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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

29482  
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OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Khalida Rachid Khan, presiding  
Lec Gacuiga Muthoga  
Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 4 November 2008

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

Case No. ICTR-99-50-T

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**DECISION ON JUSTIN MUGENZI'S MOTION TO ADMIT TRANSCRIPT  
EXTRACTS OF GENERAL ROMEO DALLAIRE'S EVIDENCE IN THE  
NDINDILYAMA PROCEEDINGS**

*Article 19 and 20 of the Statute and  
Rules 68 (A) and (E), 89 (C), and 92bis (D) of the Rules of Procedure and Evidence*

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Mr. Michel Croteau and Mr. Philippe Larochelle for Jérôme-Clément Bicamumpaka  
Mr. Tom Moran and Ms. Cynthia Cline for Prosper Mugiraneza

## INTRODUCTION

1. On 20 August 2008, the Defence for Justin Mugenzi ("Defence") filed a Motion<sup>1</sup> seeking the admission of a transcript extract from General Romeo Dallaire's testimony in the *Ndindiliyimana et al.* proceedings.<sup>2</sup>
2. It is submitted by the Defence that the transcript extract should have been disclosed by the Prosecution pursuant to Rule 68 (A) of the Rules.<sup>3</sup> The Defence submits that the extract is material of which the Prosecution was aware, and which suggests the innocence of Justin Mugenzi because the testimony rebuts allegations made against him.
3. The Prosecution filed a response on 26 August 2008 opposing the Motion.<sup>4</sup>

## DISCUSSION

### *Law on Disclosure*

4. 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.<sup>5</sup>
5. 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.<sup>6</sup>

<sup>1</sup> *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Justin Mugenzi's Motion to Admit Into Evidence Extracts of the Transcripts of the Evidence of General Romeo Dallaire in the Case of *Ndindiliyimana* and others, 20 August 2008 ("Motion").

<sup>2</sup> *Prosecutor v. Ndindiliyimana and others*, Case No. ICTR-00-65-T, T. 23 November 2006 pp. 56 – 58.

<sup>3</sup> Rule 68 (A) of the Rules of Procedure and Evidence ("Rules") provides: "The 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 Prosecution evidence."

<sup>4</sup> *Bizimungu et al.*, Prosecutor's Response to Justin Mugenzi's Motion to Admit Into Evidence Extracts of the Transcripts of the Evidence of General Romeo Dallaire in the Case of *Ndindiliyimana* and Others, 26 August 2008 ("Prosecutor's Response").

<sup>5</sup> 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.

<sup>6</sup> *Bizimungu et al.*, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 4; and *The Prosecutor v. Karemera et al.*, Case No.



6. The Chamber recalls that the Prosecution's obligation to disclose potentially exculpatory material is essential to a fair trial.<sup>7</sup> However, not every violation of Rule 68 (A) implicates a violation of an accused's fair trial rights, warranting a remedy.<sup>8</sup>

*Law on Admission of Transcripts as Evidence*

7. Rule 92bis (D) of the Rules bestows a discretionary power upon a Trial Chamber to admit a transcript of evidence given by a witness in proceedings before the Tribunal, which goes to proof of a matter other than the acts and conduct of the accused.

8. The meaning of the term "acts and conduct of the accused as charged in the indictment" has been defined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which noted that the term is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.<sup>9</sup>

9. Once a Chamber is satisfied that the threshold requirement of Rule 92bis – that the material sought to be admitted goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment – has been met, its discretion to admit the transcript of evidence is enlivened. In order for a statement to be admissible under Rule 92bis, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must be satisfied. Further, the exercise of a Chamber's discretion under Rule 92bis must be governed by the right of the Accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.<sup>10</sup>

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ICTR-98-44-T, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution, 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; see also *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; and see also *Bizimungu et al.*, 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.

<sup>7</sup> *Bagosora et al.*, ICTR Case Nos. 98-41-AR73, 98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44; *The Prosecutor v. Dario Kordic and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 183, 242; *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, 20 July 2004, para. 264; *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 180; *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3; *Karamera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 7.

<sup>8</sup> *Kordic and Čerkez Judgment (AC)*, para. 179: "Once the Defence has satisfied a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber, in addressing what is the appropriate remedy (if any) must examine whether or not the Defence has been prejudiced by a breach of Rule 68." (Emphasis added). See also *The Prosecutor v. Juvénal Kajelijeli*, ICTR Case No. 98-44A-A, Judgment, 23 May 2005, para. 262; *Blaškić Judgment (AC)*, paras. 295, 303; *Krstić Judgment (AC)*, para. 153.

<sup>9</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 bis (TC), 21 March 2002, para. 22, cited in *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, fn. 28, in support of the Appeals Chamber's statement of principle, at paragraph 10 of its Decision, that the term "acts and conduct of the accused as charged in the indictment" does not refer to the acts and conduct of others for which the accused is charged in the indictment with responsibility.

<sup>10</sup> *Bizimungu et al.*, Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA before the *Karamera et al.* Chamber, 26 September 2008, paras. 10 – 11; *Bizimungu et al.*, Rule 92

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*Whether the Transcript Extract should have been Disclosed under Rule 68 (A)*

10. As a preliminary point, the Chamber notes that the transcript extract sought to be admitted was not from closed-session proceedings, and therefore accessible to the public. However, the Chamber recalls that the duty to disclose exculpatory material under Rule 68 (A) is of a positive and continuing nature, notwithstanding the public or confidential character of the material.<sup>11</sup> The public nature of the material therefore does not impact upon the issue of whether the Prosecution has discharged its disclosure obligations under Rule 68 (A), which the Chamber shall now proceed to determine.

11. The Chamber considers that the Defence has defined the material sought with reasonable specificity. Indeed, annexed to the Motion is the relevant transcript extract of General Dallaire's testimony in the *Ndinidliyimana et al.* proceedings. Furthermore, since General Dallaire testified in the aforementioned proceedings as a Prosecution witness, the Chamber finds that the material is in the custody and control of the Prosecution.

12. The Chamber must next determine whether the Defence has presented a *prima facie* case that the material is exculpatory or potentially exculpatory. The relevant transcript extract sought to be admitted refers to the period between late 1993 and 6 April 1994. It consists of General Dallaire's testimony during cross-examination and states that there were "hard line Hutu" and others who,

"were more soft line hutu ... who were more reconciliatory. And Mugenzi was one of those – in the midst of all this debate .... People like Mugenzi were in the forefront of us attempting to find a resolution to this absolutely near impossible impasse .... And so that's why it was important to have him on the side of taking an ultimate decision, and if it was one side or the other, fine, but we were in – at a loss of trying to balance out these different parties in order to permit the two harder line sides, the MRND side and the RPF side, from reconciling to bring about the government...."<sup>12</sup>

13. The Defence submits that General Dallaire's testimony disproves allegations contained in the Indictment, the Prosecution's Opening Speech, and the testimonies of three Prosecution witnesses. With regard to the Indictment, the Defence refers to paragraph 4.7 which alleges that Mugenzi created the Liberal Party and led its "Hutu Power" faction, and paragraph 5.1, which alleges that from late 1990 until July 1994, Mugenzi and his co-Accused, among others, worked out a "plan with the intent to exterminate the civilian Tutsi population and eliminate members of the opposition .... In executing the plan, they organised, ordered and participated in the massacres perpetrated against the Tutsi population and of moderate Hutu."

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*bis* Decision, para. 20; *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

<sup>11</sup> *Kordic and Cerkez*, Judgment (AC), 17 December 2004, para. 183 ("the general practice of the International Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution execution of that function in good faith"); *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17.

<sup>12</sup> Motion, para. 6, quoting *Ndinidliyimana et al.*, T. 23 November 2006 p. 57, l. 26 to l. 34.



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14. The Defence further asserts that General Dallaire's testimony rebuts the allegation contained in the Prosecutor's Opening Speech, that Mugenzi "became a leader of the PL-Hutu Power faction" which "supported Hutu Power" and that "he became rabidly anti-Tutsi and openly advocated against the Arusha Accord ... was allied to the MRND, the CDR, which pursued similar fanaticism."<sup>13</sup> The Defence submits that this allegation appears to form the Prosecution case against Mugenzi in respect of the period prior to 6 April 1994 and amplifies the allegations made in paragraphs 4.7 and 5.1 of the Indictment.

15. Additionally, the Defence submits that General Dallaire's testimony goes towards disproving the allegations made by Prosecution witnesses: Jean Baptiste Nkuliyingoma; Prosper Higiro; and Harriet Mukamurangwa Sebera. The Chamber recalls that these three witnesses testified that Mugenzi's moderate political views changed. More specifically, they testified, *inter alia*, that around late 1993 or early 1994, Mugenzi became anti-Tutsi.<sup>14</sup>

16. The Prosecution submits that the transcript extract sought to be admitted is not exculpatory material falling within Rule 68 (A). Rather, the Prosecution asserts that the content of General Dallaire's testimony is ambiguous and does not state unequivocally that Mugenzi was "soft line Hutu."

17. The Chamber is not persuaded by the Prosecution submission. The Chamber considers that the transcript extract unequivocally states that there were "more soft line Hutu", and "Mugenzi was one of those." Indeed, the transcript extract is relevant to a material fact alleged against Justin Mugenzi, namely, that he formed the "Hutu Power" faction of the Liberal Party, as stated in paragraph 4.7 of the Indictment. Further, it is relevant to the allegation in paragraph 5.1 of the Indictment that together with his co-Accused, he formulated a plan to exterminate Tutsi. Additionally, the transcript extract, which relates to the period between late 1993 and 6 April 1994, is relevant to the testimonies of Prosecution witnesses Nkuliyingoma, Higiro, and Sebera, that by late 1993 or early 1994, Mugenzi's political views had changed from moderate, to anti-Tutsi.

18. Therefore, the Chamber finds that, as required by the Tribunal's jurisprudence, there is a *prima facie* case that the transcript extract is exculpatory or potentially exculpatory.

<sup>13</sup> Motion, para. 7, quoting *Bizimungu et al.*, Prosecutor's Opening Speech, T. 6 November 2003 p. 7, l. 12 - 18.

<sup>14</sup> Witness Nkuliyingoma testified that in 1993, within the Liberal Party, Mugenzi took a different direction and abandoned the defence of the Tutsi and the party split. Mugenzi started looking for Hutu members. Nkuliyingoma testified that Mugenzi had always been the first politician to speak out against those trying to molest the Tutsi, but that in January 1994, he heard the rally at Nyamirambo Stadium over Radio Rwanda and Radio RTLM which demonstrated the change in Mugenzi's views. See *Bizimungu et al.*, T. 7 July 2004 pp. 82 - 83. Witness Higiro testified that between 1991, from the inception of the Liberal Party, up until 1993, Mugenzi was a charismatic leader but a radical change occurred in him and he became anti-Tutsi. Higiro recalled Mugenzi's speech at the rally at Nyamirambo Stadium in January 1994, in which he said that those against the Hutus would receive the worst form of punishment. See T. 26 January 2004 pp. 19, 26, and 34 - 35. Witness Sebera testified that there was a change in Mugenzi around September 1993 which she noticed at a Liberal Party meeting she attended, where he started to talk of Hutu and Tutsi ethnicity. She testified that towards the end of 1993, Mugenzi had annulled the elections of the Liberal Party due to the number of Tutsi who had been elected and also annulled the structure of the Party, because he said it was dominated by Tutsi. Sebera testified that previously, Mugenzi had spoken on behalf of all Rwandans. See T. 19 October 2004 pp. 44, 50 - 51.



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Accordingly, the Chamber finds that the Prosecution should, at the very least, have informed the Defence of its existence in accordance with Rule 68 (A).<sup>15</sup>

*The Defence Request for Admission of the Transcript Extract under Rule 92bis (D)*

19. The Defence requests the Chamber to admit, under Rule 92bis (D), the transcript extract from General Dallaire's testimony. The Chamber recalls that a transcript of evidence may be admitted only if it goes to proof of a matter other than acts and conduct of the accused and that the Chamber has a broad discretion to admit evidence it considers to be relevant and probative under Rule 89 (C).

(i) *Is the evidence relevant and probative?*

20. As a preliminary step, the Chamber is satisfied that the material sought to be admitted meets the general requirements of Rule 89 (C), since it pertains to the aforementioned allegations in the Indictment and is relevant to the evidence of Prosecution Witnesses Nkuliyingoma, Higiroy, and Sebera. In addition, the material is official testimony given before this Tribunal. The Chamber further notes that, generally speaking, material relating to the credibility of a witness is *prima facie* relevant and probative.<sup>16</sup>

(ii) *Does the material go to the acts and conduct of the Accused?*

21. The Defence asserts that the extract from General Dallaire's testimony goes to disprove Mugenzi's acts and conduct as alleged in: (i) paragraphs 4.7 and 5.1 of the Indictment; (ii) the Prosecutor's Opening Speech; and (iii) the testimonies of Prosecution Witnesses Nkuliyingoma, Higiroy, and Sebera. However, the Defence asserts that Rule 92bis was intended to exclude material which goes to *proof* of the acts and conduct of the accused, rather than *disprove*. The Defence reasoning behind this submission is that Rule 92bis serves to act as a safeguard for the accused who might otherwise be the subject of accusations concerning the crucial elements of their case, founded principally, or solely, on the written testimony of witnesses who might not have appeared for cross-examination.

22. The Prosecution submits that as the transcript extract goes to proof of Mugenzi's conduct, it cannot be admitted under Rule 92bis (D).<sup>17</sup>

23. The Chamber considers that General Dallaire's testimony, that Mugenzi was "one of those" who was a "soft line Hutu", is directly relevant to Mugenzi's acts and conduct as charged in the Indictment. As set out earlier in this Decision, the transcript extract is relevant to the allegation in the Indictment that Mugenzi led the Liberal Party's "Hutu Power" faction.<sup>18</sup> It is further relevant to the allegation that Mugenzi and his co-Accused shared an

<sup>15</sup> See *Karemura et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 10.

<sup>16</sup> *Bizimungu et al.*, Decision on Jerome (sic) Bicamumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence, 10 June 2008, para. 11, fn. 12; and Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the *Karemura et al* Chamber, 26 September 2008, para. 22.

<sup>17</sup> Prosecutor's Response, para. 2.

<sup>18</sup> Indictment, para. 4.7.



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"extremist Hutu ideology", and along with others, worked out a plan to exterminate Tutsi.<sup>19</sup> These allegations form a key part of the Prosecution case in respect of the charge of Conspiracy to Commit Genocide.<sup>20</sup>

24. With regard to the Defence submission that Rule 92bis (D) is not intended for material which goes to *disprove* acts and conduct of an accused, the Chamber finds this submission to be without merit. The Tribunal's jurisprudence does not draw a distinction between whether the material sought to be admitted goes to prove or disprove acts and conduct of the Accused. Indeed, material tending to contradict evidence that the accused carried out certain acts has been held to relate to "proof of the acts and conduct of the accused" for the purposes of Rule 92bis.<sup>21</sup>

25. Accordingly, the Chamber finds that the transcript extract to goes to proof of acts and conduct of the Accused.

*Whether the Material Should be Admitted, notwithstanding that it goes to Acts and Conduct of the Accused*

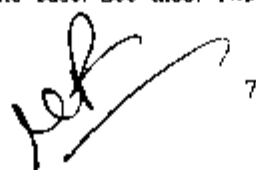
26. The Chamber recalls that, in particular circumstances, Trial Chambers of this Tribunal have considered it warranted to admit evidence which went to the acts and conduct of the accused.<sup>22</sup> In particular, the Rule 92bis limitations must be considered within the general

<sup>19</sup> Indictment, para. 5.1. Further, para. 6.14 alleges that from 7 April 1994, Justin Mugenzi and his co-Accused gave orders, directed or had knowledge of massacres of the Tutsi population and murder of numerous political opponents throughout Rwanda. It is alleged that these crimes had been planned and prepared for a long time by prominent civilian and military figures who shared the extremist Hutu ideology, and which included Justin Mugenzi and his co-Accused. Emphasis added.

<sup>20</sup> Count I, Indictment.

<sup>21</sup> *Bizimungu et al.*, Decision on Jerome-Clement Bicamumpaka's Motion for the Statement of the Deceased Witnesses, Faustin Nyagahima, to be Accepted as Evidence, 30 May 2007, para. 14; *The Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89 (C) and 92 bis of the Rules of Procedure and Evidence, 20 May 2002, para. 29 ("The Chamber notes that the statements of GER contradict the allegations made against the Accused as outlined in the Indictment against him. The Chamber considers that because of that contradiction, the said statements may be said to relate to the criminal acts and conduct of the accused"); *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admission of a Written Statement (TC), 25 January 2005, para. 5 (The statement of a witness that an accused was not present at a massacre in which he was alleged to have participated was held to go to the acts and conduct of the accused. "The Defence seeks to use it to support the Accused alibi that he was not present at Kaduha parish. This goes directly to proof of the acts and conduct of the Accused by corroborating to some extent his alibi"); *Bagasora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Admission of Written Witness Statement (TC), 9 March 2004, para. 16 ("[The statement sought to be admitted must satisfy] Rule 92 bis, in that it goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment, that is, that it does not contain evidence that tends to prove or disprove the Accused's acts or conduct as charged").

<sup>22</sup> *Bizimungu et al.*, Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber, 26 September 2008, para. 27; *The Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit Into Evidence Two Statements by Witness GER, 20 May 2003 ("*Kamuhanda* Decision") (was originally recorded as 20 May 2002), para. 31, "It appears to this Chamber that a proper reading of Rules 89(C) and 92bis may not interfere with the Chamber's discretion in a fitting case, at the instance (*sic*) of the accused, to admit statements of witnesses which are relevant and have probative value, even if those witnesses might be dead."; See also *The Prosecutor v. Ngeze*, Case No. ICTR-99-52-T, Decision on the Defence Motion to Admit Into Evidence Prosecution Witness's Statements; Alternatively to Produce Additional Defence Witnesses, 5 June 2003. Admitting one unavailable Witness's statement for the purpose of challenging the credibility of another Witness testimony based on the "particular circumstances" of the case. See also *The Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T,



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context of the accused's right to a fair trial under Articles 19 and 20 of the Statute, and at the heart of the matter, to avoid prejudice to the accused.<sup>23</sup>

27. In the present case, the Chamber notes that the transcript extract is from open session proceedings. Further, the Chamber recalls that prejudice may not be found to have been suffered by an accused where the existence of the exculpatory evidence was known to him or her, and the evidence was accessible to the defence.<sup>24</sup> However, in the present case, although the transcript extract was accessible to the public, there is nothing before this Chamber to suggest that its existence was known to the Mugenzi Defence.<sup>25</sup> In this respect, the Chamber recalls the onerous nature of the Prosecution's duty of disclosure under Rule 68.<sup>26</sup> Accordingly, the Chamber considers that had the Prosecution, in accordance with Rule 68 (A), disclosed the transcript extract or at least informed the Defence of its existence, the Defence may have elected to call and examine General Dallaire, in accordance with his right under Article 20 (4) (e).<sup>27</sup> Therefore, the Chamber finds that the violation of Rule 68 in the present case has caused Mugenzi to suffer prejudice.

28. The Chamber considers that the aspect of Rule 92bis, which usually functions to protect the accused, should not be relied upon to prevent the Defence from admitting relevant and probative evidence in circumstances where such a request would not be necessary, had the evidence been disclosed in accordance with Rule 68 (A). Accordingly, pursuant to the Chamber's duty to avoid further prejudice to Mugenzi and to ensure his fair trial rights under Articles 19 and 20, the Chamber deems it necessary to admit, into evidence, the transcript extract from General Dallaire's testimony in the *Ndindiliyimana et al* proceedings.

**FOR THESE REASONS**, the Chamber, having particular regard to the minimum guarantees afforded to the accused by Articles 19 and 20 of the Statute, hereby,

**GRANTS** the Defence Motion in its entirety; and

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Decision on the Prosecution Motion for Admission of Witness Statements (TC), 20 May 2004, ("*Muhimana Decision*") para. 29-30, citing the above cases.

<sup>23</sup> *Bizimungu et al.* Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber, 26 September 2008, para. 24. See also *Kahuhanda Decision*, para. 30, and *Muhimana Decision*, para. 24.

<sup>24</sup> *The Prosecutor v. Blaskic*, Case No. IT-95-14, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings (AC), 29 September 2000 ("*Blaskic Decision*"), para. 38.

<sup>25</sup> In the *Kordic and Cerkez Judgment* (AC), the Appeals Chamber had been satisfied that the accused was monitoring the proceedings in relation to which it was alleged that open session material should have been disclosed under Rule 68; and in the *Blaskic Decision*, para. 37, it was noted that the accused's counsel knew of the existence of the evidence that might exculpate the accused, soon after the evidence was given in open court, but remained silent.

<sup>26</sup> See *supra* in 7, and *Kordic and Cerkez Judgment* (AC), para. 183: "The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute." See also *Blaskic Judgment* (AC), paras. 264 and 265.

<sup>27</sup> The right of the accused to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.





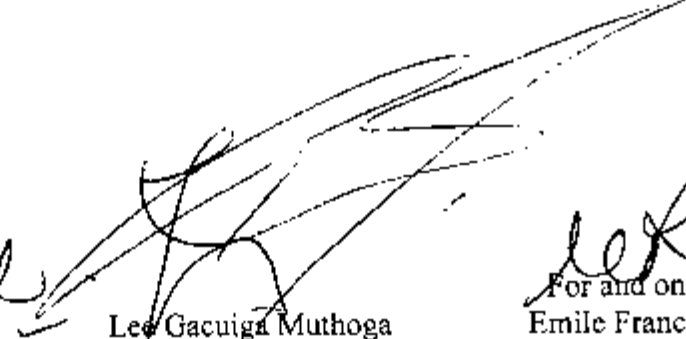
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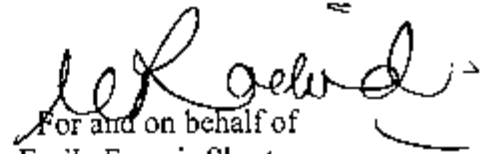
**ADMITS** into evidence, pursuant to Rule 89 (C) of the Rules, pages 56 to 58 of the transcript of General Romeo Dallaire's testimony before the *Ndindiliyimana et al.* Chamber on 23 November 2006; and

**DIRECTS** the Registry to assign an appropriate exhibit number to the transcript extract, forthwith

Arusha, 4 November 2008

  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuiya Muthoga  
Judge

  
For and on behalf of  
Emile Francis Short  
Judge

