



ICTR-99-50-T  
04-10-2004  
(18281 - 18268)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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Or: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Mr Adama Dieng

**Date:** 4 October 2004

**The PROSECUTOR**

v.

**Casimir BIZIMUNGU  
Justin MUGENZI  
Jérôme-Clément BICAMUMPAKA  
Prosper MUGIRANEZA**

*Case No. ICTR-99-50-T*

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**DECISION**

**RECONSIDERATION OF THE TRIAL CHAMBER'S DECISION OF  
5 FEBRUARY 2004 PURSUANT TO THE APPEALS CHAMBER'S DECISION  
OF 15 JULY 2004**

**Office of the Prosecutor:**

Mr Paul Ng'arua  
Mr Ibukunolu Babajide  
Mr Elvis Bazawule  
Mr Justus Bwonwonga  
Mr Shyamlal Rajapaksa

**Counsel for the Defence:**

Ms Michelyne C. St Laurent and Ms Alexandra Marcil for Casimir Bizimungu  
Mr Howard Morrison, QC and Mr Ben Gumpert for Justin Mugenzi  
Mr Pierre Gaudreau and Mr Michel Croteau for Jérôme-Clément Bicamumpaka  
Mr Tom Moran for Prosper Mugiraneza

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the “Trial Chamber”);

**SEISED** of the Appeals Chamber’s “Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence”, handed down and filed on 15 July 2004 (the “Appeals Chamber’s Decision”);

**NOTING** the findings and the directions made in the Appeals Chamber’s Decision, remitting a Decision of the Trial Chamber<sup>1</sup> (the “Remitted Decision”) on interlocutory appeal;

**RECALLING** that pursuant to the Appeals Chamber’s Decision, on 1 September 2004 the Trial Chamber invited submissions from the Parties;<sup>2</sup>

**HAVING RECEIVED**

- (1) “Prosper Mugiraneza’s Memorandum on Remand of Appeal of the Trial Chamber’s Order of 6 February 2004 and Motion for Additional Relief” filed on 3 September 2004 (“Mugiraneza’s Memorandum”);
- (2) The “Prosecutor’s Response to Prosper Mugiraneza’s Memorandum on Remand of Appeal of the Trial Chamber’s Order of 6 February 2004 and Motion for Additional Relief”, filed on 13 September 2004 (the “Response to Mugiraneza’s Memorandum”);

**SUMMARY OF THE PROCEDURAL BACKGROUND**

*The Indictment*

1. The Indictment against all four Accused in this case was confirmed by Judge Navanethem Pillay on 12 May 1999.<sup>3</sup> On 26 August 2003, the Prosecution filed a Motion to amend the Indictment.<sup>4</sup> On 6 October 2003, a differently composed Trial Chamber<sup>5</sup> denied the motion.<sup>6</sup> On 29 October 2003, the Trial Chamber certified the Prosecution’s

<sup>1</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber’s Decision of 23 January 2004 and for Other Appropriate Relief (TC), 5 February 2004.

<sup>2</sup> *Memorandum from Court Management Services Section*, 1 September 2004.

<sup>3</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Confirmation of the Indictment, 12 May 1999.

<sup>4</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Prosecutor’s Request for Leave to File an Amended Indictment (TC), 26 August 2003.

<sup>5</sup> At that time, the bench was composed of Judge William H. Sekule (Presiding), Judge Asoka de Zoysa Gunawardana, and Judge Arlette Ramarosan.

<sup>6</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment (TC), 6 October 2003.



request for leave to appeal that Decision of the Trial Chamber,<sup>7</sup> and on 3 November 2003, the Prosecution appealed the Decision denying it leave to amend the Indictment.<sup>8</sup> On 12 February 2004, the Appeals Chamber dismissed the Appeal, holding that the Trial Chamber acted within its discretion by refusing the requested amendment.<sup>9</sup> In the meantime, the trial of the case had commenced in earnest on 6 November 2003.<sup>10</sup>

### *The Decisions to Declare Testimony Inadmissible*

#### **Accused Casimir Bizimungu**

2. On 19 January 2004, Casimir Bizimungu filed a Motion requesting the Trial Chamber to declare inadmissible the testimony of five witnesses, to the extent that the anticipated testimony of four of them would exceed the scope of the Indictment. The fifth witness had already testified. In respect of this witness, the Motion requested that the portion of this testimony that exceeded the scope of the Indictment should be struck out retrospectively.<sup>11</sup> The Chamber heard the Parties on the matter on 22 January 2004,<sup>12</sup> and, on 23 January 2004, the Trial Chamber issued its Decision, granting the Defence Motion (the "*Bizimungu Decision*").<sup>13</sup> On 27 January 2004, Casimir Bizimungu filed a Motion requesting the Trial Chamber to declare inadmissible the testimony of four additional witnesses, insofar as their testimony would have taken the evidence outside the scope of the Indictment.<sup>14</sup> On 3 February 2004, the Trial Chamber issued a Decision granting the Motion, recalling its reasoning in the *Bizimungu Decision* of 23 January 2004 (the "*Second Bizimungu Decision*").<sup>15</sup>

#### **Accused Prosper Mugiraneza**

3. On 29 January 2004, Prosper Mugiraneza filed a Motion requesting the Trial Chamber to declare inadmissible the anticipated testimony of seventeen witnesses, on the ground that such testimony did not relate to factual allegations contained in the

<sup>7</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Request Pursuant to Rule 73(B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment (TC), 29 October 2003.

<sup>8</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Prosecutor's Appeal Against Trial Chamber II Decision of 6 October Denying Leave to File an Amended Indictment, 3 November 2004.

<sup>9</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment (AC), 12 February 2004.

<sup>10</sup> T. 6 November 2003.

<sup>11</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD et GFA, 19 January 2004.

<sup>12</sup> T. 22 January 2004, pp.1-47.

<sup>13</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA (TC), 23 January 2004.

<sup>14</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF et GKI, 27 January 2004.

<sup>15</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI (TC), 3 February 2004.



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Indictment.<sup>16</sup> The *Mugiraneza* Motion also contained a request, similar to the *Bizimungu* Motion, seeking a retrospective exclusion of the testimony of two witnesses who had already testified. The Chamber heard the Parties on 5 February 2004,<sup>17</sup> and issued its Decision on the same day.<sup>18</sup>

4. The Trial Chamber decided the Defence Motion in the following terms:

The Trial Chamber observes that the Prosecutor has failed to mention as material facts in the Indictment the involvement of Prosper Mugiraneza in the events that took place in Kibungu and Cyangugu *préfectures*. Hence, the evidence sought to be adduced from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ and LY will not be relevant or admissible against Prosper Mugiraneza, in so far as it implicates him in Kibungu and Cyangugu *préfectures*. Therefore, the Trial Chamber is of the view that the Prosecutor shall not be permitted to lead any evidence, relating to events implicating Prosper Mugiraneza in Kibungu and Cyangugu *préfectures* from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ and LY.

However, the Trial Chamber notes that the Indictment charges the Accused with Conspiracy to Commit Genocide as alleged in Count 1 of the Indictment and Complicity in Genocide as alleged in Count 3 of the Indictment. The Trial Chamber considers that in certain paragraphs of the Indictment, for example paragraphs 6.14, 6.23, 6.25, 6.31 and 6.68, adequately set out the material facts in relation to the commission of those offences. Therefore, the Trial Chamber is of the view that evidence from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ can be adduced in support of those charges.

5. Furthermore, regarding Mugiraneza's request for the retrospective exclusion of evidence already received, the Trial Chamber made the following finding:

Finally, the Trial Chamber notes that Witness GTE and Witness GKP have already testified before this Chamber on 1 and 2 December 2003 and on 5 and 8 December 2003 respectively. The Trial Chamber is of the view that the appropriate time to raise an objection seeking to exclude the evidence of the said witnesses was before the commencement of the evidence of the disputed witnesses or at least during the testimony of these witnesses. Furthermore, the Defence for Prosper Mugiraneza did not take the objection at the appropriate time, and since it had the opportunity to cross-examine the said witnesses, the Trial Chamber considers that no prejudice has been caused to the Accused. Therefore the Trial Chamber does not find any reason to exclude the evidence of

<sup>16</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 29 January 2004.

<sup>17</sup> T. 5 February 2004, pp. 1-27; T. 5 February 2004, pp. 28-46.

<sup>18</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief (TC), 5 February 2004.

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these two witnesses in respect of events implicating Prosper Mugiraneza in Kibungo *préfecture*.

6. Both Parties requested leave to appeal. On 24 March 2004, the Trial Chamber certified both those requests.<sup>19</sup> On 15 July 2004, the Appeals Chamber reversed the Trial Chamber's Decision of 5 February 2004, and directed the Trial Chamber to re-consider Mugiraneza's request in light of the Appeals Chamber's finding that the Trial Chamber had failed to articulate the reasonable basis for the exercising of its discretion in relation to the two co-accused. In this connection, the Appeals Chamber reasoned as follows, among other things:

While the exercise of the discretion of different Trial Chambers in relation to different cases is an unhelpful comparison to make, where the exercise of discretion concerns co-accused situated in an identical situation and results in different treatment being accorded to each of them, then *an assessment of the reasonableness of that distinction can only be made if the Trial Chamber provides reasons for that distinction.*<sup>20</sup>

7. In the same Decision, the Appeals Chamber dismissed the Prosecution's cross-appeal because it had failed to establish a discernible error committed by the Trial Chamber in the exercise of its discretion in this case.

8. On 1 September 2004, the Trial Chamber invited both Prosper Mugiraneza and the Prosecution to make further submissions in the light of the Appeals Chamber's direction that the Trial Chamber should reconsider the matter.<sup>21</sup>

#### FURTHER SUBMISSIONS OF THE PARTIES

9. The Defence submits that the Appeals Chamber Decision on 15 July 2004 vacated the Trial Chamber's Decision to the extent that it allowed the introduction of testimony relating to Mugiraneza's personal activities in Kibungo and Cyangugu *préfectures* and to the extent that it denied the request to retrospectively exclude the two witnesses who had already testified on his activities in these areas.<sup>22</sup>

10. The Defence further states that "the substance of the Appeals Chamber's remand order was that the Trial Chamber may have abused its discretion by granting one form of relief to one Accused, Casimir Bizimungu, but granting less relief to Mugiraneza based on the same set of facts". The Defence again states that parties identically situated should be treated identically.

<sup>19</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004 (TC), 24 March 2004; *The Prosecutor v. Bizimungu et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 5 February 2004 (TC), 24 March 2004.

<sup>20</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence (AC), 15 July 2004, para 21. (Emphasis added).

<sup>21</sup> Memorandum from Court Management Services Section, 1 September 2004.

<sup>22</sup> Memorandum, para. 2.



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11. In the submission of the Defence, the Appeals Chamber Decision further requires the Trial Chamber to strike or otherwise retroactively exclude evidence received in accordance with the Remitted Decision.<sup>23</sup>

12. The Defence includes in its Memorandum a request for additional relief. Citing judicial economy and "the status of the case" as justification, it requests the Trial Chamber to exclude "all testimony of all witnesses concerning [Mugiraneza's] personal actions in Kimbungo [sic] and Cyangugu prefectures to the extent that those acts are not pled in the indictment".<sup>24</sup>

13. In its Response to the Memorandum, the Prosecution submits that the Appeals Chamber concluded that the exercise of discretion by the Trial Chamber is a matter within the inherent powers of the Chamber.<sup>25</sup>

14. In relation to the request in the Memorandum for additional relief, the Prosecution objects, stating that the issue of additional relief is unrelated to the instructions of the Chamber in requesting the current submissions of the Parties, and furthermore does not form part of the Appeals Chamber Decision. Therefore the request should be disregarded.<sup>26</sup>

## DELIBERATIONS

15. The Appeals Chamber Decision requires the Trial Chamber to explain why it arrived at two different Decisions in respect of the Motions by Bizimungu and Mugiraneza in circumstances where both accused appeared to be situated in an identical situation. The Appeals Chambers reasoned thus:

22. If there is a reasonable basis for the Trial Chamber exercising its discretion differently in relation to the two co-accused, the Trial Chamber failed to articulate that basis in its decision. The Trial Chamber found that Bizimungu would be prejudiced by the admission of the evidence sought to be excluded and, in contrast, that Mugiraneza would not be so prejudiced, in relation to the same counts, by the evidence relating to events in Prefectures not identified in the Indictment. In these circumstances, the Appeals Chamber cannot be satisfied that no such error occurred.

23. [...]

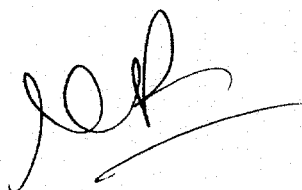
24. For the foregoing reasons, the Appeals Chamber is not satisfied that the Trial Chamber committed no error in the exercise of its discretion in holding that the evidence of the identified witness could be led in relation to Counts 1 and 3 of the Indictment, and by its refusal not to exclude the evidence of GTE. As the

<sup>23</sup> Memorandum, para. 10.

<sup>24</sup> Memorandum, para. 12.

<sup>25</sup> Response to the Memorandum, para. 3.

<sup>26</sup> Response to the Memorandum, para. 4.



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Appeals Chamber is unable to identify the basis of the distinction drawn by the Trial Chamber between the two co-accused the decision of the Trial Chamber in relation to Mugiraneza is reversed. The Trial Chamber is directed to reconsider the request of Mugiraneza in light of the guidance above.

16. The two main substantive issues the Trial Chamber had to deliberate upon in the Remitted Decision were:

- (a) The exclusion of the testimony of witnesses who had not yet testified; and
- (b) The retrospective exclusion of the evidence of Witness GTE and GKP who had already testified.

***The Exclusion of the Testimony of Witnesses Who Had not Testified***

17. The Trial Chamber recalls the submissions of the Parties whilst arguing the Motion leading to the Remitted Decision, set out in paragraphs 1-5 of the Remitted Decision, which are incorporated here by reference. Furthermore, and particularly in relation to the Prosecution submissions, the Trial Chamber notes that the brief was significantly modified by the oral submissions of 5 February 2004.

18. Whilst arguing the *Bizimungu* Motion, and in its written submissions, the Prosecution urged the Trial Chamber to accept the proposed testimony towards proof of all counts of the Indictment. However, during the oral submissions for the *Mugiraneza* Motion, the Prosecution advanced an "alternative argument", namely, that the testimony of the listed 17 witnesses, to the extent that they relate to acts occurring in Kibungo and Cyangugu *préfectures*, were being offered only in support of the charges of Complicity in Genocide ("Complicity") and Conspiracy to Commit Genocide ("Conspiracy").<sup>27</sup> The Prosecution submitted as follows:

- (i) The Indictment charges the crimes of Complicity and Conspiracy in sufficient detail, and for these crimes it is not necessary to prove the presence of the Accused at a crime scene.<sup>28</sup> For these crimes the Indictment need not go beyond the "elements of the crime" to give him notice.<sup>29</sup> The cabinet in Kigali [of which the accused was a member] hatched the conspiracy, and that everything else was in execution of that conspiracy.<sup>30</sup>
- (ii) The Indictment sets out with sufficient clarity the basis on which Complicity and Conspiracy are charged. This is so because the degree of specificity required to set out the material facts of these crimes in the Indictment is lower, and that the Trial Chamber should make its determination on these matters whilst understanding the nature of the Prosecution case.<sup>31</sup>

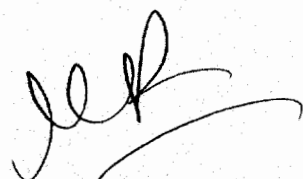
<sup>27</sup> T. 5 February 2004, pp. 12-13.

<sup>28</sup> T. 5 February 2004, p. 4.

<sup>29</sup> T. 5 February 2004, p. 9.

<sup>30</sup> T. 5 February 2004, p. 11.

<sup>31</sup> T. 5 February 2004, pp. 10 and 17.



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(iii) The Accused suffers no prejudice in facing the evidence sought to be excluded, as the evidence by which these charges would be proved was disclosed to the Defence in adequate time in the Pre-Trial brief and in the witness statements. Therefore the Accused can be under no illusion as to the evidence to which he must answer.<sup>32</sup> This is supported by the fact that Counsel for the Defence was ready and prepared to cross-examine Witnesses GTE and GKP without objection, and brought the Motion to exclude the evidence of 17 other witnesses only after the Decision in Bizimungu.<sup>33</sup>

19. The Defence, on the other hand, during its oral submissions maintained the same position as it had in its written submissions, urging the Trial Chamber to follow its own Decision given in the Bizimungu motion. In view of the alternative argument advanced by the Prosecution, the Chamber twice gave the Defence an opportunity to present arguments in rebuttal; however, the Defence failed to address the issue.<sup>34</sup>

20. It is the foregoing factors, which were not apparent in the reasoning of the Remitted Decision, which influenced the Trial Chamber in arriving at its Decision. The Trial Chamber therefore concluded in the following terms:

[...][The] Indictment charges the Accused with Conspiracy to Commit Genocide as alleged in Count 1 of the Indictment and Complicity in Genocide as alleged in Count 3 of the Indictment. The Trial Chamber considers that in certain paragraphs of the Indictment, for example paragraphs 6.14, 6.23, 6.25, 6.31 and 6.68, adequately set out the material facts in relation to the commission of those offences. Therefore, the Trial Chamber is of the view that evidence from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ can be adduced in support of those charges.

21. By contrast, the Prosecution, in the *Bizimungu* Motion, did not advance arguments on the relevance of the testimony of the proposed witnesses to the counts of conspiracy and Complicity. It made a brief reference to the idea of Conspiracy but did not elaborate the point. The Trial Chamber was therefore not afforded an opportunity in the Bizimungu Decision to consider this alternative submission. This analysis explains the difference in the outcome of the two Motions.

#### *Case Law on Sufficiency of the Indictment*

22. The Trial Chamber, in the following reasoning, will rely on the case law of this Tribunal as well as on other legal authorities. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Nyitegeka* case has accurately stated the position of both Tribunals on the issue of sufficiency and specificity of the Indictment. The Trial Chamber considers the following paragraphs as being particularly relevant:

<sup>32</sup> T. 5 February 2004, pp. 20-26; T. 5 February 2004, pp. 28-46.

<sup>33</sup> T. 5 February 2004, p. 12.

<sup>34</sup> T. 5 February 2004, pp. 42 and 45.





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193. The law governing challenges to the failure of an Indictment to provide notice of Material Facts is set out in detail in the ICTY Appeals Chamber's Judgment in *Kupreškić*. The *Kupreškić* Judgment stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21(2), 4(a) and 4(b), "translates into an obligation on the part of the Prosecution to state the Material Facts underpinning the Charges in the Indictment, but not the evidence by which such Material Facts are to be proven."<sup>35</sup> *Kupreškić* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution Charges personal physical commission of criminal acts, the Indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."<sup>36</sup>

[...]

195. Failure to set forth the specific Material Facts of a crime constitutes a "material defect" in the Indictment.<sup>37</sup> Such a defect does not mean, however, that trial on that Indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreškić* stated that a defective Indictment "may, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic.<sup>38</sup> *Kupreškić* left open the possibility that the Appeals Chamber could deem a defective Indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the Charges against him or her."<sup>39</sup>

23. Further, the Trial Chamber notes the decision of the Appeals Chamber in the *Nyiramasuhuko* Case<sup>40</sup> where it stated:

11. [...] for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence. The required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct. If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment. Where a defect remains, the question then arises whether the trial of the accused was rendered unfair.<sup>41</sup>

12. [...] the failure to specifically plead certain allegations in the indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion to under Rule 89(C) to admit any evidence which it deems to have

<sup>35</sup> *Kupreškić et al.* Appeal Judgment, para. 88.

<sup>36</sup> *Id.*, para. 89.

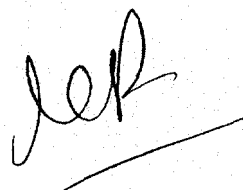
<sup>37</sup> *Id.*, para. 114.

<sup>38</sup> *Ibid.* (emphasis added).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Nyiramasuhuko v. Prosecutor*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004.

<sup>41</sup> (Internal footnote omitted).



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probative value, to the extent that it may be relevant to the proof of the other allegations specifically pleaded in the Indictment.

24. Being mindful of the consistency of the Appeals Chambers' case law to the effect that '[t]he required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct', the Trial Chamber recalls once more the Prosecution's elaborate submissions on the Conspiracy count, during the *Mugiraneza* Motion. As part of its submissions during the *Mugiraneza* Motion, the Prosecution had argued that a comparatively lower level of specificity is required in relation to the pleading of the material facts in the Indictment for Conspiracy and Complicity. The Prosecution did not bring to the attention of the Trial Chamber any case law on this issue. However, the jurisprudence of some national courts appear consistent with the Prosecution's position on this point. For example, in the United States Supreme Court, in the case of *Williamson*, it has been held that an indictment alleging a conspiracy to suborn perjury need not, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and of perjury.<sup>42</sup> The Court stated that "[...] in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy".<sup>43</sup> Similarly, in *Westbrook*, concerning an allegation of conspiracy to embezzle funds, the court pointed out that "the gist of the crime of conspiracy is unlawful agreement and that where a conspiracy is alleged it is not necessary to set out the criminal object of the conspiracy with as great certainty as is required in cases where such an object is charged as a substantive offence".<sup>44</sup>

#### *The Question of Prejudice Caused*

25. A fundamental consideration of the Appeals Chamber in reversing the Remitted Decision was the question of the Trial Chamber's determination of possible prejudice caused to the Accused.<sup>45</sup> In reconsidering the Motion, the Trial Chamber thus pays specific attention in its reasoning as to whether or not any prejudice would in fact be caused to the Accused by allowing the evidence of the impugned witnesses.

26. In determining the question of prejudice resulting from witness testimony that the accused could not fairly have anticipated, it is important to consider whether the Prosecution had provided to the Defence "timely, clear and consistent" disclosure of the challenged testimony. In this regard, the Trial Chamber notes that the Prosecution Pre-Trial Brief, filed on 20 October 2003,<sup>46</sup> gave sufficient notice to the Defence of the evidence underpinning the charges in the Indictment and that the Prosecution disclosed

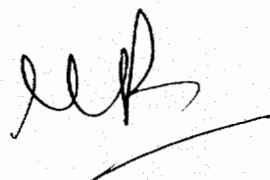
<sup>42</sup> *John Newton Williamson, Plff. In Err., v. United States*, 207 U.S. 425, 28 S.Ct. 163; later followed by the Supreme Court in *Wong Tai v. U.S.*, 273 U.S. 77.

<sup>43</sup> *Williamson*, p.171 [emphasis added]

<sup>44</sup> *United States v. Westbrook et al.*, 114 F.Supp. 192, at p.196. [emphasis added]

<sup>45</sup> Appeals Decision, para. 22

<sup>46</sup> *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 bis (B)(i), 20 October 2003.

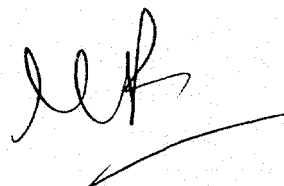


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the relevant witness statements of the impugned witnesses, in unredacted format on 8 October 2003.

27. For the purpose of determining whether or not the proposed testimony of the impugned witnesses has a direct bearing upon the Indictment served upon the Accused, the Trial Chamber has undertaken its own preliminary analysis as to the relationship between the testimony of these witnesses and the Indictment. This analysis is preliminary for the purposes of the present Motion only, and is not exhaustive at this stage.

- (i) The evidence of **Witness GJV**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 5.13, 6.16;**
- (ii) The evidence of **Witness GJQ**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 1.14, 1.15, 1.17, 1.28, 5.1, 5.3, 5.5, 5.10, 5.13, 5.14, 5.16, 6.14, 6.16, 6.18, 6.26, 6.30, 6.64, 6.68;**
- (iii) The evidence of **Witness GKP**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 1.17, 1.19, 5.15, 5.19, 5.20, 5.22, 6.16, 6.18, 6.22;**
- (iv) The evidence of **Witness GKS**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 6.26, 6.30;**
- (v) The evidence of **Witness GKM**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 1.15;**
- (vi) The evidence of **Witness GTF**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 1.14, 1.15, 1.17, 5.13;**
- (vii) The evidence of **Witness GKR**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 1.14, 1.15, 1.17, 5.1, 5.3;**
- (viii) The evidence of **Witness GJT**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 1.14, 1.15, 1.17, 5.1, 5.3, 5.10, 5.15, 5.16, 5.33, 6.14, 6.64, 6.68;**
- (ix) The evidence of **Witness GJR**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the



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following paragraphs of the **Indictment: 1.14, 1.15, 1.17, 5.10, 5.15, 5.19, 5.22, 6.14, 6.16, 6.18, 6.26;**

(x) The evidence of **Witness GJU**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.15, 6.16;**

(xi) The evidence of **Witness GJN**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 1.14, 1.15, 1.17, 5.1;**

(xii) The evidence of **Witness GJO**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 1.14, 1.15, 1.17, 4.15, 5.1, 6.16;**

(xiii) The evidence of **Witness GKT**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 6.35, 6.36, 6.66;**

(xiv) The evidence of **Witness GJX**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 5.2, 5.3, 5.15, 5.16, 5.19, 5.20, 6.16, 6.35, 6.36;**

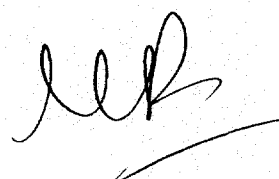
(xv) The evidence of **Witness GJW**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 5.3;**

(xvi) The evidence of **Witness GJZ**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 5.3, 5.15, 6.16, 6.35, 6.36;**

(xvii) The evidence of **Witness LY**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 5.1, 5.3, 5.22;**

(xviii) The evidence of **Witness GTE**, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the **Indictment: 4.15, 5.1, 5.3, 6.14, 6.15, 6.16, 6.26, 6.30, 6.31;**

28. Pursuant to this analysis, the Trial Chamber is satisfied that, in relation to the Conspiracy and Complicity counts, the testimony of each of these witnesses is relevant evidence in relation to the Indictment. Given also the pre-trial disclosure, including the unredacted witness statements, and the Prosecution Pre-Trial Brief which links the anticipated testimony of these witnesses to specific counts, the Trial Chamber is satisfied



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that the Accused has received adequate notice of the case against him in a clear and timely manner and that no prejudice will be caused to the Accused by the admission of the testimony of the witnesses.

***The Evidence of Witnesses Who Had Already Testified***

29. As regards the additional relief requested by the Accused, which was to exclude retrospectively the testimony of Witness GTE, the Chamber recalls the direction of the Appeals Chamber in the Appeals Decision:

23. The Trial Chamber claims that its decision to not exclude the evidence of Witness GTE, concerning the crimes Mugiraneza is alleged to have committed in Kibungo Prefecture, is based on the notion that no prejudice accrued to Mugiraneza given the Defence's opportunity to cross-examine the witness. In contrast, with respect to Bizimungu, the Trial Chamber excluded the evidence of witnesses in relation to the alleged crimes of which Bizimungu allegedly incurred criminal responsibility in Ruhengeri Prefecture on the basis that that geographical region had not been pleaded in the Indictment. The Trial Chamber failed to render clear reasoning on this issue.

30. The Trial Chamber now clarifies its reasoning and its ruling.

31. The Trial Chamber recalls that during the oral arguments of 5 February 2004, the Presiding Judge asked Defence Counsel for Mugiraneza the reason why he did not raise an objection to the evidence of Witness GTE at the time. Counsel simply responded that he "forgot".<sup>47</sup> The Trial Chamber found that:

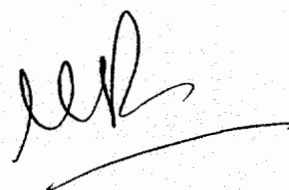
[...] the appropriate time to raise an objection seeking to exclude the evidence of the said witnesses was before the commencement of the evidence of the disputed witnesses or at least during the testimony of these witnesses. Furthermore, the Defence for Prosper Mugiraneza did not take the objection at the appropriate time, and since it had the opportunity to cross-examine the said witnesses, the Trial Chamber considers that no prejudice has been caused to the Accused.<sup>48</sup>

32. The Trial Chamber considers that, although the Appeals Chamber Decision had not mentioned the case of Witness GKP, who had also testified, it is necessary to address this issue along with the analysis regarding Witness GTE.

33. In the *Mugiraneza* Decision, the Trial Chamber considered whether prejudice had been caused to the Accused and decided that no prejudice had been caused. However, in the *Bizimungu* Decision, the Trial Chamber failed to consider the issue of prejudice to the Accused and decided to exclude the evidence "in the interests of justice" without explaining the factors that went into that finding. The Trial Chamber, in the *Mugiraneza* Decision, was satisfied that it had committed an error in the exercise of its discretion in

<sup>47</sup> T. 5 February 2004, pp. 2-3.

<sup>48</sup> Remitted Decision, para. 10.



the *Bizimungu* Decision and did not feel bound to follow the latter Decision. This accounts for the difference between the two decisions.

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34. Finally, the Trial Chamber understands that it did not make it sufficiently clear in its original findings in the Remitted Decision, but does so now, that it only intends to consider the evidence of Witnesses GTE and GKP in relation to the counts of Conspiracy and Complicity, in common with the other impugned witnesses, and for the same reasons.

**C: Conclusion**

35. The Trial Chamber finds that the Remitted Decision was correct in its result, although at the time inadequately explained its reasoning. Having so clarified the Decision, it does not find it necessary to address the Defence arguments contained in the Memorandum for additional relief.

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**REVISES** its Decision of 5 February 2004 in the following manner:

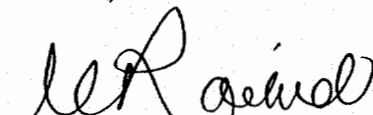
**GRANTS** the Defence Motion of 19 January 2004 in the following terms:

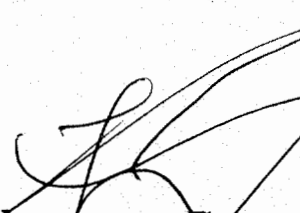
(i) Where the testimony sought to be adduced from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ, GTE, GKP, and LY relates to events occurring in Kibungu and Cyangugu *préfectures*, it will only be admitted as evidence against Counts 1 and 3 of the Indictment.

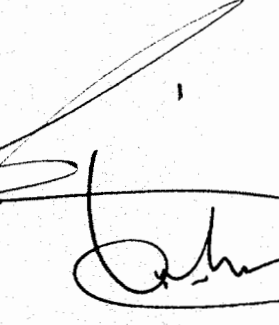
(ii) Where the testimony of any of the aforementioned Witnesses in relation to events occurring in Kibungu and Cyangugu *préfectures* has already been heard, the Trial Chamber will only consider that portion of their testimony as evidence against Counts 1 and 3 of the Indictment.

**DENIES** the Motion in all other respects.

Arusha, 4 October 2004

  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuiga Muthoga  
Judge

  
Emile Francis Short  
Judge

