



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

18230/H

ICTR-98-42-A

09th April 2015

IN THE APPEALS CHAMBER

{18230/H – 18216/H}

Before:

Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Carmel Agius
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar:

Mr. Bongani Majola

Decision of:

9 April 2015

ICTR Appeals Chamber
09 APR 2015
Date: <i>Junior R.</i>
Action: <i>Chambers, Defense,</i>
Copied To: <i>DP-ALAB 3 LKS</i>

THE PROSECUTOR

v.

**Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI
Élie NDAYAMBAJE**

Case No. ICTR-98-42-A

**DECISION ON NYIRAMASUHUKO'S FIRST MOTION FOR RELIEF FOR
RULE 68 VIOLATIONS AND TO PRESENT ADDITIONAL EVIDENCE**

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International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS
NAME / NOM: <i>ROSETTE MUZIGO-MORRISON</i>
SIGNATURE: <i>[Signature]</i> DATE: 09 APR 2015

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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of a motion filed by Pauline Nyiramasuhuko ("Nyiramasuhuko") on 20 December 2012, in which she requests the Appeals Chamber to find that the Prosecution violated its disclosure obligations pursuant to Rule 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules") and, as one of the remedies, to admit on appeal the transcripts of the testimony of Witness CHC from the *Ntagerura et al.* case.¹ The Prosecution objected to the Motion on 21 January 2013.² Nyiramasuhuko filed her reply on 4 February 2013, in which she requests the Appeals Chamber to consider her arguments and admit Witness CHC's Testimony pursuant to Rule 115 of the Rules.³

A. Background

2. On 24 June 2011, Trial Chamber II of the Tribunal ("Trial Chamber") convicted Nyiramasuhuko of conspiracy to commit genocide based on its conclusion that Nyiramasuhuko entered into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture with the intent to destroy, in whole or in part, the Tutsi ethnic group and sentenced her to life imprisonment.⁴ In support of its conclusion, the Trial Chamber relied on its findings, *inter alia*, that: (i) during a Cabinet meeting of the Interim Government held on 16 or 17 April 1994, Nyiramasuhuko agreed with other members of the Interim Government to remove Jean-Baptiste Habyalimana as prefect of Butare ("Prefect Habyalimana"), who had posed an obstacle to the killing of Tutsis, and replace him with Sylvain Nsabimana ("Nsabimana");⁵ and (ii) Nyiramasuhuko attended Nsabimana's swearing-in ceremony as the new prefect of Butare, held on 19 April 1994 ("Nsabimana's Swearing-In Ceremony") and failed to dissociate herself from the

¹ Pauline Nyiramasuhuko's Motion for Sanctions of the Prosecution for Violations of Rule 68 and Other Ancill[a]ry Reliefs, 20 December 2012 ("Motion"), paras. 5, 6, 44, p. 4749/H (Registry pagination) and Annexes E-1 and E-2, *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, Witness CHC, T. 28 May 2002, T. 29 May 2002 (collectively, "Witness CHC's Testimony").

² Response to Nyiramasuhuko Motion for Sanctions and for Admission of Additional Evidence, 21 January 2013 ("Response"), paras. 1, 2, 20, 22, 23.

³ Pauline Nyiramasuhuko's Reply to the Prosecution's Response to Her Motion for Sanctions of the Prosecution for Violations of Rule 68 and Other Ancillary Reliefs and Counter-Motion to File Additional Submissions Under Rule 115, 14 March 2013 (original French version filed on 4 February 2013) ("Reply"), paras. 1, 20, p. 10.

⁴ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011 ("Trial Judgement"), paras. 5678, 5727, 6186, 6271. *See also ibid.*, para. 6200. Nyiramasuhuko was also convicted of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. *See ibid.*, para. 6186.

⁵ Trial Judgement, paras. 862, 864, 5670, 5676. *See also ibid.*, para. 5736.

content of the speech of President Sindikubwabo during the ceremony (“Sindikubwabo’s Speech”), effectively endorsing his inflammatory statements.⁶

3. Nyiramasuhuko filed her initial notice of appeal against the Trial Judgement on 17 October 2011.⁷ The filing of the submissions related to her appeal was completed on 7 October 2013 by the filing of her brief in reply.⁸

4. On 3 January 2013, the Appeals Chamber, seized of a motion filed by the Prosecution requesting clarification of the time limit to respond to the Motion, found that the Motion should be considered as filed pursuant to both Rules 68 and 115 of the Rules.⁹

B. Applicable Law

5. Rule 68(A) of the Rules imposes an obligation on the Prosecution to disclose to the Defence, as soon as practicable, any material in the actual knowledge of the Prosecution which may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the evidence led by the Prosecution in that particular case.¹⁰ The Appeals Chamber recalls that the Prosecution’s obligation to disclose exculpatory material is essential to a fair trial and notes that this obligation has always been interpreted broadly.¹¹

6. The determination of which materials are subject to disclosure under this provision is a fact-based enquiry undertaken by the Prosecution.¹² The standard for assessing whether material is considered to be exculpatory within the meaning of Rule 68(A) of the Rules is whether there is any possibility, in light of the submissions of the parties, that the given information could be relevant to the defence of the accused.¹³ Rule 68 of the Rules *prima facie* obliges the Prosecution to monitor

⁶ Trial Judgement, paras. 921, 5671, 5672, 5676. *See also ibid.*, paras. 5738, 5739.

⁷ *Acte d’appel du [sic] Pauline Nyiramasuhuko*, 17 October 2011.

⁸ Pauline Nyiramasuhuko’s Brief in Reply, 24 June 2014 (original French version filed on 7 October 2013).

⁹ *See* Decision on Prosecution’s Urgent Motion for Clarification of the Time Limit and, in the Alternative, for Extension of Time, dated 3 January 2013, filed on 4 January 2013 (“3 January 2013 Decision”), p. 2.

¹⁰ *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, 23 March 2011 (confidential; public redacted version filed on 9 November 2011) (“Setako Decision”), para. 12; *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 (“Kalimanzira Appeal Judgement”), para. 18. *See also Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012 (“Mugenzi and Mugiraneza Decision”), para. 7; *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. 18 January 2011 Decision”), para. 7.

¹¹ *See, e.g., Setako Decision*, para. 12; *Kalimanzira Appeal Judgement*, para. 18. *See also Mugenzi and Mugiraneza Decision*, para. 7.

¹² *See, e.g., Setako Decision*, para. 13; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion”, 14 May 2008 (“Karemera et al. 14 May 2008 Decision”), para. 9. *See also Mugenzi and Mugiraneza 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.

¹³ *See, e.g., Setako Decision*, para. 13; *Karemera et al. 14 May 2008 Decision*, para. 12.

the testimony of witnesses and to disclose material relevant to their impeachment, during or after testimony.¹⁴

7. If the Defence wishes to show that the Prosecution is in breach of its disclosure obligation, it 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.¹⁵ 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.¹⁶

8. The Appeals Chamber recalls that the Prosecution may be relieved of its obligations under Rule 68 of the Rules “if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation.”¹⁷

9. The Appeals Chamber recalls that, where it is found at the appeal stage of the proceedings that an accused has been prejudiced by a breach of Rule 68 of the Rules, that prejudice may be remedied, where appropriate, through the application of Rule 115 of the Rules to establish whether the material is admissible as additional evidence on appeal.¹⁸

C. Submissions

10. Nyiramasuhuko points out that, on 24 September 2012 in the *Mugenzi and Mugiraneza* case, the Appeals Chamber found that the Prosecution had violated its Rule 68 disclosure obligations by failing to disclose the testimonies of Witness AZM in the *Kalimanzira* case, Dominique Ntawukulilyayo (“Ntawukulilyayo”) in the *Ntawukulilyayo* case, and Witness G in the *Karemera et al.* case, which were directly related to the removal from office of Prefect Habyalimana and Sindikubwabo’s Speech at Nsabimana’s Swearing-In Ceremony.¹⁹

¹⁴ See, e.g., *Setako* Decision, para. 13; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić* Appeal Judgement”), para. 206.

¹⁵ See, e.g., *Setako* Decision, para. 14; *Karemera et al.* 14 May 2008 Appeal Decision, para. 9. See also *Mugenzi and Mugiraneza* Decision, para. 8; *Bagosora et al.* 18 January 2011 Decision, para. 7.

¹⁶ See, e.g., *Setako* Decision, para. 14; *Kalimanzira* Appeal Judgement, para. 18. See also *Mugenzi and Mugiraneza* Decision, para. 8.

¹⁷ See, e.g., *Setako* Decision, para. 15; *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 30, quoting *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 51.

¹⁸ *Setako* Decision, para. 16; *Krstić* Appeal Judgement, para. 187.

¹⁹ Motion, para. 32, referring to *Mugenzi and Mugiraneza* Decision.

11. Nyiramasuhuko submits that, because she was convicted of conspiracy to commit genocide on the basis of these two incidents, the testimonies of Witness AZM in the *Kalimanzira* case, Ntawukulilyayo in the *Ntawukulilyayo* case, and Witness G in the *Karemera et al.* case are also exculpatory in her case.²⁰ She argues that, despite the exculpatory nature of these materials, the Prosecution only served her with disclosures alerting her to the existence of Witness AZM's *Kalimanzira* Testimony and Ntawukulilyayo's Testimony on 4 December 2012 and never made any disclosures regarding Witness G.²¹ She also contends that, on 4 December 2012, the Prosecution served her with disclosures alerting her to the existence of Witness CHC's Testimony and the testimony of Witness AZM in the *Nizeyimana* case, which, according to her, are also exculpatory.²² Nyiramasuhuko submits that all these materials contradict the Trial Chamber's findings that Prefect Habyalimana was dismissed because he was an obstacle to the killing of Tutsis²³ and that Sindikubwabo's Speech was inflammatory and incited the killing of Tutsis.²⁴

12. Nyiramasuhuko contends that the Prosecution violated Rule 68 of the Rules by failing to disclose or timely disclose this exculpatory evidence²⁵ and that the prejudice she suffered as a result is "immeasurable".²⁶ She claims that timely disclosure "would have altered [her] investigations", "could have led to other witnesses" and to "the recall of prosecution witnesses for further cross-examination".²⁷ She argues that the Prosecution should be sanctioned "in the form of adverse factual inferences resulting in an acquittal on [the count of] Conspiracy to Commit Genocide".²⁸ Nyiramasuhuko further requests the admission of Witness CHC's Testimony as a remedy for the Prosecution's violation.²⁹

²⁰ Motion, paras. 32, 33. See also *ibid.*, para. 36, Annex A, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-2005-88-T, Witness AZM, T. 17 June 2008 ("Witness AZM's *Kalimanzira* Testimony"), Annexes C1-C3, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness G, T. 12, 19, and 20 October 2005 (collectively "Witness G's Testimony"), Annex D, *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Dominique Ntawukulilyayo, T. 8 December 2009 ("Ntawukulilyayo's Testimony").

²¹ Motion, paras. 34, 35.

²² Motion, paras. 34, 36. See also *ibid.*, Annex B, *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-T, Witness AZM, T. 20 January 2011 ("Witness AZM's *Nizeyimana* Testimony").

²³ See Motion, para. 36, referring to Witness AZM's *Kalimanzira* Testimony, p. 8, Witness AZM's *Nizeyimana* Testimony, p. 70, Witness G's Testimony, T. 12 October 2005 pp. 4, 5, Ntawukulilyayo's Testimony, pp. 45-48, Witness CHC's Testimony, T. 28 May 2002 p. 50, T. 29 May 2002 pp. 22, 23, 35, 36, 41-44, 52, 53, 112, 113.

²⁴ See Motion, para. 36, referring to Witness AZM's *Kalimanzira* Testimony, pp. 5, 8, Witness AZM's *Nizeyimana* Testimony, pp. 68, 70, Witness G's Testimony, T. 19 October 2005 p. 24, Ntawukulilyayo's Testimony, pp. 48-50.

²⁵ Motion, para. 41. Nyiramasuhuko highlights that the Prosecution waited more than two months after the *Mugenzi and Mugiraneza* Decision to disclose Witness AZM's *Kalimanzira* Testimony and Witness AZM's *Nizeyimana* Testimony (collectively "Witness AZM's Testimonies"), Ntawukulilyayo's Testimony, and Witness CHC's Testimony. See *idem*. See also Reply, para. 2.

²⁶ Motion, para. 37.

²⁷ See Motion, paras. 37-39. Nyiramasuhuko also argues that given that her conviction for conspiracy to commit genocide was based on circumstantial evidence, this direct exculpatory evidence could have affected the verdict and resulted in an acquittal. See *ibid.*, para. 40.

²⁸ Motion, paras. 36, 43.

²⁹ Motion, para. 44, p. 4749/H (Registry pagination).

13. The Prosecution responds that Nyiramasuhuko failed to make a *prima facie* case of the potentially exculpatory nature in this case of Witness AZM's *Nizeyimana* Testimony, Witness G's Testimony, and Ntawukulilyayo's Testimony insofar as it relates to the dismissal of Prefect Habyalimana.³⁰

14. The Prosecution, however, concedes that Witness AZM's *Kalimanzira* Testimony, Ntawukulilyayo's Testimony to the extent that it relates to Sindikubwabo's Speech, and Witness CHC's Testimony are potentially exculpatory and were not disclosed as soon as practicable.³¹ It argues nonetheless that: (i) the exculpatory aspects of Witness AZM's *Kalimanzira* Testimony "were, in fact, available to [Nyiramasuhuko] in another form, six months to a year before she opened her defence case"³² and, although Nyiramasuhuko necessarily knew that this witness could offer potentially exculpatory evidence, she objected to his testimony on the ground that it would be redundant and did not seek to call him as a witness in her case;³³ (ii) Ntawukulilyayo's Testimony, which was publicly available, concerning Sindikubwabo's Speech is cumulative of other evidence presented at trial given that Nsabimana already testified to the difficulty to interpret Sindikubwabo's Speech³⁴ and Nyiramasuhuko has not shown any prejudice resulting from the delayed disclosure;³⁵ and (iii) the exculpatory aspects of Witness CHC's Testimony were either known to Nyiramasuhuko through the disclosure of one of Witness AZM's prior statements or cumulative of other evidence presented at trial and Nyiramasuhuko has not shown any prejudice resulting from the delayed disclosure.³⁶

15. The Prosecution further responds that Nyiramasuhuko's request for the admission of Witness CHC's Testimony should be summarily dismissed as she failed to demonstrate that prejudice resulted from the delayed disclosures and made no attempt to show that the evidence qualifies for admission under Rule 115 of the Rules.³⁷ It contends that, in any case, Witness CHC's Testimony concerning the dismissal of Prefect Habyalimana because of administrative errors is

³⁰ Response, para. 22(i). *See also ibid.*, para. 1. The Prosecution argues that: (i) Witness AZM in the *Nizeyimana* case never mentioned the reason for Prefect Habyalimana's dismissal and testified that many people were killed in Butare Prefecture after Sindikubwabo's Speech was delivered; (ii) Witness G testified that Prefect Habyalimana was replaced because of his Tutsi ethnicity and confirmed that killings occurred in Butare following Sindikubwabo's Speech and that the word "*gukora*" meant to attack the Tutsis; and (iii) Ntawukulilyayo only provided an opinion based on nothing but rumors and personal presumptions. *See ibid.*, paras. 6-14.

³¹ Response, paras. 3, 4, 16, 18, 22(ii)-(iv). *See also ibid.*, para. 1.

³² Response, para. 4. *See also ibid.*, paras. 1, 22(ii). The Prosecution submits that four of Witness AZM's prior statements and five Rwandan judicial records – which contained the same potentially exculpatory information – had been disclosed to Nyiramasuhuko in 2004 as part of the Prosecution's request to call him to testify as Witness FCC. *See ibid.*, paras. 3, 4.

³³ Response, paras. 3, 4, 22(ii). The Prosecution argues that Nyiramasuhuko cannot therefore claim that she was denied the opportunity to rely on that evidence at trial or any resulting prejudice. *See ibid.*, para. 4.

³⁴ Response, paras. 1, 16, 17, 22(iii).

³⁵ Response, paras. 1, 17, 22(iii).

³⁶ Response, paras. 1, 18, 19, 22(iv).

³⁷ Response, para. 20.

inconsistent with both the Prosecution and the Defence cases at trial and that the substance of the remainder of Witness CHC's Testimony is already in the trial record and has been rejected by the Trial Chamber.³⁸

16. Nyiramasuhuko replies that the Prosecution provides no justification for the violation of its disclosure obligations.³⁹ She also submits, *inter alia*, that: (i) Witness AZM's prior statements disclosed in this case in 2004 were not exculpatory;⁴⁰ (ii) Ntawukulilyayo's Testimony regarding the removal of Prefect Habyalimana corroborates her testimony;⁴¹ (iii) Ntawukulilyayo's Testimony relating to Sindikubwabo's Speech cannot be considered as corroborative of Nsabimana's evidence as the latter was "a co-defendant who contradicted himself in this matter and whose defence is irreconcilable with [Nyiramasuhuko's]";⁴² and (iv) there is an "obvious distinction" between a testimony based on hearsay and Witness CHC's Testimony based on the witness's presence at the Cabinet meeting where the decision to remove Prefect Habyalimana from office was taken.⁴³

17. In her reply, Nyiramasuhuko further requests the Appeals Chamber to consider her arguments related to the admission of Witness CHC's Testimony on appeal as a remedy pursuant to Rule 115 of the Rules "despite the error committed in good faith by her Counsel who misconstrued" the applicable legal framework.⁴⁴ She submits in this respect that Witness CHC's Testimony is credible and relevant,⁴⁵ that it was "neither available nor easily accessible despite the due diligence [she] exercised",⁴⁶ and that it could have been a decisive factor in reaching the decision at trial.⁴⁷

³⁸ Response, para. 21, referring to Trial Judgement, para. 861.

³⁹ Reply, para. 2. See also *ibid.*, para. 3.

⁴⁰ Reply, para. 7.

⁴¹ Reply, para. 15.

⁴² Reply, para. 16.

⁴³ Reply, para. 17. See also *ibid.*, para. 18. Nyiramasuhuko also points out that Witness CHC could have supported her alibi. See *ibid.*, para. 19.

⁴⁴ Reply, para. 20, p. 10. However, Nyiramasuhuko does not appear to request that her arguments be considered under Rule 115 of the Rules should the Appeals Chamber find that no remedy is warranted for the violation of Rule 68 of the Rules, unlike in relation to her second request for relief for violation of disclosure obligations. See Pauline Nyiramasuhuko's Reply to the Response to Nyiramasuhuko's Second Rule 68 and 115 Motion, 14 August 2014 (confidential; original French version filed on 19 December 2013), para. 30.

⁴⁵ Reply, paras. 23-26.

⁴⁶ Reply, para. 27. See also *ibid.*, para. 33.

⁴⁷ Reply, paras. 29-33. Specifically, Nyiramasuhuko argues that Witness CHC's Testimony: (i) rebuts the allegation that Nyiramasuhuko conspired with other members of the Interim Government to dismiss Prefect Habyalimana as he was an obstacle to the killing of Tutsis; (ii) demonstrates that there was no discussion concerning the extermination of Tutsis during Cabinet meetings "[g]iven Witness CHC's obligation to be present at all [C]abinet meetings"; (iii) rebuts the Prosecution expert witnesses' opinion concerning Prefect Habyalimana's dismissal and the instructions of 11 April and 27 April 1994; and (iv) "would have necessarily ruled out" the finding that conspiracy to commit genocide was the "only possible inference" based on circumstantial and opinion evidence given "Witness CHC's live and factual testimony". See *idem*.

D. Discussion**1. Preliminary Matter: Scope of the Reply**

18. On 3 January 2013, the Appeals Chamber found that the Motion lacked sufficient clarity as to whether the annexed documents were being presented for admission as additional evidence on appeal pursuant to Rule 115 of the Rules.⁴⁸ In her reply, Nyiramasuhuko clarified that she sought admission of Witness CHC's Testimony pursuant to Rule 115 of the Rules in relation to the prejudice she suffered and developed arguments aimed at demonstrating that the proffered material satisfied the requirements for admission as additional evidence on appeal.⁴⁹

19. The Appeals Chamber considers that, although Nyiramasuhuko failed to argue the admission of Witness CHC's Testimony under Rule 115 of the Rules in her Motion, her new arguments in reply in fact respond to the Prosecution's contention that this material does not qualify for admission as additional evidence on appeal. Noting further that the Prosecution did not object to Nyiramasuhuko's Reply and that it would not be prejudiced by the Appeals Chamber's consideration of the Reply given the arguments it developed in its Response, the Appeals Chamber accepts the Reply as validly filed and will consider Nyiramasuhuko's submissions related to the admission of Witness CHC's Testimony under Rule 115 of the Rules as a remedy for the Prosecution's alleged violation of its Rule 68 disclosure obligations.

2. Alleged Violation of Rule 68 of the Rules

20. The Appeals Chamber recalls that the Trial Chamber found that the removal of Prefect Habyalimana and the appointment of Nsabimana as the new prefect of Butare were Government decisions.⁵⁰ The Trial Chamber determined that Nyiramasuhuko's testimony that she had no choice but to consent to Prefect Habyalimana's removal, that the Interim Government had no real power with regard to the appointment of prefects, and that it was obliged to accept the proposal of the *Parti social démocrate* ("PSD") to appoint Nsabimana in order to gain the support of the PSD militants in Butare was not credible.⁵¹ The Trial Chamber found that, even if the political parties made the initial proposal to remove Prefect Habyalimana from office, the final decision fell to the Interim Government and was taken during a Cabinet meeting attended by Nyiramasuhuko.⁵² The Trial Chamber concluded that Nyiramasuhuko, as a member of the Interim Government,

⁴⁸ See 3 January 2013 Decision, p. 2.

⁴⁹ Reply, paras. 19[sic]-33.

⁵⁰ Trial Judgement, para. 859.

⁵¹ Trial Judgement, paras. 860, 861, *referring, inter alia, to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Nyiramasuhuko, T. 28 September 2005 pp. 45-49, T. 16 November 2005 pp. 62, 66, 68.

⁵² Trial Judgement, para. 861. See also *ibid.*, paras. 857-860, 862-864, 5670.

participated in the decision to remove Prefect Habyalimana from office because he “had posed an obstacle to the killing of Tutsis”.⁵³

21. With regard to Sindikubwabo’s Speech, the Trial Chamber found that, considered in the context of Rwanda in 1994, Sindikubwabo’s Speech constituted an instruction to the people of Butare to get actively involved in the massacre of Tutsis and an implicit threat that those who failed to take action and participate in the genocide would be sought out and removed.⁵⁴ It determined that the word “enemy” in Sindikubwabo’s Speech meant the Tutsis⁵⁵ and that the word “work” (“*gukora*”) contained in the speech meant to kill Tutsis.⁵⁶ The Trial Chamber concluded that Sindikubwabo’s Speech of 19 April 1994 was inflammatory and called on his listeners to kill Tutsis and their accomplices.⁵⁷

22. The Appeals Chamber notes that the Prosecution does not dispute that it did not disclose Witness AZM’s Testimonies, Ntawukulilyayo’s Testimony, and Witness CHC’s Testimony to Nyiramasuhuko prior to 4 December 2012 and that it never disclosed Witness G’s Testimony to her.⁵⁸

23. The Appeals Chamber finds that Nyiramasuhuko has sufficiently identified the alleged exculpatory materials in question and notes that the Prosecution does not dispute that these materials have been in its custody since the respective witnesses testified in 2005, 2008, 2009, and 2011. The Appeals Chamber will now examine whether Nyiramasuhuko has made a *prima facie* showing of the probable exculpatory nature of these materials and will, after this analysis, examine whether Nyiramasuhuko has been prejudiced by any possible failure of the Prosecution to comply with its Rule 68 disclosure obligations.

(a) Witness AZM’s *Nizeyimana* Testimony

24. The Appeals Chamber considers that Nyiramasuhuko has not demonstrated that the information contained in Witness AZM’s *Nizeyimana* Testimony of January 2011 is *prima facie* exculpatory. Although Witness AZM was questioned on Prefect Habyalimana’s removal, the witness merely confirmed the dismissal without providing any reason for it,⁵⁹ and therefore does not support Nyiramasuhuko’s contention that this evidence contradicts the Prosecution case. Likewise, the Appeals Chamber observes with regard to Sindikubwabo’s Speech that Witness AZM, after

⁵³ Trial Judgement, para. 5676. See also *ibid.*, para. 864.

⁵⁴ Trial Judgement, para. 880.

⁵⁵ Trial Judgement, paras. 894, 5671.

⁵⁶ Trial Judgement, paras. 897, 5671.

⁵⁷ Trial Judgement, para. 890. See also *ibid.*, paras. 5671, 5676.

⁵⁸ See Response.

⁵⁹ Witness AZM’s *Nizeyimana* Testimony, pp. 67, 68.

indicating that he “did not immediately understand what the president meant”,⁶⁰ confirmed “unequivocally” that Sindikubwabo was asking the population of Butare to start killing people and that massacres ensued throughout Butare Prefecture following the speech.⁶¹ This evidence, in the view of the Appeals Chamber, was therefore not relevant to Nyiramasuhuko’s defence case and does not constitute exculpatory material. Nyiramasuhuko’s contention that the Prosecution violated its Rule 68 disclosure obligations by failing to disclose Witness AZM’s *Nizeyimana* Testimony earlier than it did is therefore rejected.

(b) Ntawukulilyayo’s Testimony

25. The Appeals Chamber notes that the Prosecution concedes the potentially exculpatory nature of Ntawukulilyayo’s Testimony concerning Sindikubwabo’s Speech.⁶² The Appeals Chamber considers that Ntawukulilyayo’s Testimony that Prefect Habyalimana was removed from office due to his failure to attend a meeting on 11 April 1994 or his ethnicity⁶³ and that it was “difficult to understand the meaning” of Sindikubwabo’s Speech⁶⁴ was relevant to Nyiramasuhuko’s defence at trial and potentially exculpatory to the extent that it may have affected the credibility of Prosecution evidence concerning the reasons for the removal of Prefect Habyalimana and the nature of Sindikubwabo’s Speech.

26. The Appeals Chamber finds that, by failing to disclose to Nyiramasuhuko the *prima facie* exculpatory aspects of Ntawukulilyayo’s Testimony of December 2009 prior to December 2012 although there was no indication that this exculpatory evidence was known to Nyiramasuhuko, the Prosecution violated its Rule 68 disclosure obligations.

(c) Witness AZM’s *Kalimanzira* Testimony

27. The Appeals Chamber notes that the Prosecution concedes the potentially exculpatory nature of Witness AZM’s *Kalimanzira* Testimony.⁶⁵ The Appeals Chamber concurs with the parties’ assessment in this respect insofar as Witness AZM’s testimony that Prefect Habyalimana was removed from office because he failed to attend a meeting held in Kigali and that Sindikubwabo’s Speech was “difficult to understand” may have affected the credibility of

⁶⁰ Witness AZM’s *Nizeyimana* Testimony, p. 70.

⁶¹ Witness AZM’s *Nizeyimana* Testimony, p. 70.

⁶² See Response, paras. 16, 22(iii).

⁶³ See Ntawukulilyayo’s Testimony, pp. 47, 48.

⁶⁴ See Ntawukulilyayo’s Testimony, p. 49.

⁶⁵ See Response, paras. 3, 22(ii).

Prosecution evidence concerning the reasons for the removal of Prefect Habyalimana and the nature of Sindikubwabo's Speech.⁶⁶

28. As noted above, Witness AZM's *Kalimanzira* Testimony of June 2008 was not disclosed by the Prosecution until December 2012. However, the Appeals Chamber observes that, in April 2004, the Prosecution had disclosed to Nyiramasuhuko Witness AZM's 26 March 2003 statement to Tribunal investigators, in which the witness stated that Prefect Habyalimana was removed from office because he did not attend a security meeting in Kigali.⁶⁷ The Appeals Chamber is of the view that, while the information was contained in a witness statement rather than in a sworn-in testimony and Nyiramasuhuko was not informed that the witness who provided the statement testified as Witness AZM in the *Kalimanzira* case, the potentially exculpatory nature of Witness AZM's evidence concerning Prefect Habyalimana's removal, irrespective of its form, was already known to Nyiramasuhuko and in her possession as early as April 2004. Therefore, as this exculpatory evidence from the same witness was already known and in possession of Nyiramasuhuko, the Appeals Chamber considers that the Prosecution was relieved of its disclosure obligations under Rule 68 of the Rules in that respect.

29. By contrast, and contrary to the Prosecution's contention, the Appeals Chamber finds that the information contained in Witness AZM's Statement concerning Sindikubwabo's Speech was not potentially exculpatory and was not akin to that contained in Witness AZM's *Kalimanzira* Testimony.⁶⁸

30. The Appeals Chamber therefore finds that, by failing to disclose to Nyiramasuhuko the *prima facie* exculpatory aspects of Witness AZM's *Kalimanzira* Testimony relating to Sindikubwabo's Speech of which she had no knowledge prior to December 2012, the Prosecution violated its Rule 68 disclosure obligations.

(d) Witness G's Testimony

31. The Appeals Chamber considers that Nyiramasuhuko has shown that Witness G's Testimony that Prefect Habyalimana was removed from office because he belonged to the *Parti*

⁶⁶ See Witness AZM's *Kalimanzira* Testimony, pp. 5, 8.

⁶⁷ See Response, Annex A, Statement of Witness AZM of 26 March 2003 ("Witness AZM's Statement"), p. K0265435 (Registry pagination). The Appeals Chamber notes that Witness AZM's Statement was disclosed as part of the disclosure of only nine other statements. See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Inter-Office Memorandum, Butare Group of Cases ICTR-98-42-T – Disclosure, 1 April 2004 (confidential).

⁶⁸ Compare Witness AZM's Statement, p. K0265435 (Registry pagination) ("When it was time for the former President to speak, he used metaphoric language to incite the participants to genocide.") with Witness AZM's *Kalimanzira* Testimony, p. 8 ("He used a metaphor which was difficult to understand. He used a language which was very difficult for everyone to understand.").

libéral ("PL") and was not a native of Butare⁶⁹ and that Sindikubwabo's Speech was "to tell, the people that they should not attack one another"⁷⁰ was relevant to Nyiramasuhuko's defence that Prefect Habyalimana was not replaced in order to further the genocide and that the message in Sindikubwabo's Speech was to restore peace and security. Because Witness G's Testimony was *prima facie* exculpatory and there is no indication that Nyiramasuhuko knew about this exculpatory evidence prior to the filing of the *Mugenzi and Mugiraneza* Decision, the Appeals Chamber finds that the Prosecution violated its Rule 68 obligations by failing to disclose it to Nyiramasuhuko.

(e) Witness CHC's Testimony

32. The Appeals Chamber notes that the Prosecution concedes the potentially exculpatory nature of Witness CHC's Testimony.⁷¹ The Appeals Chamber concurs with the parties' assessment in this respect insofar as the following aspects of Witness CHC's Testimony were relevant to Nyiramasuhuko's case that Prefect Habyalimana was not removed from office because he was an obstacle to the killings and that the PSD and the PL made the decision to remove him, that she had no choice but to consent to this decision, and that the Interim Government had no real power in appointing prefects: (i) Prefect Habyalimana was dismissed "for serious administrative errors" and because he "failed to discharge his duties"; (ii) prefects were chosen by their respective parties; (iii) the PL suggested that Prefect Habyalimana should be dismissed; (iv) the Butare prefect had to be a native of Butare; and (v) the Interim Government "couldn't do otherwise".⁷²

33. While Witness CHC testified in the *Ntagerura et al.* case in May 2002, the transcript of his testimony was not disclosed to Nyiramasuhuko until December 2012.⁷³ The Appeals Chamber rejects the Prosecution's contention that it was relieved of its disclosure obligations with respect to this material because the substance of Witness CHC's Testimony was already contained in another witness' statement, Witness AZM's Statement, disclosed in 2004. The Appeals Chamber finds that, by failing to disclose to Nyiramasuhuko the *prima facie* exculpatory aspects of Witness CHC's Testimony prior to December 2012 although there was no indication that this specific exculpatory evidence was known to Nyiramasuhuko, the Prosecution violated its Rule 68 disclosure obligations.

⁶⁹ See Witness G's Testimony, T. 12 October 2005 p. 4.

⁷⁰ See Witness G's Testimony, T. 19 October 2005 p. 24.

⁷¹ See Response, paras. 18, 22(iv).

⁷² See Witness CHC's Testimony, T. 29 May 2002 pp. 35, 43, 44, 112, 113. See also Trial Judgement, paras. 5670, 5676.

⁷³ Motion, para. 34.

(f) Prejudice and Requested Remedy

34. The Appeals Chamber has found above that the Prosecution violated its disclosure obligations with respect to: (i) Ntawukulilyayo's Testimony; (ii) Witness AZM's *Kalimanzira* Testimony relating to Sindikubwabo's Speech; (iii) Witness G's Testimony; and (iv) Witness CHC's Testimony. The Appeals Chamber will now examine whether Nyiramasuhuko has been prejudiced by the Prosecution's failure to comply with its Rule 68 disclosure obligations and, if so, whether the remedies she requests are warranted. In this regard, the Appeals Chamber observes that Nyiramasuhuko only made general contentions concerning her alleged prejudice.⁷⁴

35. Although Nyiramasuhuko was denied an opportunity to seek to rely upon the above-mentioned evidence at trial, the Appeals Chamber is not persuaded that she suffered material prejudice as a result of the Prosecution's violations.

36. With regard to Ntawukulilyayo's Testimony, the Appeals Chamber observes that Ntawukulilyayo's explanations as to the reasons for Prefect Habyalimana's removal were based on rumours and Ntawukulilyayo's "personal presumptions"⁷⁵ and therefore carry very limited probative value. Moreover, Ntawukulilyayo's mention that Prefect Habyalimana was removed from office "because he was Tutsi" does not support Nyiramasuhuko's contention that the decision was made as a result of an agreement between the PSD and the PL.⁷⁶ In addition, Ntawukulilyayo's view that Sindikubwabo's Speech was difficult to interpret "in one way"⁷⁷ is also cumulative of other evidence considered at length in the Trial Judgement.⁷⁸

37. In the same vein, the Appeals Chamber considers that Witness AZM's *Kalimanzira* Testimony that Sindikubwabo's Speech was "difficult to understand" is of minimal probative value given that Witness AZM further testified that the word "*gukora*" used in the speech "came to mean to kill the Tutsi[s]"⁷⁹ and that killings of Tutsis followed after the meeting,⁸⁰ and that his testimony in this respect does not contradict the Prosecution case that the speech relied on coded language, was inflammatory, and that killings of Tutsis ensued after the meeting. The Appeals Chamber also

⁷⁴ See Motion, para. 37-39. The Appeals Chamber notes that Nyiramasuhuko did not identify specifically how access to this evidence would have "altered" her investigations and which Prosecution witnesses should have been recalled for further cross-examination. See *idem*.

⁷⁵ See Ntawukulilyayo's Testimony, pp. 47, 48.

⁷⁶ See Ntawukulilyayo's Testimony, p. 48.

⁷⁷ See Ntawukulilyayo's Testimony, p. 49.

⁷⁸ See Trial Judgement, paras. 884, 886-889. The Appeals Chamber recalls that the Trial Chamber rejected Nsabimana's testimony in that regard as "not truthful" and "not credible". See *ibid.*, para. 889.

⁷⁹ See Witness AZM's *Kalimanzira* Testimony, p. 9.

⁸⁰ See Witness AZM's *Kalimanzira* Testimony, p. 10.

considers that the testimony of Witness AZM that Sindikubwabo's Speech was "difficult to understand"⁸¹ is cumulative of other evidence considered at length in the Trial Judgement.⁸²

38. As for Witness G's Testimony, the Appeals Chamber notes that, while Witness G indicated that Prefect Habyalimana was removed from office because he was a member of the PL, he also stated that "he was replaced because he was a Tutsi", which does not support Nyiramasuhuko's contentions at trial.⁸³ Witness G also testified that killings occurred after Sindikubwabo's Speech, refused to pronounce himself as to whether or not the speech incited the population to carry out killings, and confirmed the meaning of the word "*gukora*" as attacking the Tutsis.⁸⁴ The Appeals Chamber considers that, whereas some excerpts of Witness G's Testimony taken in isolation may have assisted Nyiramasuhuko in her defence, the same excerpts when read in context are in fact potentially incriminatory and therefore of minimal probative value for her case.

39. Likewise, the Appeals Chamber finds that Witness CHC's evidence that the PL suggested Prefect Habyalimana's removal from office and that the Interim Government could not do otherwise is cumulative of other evidence adduced at trial in this case.⁸⁵ In the Trial Judgement, the Trial Chamber considered in detail Nyiramasuhuko's evidence that the PSD and the PL made the decision to remove Prefect Habyalimana from office and to appoint Nsabimana in his place and that the Interim Government had no real power in the appointment of the prefects.⁸⁶ The Appeals Chamber notes that the Trial Chamber did not reject Nyiramasuhuko's evidence because it lacked corroboration but considered that it was not credible,⁸⁷ and that it found that even if the political parties made the initial proposal to remove Prefect Habyalimana, the final decision fell to the Interim Government.⁸⁸

40. In light of the above, and given the limited nature of the prejudice suffered by Nyiramasuhuko as a result of the Prosecution's disclosure violations, the Appeals Chamber does not find that the remedies requested, namely the drawing of factual inferences from this material in

⁸¹ See Witness AZM's *Kalimanzira* Testimony, pp. 8, 9.

⁸² See Trial Judgement, paras. 884, 886-889.

⁸³ See Witness G's Testimony, T. 12 October 2005 p. 4. The Appeals Chamber observes that this does not support Nyiramasuhuko's explanation that the decision was made as a result of an agreement between the PSD and the PL. See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Nyiramasuhuko, T. 28 September 2005 p. 48; Trial Judgement, para. 835.

⁸⁴ See Witness G's Testimony, T. 19 October 2005 pp. 24 ("[...] After he made his speech, there were killings in Butare. Q. So did he show up to incite or did he really come to tell the population not to carry out killings? A. It's up to you to make that judgment call."), 26 ("Let me tell you, during that time Gukora meant to attack the enemy. During that time the enemy were Tutsis or members of the RPF."). See also Trial Judgement, paras. 5671, 5676.

⁸⁵ See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Nyiramasuhuko, T. 28 September 2005 pp. 45, 47-49, T. 24 November 2005 p. 24.

⁸⁶ See Trial Judgement, paras. 835-837, 859, 860, referring to *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Nyiramasuhuko, T. 28 September 2005 pp. 45, 47-49, T. 24 November 2005 p. 24.

⁸⁷ Trial Judgement, para. 861. See also *ibid.*, para. 863.

⁸⁸ Trial Judgement, para. 861.

favour of Nyiramasuhuko, the quashing of her conviction for conspiracy to commit genocide, and the admission of Witness CHC's Testimony as additional evidence on appeal, are warranted in these circumstances. The Appeals Chamber is of the view that in the present circumstances the Prosecution's violations of its disclosure obligations do not require a remedy beyond the recognition of the violations. Accordingly, the Appeals Chamber finds it unnecessary to examine Nyiramasuhuko's submissions under Rule 115 of the Rules as Nyiramasuhuko requests the admission of Witness CHC's Testimony as a remedy to the Prosecution's disclosure violations.

(g) Conclusion

41. In light of the foregoing, the Appeals Chamber concludes that the Prosecution did not violate its disclosure obligations under Rule 68 of the Rules with respect to Witness AZM's *Nizeyimana* Testimony and Witness AZM's *Kalimanzira* Testimony to the extent that it relates to the removal of Prefect Habyalimana. The Appeals Chamber, however, finds that the Prosecution's failure to disclose Ntawukulilyayo's Testimony, Witness AZM's *Kalimanzira* Testimony to the extent that it concerns Sindikubwabo's Speech, Witness G's Testimony, and Witness CHC's Testimony as soon as practicable amounts to violations of Rule 68 of the Rules. Given the minimal prejudice suffered by Nyiramasuhuko as a result of the Prosecution's disclosure violations, the Appeals Chamber nonetheless considers that the relief requested by Nyiramasuhuko is disproportionate and unwarranted.

42. The Appeals Chamber nonetheless firmly stresses 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.⁸⁹ The Appeals Chamber further emphasises that the present conclusion is in no way indicative of the Appeals Chamber's consideration of the merits of Nyiramasuhuko's appeal.

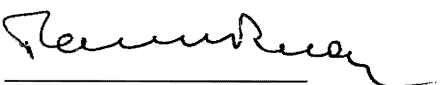
E. Disposition

43. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion.

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

Done this ninth day of April 2015,
at The Hague,
The Netherlands.




Judge Fausto Pocar
Presiding

⁸⁹ See *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No. ICTR-98-44-A, Decision on Karemera's and Ngirumpatse's Motions Under Rules 68 and 115 of the Rules, 6 February 2014, para. 22; *Mugenzi and Mugiraneza* Decision, para. 40. See also *Kamuhanda* Decision, para. 14.