



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 30 April 2012

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS/ARCHIVES
UNICTR
2012 APR 30 A 10 21

**DECISION ON DEFENCE MOTION FOR APPROPRIATE RELIEF IN LIGHT OF
EXCULPATORY MATERIAL DISCLOSED BY THE PROSECUTION ON 15
NOVEMBER 2011**

Pursuant to Rule 68 of the Rules of Procedure and Evidence

Office of the Prosecution:

Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse, Lead Counsel
Philippe Laroche, Co-Counsel

812

INTRODUCTION

1. The Prosecution case commenced on 9 November 2009 and closed on 13 April 2010 after calling a total of 19 witnesses in a total of 25 trial days. The Trial Chamber allowed the Prosecution to call one rebuttal witness.¹ The Defence case commenced on 15 April 2010 and closed on 5 May 2011 after calling a total of 40 witnesses in a total of 61 trial days.
2. The Parties filed their respective Closing Briefs on 5 July 2011.² Following a Directive from the Trial Chamber (“Oral Directive”),³ the Defence filed an Abridged Brief (“Defence Abridged Brief”) on 13 July 2011.⁴ On 13 September 2011, the Defence filed a Corrigendum to the Abridged Brief (“Corrigendum to Abridged Brief”).⁵ On 20 and 21 October 2011, the Parties presented their Closing Arguments before the Trial Chamber (“Closing Arguments”). On 21 October 2011, the Trial Chamber ordered the proceedings adjourned *sine die*.⁶
3. On 15 November 2011, the Prosecutor disclosed material which according to the Defence was potentially exculpatory, consisting of trial transcripts and will-say statements from the *Ngirabatware* trial.⁷
4. On 15 February 2012, the Defence filed a Motion requesting the Trial Chamber to dismiss allegations pertaining to Paragraphs 15, 16, 17, 22, 23, 25, 35, 37, 40 and 45 of the Indictment in light of the late disclosure of potentially exculpatory material by the Prosecution (“Motion”).⁸

¹ Prosecution Rebuttal Witness CNR1 testified on 5-6 May 2011.

² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Closing Brief, 5 July 2010 (“Prosecution Closing Brief”); *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana’s Final Brief, 5 July 2010 (“Defence Closing Brief”).

³ T. 6 May 2011 pp. 50-51 (Oral Directive).

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana’s Abridged Final Brief, 13 July 2010 (“Defence Abridged Brief”).

⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Corrigendum to “Nzabonimana’s Abridged Final Brief” dated 13 July 2010, 13 September 2011.

⁶ T. 21 October 2011 p. 25 (Oral Order).

⁷ Email from Lead Prosecution Counsel Paul Ng’arua to Lead Defence Counsel Vincent Courcelle-Labrousse entitled “Disclosure of Potentially Exculpatory Material Found in Ngirabatware Trial Chamber”, 15 November 2011.

⁸ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 15 November 2011 (“Motion”), 15 February 2011.

5. On 21 February 2012, the Prosecution filed its Response (“Response”).⁹ On 23 February 2012, the Prosecution filed a Corrigendum to its Response (Corrigendum to Response).¹⁰

6. On 24 February 2012, the Defence filed its Reply (“Reply”).¹¹

SUBMISSIONS OF THE PARTIES

Defence Motion

7. The Defence seeks relief under Rule 68 of the Rules of Procedure and Evidence (“Rules”) based upon the Prosecution’s late disclosure of exculpatory evidence communicated to the Defence on 15 November 2011.¹²

8. The material disclosed consists of transcripts of the testimony of Augustin Ngirabatware and Witness DWAN-8 from the *Ngirabatware* trial¹³ and the will-say statement of Witness DWAN-151.¹⁴ The Defence submits that the exculpatory material is relevant, has high probative value and is potentially exculpatory,¹⁵ in that it supports Nzabonimana’s alibi for the period of 6 to 12 April 1994.¹⁶ The Defence asserts that this material demonstrates that Nzabonimana did not commit the crimes alleged in Paragraphs 15, 16, 17, 22, 23, 25, 35 and 37 of the Indictment.¹⁷

9. The Defence avers that the transcripts of Augustin Ngirabatware’s testimony show that Nzabonimana and his family were at the Presidential Guard camp in Kigali on 6 April 1994 and that Nzabonimana had left the camp for the French Embassy on 7 April 1994.¹⁸ The transcripts also attested that Nzabonimana was at the French Embassy when he arrived on 8 April 1994,¹⁹ that members of the Interim Government attended a swearing-in ceremony at

⁹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Response to Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 15 November 2011 (“Response”), 21 February 2012.

¹⁰ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Corrigendum to Prosecutor’s Response to Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 15 November 2011 (“Corrigendum to Response”), 23 February 2012.

¹¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence Reply to Prosecutor’s Response to Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 15 November 2011 (“Reply”), 24 February 2012.

¹² Motion, paras. 1, 7, 66-69.

¹³ Annexes 1, 2 and 3 attached to the Motion.

¹⁴ Motion, para. 6; Annex 4.

¹⁵ Motion, paras. 30-31.

¹⁶ Motion, para. 31.

¹⁷ Motion, para. 32.

¹⁸ Motion, paras. 34-35.

¹⁹ Motion, paras. 36 & 45; Annex 4, para. 6.

the Diplomat Hotel on 9 April 1994,²⁰ and that cabinet meetings were convened at the hotel on 10 and 11 April 1994.²¹ The Defence asserts that this material corroborates the testimony of Defence Witnesses T5, T9, T11, Léoncie Bongwa and Mechtilde Mugiraneza and contradicts the testimony of Prosecution Rebuttal Witness CNR1.²²

10. The Defence asserts that the transcript of Witness DWAN-8's testimony shows that Nzabonimana went to the Presidential Guard camp with his family on 6 April 1994 and that Nzabonimana went to the Diplomat Hotel on 9 April 1994 for a swearing-in ceremony. The Defence asserts that this corroborates Defence Witnesses T9, T11, Bongwa and Mugiraneza.²³ Lastly, the Defence asserts that the will-say statement of Defence Witness DWAN-151 also supports Nzabonimana's alibi that he went to the Presidential Guard camp on 6 April 1994, that the ministers and their families went to the French Embassy on 8 April 1994 and that there was a swearing-in ceremony for the ministers at the *Hotel des Diplomates* on 9 April 1994.²⁴

11. The Defence argues that Nzabonimana has been prejudiced by the Prosecution's late disclosure of these materials, as they were transmitted between 9 and 12 months after the relevant court sessions.²⁵ The Defence submits that the material could have been used to cross-examine Prosecution Rebuttal Witness CNR1 if it had been disclosed in a timely manner and could have supplemented the testimony of Defence Witnesses T11 and T400.²⁶ The Defence claims that late disclosure of these materials also prevented the Defence from interviewing and calling as witnesses Ngirabatware, DWAN-8 and DWAN-151, contrary to Article 20 (4)(e) of the Statute.²⁷ The Defence claims that with the case closed, it is not able to make effective use of the disclosed material.²⁸

12. As a remedy, the Defence requests the Chamber to dismiss the allegations pertaining to Nzabonimana's alibi, namely Paragraphs 15, 16, 17, 22, 23, 25, 35, 37, 40 and 45 of the Indictment.²⁹ Alternatively, the Defence requests that the Chamber draw a reasonable inference in favour of Nzabonimana; re-open the case to allow the Defence to interview and

²⁰ Motion, paras. 37 & 42, 45; Annex 4.

²¹ Motion, paras. 38-39.

²² Motion, paras. 34-40.

²³ Motion, paras. 41-43.

²⁴ Motion, paras. 44-46.

²⁵ Motion, para. 47.

²⁶ Motion, para. 50.

²⁷ Motion, paras. 51, 54, 56.

²⁸ Motion, paras. 50, 54.

²⁹ Motion, paras. 29, 64, 67, 69.

908

call witnesses; or admit the material into evidence.³⁰ It also requests that the Chamber sanction the Prosecution pursuant to Rule 46 for the late disclosure, report Lead-Counsel Paul Ng'arua to his national bar and calls on the Registry or Prosecutor to review his competence.³¹

Prosecution Response

13. Although the Prosecution does not dispute that the materials at issue are exculpatory, it asserts that the material is cumulative and of low probative value. The Prosecution submits that it disclosed the transcripts and will-say statements after reviewing the *Ngirabatware* case. The Prosecution contends that the material was readily accessible and that the Defence had access to the open session testimony of Ngirabatware. The Prosecution submits that it regrets the late disclosure but that the Defence has not suffered any prejudice for which any remedy is required.³²

14. The Prosecution asserts that the Defence was not prejudiced because the testimony of Ngirabatware occurred in open session and was readily available to the Defence.³³ The Defence was aware that Ngirabatware would testify about the French Embassy because Ngirabatware's presence at the Embassy was mentioned in Defence Exhibit 15,³⁴ and the Defence called alibi witnesses who testified that both Nzabonimana and Ngirabatware were at the French Embassy between 7 and 12 April 1994.³⁵ The Prosecution asserts that it was also common knowledge that Ngirabatware was being held in UNDF with Nzabonimana.³⁶ The Prosecution submits that the Defence could have accessed the open session testimony at any time.³⁷ If the existence of the exculpatory material is known and accessible to the accused through the exercise of due diligence, he is not materially prejudiced.³⁸

15. The Prosecution further submits that portions of the material relate to Nzabonimana's whereabouts between 6 and 7 April 1994. The Defence did not suffer prejudice because of the disclosure of these materials as Nzabonimana has not been charged with any allegations

³⁰ Motion, paras. 2, 29, 70-80.

³¹ Motion, paras. 3, 29, 81-87.

³² Response, paras. 1-4, 8.

³³ Response, paras. 9-11.

³⁴ Response, para. 10; Defence Exhibit 15 (Diplomatic Telegrams from the French Embassy in Kigali).

³⁵ Response, para. 10; see Defence Witnesses Mechtilde Mugiraneza, Léonic Bongwa, T9 and T11.

³⁶ Response, para. 10.

³⁷ Response, para. 11.

³⁸ Response, para. 11; *Prosecutor v. Blaškić*, Judgement (AC), paras. 295-296.

88

on these dates. The material pertaining to 6 and 7 April 1994 therefore is not relevant and has insufficient probative value.³⁹

16. The Prosecution also asserts that portions of the material make reference to government ministers and not specifically Nzabonimana. The witnesses do not mention that they saw Nzabonimana and therefore the material is of low probative value.⁴⁰

17. The Defence also did not suffer prejudice because the material is cumulative to other evidence introduced at trial.⁴¹ The Prosecution submits that the Defence fails to show how it could have used the material to impeach Rebuttal Witness CNR1 during cross-examination; hence no prejudice has been caused.⁴² It also notes that the Defence took three months to file its motion which indicates that no real prejudice is caused and thus no remedies are required.⁴³ It argues that sanctions against the Prosecution as a unit or singling out Lead Counsel for the Prosecution under Rule 46 (A) have no basis in law, especially since there is an absence of bad faith. The Prosecutor disclosed the material once the Defence became aware of it.⁴⁴

Defence Reply

18. The Defence objects to the Prosecution assertion that the material was readily accessible.⁴⁵ The statements of Ngirabatware, DWAN-8 and DWAN-151 that they saw Nzabonimana at the Presidential Guard camp and at the French Embassy are what constitute exculpatory material. The mere presence of these witnesses at the camp and the Embassy is not exculpatory. The Defence claims that it is absurd for the Prosecution to argue that the Defence was aware that Ngirabatware was about to give evidence that Nzabonimana was at the French Embassy.⁴⁶

19. The Defence submits that even if it had lists of who was present at the French Embassy, it was not feasible for the Defence to interview all the persons listed on the French

³⁹ Response, para. 12.

⁴⁰ Response, para. 13.

⁴¹ Response, para. 14.

⁴² Response, para. 15.

⁴³ Response, paras. 7, 16-17.

⁴⁴ Response, paras. 18-22.

⁴⁵ Reply, paras. 7-8.

⁴⁶ Reply, para. 9.

documents or access all the open session testimony of persons present at the French Embassy.⁴⁷

20. The Defence submits that the Prosecution is misguided in its interpretation of the Appeals Chamber finding in *Blaškić* and notes that reference was made to “material of a public nature” and not “open session testimony” which jurisprudence dictates that the Prosecution is obliged to disclose.⁴⁸

21. The Defence asserts that the information relating to Nzabonimana’s whereabouts on 6 and 7 April 1994 is not of low probative value, in that it supports the claim that Nzabonimana was in Kigali between 8 and 12 April 1994.⁴⁹

22. It also argues that the material which does not specifically refer to Nzabonimana’s name but to government ministers has probative value since at the time, Nzabonimana was a minister. It notes that it was not in a position to interview these witnesses due to budgetary constraints.⁵⁰ Furthermore, it objects to the Prosecution assertion that the Chamber capped the number of alibi witnesses to four and notes that decisions by the Chamber are subject to reconsideration.⁵¹ Accordingly, the Defence requests the Chamber to grant its motion.

DELIBERATIONS

Applicable Law

23. Rule 68(A) of the Rules of Procedure and Evidence states:

“[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 Prosecution evidence.”⁵²

24. The determination of which materials are subject to disclosure under this provision is a fact-based inquiry made by the Prosecution.⁵³ In order to establish a violation of Rule 68 disclosure obligations, the Defence must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its potential exculpatory nature; and (3) prove that the

⁴⁷ Reply, paras. 12-13.

⁴⁸ Reply, para. 14.

⁴⁹ Reply, para. 15.

⁵⁰ Reply, para. 16.

⁵¹ Reply, para. 17.

⁵² Rule 68(A) of the Rules of Procedure and Evidence.

⁵³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, para. 16.

9325

material requested is in the custody or under the control of the Prosecution.⁵⁴ Information is considered exculpatory under Rule 68(A) if there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.⁵⁵ The Prosecution may be relieved of this obligation if the existence of the relevant exculpatory evidence is known to the Defence and is reasonably accessible to the Defence through the exercise of due diligence.⁵⁶

25. The Prosecution's disclosure obligation generally encompasses open session testimony of witnesses in other proceedings conducted before the Tribunal.⁵⁷ However, the Prosecution may be relieved of this obligation if the Defence knew of the relevant exculpatory evidence and had access to it, as the Defence would not be prejudiced materially by this violation.⁵⁸ Defence counsel may contact the Registry and request certain public documents such as transcripts and the Registrar may, where possible, grant the request. If such a request was made to the Registry, and the Registry did not comply with it, the Accused could apply to the Trial Chamber by way of motion for assistance to obtain access to the documents.⁵⁹

26. Before considering whether a remedy is appropriate the Chamber must examine whether the Defence has been prejudiced by the failure to disclose potentially exculpatory material.⁶⁰ In determining whether the Defence has been prejudiced, the Chamber may consider such factors as the potentially low probative value of the evidence, whether the Defence had sufficient time to examine the evidence and challenge it during cross-examination or seek admission of the material as additional evidence, whether the Defence

⁵⁴ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (AC), 8 December 2006, para. 34; *Kalimanzira*, Judgement (AC), para. 18; *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13.

⁵⁵ *Karemera*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

⁵⁶ *Nahimana et al.*, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (AC), 8 December 2006, para. 33.

⁵⁷ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review (AC), 23 January 2008, para. 27; *Prosecutor v. Dario Kordić*, Case No. IT-95-14/2-A, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with Its Disclosure Obligation under Rule 68 of the Rules (AC), 11 February 2004, para. 20.

⁵⁸ *Nahimana et al.*, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (AC), 8 December 2006, para. 33; *Kordić*, Decision on Appellant's Notice of Prosecution Non-Compliance with Rule 68 (AC), para. 20.

⁵⁹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 54; *Prosecutor v. 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 (AC), 7 December 2004, p. 3.

⁶⁰ *Kalimanzira*, Judgement (AC), para. 18.

88

0524

could call the relevant witness to testify, and the extent to which the Defence knew about the evidence and had access to it.⁶¹

Analysis

27. The Trial Chamber recalls that the Prosecution has a positive and continuous obligation under Rule 68 to disclose to the Defence any documents that contain exculpatory material.⁶² In the present circumstances, the Defence has specifically identified the material sought and it was in the custody and control of the Prosecution. The Chamber considers that the first and third criteria of the test for determining whether the Prosecution has breached its disclosure obligations under Rule 68(A) have been met. Thus, in determining whether the Prosecution violated its disclosure obligation, the Chamber must determine whether the materials were potentially exculpatory.

Evidence of Augustin Ngirabatware and Witness DWAN-8

Whether the Defence presented a prima facie case that the material is exculpatory

28. The Defence submits that the testimony of Ngirabatware and Witness DWAN-8 has potentially exculpatory value as to the whereabouts of Nzabonimana during the alibi period of 6 to 12 April 1994.⁶³ The Prosecution does not dispute the potentially exculpatory nature of the materials but submits that portions of the material relate to Nzabonimana's whereabouts between 6 and 7 April 1994, which is irrelevant as the Indictment only contains allegations beginning on 8 April 1994, and thus the material is cumulative and of insufficient probative value.⁶⁴

29. The Chamber observes that the Defence has made a *prima facie* showing that the Ngirabatware and DWAN-8 transcripts are potentially exculpatory as to the whereabouts of Nzabonimana during the alibi period of 6-12 April 1994, more specifically 6-9 April 1994.⁶⁵ Although the Prosecution correctly observes that the Indictment does not contain allegations pertaining to 6 and 7 April 1994, the Chamber considers that the evidence pertaining to these dates could impact the credibility of Prosecution evidence.

⁶¹ *Kalimanzira*, Judgement (AC), para. 20; *Krstić* Judgement (AC), paras. 192, 197; *Blaškić*, Judgement (AC), para. 282, 295, 298; *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 38.

⁶² *Mugiraneza v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Prosper Mugiraneza's Motion for Disclosure (AC), 22 March 2012, para. 4; *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

⁶³ Annex 1, 2 and 3 attached to the Motion.

⁶⁴ Response, para. 12.

⁶⁵ Annex 1, 2 and 3 attached to the Motion.

88

Whether the Prosecution violated its Rule 68 disclosure obligation

30. The Chamber must next determine whether the documents were disclosed to the Defence “as soon as practicable” pursuant to Rule 68(A).

31. The Chamber notes that Witness DWAN-8 testified in the *Ngirabatware* trial on 18 October 2011. The Prosecution disclosed the transcripts of this testimony to the Defence via email on 15 November 2011. The Prosecution indicated that the documents would be posted on EDS and sent via CD-ROM as well. Given that the Prosecution disclosed the testimony of DWAN-8 less than one month after his testimony, the Chamber considers that the Prosecution disclosed these documents as soon as practicable and therefore did not violate its Rule 68 disclosure obligations as to this material.

32. With regard to the testimony of *Ngirabatware*, the Chamber notes that the transcripts disclosed by the Prosecution emerged from *Ngirabatware*’s testimony on 25 and 29 November 2010, 6 December 2010, 3 February 2011 and 14 February 2011. These transcripts were disclosed to the Defence on 15 November 2011.

33. The Trial Chamber recalls that because the materials in possession of the Prosecution and/or in the custody of the Registry are so voluminous, delays in disclosure to the Defence may occur. It is often difficult for the various organs within an international tribunal to access documents. Indeed, the voluminous nature of the materials in the possession of the Prosecution may result in delayed disclosure, since the material in question may be identified only after the trial proceedings have concluded.⁶⁶ Nevertheless, the Chamber recalls that the Prosecution must adhere to its disclosure obligations pursuant to Rule 68(A) as a single unit.⁶⁷

34. The Prosecution has had this material in its possession for between 9 and 12 months. Considering the foregoing the Chamber finds that the disclosure of the *Ngirabatware* transcripts was not made in a timely manner and was not “as soon as practicable” in accordance with Rule 68(A).⁶⁸ Accordingly, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68(A) as to these materials.

⁶⁶ *Blaškić*, Judgement (AC), para. 300.

⁶⁷ *Bizimungu et al.*, Judgement (TC), para. 155.

⁶⁸ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 38 (finding that up to eight months was not an inordinate delay).

The Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D

Whether the Defence was prejudiced

35. The Chamber recalls that on 16 March 2010, the French government disclosed telegrams to the Defence which indicate that Ngirabatware and his family were present at the French Embassy during the period in question. The Chamber admitted these telegrams into evidence as Defence Exhibit 15. Furthermore, the Chamber recalls that during her examination-in-chief on 11 October 2010, Defence Witness Léoncie Bongwa testified that she saw Ngirabatware at the Presidential Guard camp on 6 April 1994 and also upon her arrival at the French Embassy in Kigali on 8 April 1994.⁶⁹ The Defence has therefore known since at least March 2010 that Ngirabatware was placed at the French Embassy and since at least October 2010 that Ngirabatware was placed at the Presidential Guard camp.

36. The Chamber notes that the *Ngirabatware* trial was being conducted at the same time as the *Nzabonimana* trial and was one of three ongoing trials before this Tribunal. The Chamber further notes that all of the transcript citations provided by the Defence as to the potentially exculpatory material refer to open session testimony. The Chamber notes as well that Ngirabatware testified after the Defence received the Embassy telegrams from the French government and after the testimony of Bongwa in the *Nzabonimana* trial. The Chamber recalls that the Prosecution's disclosure obligation generally encompasses open session testimony of witnesses in other proceedings conducted before the Tribunal. However, the Prosecution may be relieved of its disclosure obligation if the existence of the relevant exculpatory evidence is known to the Defence and is accessible to it, namely, available to the Defence with the exercise of due diligence.⁷⁰

37. The Chamber observes that: (1) the Defence knew since 2010 that Ngirabatware was at the Presidential Guard camp and at the French Embassy; (2) Ngirabatware testified in his own trial while the *Nzabonimana* trial was also ongoing; and (3) Ngirabatware testified in open session. In line with Tribunal jurisprudence, the Chamber considers that the Defence was put on notice that Ngirabatware had given evidence tending to exculpate Nzabonimana.⁷¹ The Chamber recalls that counsel may contact the Registry and request certain public documents such as transcripts and that the Registrar may, where possible, grant the request. If such a request was made to the Registry, and the Registry did not comply with it, the

⁶⁹ T. 11 October 2010 pp. 11-15 (Bongwa).

⁷⁰ *Niyetigeka*, Decision on Third Request for Review (AC), 23 January 2008, para. 27; *Blaškić*, Judgement (AC), para. 296.

⁷¹ *Niyetigeka*, Decision on Third Request for Review (AC), 23 January 2008, para. 27.

9301

Accused could apply to the Trial Chamber by way of motion for assistance to obtain access to the documents.⁷²

38. Given these circumstances, the Chamber considers that Ngirabatware's evidence was known to the Defence and was available through the exercise of due diligence. The Chamber therefore concludes that the Prosecution was relieved of its obligation under Rule 68 as the Defence was not materially prejudiced by this violation.⁷³

39. Furthermore, the Defence was not prejudiced by the disclosure of the transcripts of Ngirabatware's testimony because this evidence was cumulative to evidence already presented at trial.⁷⁴ The Defence argues that the Ngirabatware transcripts show that Nzabonimana was at the Presidential Guard camp on 6 April 1994. Witnesses Mechtilde Mugiraneza, Léoncie Bongwa, T9 and T11 all testified to seeing Nzabonimana at the Presidential Guard camp.⁷⁵ The Defence also asserts that the Ngirabatware transcripts show that Nzabonimana left the Presidential guard camp for the French Embassy on 7 April 1994. Mugiraneza, T11 and T9 all testified to this fact during trial,⁷⁶ and Defence Exhibit 15 indicates that Nzabonimana and his family registered at the French Embassy on 7 April 1994. The Defence submits that Ngirabatware testified that the ministers of the Interim Government attended a swearing-in ceremony at the Diplomat hotel on 9 April 1994. Mugiraneza, Bongwa, T9, T11 and Prosecution Witness CNR1 all testified to this fact.⁷⁷ The Defence submits that Ngirabatware testified that there were cabinet meetings at the Diplomat Hotel on 10 and 11 April 1994. Witnesses T5, T9, T11 and Mugiraneza provided testimony that Nzabonimana went to the Diplomat Hotel and attended meetings on these days.⁷⁸

⁷² *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 54; *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 (AC), 7 December 2004, p. 3

⁷³ *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 38; *Kordić and Cerkez*, Judgement (AC), paras. 200-201.

⁷⁴ *Blaškić*, Judgement (AC), para. 298.

⁷⁵ T. 19 April 2010 pp. 28-29 (ICS) (Witness T9); T. 11 October 2010 pp. 11-13 (Bongwa); T. 4 May 2011 pp. 3-4, 6 (ICS) (Witness T11); T. 15 April 2010 pp. 33, 40-41 (Mugiraneza).

⁷⁶ T. 15 April 2010 pp. 48-49 (Mugiraneza); T. 19 April 2010 pp. 28-30 (ICS) (Witness T9); T. 3 May 2011 p. 24 (ICS) (Witness T11).

⁷⁷ T. 19 April 2010 p. 30 (ICS) (Witness T9); T. 11 October 2010 p. 18 (Bongwa); T. 3 May 2011 p. 27 (ICS) (Witness T11); T. 15 April 2010 p. 37 (Mugiraneza); T. 4 May 2011 p. 67 (ICS) (Witness T400); T. 5 May 2011 p. 44 (ICS) (Witness CNR1).

⁷⁸ T. 15 April 2010 p. 11 (ICS) (Witness T5); T. 19 April 2010 p. 31 (ICS) (Witness T9); T. 3 May 2011 pp. 27-28 (ICS) (Witness T11); T. 19 April 2010 pp. 5, 8 (Mugiraneza).

88

030

40. Given the cumulative nature of the Ngirabatware transcripts the Chamber concludes that Nzabonimana was not prejudiced by the late disclosure of this material and no remedy is warranted.⁷⁹

Will-Say Statement of Witness DWAN-151

41. The Defence submits that the will-say statement of Witness DWAN-151 has potentially exculpatory value as to the whereabouts of Nzabonimana during the alibi period of 6-12 April 1994, more specifically 6-9 April 1994.⁸⁰

Whether the Defence presented a prima facie case that the material is exculpatory

42. The Chamber recalls that a will-say statement differs from a typical statement given by a witness. In the practice of the Tribunal, will-say statements are primarily communications from one party to another and to the Chamber concerning aspects of a witness' anticipated testimony that were not mentioned in previously-disclosed witness statements. Will-say statements are generally communicated by counsel upon learning of new details during the preparation of a witness for examination, and are not necessarily acknowledged by the witness. Therefore, will-say statements have no probative value except to the extent that the witness confirms their content.⁸¹ In the instant case, the Chamber considers that there is no means of affirming the contents of the will-say statement of Witness DWAN-151. The Chamber notes as well that the will-say statement is unsigned. Considering the above, the Chamber concludes that the Defence has not established a *prima facie* showing of the document's potentially exculpatory nature and that no disclosure obligation attaches to this will-say statement.

⁷⁹ *Blaškić*, Judgement (AC), para. 298.

⁸⁰ Annex 4 attached to the Motion.

⁸¹ *Kalimanzira*, Judgement (AC), para. 180.

88

FOR THESE REASONS, THE TRIAL CHAMBER

CONSIDERS that the Prosecution has not violated its disclosure obligations pursuant to Rule 68(A) of the Rules with regard to the testimony of DWAN-8 and the will-say statement of DWAN-151;

CONSIDERS that the Prosecution has violated its disclosure obligations pursuant to Rule 68(A) of the Rules with regard to the testimony of Ngirabatware but that the Defence was not materially prejudiced by this violation;

PARTIALLY GRANTS the Defence Motion to the extent that the Chamber has found that the Prosecution violated its disclosure obligations pursuant to Rule 68(A) of the Rules as set out above; and

DENIES the Defence Motion in all other respects.

Arusha, 30 April 2012, done in English.

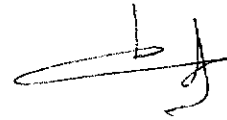


Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge

(absent at time of signature)



Mparany Rajohnson
Judge



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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

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

| | | | |
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| To: | <input type="checkbox"/> Team I N. M. Diallo | <input type="checkbox"/> Team II C. K. Hometowu N. M. Diallo | <input type="checkbox"/> Team III C. K. Hometowu |
| | <input checked="" type="checkbox"/> OIC, JLSD P. Besnier | <input type="checkbox"/> OIC, JPU C. K. Hometowu | <input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison |
| From: | <input checked="" type="checkbox"/> Chamber TC III (names) | <input type="checkbox"/> Defence (names) | <input type="checkbox"/> Prosecutor's Office (names) |
| | <input type="checkbox"/> Other: (names) | | |
| Case Name: | The Prosecutor vs. Callixte Nzabonimana | | Case Number: ICTR-98-44D-T |
| Dates: | Transmitted: 30 April 2012 | | Document's date: 30 April 2012 |
| No. of Pages: | 15 pages (inc. CMS cover page) | Original Language: | <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda |
| Title of Document: | Decision on Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 15 November 2011 | | |
| Classification Level: | TRIM Document Type: | | |
| <input type="checkbox"/> Ex Parte | <input type="checkbox"/> Indictment | <input type="checkbox"/> Warrant | <input type="checkbox"/> Correspondence |
| <input type="checkbox"/> Strictly Confidential / Under Seal | <input checked="" type="checkbox"/> Decision | <input type="checkbox"/> Affidavit | <input type="checkbox"/> Notice of Appeal |
| <input type="checkbox"/> Confidential | <input type="checkbox"/> Disclosure | <input type="checkbox"/> Order | <input type="checkbox"/> Appeal Book |
| <input checked="" type="checkbox"/> Public | <input type="checkbox"/> Judgement | <input type="checkbox"/> Motion | <input type="checkbox"/> Book of Authorities |
| | <input type="checkbox"/> Submission from non-parties | <input type="checkbox"/> Submission from parties | <input type="checkbox"/> Accused particulars |

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

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| CMS SHALL take necessary action regarding translation. | | | |
| <input checked="" type="checkbox"/> Filing Party hereby submits only the original, and will not submit any translated version. | | | |
| <input type="checkbox"/> Reference material is provided in annex to facilitate translation. | | | |
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| <input type="checkbox"/> English | <input type="checkbox"/> French | <input type="checkbox"/> Kinyarwanda | |
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| Translation | in | <input type="checkbox"/> English | <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda |

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| <input type="checkbox"/> Urgent | | <input type="checkbox"/> Hearing date: |
| <input type="checkbox"/> Normal | | <input type="checkbox"/> Other deadlines: |