearing that her allegations related to the following conduct:

(i) Interfering with Prosecution witnesses;

(ii) False recording of statements of Prosecution witnesses; and,

(iii) Inducing, or attempting to induce, Prosecution witnesses to present false testimony before the Tribunal.

18. In addition to the conduct above, the Chamber notes, as did Counsel for Kanyabashi, that, considering the witness statements disclosed, the following allegations made in the initial Motion seem to remain valid:

(i) Attempted theft of a number of documents identifying a protected Prosecution witness from the Ngoma *Commune* Office (*See* FAY's statement); and,

(ii) Misrepresentation of the individuals concerned to witnesses and/or Rwandan authorities as investigators of the Tribunal (*See* XV, HF, FAZ, FAY, RJ and RO's statements).

19. In submitting that the individuals concerned, as members of the Defence, are guilty of interference with their witnesses, the Prosecutor seems to be challenging the mere fact that the Defence contacted some of their witnesses in the course of their investigations in Butare.

20. It may therefore be recalled that contempt is by its very nature a criminal charge, for which an individual may be sentenced to a fine or a term of imprisonment, if found guilty (Rule 77(A) of the Rules). As such, the party alleging that such conduct occurred should satisfy the Chamber that the alleged contemnor(s) acted with an intention to commit the crime of contempt (*See* notably, on the intention to commit contempt, the *Aleksovski* Appeal Judgement on Contempt, § 54). In this sense, Rule 77(C) of the Rules, which refers to interference with a witness as contempt, is to be construed as prohibiting only *undue* interference with a witness. Undue interference with the Prosecution witnesses who were allegedly contacted could have occurred, in the present case, if the individuals concerned acted in knowing and wilful violation of a witness protection order of this court, or if they tried to intimidate witnesses, as specified under Rule 77(C) of the Rules, or, notably, if they tried to induce them to change their testimony, as the Prosecutor alleges in the present case.

21. The Chamber considers that the parties may, for the purpose of their investigations and preparation for trial, contact witnesses of the other party, provided that they do so subject to the applicable witness protection orders. The said orders applicable at the time to Prosecution witnesses in the Kanyabashi case did not stipulate that the Defence was to notify the Prosecutor prior to contacting its witnesses. (*See* "Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses", *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, 6 March 1997)

22. A party may, however, expect the opposing party to notify it prior to contacting its witnesses, even in the absence of an order to this effect. Even so, however, the Prosecution, while submitting that the individuals concerned, acting as members of the Defence for the Accused Kanyabashi, are guilty of interference with its witnesses, has not adduced *prima facie* evidence that the Defence may have known, prior to contacting the concerned individuals, that they would be called to testify against the Accused. Indeed, the Prosecution did not deny that, of the seven witnesses who were allegedly contacted, only RO and RJ appear in its Witness List filed on 11 April 2001. Furthermore, in respect of these two witnesses, the Prosecutor did not contradict Counsel for Kanyabashi's submission that, when the interviews allegedly took place – "in March or April [2001]" (according to XV), "at the beginning of May" (according to HF), "in or about April [2001]" (according to FAZ), "sometime in May this year" (according to RO), "between [...] April and May [2001]" (according to FAX) and/or "at the beginning of this year" (according to RJ) -, RO and RJ's identity had not been disclosed. Accordingly, the Chamber shall not entertain allegations of undue interference with regard to contact by the Defence of the Accused Kanyabashi with the concerned individuals.

23. Finally, the Chamber notes, as stated above, that Counsel for the accused before this Tribunal are officers of the court, just as Counsel for the Prosecutor are. Counsel for Kanyabashi rightly pointed out that the identification cards delivered by the Tribunal to the Defence investigators identify them as "Member[s] of the United Nations International Criminal Tribunal for Rwanda". The individuals concerned, if they were acting on behalf of the Defence, were therefore entitled to introduce themselves as "Investigators from the Tribunal" or "from the Tribunal", as indicated by XV, HF, FAZ, FAY and RJ in their respective statements. Similarly, it was not a misrepresentation for the individual referred to as "Boubou" to have stated, according to HF's statement, that "the Tribunal had sent them to investigate what Kanyabashi did during the genocide" or, for the same "Boubou" and "a white man", to have declared that they were "staff from the ICTR", according to RO's statement. This allegation of contempt is therefore dismissed.

(3.3) Whether The Witness Statements Produced Constitute *Prima Facie* Evidence Of Contempt

(a) Whether the Prosecutor Established That the Individuals in Question May Have Attempted to "make [Prosecution witnesses] change their mind not to testify for the Prosecution" (Initial Motion, § 6)

24. Notwithstanding the developments at § 22 *supra* in respect of the Prosecutor's failure to establish that the individuals concerned, along with others, may have known that the individuals contacted were Prosecution witnesses, the Chamber considers that the statements adduced by the Prosecution do not support this allegation and, accordingly, dismisses it.

(b) Whether The Prosecutor Established That "A White Man" May Have Attempted To Steal Documents Identifying A Prosecution Witness From The Ngoma *Commune* Office

25. The Prosecutor relies, in support of this allegation, on FAY's statement, according to which:

(i) "[S]ometime in March this year", a person referred to as a "white man" was granted access to the Office archives, from which that person selected a number of documents;

(ii) FAY "asked him to make photocopies of the documents [...] and return the originals [to] the files", and he or she "gave him a room and someone to help him do the photocopying";

(iii) "[I]nitially [the white man] wanted to carry the documents away with him" and "[FAY] saw that he did not like the idea of having another person around when he was doing photocopies"; and, finally,

(iv) FAY "refused" to let him carry the documents away.

26. For the reasons articulated at § 22 above, the Prosecutor has failed to establish that the "white man" referred to by FAY may have known that the documents in question referred to a Prosecution witness. In the Chamber's view, that conclusion alone essentially impairs this allegation of contempt.

27. The Chamber further notes, as submitted by Counsel for Kanyabashi, that FAY's statement does not establish that the person in question may have attempted to steal documents, irrespective of their content. Indeed, the Chamber is not satisfied that the individual concerned may have attempted to remove documents from the *Commune* Office with the intention of stealing them and, accordingly, rejects this allegation of contempt.

(c) Whether The Prosecutor Established That Identified and/or Unidentified Individuals, While Conducting Interviews With Prosecution Witnesses, Induced Them or Attempted To Induce Them To Change Their Testimony

28. Five of the seven witnesses whose statements have been produced (namely, XV, HF, RO, FAX and RJ) relate to an interview which took place in Butare, Rwanda, with one "Boubou", or a "black person", and several other identified or unidentified individuals, including "a white man".

29. The Chamber notes again the Prosecutor's failure to establish that the individuals concerned and/or others, may have known that the individuals contacted were Prosecution witnesses (*See* § 22 *supra*). In the Chamber's view, that conclusion alone essentially impairs this allegation of contempt.

30. The Chamber, however, notes that, upon interviewing XV, HF, RO, FAX and RJ, the individuals in question, including the person referred-to as "Boubou", may have

realised that these individuals, or some of them, may be among the Prosecution's witnesses. Even had the Prosecutor adduced *prima facie* evidence of the above proposition, the Chamber considers that the relevant witness statements would not support such an allegation of contempt.

31. FAX's statement does not support this allegation. The Prosecutor may, however, have considered that XV, HF, RO, FAX and RJ's statements were relevant, as follows:

(i) RJ states that: "As I started talking about the bad things Kanyabashi did, Boubou produced [...] Colonel Muvunyi's photograph and asked me if I knew him. I said yes and told him the man was Col. Muvunyi. He then said couldn't I say that Kanyabashi did the bad things because of the orders he received from Colonel Muvunyi. I said no. [...] I remember Boubou asking me why I was talking about the bad things only and whether I did not know about the good things Kanyabashi did, but I told him I was not aware of the good things [...]";

(ii) HF states that: "[Boubou] [...] wondered why I was not citing Col. Muvunyi as the one who did the bad things. I talked [...] instead of Kanyabashi";

(iii) RO states that: "[...] Boubou then showed me a photograph of Col. Muvunyi and asked me if I knew who he was. I told him that I knew Col. Muvunyi [...]. Boubou proposed to me if it wasn't true to say that Col. Muvunyi in fact gave orders to Kanyabashi [to] kill people. I disagreed with his proposition [...]. Boubou [...] insisted that I accept the proposition that Kanyabashi received orders to kill from Col. Muvunyi.";

(iv) XV (referring to an interview with "a white man" and "three black persons") states that: "They [...] said that Kanyabashi did all those things because of the pressure from Colonel Muvunyi [...]".

32. Counsel for Kanyabashi did not contest that one Boubou Diabira is currently working as an Investigator and member of their Defence team and that he was working for their team at the time of the alleged events. In the Chamber's view, however, even assuming that "Boubou" and Mr Diabira are one and the same person, that person's insistence on mentioning Colonel Muvunyi and asking the witnesses whether they could say, or why they would not say, that Kanyabashi acted upon his orders during the events of 1994 is capable of an innocent explanation. Such questions could be seen as efforts to investigate their case. For example:

(i) FAX states that "Boubou's group asked if [redacted] knew of any good things Kanyabashi did during [the] genocide"; while

(ii) XV states that "[t]hey [...] insisted that I tell them all the things that Kanyabashi did, including the good things", but that "it was very evident from the questions they asked me that they only wanted me to tell them about the good thing Kanyabashi did during [the] genocide"; and

(iii) RJ states that "Boubou [...] asked me to tell him about the good and bad things Kanyabashi did during [the] genocide" and that "I remember Boubou asking me why I was talking about the bad things only and whether I did not know about the good things Kanyabashi did [...]"; or

(iv) RO, that Boubou declared that "all he wanted to know is what Kanyabashi did during [the] genocide"; or again

(v) HF, that "Boubou asked me to tell him the good things Kanyabashi did during [the] genocide"; and that, "whenever I talked about the bad things Kanyabashi did, Boubou did not write down what I said [while] if I mentioned something that sounded good about Kanyabashi, Boubou quickly noted that down".

33. For these reasons, the Chamber is not satisfied that the individuals concerned may have tried to induce Prosecution witnesses to change their testimonies. The Chamber, accordingly, dismisses this allegation of contempt.

(d) Whether The Prosecutor Established That Identified And/Or Unidentified Individuals May Have Attempted To Falsely Record Witnesses Statements

34. The Prosecutor relied mainly on RO's statement in support of this allegation. RO declares that: "Boubou went on to hand me a document that had my particulars and address and he asked me to sign it though he could not let me read its contents. I told him that I could not sign a document whose contents I did not know. I said that if he wanted me to sign he had to come [...] with a document that reflected everything we had discussed and that I would have to read it first before signing".

35. However, the Chamber considers that neither the above statement, nor the other statements referred to by the Prosecutor, constitute *prima facie* evidence of any attempt "to falsely record a version of the evidence given by a potential witness so as to exculpate Kanyabashi" (Motion, § 40; *See also*, notably, Motion, § 37). Specifically, the Chamber notes that RO's statement does not indicate that the content of the document allegedly produced for signature by Boubou could have contained a falsified account of the interview. The Chamber, accordingly, dismisses this allegation of contempt.

36. The Chamber further generally emphasises that the Prosecutor did not dispute that the statements disclosed show that contact was made in broad daylight by the person identified as Boubou and by other individuals and that they appear to have contacted the witnesses through proper and official channels. Particularly, FAZ's statement indicates that they went to the concerned individuals' workplace and that they were granted permission by their supervisor to interview them. This, in the Chamber's view, can hardly be reconciled with any intention to commit contempt.

(4) The Prosecutor's Allegations of Misconduct of Counsel

37. Lastly, in view of the reasons set out above to dismiss the Prosecutor's allegations of contempt pursuant to Rule 77 of the Rules, the Chamber dismisses all allegations of Misconduct of Counsel pursuant to Rule 46 of the Rules, which relate to the same facts.

III. DISPOSITION

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FOR THE ABOVE REASONS,

THE TRIBUNAL

I. **FINDS** that the Prosecutor did not adduce *prima facie* evidence of contemptuous conduct or that Misconduct of Counsel may have occurred in the present case; and, accordingly,

II. **DISMISSES** the Prosecutor's Motion.

Arusha, 30 November 2001

William H. Sekule
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

(Seal of the Tribunal)