



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 10 June 2008

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

**DECISION ON JUSTIN MUGENZI'S MOTION FOR FURTHER CERTIFIED
DISCLOSURE AND LEAVE TO REOPEN HIS DEFENCE**

Rule 68 of the Rules of Procedure and Evidence

Office of the Prosecutor:

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Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicomumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

INTRODUCTION

1. On 18 February 2008, the Defence for Justin Mugenzi (“Defence”) obtained disclosure of four statements detailing activities of the Rwandan Patriotic Front (“RPF”).¹ On 25 February 2008, the Defence filed a Motion requesting further certified disclosure under Rule 68 (A) of the Rules of Procedure and Evidence (“Rules”), and leave to reopen his defence.² Annexed to the Motion are the four statements disclosed by the Prosecutor.³

2. The Defence submits that all the statements constitute material which “may suggest the innocence or mitigate the guilt of the accused.”⁴ The Defence further submits that the Prosecutor has breached his disclosure obligations under Rule 68 (A) by failing to disclose the four statements in a timely manner. The Defence argues that had the statements been disclosed earlier, it would have had significant material to use in cross-

¹ The disclosure was made pursuant to a Defence request. See *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T (“*Bizimungu et al.*”), “Justin Mugenzi’s Motion for Disclosure of Certain Material under Rule 68”, 13 February 2008.

² *Bizimungu et al.*, “Justin Mugenzi’s Motion for Further Certified Disclosure and For Leave to Reopen his Defence”, 25 February 2008 (“Motion”).

³ - Statement of 6 April 2002: This statement details activities of the RPF Alpha Battalion based in Byumba prefecture. By 6 April 1994, it had almost 2000 combatants, who marched to Kigali in April 1994 and were deployed to: assist a 3rd Battalion company engaging the Presidential Guard Camp; secure Remera; block the Military Police Camp in Kami in case they attacked; and protect their Colonel and equipment. Orders were given to “eliminate any possible enemy” and attack and capture Kigali. By 9 April 1994, the Remera area was under RPF control. RPF “technicians” were used to destabilise Habyarimana’s regime through, for example, the attack on the Kigali Bus Park and killings of *Interahamwe*, and people who had been in Amahoro Stadium. The “technicians” also infiltrated the *Interahamwe* at roadblocks. They checked people’s identities and used machetes to kill in the same manner as the *Interahamwe* to avoid suspicion.

- Statement of 3 April 2003: This statement details infiltration of a roadblock in Nyamirambo, Kigali. The maker of the statement states that in December 1995, his father told him that the RPF had created “*Intinzi*” (the reason for victory) policy which included a “double genocide” committed in the Mutara region of Byumba, where the Hutu population was “systematically and totally liquidated.” It states that the same was happening in the Bugesera and Kibungo regions, with a view to creating a “Tutsiland.” The policy also included the: murder of any Hutu who had been a member of the MDR-Parmehutu and/or the MRND; disappearance of any Hutu returning to the country and had property or was likely to reclaim it; and the liquidation or prosecution before national or international tribunals; killing of young Hutus being captured by the RPA; and torture of natives of Gisenyi or Ruhengeri, or because they are Hutus.

- Statement of 28 March 2002: States that the RPF was responsible for the Kigali Bus Park bombing and the deaths of civilians who took refuge in the CND, Amahoro Stadium, the Meridien Hotel, Nzirorera’s house, and King Faycal Hospital. The civilians are said to have been suspected of working for, or collaborating with, the Habyarimana regime. The RPF was responsible for the death of civilians in Musha and in Bicumbi commune, Gahengeri, during May to June 1994, and for the deaths of soldiers executed in the Training Wings of Gishuro and Karama. “Technicians” were responsible for a number of murders within Kigali city but most technicians were killed by either FAR, the militia, or CDR supporters. In 1995, the RPA was responsible for the massacre of civilians in a refugee camp in Kibeho.

- Statement of 18 May 2002: States that 600 RPF soldiers were posted at the CND from December 1993 to April 1994 when about 100 “technicians” a week were trained at the CND. After 6 April 1994, they were ordered to kill all Hutus and the *Interahamwe* had started killings. The maker of the statement says his company moved towards Remera and Kanombe and attacked Gendarmerie Post in Remera and the Amahoro Stadium. Their HQ was at Kanombe Camp where Hutus were taken, and later transported to Gabiro, and killed by the Military Police.

⁴ Motion, para. 7.

examination of Prosecution witnesses and would have called the individuals, who made the statements, as witnesses.

3. The Defence requests that:

- (i) The Prosecutor make a full and proper search of all the material held in his possession, including material gathered during investigations into the possible commission of alleged RPF offences, with a view to establishing whether or not any further material exists, which falls within Rule 68 (A), and that such material be disclosed.
- (ii) The Prosecutor provide a written undertaking giving: names of persons who conducted the said searches, with dates; that those persons are satisfied that they had unrestricted access to all material held by the Prosecution; and that the results showed that no such further material exists.
- (iii) The Prosecutor either make formal admissions of fact that the contents of the statements disclosed are true, or, the Defence be allowed to re-open its case, to call the four witnesses, and any such other witnesses as may be necessary.

4. On 12 March 2008, the Prosecutor responded objecting to the Motion.⁵ The Prosecutor submits that the disclosed statements do not suggest the innocence or mitigate the guilt of the accused, nor do they affect the credibility of Prosecution evidence.⁶ The Prosecutor further submits that the statements do not disclose any new allegations. In reply, the Defence submits that the Prosecutor, when disclosing the four statements, accepted that Rule 68 (A) applied to them.⁷ The Defence reiterates that the statements are relevant to Justin Mugenzi's case and affect the credibility of Prosecution evidence.

5. On 12 March 2008, the Defence for Casimir Bizimungu ("Bizimungu Defence") made submissions in support of the Motion.⁸ The Bizimungu Defence submits that the four statements are crucial to the Defence case because they suggest Mr. Mugenzi's innocence, mitigate his guilt, and, may affect the credibility of Prosecution witnesses. The Bizimungu Defence requests that the Chamber grant the Defence Motion, and further order that the Prosecution: (i) conduct searches of RPF statements and where found, disclose these to the Defence teams; and (ii) allow access to the database of all documents identified by the reference code "R" as the four disclosed statements are identified by this code.

⁵ *Bizimungu et al*, "Prosecutor's Response to Mr. Justice Mugenzi's Motion for Further Certified Disclosure and for Leave to Reopen His Defence", 12 March 2008 ("Prosecutor's Response").

⁶ Prosecutor's Response, para. 2.

⁷ *Bizimungu et al*, "Justin Mugenzi's Reply to the Prosecutor's Response to Justin Mugenzi's Motion for Further Certified Disclosure and for Leave to Reopen his Defence", 14 March ("Defence Reply"), para. 7.

⁸ *Bizimungu et al*, "Submissions by the Defence of Dr. Casimir Bizimungu in Support of the Motion Entitled: 'Justin Mugenzi's Motion for Further Certified Disclosure and for Leave to Reopen his Defence'", 10 April 2008 ("Bizimungu Defence Submissions")

6. On 18 March 2008, the Prosecutor responded to the Bizimungu Defence submissions adopting the same arguments as contained in his Response to the Motion.⁹

DISCUSSION

7. Rule 68 (A) of the Rules provides that “[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence.” Pursuant to Rule 68 (E), the Prosecution’s disclosure obligations under Rule 68 (A) are ongoing.¹⁰

8. According to the established jurisprudence of the Tribunal, where the Defence claims that the Prosecutor’s obligation under Rule 68 has been violated, it must: (i) define the material sought with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecution; and (iii) present a *prima facie* case that the material is exculpatory or potentially exculpatory. Information is exculpatory only if it tends to disprove a material fact alleged against the Accused, or if it undermines the credibility of evidence intended to prove those facts. This consideration depends on the nature of the charges and evidence heard against the Accused.¹¹

9. Furthermore, disclosure of an entire category of documents will only be ordered under Rule 68 where the category is narrowly tailored to the exculpatory content.¹²

10. The Chamber considers that the merits of the Defence Motion turn on whether the statements disclosed by the Prosecution “may suggest the innocence or mitigate the guilt

⁹ *Bizimungu et al.*, “Prosecutor’s Response to ‘Arguments de la Defense du Dr Casimir Bizimungu au Soutien de la Requete Intitulee: Justin Mugenzi’s Motion for Further Certification Disclosure and for Leave to Reopen his Defence’”, 18 March 2008.

¹⁰ Rule 68 (E) states: “Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.” See *Bizimungu et al.*, “Decision on Prosper Mugiraneza’s Motion for Records of all Payments made directly or indirectly to Witness D”, 18 February 2008, para. 4.

¹¹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, “Decision on Ntabakuze Motion for Disclosure of Prosecution Files”, para. 4 (“*Bagosora* Decision”); and *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, “Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution” (“*Karemera* Decision”), para. 6; *Bizimungu et al.*, “Decision on Prosper Mugiraneza’s Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC)”, 14 September 2004, para. 11, “Decision on Prosper Mugiraneza’s Motion for Records of all Payments Made Directly or Indirectly to Witness D”, 18 February 2008, para. 4; and “Decision on Jerome-Clement Bicamumpaka’s Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA”, 21 April 2008, para. 9.

¹² *Bagosora* Decision, para. 6 citing *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, “Decision on the Request of the Accused Hazim Delalic Pursuant to Rule 68 for Exculpatory Information” (TC) 24 June 1997, para. 15: “[A]ny request for disclosure of information should clearly specify the material desired. The Request before the Trial Chamber fails to do so. It generally refers to all the evidence in the hands of the Officer of the Prosecutor concerning the conduct of forces of the Republic of Serbia, the Bosnian Serbs and others. The Rules permitting disclosure of certain documents cannot be used freely as a means to obtain all information from the Prosecution and then subsequently to determine whether it can be used or not.”

of the accused or affect the credibility of Prosecution evidence” pursuant to Rule 68 (A). The Chamber will therefore consider the substance of the four statements disclosed to it prior to considering the prayers of the Defence Motion.

11. The Defence submits that the statements fall under Rule 68 (A) for the following reasons:¹³

- (i) Roadblocks and similar security measures were necessary measures against an enemy force.¹⁴
- (ii) The statements support the Defence proposition that the Government did not have the power to control, or even effectively monitor, events in territory over which it had nominal sovereignty.¹⁵
- (iii) The existence of documented killings on a large scale by the RPF from April to June 1994, shows that a large number of those who died cannot be said to be the victims of a Government controlled or inspired genocide, but rather, massacres by the Interim Government’s political opponents.¹⁶

The Chamber will consider the statements in light of these submissions.

(i) *Roadblocks were a necessary measure against enemy forces*

12. The Defence submits that roadblocks and similar security measures were necessary measures against enemy forces. The Indictment refers to the establishment of roadblocks on major roads, controlling peoples’ movements.¹⁷ It is alleged that, at these roadblocks, identity cards were checked, and Tutsis, or those identified as such, were summarily executed. It is further alleged that on 27 April 1994, the Interim Government ordered roadblocks to be set up, knowing that the roadblocks were being used to identify Tutsis, and their accomplices, for the purpose of eliminating them.¹⁸ The Prosecution Pre-Trial Brief also refers to roadblocks in this context, namely, that the Interim Government ordered the establishment and operation of roadblocks to further the common purpose of killing Tutsis.¹⁹

¹³ Motion, para. 7.

¹⁴ *Ibid.*

¹⁵ Motion, para. 8.

¹⁶ Motion, para. 9.

¹⁷ *Bizimungu et al*, Indictment, para. 6.15.

¹⁸ *Bizimungu et al*, Indictment, para. 6.24.

¹⁹ *Bizimungu et al*, Pre-Trial Brief, 20 October 2003, para. 135 states: “In order to further the common purpose of killing Tutsi, the Interim Government ordered and supported the establishment and operation of roadblocks throughout the country Roadblocks were used to identify Tutsis and to have them eliminated.” Para. 136 provides that the Minister of Interior issued a directive on the “operation of roadblocks throughout the country. The intention of the directives was to facilitate the identification of and killing of Tutsis. Many Tutsis were identified and killed.” Para. 143 states: “In the period between 9 April and 31 July 1994, throughout Rwanda, Tutsi were hunted down and hundreds of thousands slaughtered from their homes, at roadblocks....”

13. In light of the charges against Mr. Mugenzi, the Chamber considers that the Defence submission with regard to roadblocks is without merit. The Accused is not charged with the mere act of establishing roadblocks. Rather, the Interim Government is alleged to have *ordered* the establishment and operation of roadblocks for the purposes of killing Tutsis. The statements, which suggest that some roadblocks, *already established*, were infiltrated by the RPF, do not go towards disproving the allegation against the Accused. On the contrary, one of the statements suggests that roadblocks were being used to kill Tutsis, by detailing how the RPF infiltrators “checked people’s identities, and used machetes to kill, in the same manner as the *Interahamwe* to avoid suspicion.”²⁰

(ii) *Interim Government lacked power to control or monitor events*

14. The Defence submits that the disclosed statements support the proposition that the Government did not have power to control, or even monitor, events in territory over which it had nominal sovereignty. In the Chamber’s view, the disclosed statements do not support this submission. The statements demonstrate that the RPF carried out attacks in specific locations and infiltrated the CND in such a way so as not to be discovered.²¹ None of the statements provide evidence of how any of the Accused in this case no longer had control, with regard to their responsibilities, as a result of such attacks or infiltration. The statements do not therefore support the Defence claim that the situation in Rwanda was such that the members of the Interim Government could not exercise authority and control.

(iii) *Large numbers of those killed included victims of RPF attacks*

15. The Defence submits that the existence of documented killings on a large scale by the RPF from April to June 1994 shows that a large number of those who died cannot be said to be the victims of a Government controlled or inspired genocide, but rather, massacres by the Interim Government’s political opponents. The Chamber considers this submission to be without merit. First, in line with the Tribunal’s jurisprudence, the Chamber has taken judicial notice that genocide of the Tutsi occurred in Rwanda between 6 April and 17 July 1994.²² Second, the Chamber considers that evidence suggesting RPF responsibility for a large number of deaths does not impact upon the guilt or innocence of Mr. Mugenzi with regard to the specific charges against him. The specific killings attributed to the RPF in the statements are not crimes which Mr. Mugenzi, or any of the other defendants, are alleged to have committed, ordered, instigated, or, aided or abetted. Indeed, the Accused persons in this case are not charged with responsibility for *all* killings in Rwanda in 1994.

²⁰ Motion, Annex I, Statement of 8 April 2002.

²¹ See *supra* footnote. 2. For example, they would enter the CND under the pretext that that they were going to the canteen and train at night. See Statement of 18 May 2002.

²² *Bizimungu et. al.*, “Decision on Prosecutor’s Motion for Judicial Notice”, 22 September 2006, para. 11, following *Prosecutor v. Karemera et. al.*, Case No. ICTR-98-44-AR73 (C), “Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice” (AC), 16 June 2006, para. 35.

16. The Defence further submits that the disclosed statements are relevant to the Chamber's assessment of the evidence of Prosecution witnesses, Mr. Eric Rousseau and Mr. Maxwell Nkole. The Chamber will consider the evidence of these witnesses in turn.

17. Mr. Rousseau's evidence concerned investigations that he conducted, and a report which he produced that was commissioned by the Rwandan Government for the purposes of identifying massacre and burial sites of genocide victims.²³ During cross-examination, he answered that, based on the information they collected, he did not consider that the sites they identified involved victims of killings by people who were not Hutu extremists or government supporters. However, he did not, at any time, deny that such killings may have occurred.²⁴

18. Mr. Nkole's evidence concerned investigations which were conducted on behalf of the Prosecution.²⁵ He was the First Commander of Investigations for the Prosecution and testified that the sites identified in Mr. Rousseau's report were tested by conducting independent witness interviews.²⁶ Mr. Nkole accepts, during his testimony, that RPF insurgents and the Habyarimana Government, were engaged in a battle.²⁷ He further testified that the purpose of his work was merely to identify sites and provide numbers of those killed.²⁸ When asked whether the majority of victims buried at the sites were either Tutsis or moderate Hutus, Mr. Nkole responded that he believed this to be the case, but was not in a position to say who was killed, as this would be a matter for individual witnesses who come forward to testify.²⁹

19. The Chamber considers that the statements disclosed by the Prosecutor do not tend to undermine the evidence of Mr. Rousseau and Mr. Nkole. The statements detail an unspecified number of killings by the RPF. The evidence of Mr. Rousseau and Mr. Nkole was that a large number of Tutsis and moderate Hutus were killed. However, their evidence does not rule out RPF killings. Indeed, Mr. Nkole's testimony accepts that there were RPF insurgents and Mr. Rousseau had evidence of RPF killings put to him during cross-examination by the Defence.³⁰ Therefore, the Chamber is of the view that the disclosed statements do not impact upon its assessment of the evidence of Mr. Rousseau and Mr. Nkole.

20. The Chamber therefore finds that the four disclosed statements are not exculpatory under Rule 68 (A). Considering that the Defence has failed to show, *prima facie*, the exculpatory nature of the statements under Rule 68 (A), the Chamber finds the request for the reopening of the Defence case, which the Chamber recalls is only allowed

²³ Preliminary Report on the Identification of Sites of the Genocide and Massacres that took place in Rwanda from April to July 1994, dated February 1995 (Exhibit No. P. 2 (179) (E) 2 (f)).

²⁴ See T. 24 November 2003, p. 35.

²⁵ T. 6 November 2003, p. 15.

²⁶ T. 6 November 2003, p. 44.

²⁷ T. 11 November 2003, p. 16.

²⁸ T. 14 November 2003, p. 50.

²⁹ T. 14 November 2003, p. 55.

³⁰ T. 14 November 2003, p. 55 and T. 24 November 2003, pp. 38 and 39.

in “exceptional circumstances”, to be unfounded.³¹ Accordingly, the Chamber finds the Defence request that the Prosecutor make formal admissions of fact with regard to the contents of the statements disclosed, also to be unfounded.

The Defence Request for Disclosure

21. The Defence requests that “the Prosecutor make a full and proper search of all material held in his possession, including material gathered during investigations into the possible commission of offences by the RPF, with a view to establishing whether or not any further material exists which falls within Rule 68 (A)...” and that any such material be disclosed. In view of the above, the Chamber does not consider that the commission of alleged RPF offences, *per se*, is relevant to the charges against Mr. Mugenzi.

22. In any event, the Chamber considers the Defence request to be overly broad and fails to meet the requirement that the material requested be defined with reasonable specificity. Although the Chamber cannot rule out the possibility that some of the materials within the category of “material gathered during investigations into the possible commission of offences by the RPF” may be exculpatory, this does not justify an order for disclosure of the entire category. The Chamber recalls that disclosure of an entire category of documents will only be ordered under Rule 68 where the category is narrowly tailored to the exculpatory content.³² The Defence does not show how the category of materials requested would tend to disprove material facts alleged against Mr. Mugenzi, or undermine the credibility of the evidence intended to prove those facts. Accordingly, the Chamber finds that pursuant to the established jurisprudence of the Tribunal, the Defence request is not made in accordance with Rule 68 (A).

Should the Prosecution Provide a Written Undertaking?

23. The Defence requests that the Prosecutor give a written undertaking providing names of those who conducted the said searches, with dates, and stating that those persons are satisfied that they had full and unrestricted access to all material held by the Prosecution, and that the results show that no such further material exists. In this regard, the Chamber recalls that the Prosecution is presumed to have diligently, and in good faith, discharged its obligation to disclose such information as may be exculpatory.³³

³¹ A Trial Chamber may order the reopening of a case in exceptional circumstances. *See Prosecutor v. Delalic et al.*, Case No: IT-96-21-T, Judgement (AC), 20 February 2001, para. 290; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, “Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-ling”, 16 November 2006, paras. 15, 16; *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, “Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses”, 14 August 2007, para. 7; and *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, “Decision on Nyiramasuhuko’s Motion for Disclosure of Documents under Rule 68 and for Re-Opening of her Case,” 29 April 2008, para. 49.

³² *Bagosora* Decision, para. 6.

³³ *Ibid.*

24. The Chamber notes that, notwithstanding the Prosecution position in its Response, it disclosed the four statements pursuant to a request by the Defence. However, the Chamber considers there is no reason to suggest the Prosecutor has failed to act in good faith in discharging his obligation under Rule 68, particularly in light of the Chamber's finding that the disclosed statements are not exculpatory. Accordingly, the Chamber does not consider it necessary to order that the Prosecutor provide an undertaking in the terms requested by the Defence. The Chamber, however, reminds the Prosecution of its continuing obligation under Rule 68 (E).

The Bizimungu Defence requests

25. The Bizimungu Defence reiterates the submissions contained in the Mugenzi Defence Motion. In particular, it is submitted that the four disclosed statements demonstrate RPF preparations to seize power in Rwanda by force, as well as the difficulties facing the Interim Government from 9 April 1994.³⁴ The Bizimungu Defence further adds that the statements are relevant to the evidence of Prosecution expert witnesses Alison Des Forges, who "minimized the killings attributed to the RPF before, during, and after the events of 1994,"³⁵ and Prosecution Witness Sagahutu, former Rwandan Ambassador to Uganda, who testified that he was unaware of the killings perpetrated by the RPF.³⁶

26. The Chamber considers that through addressing the aforementioned Defence submissions, it has also dealt with the Bizimungu Defence submissions. The only specific issue outstanding is the Bizimungu Defence argument that the statements are relevant to the evidence of Prosecution Expert Witness Dr. Des Forges and Prosecution Witness Sagahutu. However, for the reasons set out above, the Chamber considers that the issue of RPF killings in 1994, *per se*, is not relevant to the charges against any of the Accused, as contained in the Indictment, or the Pre-Trial Brief. Accordingly, the Chamber also finds that the other Bizimungu Defence requests, which relate to searches and disclosure of RPF statements, are unfounded.

FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 10 June 2008

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]

³⁴ Bizimungu Defence Submissions, para. 23.

³⁵ Bizimungu Defence Submissions, para. 24.

³⁶ *Ibid.*