



**Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda**

1054/H

ICTR-99-50A

24<sup>th</sup> Sept. 2012

{1054/H – 1038/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Andréia Vaz  
Judge Bakhtiyar Tuzmukhamedov

ICTR Appeals Chamber  
Date: 24<sup>th</sup> September 2012  
Action: R. Jumbo  
Copied To: Concerned Judges  
Parties, JPU, LSS,  
LD ~~JUSTIN~~

**Acting Registrar:** Mr. Pascal Besnier

**Decision of:** 24 September 2012

**JUSTIN MUGENZI  
PROSPER MUGIRANEZA**

v.

**THE PROSECUTOR**

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

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**DECISION ON MOTIONS FOR RELIEF  
FOR RULE 68 VIOLATIONS**

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**Defence Counsel:**

Ms. Kate Gibson and Mr. Christopher Gosnell for Justin Mugenzi  
Mr. Tom Moran and Ms. Cynthia J. Cline for Prosper Mugiraneza

**The Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
Mr. James J. Arguin  
Mr. George W. Mugwanya  
Ms. Evelyn Kamau  
Mr. Mihary Andrianaivo

International Criminal Tribunal for Rwanda  
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NAME / NOM: ROSETTE MUZIGO-MORRISON  
SIGNATURE: DATE: 24/9/12

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of a motion filed by Justin Mugenzi on 15 March 2012<sup>1</sup> and of a motion filed by Prosper Mugiraneza on 20 March 2012.<sup>2</sup>

### A. Background

2. On 30 September 2011, Trial Chamber II of the Tribunal (“Trial Chamber”) rendered its judgement in the case of *The Prosecutor v. Casimir Bizimungu et al.*, finding Mr. Mugenzi and Mr. Mugiraneza guilty of conspiracy to commit genocide based on their roles in the removal of Mr. Jean-Baptiste Habyalimana from his post as the prefect of Butare Prefecture on 17 April 1994.<sup>3</sup> The Trial Chamber also found Mr. Mugenzi and Mr. Mugiraneza guilty of direct and public incitement to commit genocide based on their roles in the installation ceremony of Mr. Sylvain Nsabimana as the new prefect of Butare Prefecture on 19 April 1994, where, according to the Trial Chamber’s findings, Interim President Théodore Sindikubwabo delivered an inflammatory speech calling for the killing of Tutsis.<sup>4</sup> The Trial Chamber sentenced both Mr. Mugenzi and Mr. Mugiraneza to 30 years of imprisonment.<sup>5</sup> Their appeals against the Trial Judgement are pending.<sup>6</sup>

3. In a letter to the Prosecution dated 5 December 2011 (“5 December 2011 Letter”), Mr. Mugenzi’s counsel suggested that the Prosecution was in possession of information that is “exculpatory in relation to the findings in the present case” and subject to disclosure under Rule 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”).<sup>7</sup> In particular, Mr. Mugenzi’s counsel requested that the Prosecution disclose “all transcripts, witness statements, exhibits and any other relevant material” relating to evidence identified in selected passages from the trial judgements in the cases of *The Prosecutor v. Callixte Kalimanzira* (“Kalimanzira case”) and *The*

<sup>1</sup> Justin Mugenzi’s Motion for Relief for Violations of Rule 68, 15 March 2012 (“Mugenzi Motion”).

<sup>2</sup> Prosper Mugiraneza’s Motion Joining Justin Mugenzi’s Motion for Relief for Violations of Rule 68, 20 March 2012 (“Mugiraneza Motion”).

<sup>3</sup> *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Judgement and Sentence, dated 30 September 2011 and filed on 19 October 2011 (“Trial Judgement”), paras. 1222-1250, 1959-1962, 1988.

<sup>4</sup> Trial Judgement, paras. 1322-1383, 1976-1988.

<sup>5</sup> Trial Judgement, paras. 2021, 2022.

<sup>6</sup> See Justin Mugenzi’s Appeal Brief, 20 February 2012; Prosper Mugiraneza’s Appellate Brief, 20 February 2012; Justin Mugenzi’s Reply Brief, 15 May 2012; Prosper Mugiraneza’s Reply to the Prosecutor’s Appellate Brief, 15 May 2012.

<sup>7</sup> Mugenzi Motion, Annex 1 (Letter dated 5 December 2011 from Ms. Kate Gibson to Mr. James J. Arguin).

*Prosecutor v. Pauline Nyiramasuhuko et al.* (“*Nyiramasuhuko et al.* case”).<sup>8</sup> Mr. Mugenzi’s counsel further requested that the Prosecution conduct a review of all cases - including, *inter alia*, the case of *The Prosecutor v. Dominique Ntawukulilyayo* (“*Ntawukulilyayo* case”) - in which evidence was heard concerning the incidence of violence in Butare Prefecture prior to 19 April 1994, the removal of the prefect of Butare Prefecture, and President Sindikubwabo’s speech of 19 April 1994, and disclose any other exculpatory evidence in its possession.<sup>9</sup>

4. By letter dated 20 December 2011, the Prosecution responded that it was providing material, including transcripts and exhibits, to Mr. Mugenzi.<sup>10</sup> In a letter dated 6 January 2012, Mr. Mugenzi’s counsel reiterated certain requests for material subject to disclosure, including from the *Ntawukulilyayo* case.<sup>11</sup> The Prosecution responded by letter dated 23 January 2012 and indicated that further material was being provided to Mr. Mugenzi.<sup>12</sup> In its 20 December 2011 and 23 January 2012 letters, the Prosecution noted that, in providing materials to Mr. Mugenzi, it was not admitting that the materials came within the scope of Rule 68 of the Rules.<sup>13</sup>

5. On 15 March 2012, Mr. Mugenzi filed the Mugenzi Motion, arguing that the Prosecution had violated Rule 68 of the Rules by failing to timely disclose certain witness testimonies from the *Kalimanzira*, *Nyiramasuhuko et al.*, and *Ntawukulilyayo* cases, and requesting that the Appeals Chamber quash his convictions.<sup>14</sup> On 20 March 2012, Mr. Mugiraneza filed the Mugiraneza Motion, in which he joined the Mugenzi Motion and made additional submissions.<sup>15</sup> The Prosecution filed responses in opposition to the Mugenzi Motion and the Mugiraneza Motion, contending, *inter alia*, that the Mugenzi Motion appears to exceed the relevant word limit and is, accordingly, procedurally defective.<sup>16</sup> Mr. Mugenzi replied on 29 March 2012.<sup>17</sup> Mr. Mugiraneza did not file a reply.

<sup>8</sup> Mugenzi Motion, Annex 1 (Letter dated 5 December 2011 from Ms. Kate Gibson to Mr. James J. Arguin).

<sup>9</sup> Mugenzi Motion, Annex 1 (Letter dated 5 December 2011 from Ms. Kate Gibson to Mr. James J. Arguin).

<sup>10</sup> Mugenzi Motion, Annex 6 (Letter dated 20 December 2011 from Mr. James J. Arguin to Ms. Kate Gibson) (confidential).

<sup>11</sup> Mugenzi Motion, Annex 7 (Letter dated 6 January 201[2] from Ms. Kate Gibson to Mr. James J. Arguin) (confidential). The Appeals Chamber notes that the letter is purportedly dated in 2011 but considers this to be a typographical error.

<sup>12</sup> Mugenzi Motion, Annex 8 (Letter dated 23 January 2012 from Mr. George W. Mugwanya to Ms. Kate Gibson) (confidential).

<sup>13</sup> See Mugenzi Motion, Annex 6 (Letter dated 20 December 2011 from Mr. James J. Arguin to Ms. Kate Gibson) (confidential); Mugenzi Motion, Annex 8 (Letter dated 23 January 2012 from Mr. George W. Mugwanya to Ms. Kate Gibson) (confidential).

<sup>14</sup> Mugenzi Motion, paras. 1, 2, 11-49, 56-59.

<sup>15</sup> Mugiraneza Motion, paras. 1-11.

<sup>16</sup> Prosecutor’s Response to: “Justin Mugenzi’s Motion for Relief for Violations of Rule 68”, 26 March 2012 (“Response to Mugenzi Motion”), paras. 2, 3, 28; Prosecutor’s Response to Prosper Mugiraneza’s Motion Joining Justin Mugenzi’s Motion for Relief for Violations of Rule 68, 29 March 2012 (“Response to Mugiraneza Motion”), paras. 3, 11.

## **B. Preliminary Matter**

6. The Prosecution asserts that the Mugenzi Motion does not meet the procedural requirements for pleadings before the Appeals Chamber, as it does not include a word count and appears to exceed the relevant word limit for motions filed during appeals.<sup>18</sup> In reply, Mr. Mugenzi's Defence team acknowledges the failure to adhere to the Practice Direction's requirements and, *inter alia*, requests leave to exceed the applicable word limit in light of the volume of undisclosed material.<sup>19</sup> The Appeals Chamber recalls that a party must seek authorization in advance to exceed the word limits in the Practice Direction.<sup>20</sup> However, the Appeals Chamber considers that, in the specific circumstances presented here and in view of the fact that the Prosecution has responded in full to the Mugenzi Motion,<sup>21</sup> it is in the interests of justice to accept the oversized Mugenzi Motion as validly filed.

## **C. Applicable Law**

7. The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation under Rule 68 of the Rules to, "as soon as practicable, disclose to the Defence any material, which in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".<sup>22</sup> The determination of which materials are subject to disclosure under this provision is a fact-based enquiry made by the Prosecution.<sup>23</sup> Therefore, the Appeals Chamber will not intervene in the exercise of the Prosecution's discretion unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith.<sup>24</sup> The Appeals Chamber recalls that the Prosecution's

<sup>17</sup> Justin Mugenzi's Reply to Prosecutor's Response to Motion for Relief for Violations of Rule 68, 29 March 2012 ("Mugenzi Reply").

<sup>18</sup> Response to Mugenzi Motion, para. 3, referring to Practice Direction on the Length of Briefs and Motions on Appeal, dated 8 December 2006 ("Practice Direction"), paras. (C)3, (C)7.

<sup>19</sup> Mugenzi Reply, paras. 26, 27.

<sup>20</sup> See Practice Direction, para. (C)5.

<sup>21</sup> See Response to Mugenzi Motion, paras. 2, 3, 5-27.

<sup>22</sup> See, e.g., *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Disclosure, 18 January 2011 ("*Bagosora et al.* Decision"), para. 7; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010 ("*Kamuhanda* Decision"), para. 14.

<sup>23</sup> See, e.g., *Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend his Notice of Appeal and Motion to Admit Evidence, filed confidentially on 23 March 2011, public redacted version filed on 9 November 2011 ("*Setako* Decision"), para. 13; *Kamuhanda* Decision, para. 14.

<sup>24</sup> See, e.g., *Kamuhanda* Decision, para. 14; *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, 8 December 2006, para. 34.

obligation to disclose exculpatory material is essential to a fair trial, and notes that this obligation has always been interpreted broadly.<sup>25</sup>

8. To establish that the Prosecution is in breach of its disclosure obligation, the applicant must: (i) identify specifically the material sought; (ii) present a *prima facie* showing of its probable exculpatory nature; and (iii) prove that the material requested is in the custody or under the control of the Prosecution.<sup>26</sup> If the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate.<sup>27</sup>

#### D. Mugenzi Motion

9. Mr. Mugenzi submits that the Prosecution violated Rule 68 of the Rules by failing to timely disclose materials which are directly relevant to the two incidents for which he was convicted: (i) the replacement of the Butare prefect on 17 April 1994; and (ii) President Sindikubwabo's speech on 19 April 1994.<sup>28</sup> Mr. Mugenzi asserts that he has been prejudiced by this disclosure failure, which is part of a wider pattern of Rule 68 violations.<sup>29</sup> In his view, the only adequate remedy for the Prosecution's disclosure violations at this stage of the proceedings is for the Appeals Chamber to draw factual inferences in favour of Mr. Mugenzi with respect to these materials and to quash his convictions as a result.<sup>30</sup> The Prosecution opposes the Mugenzi Motion, arguing, *inter alia*, that the materials identified by Mr. Mugenzi are not exculpatory, that there was no material prejudice from their non-disclosure, and that the remedy sought is unwarranted.<sup>31</sup>

##### 1. Replacement of the Butare Prefect on 17 April 1994

10. Mr. Mugenzi contends that the Prosecution violated Rule 68 of the Rules by failing to disclose materials directly relevant to his conviction in relation to the replacement of the Butare prefect on 17 April 1994, namely specific portions of: (i) Witness AZM's testimony in the *Kalimanzira* case; (ii) Dominique Ntawukulilyayo's testimony in the *Ntawukulilyayo* case;

<sup>25</sup> See, e.g., *Setako* Decision, para. 12; *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement"), para. 18.

<sup>26</sup> See, e.g., *Bagosora et al.* Decision, para. 7; *Kamuhanda* Decision, para. 14.

<sup>27</sup> See, e.g., *Setako* Decision, para. 14; *Kalimanzira* Appeal Judgement, para. 18.

<sup>28</sup> Mugenzi Motion, paras. 1, 11-49. See also Mugenzi Reply, paras. 3-25.

<sup>29</sup> Mugenzi Motion, paras. 1, 2, 17, 19, 24, 28, 30, 33, 50-55. See also Mugenzi Reply, paras. 2, 7, 13, 16, 17, 19, 25.

<sup>30</sup> Mugenzi Motion, paras. 2, 56-59. See also Mugenzi Reply, paras. 2, 28.

<sup>31</sup> Response to Mugenzi Motion, paras. 2, 3, 28.

(iii) André Guichaoua's testimony in the *Nyiramasuhuko et al.* case; and (iv) Witness QI's testimony in the *Nyiramasuhuko et al.* case.<sup>32</sup>

(a) Witness AZM's testimony in the *Kalimanzira* case

11. In the 5 December 2011 Letter, Mr. Mugenzi's counsel requested, *inter alia*, disclosure of transcripts and other information related to Witness AZM, who testified in the *Kalimanzira* case.<sup>33</sup> Later that same month, the Prosecution provided, *inter alia*, the 17 June 2008 transcript of Witness AZM's testimony in the *Kalimanzira* case to Mr. Mugenzi.<sup>34</sup>

12. Mr. Mugenzi submits that the Prosecution breached its Rule 68 obligations by failing to disclose the testimony of Witness AZM in the *Kalimanzira* case.<sup>35</sup> Mr. Mugenzi contends that Witness AZM's testimony is exculpatory because it contradicts the Prosecution's successful claim at trial that the removal of Mr. Habyalimana from his position as the prefect of Butare Prefecture was motivated by a desire to "unleash massacres of Tutsis in Butare".<sup>36</sup> According to Mr. Mugenzi, Witness AZM's testimony demonstrates that it was widely known that Mr. Habyalimana had to be removed as a result of his failure to attend a crucial meeting held in Kigali on 11 April 1994 and that Mr. Habyalimana did not attend the meeting because he felt himself to be under threat as of that date.<sup>37</sup> Mr. Mugenzi asserts that he suffered prejudice as a result of the Prosecution's failure to timely disclose Witness AZM's testimony because, *inter alia*, this testimony might have triggered additional inquiries or led Mr. Mugenzi to seek to re-open the case.<sup>38</sup>

13. The Prosecution responds that Witness AZM's testimony relates to "presumptions or thoughts" and that the witness provides no basis for his claim that it was a "known fact" that Mr. Habyalimana was removed as a result of his alleged failure to attend the meeting on 11 April 1994.<sup>39</sup> The Prosecution submits that, in any event, Mr. Mugenzi was not materially prejudiced by

<sup>32</sup> See Mugenzi Motion, paras. 11-34. See also Mugenzi Motion, Annex 2 (*The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, T. 17 June 2008 p. 5); Mugenzi Motion, Annex 3 (*The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, T. 8 December 2009 pp. 47, 48); Mugenzi Motion, Annex 4 (*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 7 October 2004 pp. 19, 21); Mugenzi Motion, Annex 5 (*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 24 March 2004 p. 37).

<sup>33</sup> Mugenzi Motion, Annex 1 (Letter dated 5 December 2011 from Ms. Kate Gibson to Mr. James J. Arguin).

<sup>34</sup> Mugenzi Motion, para. 17, referring to Mugenzi Motion, Annex 6 (Letter dated 20 December 2011 from Mr. James J. Arguin to Ms. Kate Gibson) (confidential). See also Motion, Annex 7 (Letter dated 6 January 201[2] from Ms. Kate Gibson to Mr. James J. Arguin) (confidential).

<sup>35</sup> Mugenzi Motion, paras. 12-19, referring to Mugenzi Motion, Annex 2 (*The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, T. 17 June 2008 p. 5).

<sup>36</sup> Mugenzi Motion, para. 15. See also Mugenzi Motion, paras. 12-14, 16; Mugenzi Reply, para. 15.

<sup>37</sup> Mugenzi Motion, paras. 13-16.

<sup>38</sup> Mugenzi Motion, paras. 17, 18. See also Mugenzi Motion, paras. 54, 55; Mugenzi Reply, para. 16.

<sup>39</sup> Response to Mugenzi Motion, para. 6 (emphasis omitted).

the non-disclosure of Witness AZM's testimony in light of other testimony before the Trial Chamber making the same assertions.<sup>40</sup>

14. The Appeals Chamber considers that Mr. Mugenzi has specifically identified the material in question and demonstrated that the material has been in the custody or control of the Prosecution since June 2008. Given the centrality of the Trial Chamber's findings concerning the reasons for the removal of the prefect of Butare Prefecture to Mr. Mugenzi's related conviction,<sup>41</sup> the Appeals Chamber also considers that Mr. Mugenzi has made a *prima facie* showing of the probable exculpatory nature of Witness AZM's testimony concerning the reasons for Mr. Habyalimana's replacement.<sup>42</sup> In arguing otherwise, the Prosecution appears to focus on the potentially low probative value of Witness AZM's testimony.<sup>43</sup> The Appeals Chamber recalls that while this is certainly a relevant consideration in assessing whether an accused was prejudiced by late disclosure or non-disclosure of Rule 68 material, the Defence does not bear the burden of contradicting the Prosecution's evidence but, instead, need only show that the material is *prima facie* or "potentially" exculpatory.<sup>44</sup>

15. Although Witness AZM testified in the *Kalimanzira* case in June 2008, the transcript of the witness's testimony was not provided to Mr. Mugenzi until December 2011.<sup>45</sup> The Prosecution has not suggested that it was unable to disclose the witness's testimony earlier than December 2011.<sup>46</sup> The Appeals Chamber accordingly finds that the Prosecution failed to comply with its obligations under Rule 68 of the Rules to disclose this material as soon as practicable.<sup>47</sup>

16. Because Witness AZM's testimony was not disclosed to Mr. Mugenzi when he still had time, *inter alia*, to seek to introduce it into evidence before the Trial Chamber, Mr. Mugenzi was denied the opportunity to seek to rely upon this evidence at trial. Nonetheless, the Appeals Chamber considers this prejudice to be minimal. In this regard, the Appeals Chamber observes that the Trial Chamber explicitly considered "undisputed evidence" concerning Mr. Habyalimana's failure to

<sup>40</sup> Response to Mugenzi Motion, paras. 6, 8, 9.

<sup>41</sup> See Trial Judgement, paras. 1250, 1941, 1945, 1947, 1959-1962.

<sup>42</sup> See Mugenzi Motion, para. 14. By contrast, the Appeals Chamber does not consider that Mr. Mugenzi has made a *prima facie* showing how Witness AZM's testimony concerning the prefect's *reasons* for not attending the meeting on 11 April 1994 may suggest Mr. Mugenzi's innocence, mitigate his guilt, or affect the credibility of Prosecution evidence.

<sup>43</sup> See Response to Mugenzi Motion, paras. 2, 6. See also Response to Mugenzi Motion, paras. 8, 9.

<sup>44</sup> See *Kalimanzira* Appeal Judgement, para. 20.

<sup>45</sup> See Mugenzi Motion, para. 17, referring to Motion, Annex 6 (Letter dated 20 December 2011 from Mr. James J. Arguin to Ms. Kate Gibson) (confidential). See also Mugenzi Motion, Annex 7 (Letter dated 6 January 2012 from Ms. Kate Gibson to Mr. James J. Arguin) (confidential).

<sup>46</sup> Compare generally *Kalimanzira* Appeal Judgement, para. 21, and references cited therein.

<sup>47</sup> Mr. Mugenzi notes that he requested Witness AZM's statements from the Prosecution in December 2011 and that these statements date back to October 2002. See Mugenzi Motion, para. 17. However, because Mr. Mugenzi has not made any submissions as to the probable exculpatory nature of these statements, the Appeals Chamber declines to consider them further.

attend the 11 April 1994 meeting in Kigali as well as Defence evidence suggesting that the prefect's failure to attend the meeting raised doubts as to his ability to lead the Butare Prefecture in a time of war.<sup>48</sup> Contrary to Mr. Mugenzi's suggestion,<sup>49</sup> the Trial Chamber did not reject this Defence evidence on the basis that it was self-interested testimony but instead considered that the "Defence explanations for Habyalimana's removal, when viewed in the context of all the evidence, [did not] raise doubt in the Prosecution evidence that his dismissal was part of a larger agenda aimed at furthering the killing of Tutsi civilians in Butare".<sup>50</sup> It is not apparent how Witness AZM's evidence that it was "a known fact" that Mr. Habyalimana had to be replaced as a result of his failure to attend the 11 April 1994 meeting<sup>51</sup> would materially differ from or add to evidence already on the record. This is particularly so given that, by Witness AZM's own admission, the witness was not a member of the "institution" that decided to replace the prefect of Butare Prefecture,<sup>52</sup> and, hence, not in a position to give direct evidence as to the reasons for Mr. Habyalimana's removal. In these circumstances, the Appeals Chamber considers that Witness AZM's testimony is either cumulative of other evidence on the record or of limited probative value.

17. In any event, the Appeals Chamber considers that the limited prejudice suffered by Mr. Mugenzi in relation to the Prosecution's disclosure failure, even when viewed in the context of previous disclosure violations by the Prosecution,<sup>53</sup> does not warrant granting the disproportionate relief requested, namely, the drawing of factual inferences from this material in favour of Mr. Mugenzi and the quashing of his conviction as a result.<sup>54</sup> Moreover, the Appeals Chamber recalls that where an appellant has been prejudiced by a breach of Rule 68 of the Rules, that prejudice may be remedied, where appropriate, through the admission of additional evidence on appeal under Rule 115 of the Rules.<sup>55</sup> Notably, however, although Mr. Mugenzi has been in possession of Witness AZM's testimony since December 2011, he has not sought its admission under Rule 115 of the Rules. Accordingly, while the Appeals Chamber reminds the Prosecution of the importance of disclosure obligations, it finds that no further remedy is warranted in this instance.

<sup>48</sup> Trial Judgement, para. 1233. *See also* Trial Judgement, paras. 1195, 1227.

<sup>49</sup> Mugenzi Reply, para. 16.

<sup>50</sup> Trial Judgement, para. 1235. *See also* Trial Judgement, para. 1244.

<sup>51</sup> Mugenzi Motion, Annex 2 (*The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, T. 17 June 2008 p. 5).

<sup>52</sup> Mugenzi Motion, Annex 2 (*The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, T. 17 June 2008 p. 5).

<sup>53</sup> *See, e.g.*, Trial Judgement, paras. 175-177.

<sup>54</sup> Mugenzi Motion, paras. 2, 56-59. *See also* Mugenzi Reply, paras. 2, 28. At any rate, given that Witness AZM's testimony is not part of the record on appeal, *see* Rule 109 of the Rules, the Appeals Chamber may not properly draw factual inferences from it in favour of Mr. Mugenzi, as he has requested.

<sup>55</sup> *See Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić's Motion for Remedies Arising out of Disclosure Violations by the Prosecution, 12 May 2011, para. 22, *referring to Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 187; *Setako* Decision, para. 16.



(b) Dominique Ntawukulilyayo's testimony in the Ntawukulilyayo case

18. In the 5 December 2011 Letter, Mr. Mugenzi's counsel requested, *inter alia*, disclosure of any exculpatory material from the *Ntawukulilyayo* case.<sup>56</sup> In January 2012, following a second request from Mr. Mugenzi's counsel, the Prosecution provided, *inter alia*, the 8 December 2009 transcript of Mr. Ntawukulilyayo's testimony in the *Ntawukulilyayo* case to Mr. Mugenzi.<sup>57</sup>

19. Mr. Mugenzi submits that the Prosecution failed to timely disclose the testimony of Mr. Ntawukulilyayo in the *Ntawukulilyayo* case and that, as a result, Mr. Mugenzi was denied an opportunity to consider whether to seek re-opening of his case.<sup>58</sup> According to Mr. Mugenzi, Mr. Ntawukulilyayo's testimony contradicts the Prosecution's successful claims at trial in his own case concerning the reasons for Mr. Habyalimana's removal as the prefect of Butare Prefecture because Mr. Ntawukulilyayo attributes this removal either to the prefect's failure to attend the 11 April 1994 meeting or to racism based on the prefect's Tutsi ethnicity.<sup>59</sup>

20. The Prosecution responds that Mr. Ntawukulilyayo's testimony concerning the reasons for Mr. Habyalimana's removal is speculative and, as Mr. Ntawukulilyayo himself acknowledges, reflects his own presumptions or thoughts, based on rumours.<sup>60</sup> In any event, the Prosecution contends, Mr. Mugenzi was not materially prejudiced by the non-disclosure of Mr. Ntawukulilyayo's testimony.<sup>61</sup>

21. The Appeals Chamber considers that Mr. Mugenzi has specifically identified the material in question and demonstrated that the material has been in the custody or control of the Prosecution since December 2009. The Appeals Chamber also considers that Mr. Mugenzi has made a *prima facie* showing of the probable exculpatory nature of Mr. Ntawukulilyayo's testimony, as it may affect the credibility of Prosecution evidence concerning the reasons for the removal of Mr. Habyalimana as the prefect of Butare Prefecture, an issue of central importance to Mr. Mugenzi's conviction. The Prosecution has not indicated that it was unable to disclose Mr. Ntawukulilyayo's testimony prior to January 2012. By failing to disclose this evidence as soon as practicable, the Prosecution therefore breached its obligations under Rule 68 of the Rules.

<sup>56</sup> Mugenzi Motion, Annex 1 (Letter dated 5 December 2011 from Ms. Kate Gibson to Mr. James J. Arguin).

<sup>57</sup> Mugenzi Motion, para. 24, referring to Mugenzi Motion, Annex 7 (Letter dated 6 January 2012) from Ms. Kate Gibson to Mr. James J. Arguin (confidential), and Mugenzi Motion, Annex 8 (Letter dated 23 January 2012 from Mr. George W. Mugwanya to Ms. Kate Gibson) (confidential).

<sup>58</sup> Mugenzi Motion, paras. 20-24, referring to Mugenzi Motion, Annex 3 (*The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, T. 8 December 2009 pp. 47, 48). See also Mugenzi Motion, paras. 53-55; Mugenzi Reply, para. 17.

<sup>59</sup> Mugenzi Motion, paras. 20, 21.

<sup>60</sup> Response to Mugenzi Motion, para. 7.

<sup>61</sup> Response to Mugenzi Motion, paras. 8, 9.

22. In light of the Prosecution's disclosure failure, Mr. Mugenzi was denied the opportunity to seek to rely upon this evidence at trial. The Appeals Chamber nonetheless considers that the resulting prejudice to Mr. Mugenzi was minimal. The Appeals Chamber notes that Mr. Ntawukulilyayo's testimony explicitly concerns "rumours" related to the reasons for Mr. Habyalimana's removal as well as Mr. Ntawukulilyayo's own suppositions in that regard.<sup>62</sup> The probative value of Mr. Ntawukulilyayo's testimony is thus limited. Moreover, Mr. Ntawukulilyayo's testimony is cumulative of other evidence on the record in many respects.<sup>63</sup> In view of the minimal prejudice suffered, the Appeals Chamber considers that the requested relief is unwarranted.<sup>64</sup>

(c) André Guichaoua's testimony in the *Nyiramasuhuko et al.* case

23. In the 5 December 2011 Letter, Mr. Mugenzi's counsel requested, *inter alia*, disclosure of transcripts and other information related to Mr. Guichaoua, who gave evidence in the *Nyiramasuhuko et al.* case.<sup>65</sup> Later that same month, the Prosecution provided, *inter alia*, the 7 October 2004 transcript of Mr. Guichaoua's testimony in the *Nyiramasuhuko et al.* case to Mr. Mugenzi.<sup>66</sup>

24. Mr. Mugenzi contends that the Prosecution breached its obligations under Rule 68 of the Rules by failing to disclose the testimony of Mr. Guichaoua, who appeared as an expert witness for the Prosecution in the *Nyiramasuhuko et al.* case.<sup>67</sup> Mr. Mugenzi submits that Mr. Guichaoua gave evidence concerning the circulation of a report to the Cabinet of the Interior Ministry which called for the resignation of Mr. Habyalimana and made serious allegations concerning the prefect's links with the Rwandan (also Rwandese) Patriotic Front ("RPF").<sup>68</sup> According to Mr. Mugenzi, this evidence directly corroborates Mr. Mugenzi's own testimony concerning the reasons for his acquiescence to the replacement of Mr. Habyalimana on 17 April 1994, and he underscores that the Trial Chamber expressed doubt as to the existence of this report.<sup>69</sup> Mr. Mugenzi asserts that his ability to present his defence was prejudiced by the Prosecution's failure to timely disclose this

<sup>62</sup> Mugenzi Motion, Annex 3 (*The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, T. 8 December 2009 pp. 47, 48).

<sup>63</sup> See, e.g., Trial Judgement, paras. 1227, 1233. See also Trial Judgement, para. 1235.

<sup>64</sup> See *supra* para. 17.

<sup>65</sup> Mugenzi Motion, Annex 1 (Letter dated 5 December 2011 from Ms. Kate Gibson to Mr. James J. Arguin).

<sup>66</sup> Mugenzi Motion, para. 28, referring to Mugenzi Motion, Annex 6 (Letter dated 20 December 2011 from Mr. James J. Arguin to Ms. Kate Gibson) (confidential). See also Mugenzi Motion, Annex 7 (Letter dated 6 January 2012 from Ms. Kate Gibson to Mr. James J. Arguin) (confidential).

<sup>67</sup> Mugenzi Motion, paras. 25-30, referring to Mugenzi Motion, Annex 4 (*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 7 October 2004 pp. 19, 21).

<sup>68</sup> Mugenzi Motion, paras. 25, 26, referring to Mugenzi Motion, Annex 4 (*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 7 October 2004 pp. 19, 21).

<sup>69</sup> Mugenzi Motion, paras. 26, 27. See also Mugenzi Reply, para. 18.

evidence, including because he was denied an opportunity to try to introduce this evidence before the Trial Chamber and to inquire further as to the sources of Mr. Guichaoua's testimony.<sup>70</sup>

25. The Prosecution responds that the information contained in Mr. Guichaoua's testimony was before the Trial Chamber and that Mr. Mugenzi did not suffer any material prejudice from the non-disclosure of this testimony.<sup>71</sup> The Prosecution adds that Mr. Mugenzi distorts the Trial Judgement by suggesting that the Trial Chamber doubted the existence of the report in question.<sup>72</sup>

26. The Appeals Chamber considers that Mr. Mugenzi has specifically identified the material at issue and demonstrated that it has been in the custody or control of the Prosecution since October 2004. Mr. Mugenzi has also made a *prima facie* showing of the probable exculpatory nature of that evidence, as it may affect the credibility of Prosecution evidence concerning the reasons for the removal of Mr. Habyalimana as the prefect of Butare Prefecture. Given that the Prosecution did not provide Mr. Guichaoua's testimony to Mr. Mugenzi until December 2011 and that the Prosecution has given no indication that it was unable to do so earlier, the Appeals Chamber considers that the Prosecution breached its disclosure obligations under Rule 68 of the Rules in relation to this evidence by failing to disclose it as soon as practicable.

27. The Appeals Chamber considers that the Prosecution's violation of its disclosure obligations prevented Mr. Mugenzi from using the information contained in Mr. Guichaoua's testimony to prepare his defence at trial. Nonetheless, the Appeals Chamber is not convinced that Mr. Mugenzi was significantly prejudiced as a result of the Prosecution's disclosure violation.

28. In reaching its findings concerning the reason for Mr. Habyalimana's removal, the Trial Chamber explicitly considered Defence evidence that during the meeting at which the dismissal of the prefect was agreed, information was provided that Mr. Habyalimana might have links with the RPF.<sup>73</sup> The Trial Chamber further stated that the fact that this issue was discussed at the meeting "finds some corroboration in the Prosecution evidence".<sup>74</sup> Although the Trial Chamber made no finding as to whether information concerning alleged links with the RPF was, in fact, discussed at the meeting, it nonetheless concluded that,

[t]o the extent such allegations were discussed by the cabinet ministers, the Chamber has no doubt that all participants would have understood them as relying primarily on the fact that

<sup>70</sup> Mugenzi Motion, paras. 27-30. See also Mugenzi Reply, para. 19.

<sup>71</sup> Response to Mugenzi Motion, paras. 10, 13.

<sup>72</sup> Response to Mugenzi Motion, paras. 10-12, referring to Trial Judgement, para. 1235.

<sup>73</sup> Trial Judgement, para. 1233.

<sup>74</sup> Trial Judgement, para. 1233.

[Mr. Habyalimana] was a Tutsi and political moderate rather than any genuine threat he posed to safety in his prefecture through RPF infiltration.<sup>75</sup>

In this context, the Appeals Chamber considers that evidence of a report calling for the prefect's removal in light of his alleged ties to the RPF, about which Mr. Guichaoua testified, according to Mr. Mugenzi, would have been cumulative of other evidence on the record. In any event, as discussed above, to the extent that Mr. Mugenzi suffered prejudice in relation to the Prosecution's failure to disclose Mr. Guichaoua's evidence, the Appeals Chamber considers that the relief requested is disproportionate to the violation at issue and is unwarranted.<sup>76</sup>

(d) Witness QI's testimony in the *Nyiramasuhuko et al.* case

29. In the 5 December 2011 Letter, Mr. Mugenzi's counsel requested, *inter alia*, disclosure of exculpatory materials from the *Nyiramasuhuko et al.* case.<sup>77</sup> Later that same month, the Prosecution provided, *inter alia*, the 24 March 2004 transcript of Witness QI's testimony in the *Nyiramasuhuko et al.* case to Mr. Mugenzi.<sup>78</sup>

30. Mr. Mugenzi submits that Witness QI testified in the *Nyiramasuhuko et al.* case that, by 18 April 1994, disturbances had already begun in several communes in Butare Prefecture.<sup>79</sup> According to Mr. Mugenzi, this testimony directly undermines the Prosecution's successful claims at trial in his case concerning the calm in Butare Prefecture prior to the prefect's removal and, instead, supports his own contention that the violence in Butare Prefecture started well before Mr. Habyalimana was replaced.<sup>80</sup> Mr. Mugenzi argues that he was prejudiced by the Prosecution's failure to timely disclose this evidence.<sup>81</sup>

31. According to the Prosecution, Witness QI's evidence is not exculpatory because it is consistent with the Prosecution's case at trial that Mr. Habyalimana had succeeded in maintaining calm with a few exceptions and, in any event, would only be similar to evidence already before the Trial Chamber.<sup>82</sup> The Prosecution underscores that the Trial Chamber itself found that there was some violence in Butare Prefecture prior to Mr. Habyalimana's removal.<sup>83</sup>

<sup>75</sup> Trial Judgement, para. 1235.

<sup>76</sup> See *supra* para. 17.

<sup>77</sup> Mugenzi Motion, Annex 1 (Letter dated 5 December 2011 from Ms. Kate Gibson to Mr. James J. Arguin).

<sup>78</sup> Mugenzi Motion, para. 33, referring to Mugenzi Motion, Annex 6 (Letter dated 20 December 2011 from Mr. James J. Arguin to Ms. Kate Gibson) (confidential). See also Mugenzi Motion, Annex 7 (Letter dated 6 January 2012 from Ms. Kate Gibson to Mr. James J. Arguin) (confidential).

<sup>79</sup> Mugenzi Motion, para. 33, referring to Mugenzi Motion, Annex 5 (*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 24 March 2004 p. 37). See also Mugenzi Reply, para. 21.

<sup>80</sup> Mugenzi Motion, paras. 31, 33, 34. See also Mugenzi Reply, paras. 20-24.

<sup>81</sup> Mugenzi Motion, paras. 32-34. See also Mugenzi Reply, para. 25.

<sup>82</sup> Response to Mugenzi Motion, paras. 14-16.

<sup>83</sup> Response to Mugenzi Motion, paras. 16, 17, referring to Trial Judgement, paras. 1240, 1241.

32. The Appeals Chamber considers that Mr. Mugenzi has specifically identified the material at stake and has demonstrated that it has been in the custody or control of the Prosecution since March 2004. Mr. Mugenzi has also made a *prima facie* showing as to the probable exculpatory nature of Witness QI's testimony insofar as the witness's testimony addresses the extent of violence in Butare Prefecture at or around the time of the prefect's removal, one of the Trial Chamber's considerations in relation to Mr. Mugenzi's conviction for the removal of Mr. Habyalimana.<sup>84</sup> Given that this testimony was not disclosed to Mr. Mugenzi until 20 December 2011 and that the Prosecution has not suggested that it was unable to provide the testimony earlier, the Appeals Chamber considers that the Prosecution breached its obligations under Rule 68 of the Rules to disclose the material as soon as practicable.

33. The Prosecution's violation of its Rule 68 obligations was prejudicial to Mr. Mugenzi insofar as he was prevented from relying on Witness QI's testimony in preparing his defence. However, the Appeals Chamber considers that the prejudice suffered by Mr. Mugenzi as a result of this violation was minimal. In this regard, the Appeals Chamber notes that the Trial Chamber explicitly concluded that there were instances of violence in Butare Prefecture prior to the removal of Mr. Habyalimana, including killings.<sup>85</sup> Witness QI's testimony, which relates to "disturbances" and houses on fire in two communes,<sup>86</sup> is consistent with the Trial Chamber's conclusions in this regard, and Mr. Mugenzi's submissions as to the cumulative effect that this evidence, together with other hypothetical information concerning the scope of violence in Butare Prefecture, might have had<sup>87</sup> are speculative. Accordingly, to the extent that Mr. Mugenzi suffered prejudice from the Prosecution's failure to disclose this evidence, the Appeals Chamber is not persuaded that such prejudice was material or warrants the relief that Mr. Mugenzi requests.<sup>88</sup>

## 2. President Sindikubwabo's speech on 19 April 1994

34. As set forth above, in response to a request from Mr. Mugenzi's counsel, the Prosecution provided the 17 June 2008 transcript of Witness AZM's testimony in the *Kalimanzira* case to Mr. Mugenzi.<sup>89</sup> In January 2012, following a second request from Mr. Mugenzi's counsel, the Prosecution provided the 8 December 2009 transcript of Mr. Ntawukulilyayo's testimony in the *Ntawukulilyayo* case to Mr. Mugenzi.<sup>90</sup>

<sup>84</sup> Trial Judgement, para. 1240.

<sup>85</sup> See Trial Judgement, paras. 1240, 1241.

<sup>86</sup> Mugenzi Motion, Annex 5 (*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 24 March 2004 p. 37).

<sup>87</sup> Mugenzi Reply, paras. 24, 25.

<sup>88</sup> See *supra* para. 17.

<sup>89</sup> See *supra* para. 11.

<sup>90</sup> See *supra* para. 18.

35. Mr. Mugenzi submits that the Prosecution failed to timely disclose Witness AZM's testimony in the *Kalimanzira* case and Mr. Ntawukulilyayo's testimony in the *Ntawukulilyayo* case, both of which directly contradict the Prosecution's claim in his own case that President Sindikubwabo's speech on 19 April 1994 was clear and unambiguous, and thus constituted "direct" incitement.<sup>91</sup> In addition, according to Mr. Mugenzi, Witness AZM's and Mr. Ntawukulilyayo's evidence shows the spontaneous nature of President Sindikubwabo's speech, thus undermining the Prosecution's successful argument at trial that Mr. Mugenzi had advance knowledge of what the President would say and shared the President's intent that the speech incite massacres.<sup>92</sup> Mr. Mugenzi also asserts that Witness AZM's testimony undercuts the Prosecution's claim that President Sindikubwabo's speech was "public", as the witness gave evidence that the audience included senior officials from Kigali, soldiers, leaders of political parties, and others.<sup>93</sup> Mr. Mugenzi adds that the failure to disclose these testimonies prejudiced him and constitutes an egregious violation of Rule 68 of the Rules, particularly in light of the fact that the same Prosecution counsel prosecuted both Mr. Mugenzi's case and the *Ntawukulilyayo* case.<sup>94</sup>

36. The Prosecution responds that Witness AZM's and Mr. Ntawukulilyayo's testimonies are not exculpatory and that, to the contrary, their testimonies clearly show a direct link between President Sindikubwabo's speech and the subsequent killings and demonstrate that the speech was given at a public meeting, in line with the Prosecution's case at trial.<sup>95</sup> The Prosecution adds that Mr. Mugenzi misinterprets the testimonies of Witness AZM and Mr. Ntawukulilyayo concerning the content of the President's speech and misconstrues the Trial Chamber's findings as to Mr. Mugenzi's own knowledge.<sup>96</sup>

37. The Appeals Chamber considers that Mr. Mugenzi has sufficiently identified the material in question and demonstrated that the transcripts of Mr. Ntawukulilyayo's and Witness AZM's testimonies have been in the custody or control of the Prosecution for two years and more than three years, respectively, prior to their disclosure to Mr. Mugenzi. Mr. Mugenzi has also made a *prima facie* showing that Witness AZM's and Mr. Ntawukulilyayo's testimonies about President Sindikubwabo's speech may affect the credibility of Prosecution evidence concerning the speech. Because these materials were not provided to Mr. Mugenzi as soon as practicable, the Appeals

<sup>91</sup> Mugenzi Motion, paras. 35, 40-44, referring to Mugenzi Motion, Annexes 2 (*The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, T. 17 June 2008 pp. 5, 8-10), 3 (*The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, T. 8 December 2009 pp. 48, 49). See also Mugenzi Motion, paras. 36-39; Mugenzi Reply, paras. 3-6, 8-10, 13.

<sup>92</sup> Mugenzi Motion, para. 46. See also Mugenzi Reply, paras. 11-13.

<sup>93</sup> Mugenzi Motion, para. 45. See also Mugenzi Reply, paras. 7, 13.

<sup>94</sup> Mugenzi Motion, paras. 47-49; Mugenzi Reply, paras. 7, 13.

<sup>95</sup> Response to Mugenzi Motion, paras. 18-21, 24, 27.

<sup>96</sup> Response to Mugenzi Motion, paras. 22, 23, 25-27.

Chamber accordingly considers that the Prosecution has breached its disclosure obligations under Rule 68 of the Rules.

38. Although Mr. Mugenzi was denied an opportunity to seek to rely upon this evidence at trial, the Appeals Chamber is not persuaded that he suffered material prejudice as a result of the Prosecution's violations. In this respect, the Appeals Chamber considers that, given the Trial Chamber's extensive deliberations concerning possible interpretations of President Sindikubwabo's speech,<sup>97</sup> the views of Witness AZM and Mr. Ntawukulilyayo, as expressed in their respective testimonies, that the President's speech was difficult to understand or interpret in a single way<sup>98</sup> are of limited probative value. The Appeals Chamber further considers that Witness AZM's and Mr. Ntawukulilyayo's testimonies concerning the improvised or unexpected nature of President Sindikubwabo's speech are cumulative of other evidence on the record in this case,<sup>99</sup> as is Witness AZM's testimony describing certain individuals in the audience at the President's speech.<sup>100</sup> Given the limited nature of the prejudice suffered by Mr. Mugenzi, the Appeals Chamber considers that the relief requested is both disproportionate and unwarranted.<sup>101</sup>

### 3. Conclusion

39. In light of the foregoing, the Appeals Chamber finds that the Prosecution's failure to disclose the specific witness testimonies annexed to the Mugenzi Motion as soon as practicable amounts to a violation of Rule 68 of the Rules. Given the limited prejudice suffered by Mr. Mugenzi as a result of the Prosecution's disclosure violations, however, the Appeals Chamber considers that the relief requested is disproportionate and unwarranted.

40. The Appeals Chamber nonetheless firmly emphasizes that the Prosecution's disclosure obligation is as important as its obligation to prosecute, and exhorts the Prosecution to act in good faith and in full compliance with its positive and continuous disclosure obligations.<sup>102</sup> The Appeals Chamber also underscores that any further violations of the Prosecution's disclosure obligation under Rule 68 of the Rules could lead to appropriate sanctions, if warranted in the circumstances.

<sup>97</sup> See Trial Judgement, paras. 1333-1367.

<sup>98</sup> See Mugenzi Motion, Annexes 2 (*The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, T. 17 June 2008 pp. 8-10), 3 (*The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, T. 8 December 2009 pp. 48, 49).

<sup>99</sup> Trial Judgement, para. 1368. See also Trial Judgement, para. 1369.

<sup>100</sup> See, e.g., Trial Judgement, para. 1329, and references cited therein.

<sup>101</sup> See *supra* para. 17.

<sup>102</sup> See, e.g., *Kamuhanda* Decision, para. 46.

### E. Mugiraneza Motion

41. In the Mugiraneza Motion, Mr. Mugiraneza joins the Mugenzi Motion, adding that the dismissal of an indictment or the vacatur of a conviction, while a harsh remedy for Rule 68 violations, is not unprecedented.<sup>103</sup> He further submits that the Appeals Chamber should “correct the Prosecutor’s repeated Rule 68 violations” and impose sanctions.<sup>104</sup> Mr. Mugiraneza cites the example of Witness G, who gave testimony in the case of *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse* (“*Karemera and Ngirumpatse case*”)<sup>105</sup> and of whose testimony Mr. Mugiraneza was unaware until the *Karemera and Ngirumpatse* Trial Judgement was issued.<sup>106</sup> According to Mr. Mugiraneza, Witness G’s testimony is exculpatory, as it is consistent with his own position advanced at trial concerning the reasons for Mr. Habyalimana’s replacement as the prefect of Butare Prefecture.<sup>107</sup>

42. The Prosecution responds that the Mugiraneza Motion should be dismissed in its entirety.<sup>108</sup> According to the Prosecution, Mr. Mugiraneza’s arguments concerning Witness G are without merit, as the witness’s testimony confirms the Prosecution’s arguments concerning the removal of Mr. Habyalimana.<sup>109</sup> The Prosecution adds that Mr. Mugiraneza’s unsupported allegations of widespread failures to disclose exculpatory materials should likewise be disregarded and that, in any event, the requested relief is not in conformity with established jurisprudence.<sup>110</sup>

43. To the extent that Mr. Mugiraneza has adopted the arguments advanced by Mr. Mugenzi and advanced related allegations concerning the Prosecutor’s Rule 68 violations, Mr. Mugiraneza’s submissions are rejected for the reasons set forth above in relation to the Mugenzi Motion.<sup>111</sup>

44. As regards Mr. Mugiraneza’s submissions concerning Witness G, the Appeals Chamber considers that Mr. Mugiraneza has sufficiently identified the material at issue and demonstrated that it has been in the custody or control of the Prosecution since October 2005 when the witness appeared before the Tribunal.<sup>112</sup> Mr. Mugiraneza has also made a *prima facie* showing as to the probable exculpatory nature of Witness G’s testimony discussed in the *Karemera and Ngirumpatse* Trial Judgement insofar as that testimony may affect the credibility of Prosecution evidence

<sup>103</sup> Mugiraneza Motion, paras. 1, 9-11.

<sup>104</sup> Mugiraneza Motion, para. 14. *See also* Mugiraneza Motion, paras. 2, 6-8, 12, 13.

<sup>105</sup> *See The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012 (“*Karemera and Ngirumpatse Trial Judgement*”), paras. 867-869, and references cited therein.

<sup>106</sup> Mugiraneza Motion, paras. 4, 5, referring to *Karemera and Ngirumpatse Trial Judgement*, paras. 867, 869.

<sup>107</sup> Mugiraneza Motion, para. 4.

<sup>108</sup> Response to Mugiraneza Motion, paras. 3, 11.

<sup>109</sup> Response to Mugiraneza Motion, paras. 3, 6-9.

<sup>110</sup> Response to Mugiraneza Motion, para. 10.

<sup>111</sup> *See supra* para. 39. *See also supra* para. 17.



concerning the reasons for Mr. Habyalimana's removal. Moreover, it appears that the Prosecution has not disclosed Witness G's October 2005 testimony to Mr. Mugiraneza.<sup>113</sup> Because this evidence has not been provided to Mr. Mugiraneza as soon as practicable, the Appeals Chamber accordingly considers that the Prosecution has violated its Rule 68 disclosure obligations in relation to this evidence. However, as Mr. Mugiraneza has made no submissions with regard to prejudice suffered as a result of the Prosecution's failure to disclose Witness G's evidence, the Appeals Chamber will not consider whether any specific relief is warranted as a result. In any event, the Appeals Chamber observes that Witness G's testimony concerning the reasons for Mr. Habyalimana's removal as prefect is cumulative of other evidence on the record in this case.<sup>114</sup>

#### F. Disposition


45. For the foregoing reasons, the Appeals Chamber **ACCEPTS** the Mugenzi Motion as validly filed, **DENIES** the Mugenzi Motion, and **DENIES** the Mugiraneza Motion.

Done in English and French, the English version being authoritative.

Done this 24th day of September 2012  
At The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
Judge Theodor Meron  
Presiding

<sup>112</sup> See *Karemera and Ngirumpatse* Trial Judgement, paras. 867-869, and references cited therein.

<sup>113</sup> See Mugiraneza Motion, paras. 4, 5.

<sup>114</sup> See, e.g., Trial Judgement, para. 1232, and references cited therein.