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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: English

TRIAL CHAMBER II

**Before:** Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuiga Muthoga  
Judge Emile Francis Short

**Registrar:** Adama Dieng

**Dated:** 16 June 2008

THE PROSECUTOR  
vs.  
CASIMIR BIZIMUNGU  
JUSTIN MUGENZI  
JEROME BICAMUMPAKA  
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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**PROSECUTOR'S RESPONSE TO  
PROSPER MUGIRANEZA'S FIRST AMENDED EMERGENCY MOTION TO  
INSTITUTE PROCEEDINGS PURSUANT TO RULE 77**

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Mr. Justin Mugenzi  
Mr. Jerome Bicamumpaka  
Mr. Prosper Mugiraneza

**PROSECUTOR'S RESPONSE TO  
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**Introduction**

1. Mr. Prosper Mugiraneza requests in his motion dated 6 June 2008 ("the Motion") that the Trial Chamber ("TC") institute contempt proceedings against officials of the Government of Rwanda and others for intimidating and threatening, causing injury or otherwise interfering with witnesses who have testified before the TC in this cause.
2. The Prosecutor responded to Mr. Prosper Mugiraneza's original *ex parte* motion filed under seal. That response being extant is incorporated and forms part of this response. The Motion states that nine named protected defence witnesses are involved and they are all Tutsi survivors who earlier testified under the witness protection order granted in favour of Mr. Prosper Mugiraneza.
3. The issues raised in the motion may be summarised as, from certain documents gathered from the ICTR Registry from the concerned witnesses, there is a *prima facie* case that IBUKA and the Government of Rwanda harassed and retaliated against witnesses, and the Tribunal should call the government of Rwanda and IBUKA officials before it to answer contempt charges, or order an investigation into the allegations.
4. The Prosecutor objects to the Motion and responds to it as set out below.

**Statement of the law**

5. ***Rule 77: Contempt of the Tribunal***
  - (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who
    - (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
    - (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
    - (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

- (iv) 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 potential witness; or
- (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.
- (B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.
- (C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
  - (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
  - (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
  - (iii) initiate proceedings itself.
- (D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:
  - (i) in circumstances described in paragraph (C) (i), direct the Prosecutor to prosecute the matter; or
  - (ii) in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.
- (E) The Rules of Procedure and Evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.
- (F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.
- (G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding five years, or a fine not exceeding USD10,000, or both.
- (H) Payment of a fine shall be made to the Registrar to be held in a separate account.

- (I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.
- (J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless:
  - (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
  - (ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.
- (K) In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President. Where the impugned decision is rendered orally, the appeal shall be filed within fifteen days of the oral decision, unless:
  - (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
  - (ii) the Appeals Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

**Rule 77 power is inherent and discretionary**

6. The Tribunal in the exercise of its *inherent power may* hold in contempt those who knowingly and wilfully interfere with its administration of justice (bold italics for emphasis). Consequently, the core issue here is whether the Motion establishes sufficient or reasonable grounds, taking into consideration all the material put before the Chamber, to justify the exercise of the Chamber's discretion under the provisions of Rule 77, including an order for an investigation of the allegations.
7. The Motion lacks sufficient and reasonable grounds for the exercise of the Chamber's discretion and as such it is bad and unsustainable at law for the many reasons, but not limited to, those set out below and the Chamber should deny it.

**Preliminary point of law**

8. Mr. Prosper Mugiraneza requests contempt proceedings to issue against the government of Rwanda. The phrases “those who” and “including any person who” in Rule 77(A) cannot include a government or more particularly the government of Rwanda. The Statute or the Rules specifically employ the word government or the word State to refer to a government, or State, thus differentiating a government or a state from natural persons. Examples abound in Articles 6(2), (4), 15(2) 17(1), and 28 of the Statute; and Rules 7 (A), (B), 8, 9, 10 (A), (C), 11, 11*bis* (A), (C), (D) and (F), 12, 13, 39, 40, 40*bis*, 44, 46, 53, 55, 55*bis*, 56, 57, 58, 59, 60, 61, 66(C), 68, 71, 74, 90, 101, 103, 106, and 124.
9. These legal provisions specifically address governments or states. They specifically refer to governments or states as such, and not as “persons” consequently, Rule 77 does not contemplate governments or states as qualifying persons for the purposes of contempt proceedings. The only route available to compel or sanction states is a referral to the Security Council in the absence of their cooperation.
10. The request for the commencement of contempt proceedings, including an investigation into the allegations, against the government of Rwanda fails on this point of law. The Prosecutor will now consider the law relating to other qualifying persons such as IBUKA and others under the Motion.

#### **Threshold of Discretion in Rule 77 Contempt Proceedings**

11. All legal power, as opposed to duty, is inevitably discretionary to a greater or lesser extent, but now the emphasis falls upon the nature of the discretion itself, and the standards upon which the courts insist in order that it may be exercised in a proper and lawful way in accordance with the presumed intentions of the legislature that conferred it. Next, comes the sovereign principle that powers must be exercised reasonably and in good faith, and on proper grounds – in other words, that they must not be abused.<sup>1</sup>
12. The instant Motion fails the overriding test governing the request for the standards for the exercise of discretionary powers in that the request is improper, unlawful, unreasonable, and in bad faith. It is a ruse to delay the proceedings and undermine the true cause and course of justice. Consequently, the TC should apply the test of reasonableness to the reasons Mr. Prosper Mugiraneza gives for his request to commence contempt proceedings, including an investigation.
13. Paragraphs 6 to 9 of the Motion titled “Statement of Relevant Facts” provide the factual basis on which the request is grounded, as the nine witnesses in question were relieved of their membership of IBUKA, stripped of government benefits, and the government of Rwanda condoning this and his Investigator’s report.
14. The Prosecutor submits that these reasons fail the reasonability test. There is no clear and exclusive basis to conclude that whatever these witnesses suffered was because of their testifying in the instant case. That proposition is not established. The Investigator

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<sup>1</sup> Administrative Law, H.W.R Wade & C. F. Forsyth, 8<sup>th</sup> Edition 2000, page 315.

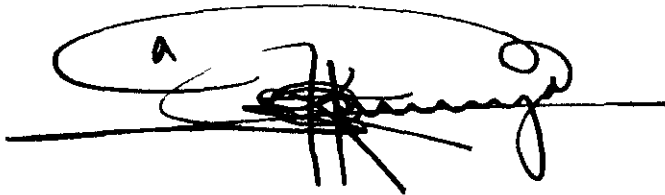
is part and indeed, he is an integral part of the Prosper Mugiraneza team. Therefore, he is partisan and unreliable. His report is of no value in establishing any of the facts alleged therein. The TC should discount it as worthless and of no assistance. Further, an important element of a prosecution under Rule 77 is the proof that the person to be held in contempt has acted "knowingly and wilfully"<sup>2</sup>. The evidence provided by the instant motion falls far short of providing any evidence of such intentional action. Therefore, even an investigation into the issue would be unwarranted.

15. The factual basis of the application fails the reasonability test and as such, the TC should not entertain the Motion. The least the TC could do in the circumstances as was the case in *Hormisdas NSENGIMANA*<sup>3</sup> where it was shown during trial that witnesses were being intimidated. In the instant case, unlike the Nsengimana case, the witnesses in question have completed their testimonies. They are *functus officio* as far as the instant proceedings are concerned. This is no more than a concocted allegation to slow down the trial.

#### Prayer

The Prosecutor prays that the Chamber deny the defence motion in its entirety.

**Dated in Arusha, Tanzania this 16<sup>th</sup> day of June 2008**

A handwritten signature in black ink, appearing to read 'Paul Ng'arua', is written over a horizontal line. The signature is stylized and somewhat illegible.

Paul Ng'arua  
Senior Trial Attorney

<sup>2</sup> *Prosecutor v. Nchamihigo*, Decision on defence motion on contempt of Court and Reconsideration of protective measures for defence witnesses [TC], 10 August 2007, para.9.

<sup>3</sup> *Prosecutor v. Nsengimana*, para. 1 of The Registry's Report To The Chamber on Alleged Interference with Prosecution Witnesses (Rule 33(B) of the Rules of Procedure and Evidence), 21 April 2008 - on 24 January 2008, Trial Chamber I requested the Registry to investigate allegations of security threats and/or unauthorized contact with witnesses made by Prosecution witnesses during their testimony.



## TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

### I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input checked="" type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
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<b>From:</b>	<input type="checkbox"/> Chamber (names)	<input type="checkbox"/> Defence (names)	<input checked="" type="checkbox"/> Prosecutor's Office <b>P. Ng'arua/Ndeye</b> <b>Marie Ka</b> (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. <b>Casimir Bizimungu, et al</b>			<b>Case Number:</b> ICTR-99-50-T
<b>Dates:</b>	Transmitted: <b>16/06/2008</b>		Document's date: <b>16/06/08</b>	
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<b>Title of Document:</b>	<b>PROSECUTOR'S RESPONSE TO PROSPER MUGIRANEZA'S FIRST AMENDED EMERGENCY MOTION TO INSTITUTE PROCEEDINGS PURSUANT TO RULE 77</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
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<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
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Reference material is provided in annex to facilitate translation.

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