



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

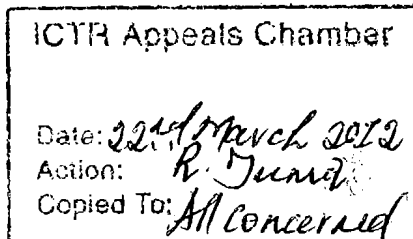
336/H

ICTR-99-50-A
22nd March 2012
{336/H – 332/H}

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Andréia Vaz
Judge Carmel Agius**



Registrar:

Mr. Adama Dieng

Decision of:

22 March 2012

**JUSTIN MUGENZI
PROSPER MUGIRANEZA**

v.

THE PROSECUTOR

Case No. ICTR-99-50-A

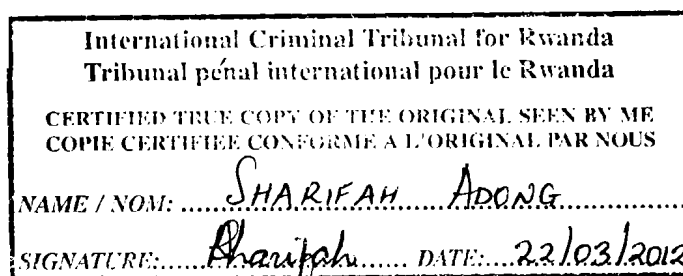
DECISION ON PROSPER MUGIRANEZA'S MOTION FOR DISCLOSURE

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
Mr. William M. Mubiru
Mr. Ousman Jammeh



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 seized of “Prosper Mugiraneza’s Motion to Disclosure of Exculpatory Material and for Sanctions”, filed by Prosper Mugiraneza on 21 November 2011 (“Motion”). The Prosecution filed its response to the Motion on 1 December 2011.¹ Mr. Mugiraneza replied on 5 December 2011.²

A. Background

2. On 30 September 2011, Trial Chamber II of the Tribunal (“Trial Chamber”) rendered its Judgement in the *Bizimungu et al.* case, finding Mr. Mugiraneza guilty of conspiracy to commit genocide based on his role in the removal of Mr. Jean-Baptiste Habyalimana from his post as the prefect of Butare Prefecture on 17 April 1994.³ The Trial Chamber also found Mr. Mugiraneza guilty of direct and public incitement to commit genocide based on his role in the installation ceremony of Mr. Sylvain Nsabimana as the new prefect of Butare Prefecture on 19 April 1994, where Interim President Théodore Sindikubwabo delivered an inflammatory speech calling for the killing of Tutsis.⁴ The Trial Chamber sentenced Mr. Mugiraneza to 30 years’ imprisonment.⁵ Mr. Mugiraneza’s appeal against the Trial Judgement is pending.⁶

B. Discussion

3. Mr. Mugiraneza requests that the Appeals Chamber order the Prosecution to disclose, pursuant to Rule 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), all of the transcripts of testimony, reports, and other documentary evidence relevant to the testimony of (i) Prosecution Witness Évariste Ntakirutimana in the *Nyiramasuhuko et al.* case⁷ and (ii) “several prosecution witnesses including QC, Jeremy Masons, OR, and BY” in the *Hategekimana* case.⁸ In

¹ Prosecutor’s Response to “Prosper Mugiraneza’s Motion to Disclosure (sic!) Exculpatory Material and for Sanctions”, 1 December 2011 (“Response”).

² Prosper Mugiraneza’s Reply to the Prosecutor’s Response to his Motion to Disclosure of Exculpatory Material and for Sanctions, 5 December 2011 (“Reply”).

³ *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.

⁴ Trial Judgement, paras. 1322-1383, 1959-1962, 1976-1987, 1988.

⁵ Trial Judgement, para. 2022.

⁶ See Prosper Mugiraneza’s Appellate Brief, 20 February 2012.

⁷ Motion, paras. 1, 6, 8, 11. See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T (“*Nyiramasuhuko et al.* case”).

⁸ Motion, paras. 1, 9, 11. See *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T (“*Hategekimana* case”).

addition, Mr. Mugiraneza requests the Appeals Chamber to “assess sanctions” against the Prosecution for failing to comply with its disclosure obligations under Rule 68 of the Rules.⁹

4. 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”.¹⁰ To establish that the Prosecution is in breach of its disclosure obligation, the applicant must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.¹¹

1. Evidence from the Nyiramasuhuko et al. Case

5. Mr. Mugiraneza submits that in the *Nyiramasuhuko et al.* case, Mr. Ntakirutimana gave evidence as an expert witness for the Prosecution that, in the context of the 1994 conflict in Rwanda, the terms “enemies” and “*Inkotanyi*” referred to the “group who was attacking”.¹² According to Mr. Mugiraneza, this is “directly contrary” to the Prosecution’s theory in his case that “enemies” and similar words referred to all Tutsis.¹³ Mr. Mugiraneza further argues that if such evidence had been presented to the Trial Chamber, it would have been material.¹⁴

6. The Prosecution responds that Mr. Mugiraneza refers to Mr. Ntakirutimana’s evidence in the *Nyiramasuhuko et al.* case out of context, and asserts that there are no contradictions between Mr. Ntakirutimana’s evidence, when read holistically, and the Prosecution’s theory in this case that “enemies” and similar words referred to all Tutsis.¹⁵ The Prosecution argues that Mr. Mugiraneza therefore does not make a *prima facie* showing that the material sought is exculpatory.¹⁶

⁹ Motion, para. 1. *See also* Motion, paras. 5, 12.

¹⁰ *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; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Disclosure, 7 September 2009, para. 5.

¹¹ *See, e.g., Bagosora et al.* Decision, para. 7; *Kamuhanda* Decision, para. 14; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga’s Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010, para. 16.

¹² Motion, para. 6, referring to *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, dated 24 June 2011 and filed 14 July 2011, paras. 476, 3814, 3825.

¹³ Motion, para. 6. *See also* Motion, para. 3.

¹⁴ Motion, para. 4. *See also* Reply, paras. 3, 4. Mr. Mugiraneza also contends that the fact that Mr. Ntakirutimana’s expert report “seems to be in conflict with his oral testimony is irrelevant to whether the testimony in open court, under oath was exculpatory”. Motion, para. 8.

¹⁵ Response, paras. 8-13.

¹⁶ Response, paras. 2, 6. *See also* Response, paras. 8, 13.

7. The Appeals Chamber considers that Mr. Mugiraneza has identified the material sought with sufficient precision. However, Mr. Mugiraneza fails to demonstrate how the material sought would cast doubt on the credibility of any specific Prosecution witness or otherwise explain how this material might suggest his innocence or mitigate his guilt with respect to the particular charges for which he was convicted.¹⁷ Accordingly, the Appeals Chamber finds that Mr. Mugiraneza has not made a *prima facie* showing of the probable exculpatory nature of Mr. Ntakirutimana's evidence from the *Nyiramasuhuko et al.* case. The Appeals Chamber concludes, therefore, that Mr. Mugiraneza has not demonstrated that the evidence constitutes exculpatory material within the meaning of Rule 68 of the Rules.

2. Evidence from the *Hategekimana* Case

8. Mr. Mugiraneza submits that "several prosecution witnesses including QC, Jeremy Masons, OR, and BY" testified in the *Hategekimana* case "that there was violence in Butare town prior to the [P]resident's speech of 19 April 1994".¹⁸ Mr. Mugiraneza argues that this testimony is inconsistent with both the Prosecution's theory in his case and the Trial Chamber's factual findings, and contends that it would have been material if presented to the Trial Chamber.¹⁹

9. The Prosecution responds that none of the witnesses identified by Mr. Mugiraneza testified in the *Hategekimana* case under the names or pseudonyms he lists and that, in any event, Mr. Mugiraneza does not point to specific findings of the Trial Chamber with which such testimony would be inconsistent.²⁰

10. In reply, Mr. Mugiraneza argues that the trial judgement in the *Hategekimana* case refers to an incident in Butare Prefecture on the night of 8 to 9 April 1994, and contends that this incident is inconsistent with the Prosecution's theory in his case that "the killings started with the [P]resident's speech on 19 April [1994]".²¹

11. The Appeals Chamber notes that Mr. Mugiraneza does not provide any information as to when witnesses "QC", "Jeremy Mason", "OR", or "BY" may have testified in the *Hategekimana* case. The Appeals Chamber further notes that these witnesses, identified as Mr. Mugiraneza refers to them, are not mentioned in the *Hategekimana* Trial Judgement, including in the paragraphs cited in Mr. Mugiraneza's Reply. Accordingly, the Appeals Chamber considers that Mr. Mugiraneza has

¹⁷ See Motion, paras. 3, 6-8; Reply, paras. 3, 4. Cf. *Bagosora et al.* Decision, para. 9.

¹⁸ Motion, para. 9.

¹⁹ Motion, paras. 3, 4, 9, 10.

²⁰ Response, paras. 15, 16. See also Response, para. 2.

²¹ Reply, para. 5, referring to *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Judgement and Sentence, dated 6 December 2010 and filed 14 February 2011 ("*Hategekimana* Trial Judgement"), paras. 232-306.

failed to identify the material sought from the *Hategekimana* case with sufficient precision. The Appeals Chamber therefore finds that Mr. Mugiraneza has not demonstrated that such material constitutes exculpatory material within the meaning of Rule 68 of the Rules.

3. Request for Sanctions

12. Based on the alleged disclosure violations set forth in the Motion, as well as the Prosecution's "history of withholding exculpatory information", Mr. Mugiraneza requests the Appeals Chamber to assess sanctions against the Prosecution for failing to comply with its disclosure obligations under Rule 68 of the Rules.²² The Prosecution opposes the request.²³

13. As set forth above, Mr. Mugiraneza has failed to show that the material sought constitutes exculpatory material within the meaning of Rule 68 of the Rules. Further, Mr. Mugiraneza has not substantiated his allegation regarding the Prosecution's alleged tendency to withhold exculpatory information. Accordingly, the Appeals Chamber finds that Mr. Mugiraneza's request for sanctions against the Prosecution lacks merit.

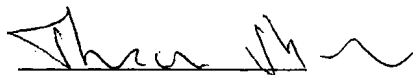
C. Disposition

14. For the foregoing reasons, the Appeals Chamber **DENIES** Mr. Mugiraneza's Motion.

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

Done this 22nd day of March 2012
At The Hague,
The Netherlands.




Judge Theodor Meron
Presiding

[Seal of the Tribunal]

²² Motion, paras. 1, 5, 12.

²³ See Response, paras. 2, 19, 21.