



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

ICTR-01-70-T

14-12-2007

(3714-3710)

**Before:** Judge Asoka de Silva, Presiding  
Judge Taghrid Hikmet  
Judge Seon Ki Park

**Registrar:** Mr Adama Dieng

**Date:** 14 December 2007

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-T



EMMANUEL RUKUNDO  
PROSECUTOR

DECISION ON THE HAGUMA REPORT

*Rules 54 and 91 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Mr William T. Egbé  
Mr Sulaiman Khan  
Mrs Veronic Wright  
Mr Patrick Gabaake  
Mr Disengi Mugeyo  
Ms Amina Ibrahim

**Counsel for the Defence:**

Ms Aïcha Condé  
Ms Alison Turner



3713

## INTRODUCTION

1. The evidentiary phase in this case was concluded on 22 October 2007. On 16 and 17 November 2006, the Chamber heard the testimony of Prosecution Witness BLP. After denying the Defence request to recall Witness BLP for the alleged recantation of his testimony, – the Defence had submitted two letters purportedly written by Witness BLP apologizing and asking for forgiveness from the Accused for giving false testimony – the Chamber ordered *proprio motu* that Witness BLP be called as its own witness.<sup>1</sup> Witness BLP re-appeared on 2 July 2007 and testified that he did not wish to vary any of his prior testimony.<sup>2</sup> The Chamber then instructed the Registry to conduct an investigation into the allegations of false testimony of Witness BLP and the alleged violations of protective measures surrounding the witness, and the Defence investigator, Léonidas Nshogoza, and to submit its findings within two months.<sup>3</sup>

2. The Registrar appointed Mr. Jean Haguma<sup>4</sup> as an independent investigator for this task.<sup>5</sup> After several extensions of time granted by the Chamber and an explanation in open court by the Deputy Registrar for the delay in submitting the investigation report, Mr. Haguma appeared in Court on 11 October 2007 to present his findings and answer questions from the parties.<sup>6</sup> The Chamber accepted the report of the findings as an exhibit (“Haguma report”)<sup>7</sup> after granting the Defence an opportunity to cross-examine Mr. Haguma, and thereafter granted the Defence a further 10 days within which to file its conclusions on the report.<sup>8</sup> The Prosecution also submitted observations<sup>9</sup>, and the Defence replied to those observations.<sup>10</sup>

## DELIBERATIONS

*i) Preliminary Issue*

3. The Defence submits that although its Reply to the Prosecution Response was marked as filed on 1 November 2007, it was actually filed on 31 October 2007, the day it was due as per the time limits contained in Rule 73(E) of the Rules of Procedure and Evidence. The Chamber notes that the filing is marked by the ICTR fax centre as received prior to the close of business on 31 October 2007, and therefore accepts the Reply as being filed in a timely manner.

*ii) The Haguma Report*

4. The Haguma report concludes that 1) the Defence violated protective measures because of the meetings between the Defence Investigator Léonidas Nshogoza and Witness

<sup>1</sup> Decision on Defence Motion to Recall Prosecution Witness BLP, 30 April 2007, disposition.

<sup>2</sup> T. 2 July 2007, p. 42 (Closed Session).

<sup>3</sup> Decision on Motions Relating to the Scheduled Appearances of Witness BLP and the Defence Investigator, 4 July 2007, disposition.

<sup>4</sup> Jean Haguma is an attorney in Rwanda. He is also registered on the Registrar’s list of Counsel eligible for assignment.

<sup>5</sup> See contract between May Nwanze, OIC, Staff Recruitment Unit, and Jean Haguma dated 7 July 2007.

<sup>6</sup> T. 11 October 2007, p. 36-51.

<sup>7</sup> Chamber exhibit X1.

<sup>8</sup> Conclusions de la défense de la rapport d’enquête de Monsieur Haguma, filed on 23 October 2007, after the Chamber granted an extension on 16 October 2007 so that the Defence could have the annexes to the report.

<sup>9</sup> The Prosecution’s Comments on the Report of Mr. Haguma on the Investigation Ordered by the Trial Chamber on 4th July 2007, filed on 26 October 2007.

<sup>10</sup> Conclusions en duplique de la défense suite au dépôt du rapport de monsieur Haguma, filed on 1 November 2007.



BLP; 2) the Prosecution did not violate protective measures by revealing Witness BLP's name to the Prosecutor of Gitarama and the Gitarama Prison Director unless it disclosed to them Witness BLP's letter; and 3) Witness BLP wrote (at least) one of the two letters sent to the Accused Rukundo recanting his testimony upon the threat of the Defence investigator Nshogoza and another priest mentioned in the report. The report further concluded that Witness BLP wrote the letter, because he was afraid for his life, but stands by the testimony he gave before the Chamber.

5. The Defence claims that there are defects in the form of the report (translation errors, incomplete annexes, and failure to disclose methodology), as well as in the substance (inconsistent conclusions, conflicting accounts, lack of examination of a handwriting expert, failure to interview the priest mentioned in the report, the incomplete nature of BLP's statements, failure to verify the authenticity and information provided by Defence Counsel). It requests the Chamber to reject the report, order disclosure of the missing elements, order the interview of the priest mentioned in the report, order the investigation of Nshogoza's telephone records, and order the Rwandan government to stay out of this case. The Defence also contends that the Prosecutor violated protective measures and should be sanctioned accordingly.

6. The Prosecution submits that the report should stand, that the investigator Nshogoza, and Lead Counsel Ms. Condé as Mr. Nshogoza's superior, should both be sanctioned for violating protective measures, and finally that the matter be referred to the ICTR Prosecutor for further action.

*iii) Content of the Report*

7. The Chamber notes the shortcomings of the Haguma report. Although the presentation of additional information may have been enlightening, the Chamber finds that this is not necessary, nor would it have been determinative of the Chamber's credibility evaluation of Witness BLP.

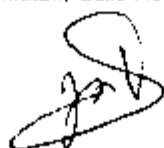
*iv) Concerning Nshogoza's arrest*

8. The Defence asks that the Chamber use its powers pursuant to Article 8 of the Tribunal's Statute to order the Rwandan government to stop interfering with the functioning of the ICTR. The Chamber assumes that the Defence is referring to the arrest of Mr. Nshogoza by the Rwandan authorities.

9. The Prosecution also requests that this matter be referred to the ICTR Prosecutor for further action. The Chamber notes that it is not clear which matter is requested for referral to the ICTR Prosecutor; the alleged breach of protective measures by Nshogoza to be determined by this Trial Chamber, or Nshogoza's case before the Rwandan authorities.

10. The Chamber was seized, in a separate motion, by the issue of Nshogoza's arrest and functional immunity.<sup>11</sup> That request was subsequently withdrawn following the Registrar's declaration that Nshogoza did, in fact, benefit from functional immunity. The Chamber therefore finds that these issues have already been resolved. As decisions have now been

<sup>11</sup> See Urgent Request for Court Order that United Nations Functional Immunity Applies to Leonidas Nshogoza, Defence Investigator for Emmanuel Rukundo Arrested in Rwanda on 16/6/07, filed on 19 October 2007, and subsequent filings.



rendered on all of the motions that would have a bearing on the arguments in the closing brief, the Chamber also disposes of the Defence motion in that regard.<sup>12</sup>

*v) Accepting the Report*

11. The Chamber recalls that it has already accepted the Haguma report as an exhibit in this case, following the live testimony of Mr. Haguma.<sup>13</sup> The weight to be accorded to the report will be decided at a later stage after the Chamber assesses the totality of the evidence.<sup>14</sup> Regardless of its shortcomings, the Chamber sees no reason to exclude the Haguma report.

*vi) Sanctions for the Prosecution*

12. The Defence requests that the Prosecution be sanctioned for violating the Chamber's Order on protective measures by disclosing a confidential letter purportedly written by Witness BLP during its own investigations into the witness' possible false testimony. The Chamber notes that a person who knowingly and willfully violates an order of a Chamber by disclosing information relating to the proceedings may be held in contempt pursuant to Rule 77(A)(ii) of the Rules.<sup>15</sup> In making this determination, the Chamber must first have some evidence that the order was violated.<sup>16</sup> Sanctions can also be imposed by the Chamber pursuant to Rule 46(A) of the Rules when a counsel, after a warning, "remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice."

13. In this case, the Chamber does not have any evidence that the Prosecution disclosed the confidential letter. For this reason, the Chamber denies the Defence request to impose sanctions upon the Prosecution.

*vii) Sanctions for the Defence*

14. The Prosecution requests that sanctions be imposed on the Defence for the actions of its investigator who allegedly met or contacted protected Witness BLP in breach of the Chamber's Order for protective measures. As stated above, in order to be held in contempt, a procedure which may have criminal consequences, there must first be an evidentiary showing to conclude that the Chamber's Order was violated. Specifically, the party alleging the conduct must show that the action was done with specific intent and that the violator had actual knowledge and intended to consciously disregard the order.<sup>17</sup> Bearing in mind the importance of the principle of the presumption of innocence in determining applications for

<sup>12</sup> Requête de la Défense aux fins de voir statuer avant le dépôt du mémoire sur les requêtes pendantes devant la Chambre, filed on 19 November 2007 (The defence specifically mentions four motions which had not yet been decided, but have now all been decided).

<sup>13</sup> T. 11 October 2007, p. 47.

<sup>14</sup> *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Arsène Shalom Ntahobali and Pauline Nyiramasuhuko on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (AC), 2 July 2004, para. 15; *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.

<sup>15</sup> See Rule 77(A)(ii) of the Rules of Procedure and Evidence.

<sup>16</sup> *Prosecutor v. Dusko Tadic*, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin (AC), 31 January 2000, para. 29. The AC stated that it first needed to consider whether the allegations had been established against the Respondent charged with contempt.

<sup>17</sup> *Prosecutor v. Simeon Nchumihigo*, Case No. 2001-63-T, Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses (TC), 10 August 2007, para. 9, citing *Prosecutor v. Nyiramasuhuko et al.*, Case Nos. ICTR-97-21-T, ICTR-97-29-T, ICTR-96-15-T, ICTR-96-8-T, Decision on the Prosecutor's Further Allegations of Contempt (TC), 30 November 2001, para. 20; *Prosecutor v. Zlatko Aleksovski*, ICTY Case No. IT-95-14/1, Judgement on Appeal by Anto Nobile Against Finding of Contempt (AC), 30 May 2001, para. 25.

content, the Chamber finds that allegations of contempt are to be considered with due care.<sup>18</sup>

15. The Haguma report asserts that Mr. Nshogoza violated the Order for protective measures by contacting protected Witness BLP. The Defence investigator, Nshogoza, does not deny contacting the witness but insists that he did not initiate communication with Witness BLP.<sup>19</sup> The Chamber has information to the effect that when the first contact between Witness BLP and Nshogoza was initiated, Mr. Nshogoza e-mailed Lead Counsel, Ms. Condé to inform her about his contact with the witness and to seek her guidance on the matter. Lead Counsel, Ms. Condé advised Nshogoza to instruct the witness to put his concerns in writing.<sup>20</sup>

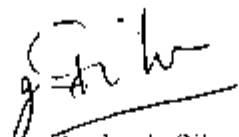
16. The Chamber finds, from Nshogoza's own admission, as seen in Haguma's notes where Nshogoza stated that he met with Witness BLP on several occasions, that Nshogoza had contact with Witness BLP without prior permission from the Chamber. Lead Counsel, Ms. Condé, violated the Chamber's Order for protective measures by urging Mr. Nshogoza to solicit a statement from the witness. Nevertheless, the facts of the meetings between Mr. Nshogoza and Witness BLP are shrouded in ambiguities and inconsistencies such that they do not satisfy the criteria to hold Mr. Nshogoza or Ms. Condé in contempt. In particular, the Chamber finds no evidence that the conduct in question was done with specific intent. The Chamber, however, cannot absolve Mr. Nshogoza and Ms. Condé of the admitted conduct related to Witness BLP, which the Chamber considers to have been contrary to the interests of justice, and hereby issues a warning pursuant to Rule 46(A) of the Rules to Ms. Condé as Lead Counsel for the Defence for Rukundo.<sup>21</sup>

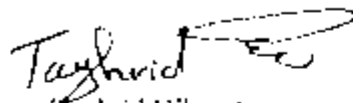
#### THE CHAMBER THEREFORE

**ISSUES A WARNING** to Ms. Condé pursuant to Rule 46(A) of the Rules;

**DENIES** the remainder of the relief sought.

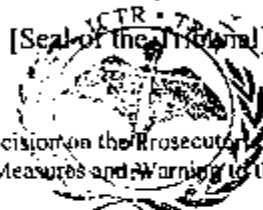
Ansha, 14 December 2007, done in English.

  
Asoka de Silva  
Presiding Judge

  
Taghriddin Hikmet  
Judge

  
Seon Ki Park  
Judge

[Seal of the Tribunal]



<sup>18</sup> *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Prosecutor's Allegations of Contempt, the Harmonization of the Witness Protective Measures and Warning to the Prosecutor's Counsel (TC), 10 July 2001, para. 6.

<sup>19</sup> Annex to Final Haguma Report, filed on 17 October 2007, notes from meeting with Leonidas Nshogoza.

<sup>20</sup> Annex to Final Haguma Report, e-mail from Leonidas Nshogoza to Aicha Condé dated 30 December 2006; Final Haguma Report p.5; Conclusions de la défense du rapport d'enquête de Monsieur Haguma, *supra* at fn 7, p. 14.

<sup>21</sup> *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme Bicomumpaka, and Prosper Mugiraneza*, Case No. ICTR-02-50-T, Decision on Prosper Mugiraneza's Motion For An Order Requiring Paul Ng'arusu To Show Why He Should Not Be Held In Contempt Of The Tribunal (TC), 12 May 2004, paras. 6-7 (although the Chamber found that a breach occurred, it held that the breach was accidental and decided not to levy sanctions or order an investigation).

