

ICTR-99-50-A
6-10-2012
(1070/A - 1055/A)

1070/A

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN THE APPEALS CHAMBER

NO. ICTR-99-50-A

BEFORE: The Hon. Theodor Meron, Presiding
The Hon. Patrick Robinson
The Hon. Liu Daqun
The Hon. Andresia Vaz
The Hon. Bakhtiyar Tuzmukhamedov

Acting Registrar: Pascal Besnier

Date: 5 October 2012

**JUSTIN MUGENZI AND
PROSPER MUGIRANEZA**

VS.

THE PROSECUTOR

2012 OCT - 5 A 9:24
JUDICIAL REGISTRAR
UNICTR

**PROSPER MUGIRANEZA'S EMERGENCY MOTION FOR ADMISSION OF EVIDENCE
PURSUANT TO RULE 115(A)**

FOR THE PROSECUTION:

Mr. Hassan Bubacar Jallow
Mr. James R. Arguin
Mr. George W. Mugwanya
Ms. Evelyn Kamu
Mr. Michael Mihary Andrianaivo

FOR THE DEFENCE:

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

1. This motion seeks admission of newly disclosed evidence pursuant to Rule 115(A). The evidence was disclosed by the Prosecutor on 3 October 2012. The evidence is testimony of Witness CHC in *Prosecutor v. Ntagerura*, No. ICTR-96-46-T (Joinder). It is cross examination by the Prosecutor which occurred on 29 May 2002.
2. While the witness is not identified by name, the open session transcript shows that he was secretary general of the council of ministers. Tr. 38.
3. At this point, Mugiraneza chooses not to argue the obvious violation of Rule 68 for the failure of the Prosecutor to make timely disclosure of the evidence sought to be admitted pursuant to Rule 115(A). However, this information was disclosed by e-mail less than a week prior to oral arguments on appeal.
4. Copies of the pages of transcript Mugiraneza moves to admit under Rule 115(A) are attached hereto as Exhibit A.

I. THE EXCULPATORY EVIDENCE WAS NOT AVAILABLE TO MUGIRANEZA THROUGH THE USE OF DUE DILIGENCE

5. While this information is included in a public transcript, the defence has no duty to examine every public transcript in every case seeking exculpatory information. Mugiraneza and his legal team did not have ready access to this transcript and had no idea what the witness testified to. It also appears that the testimony was given after Mugiraneza's prior lead counsel removed from the case for misconduct and prior to the assignment of current counsel.¹ Therefore, at the applicable time, Mugiraneza was without counsel. An electronic search of both the Trial Chamber and this Chamber's judgments in *Ntagerura* does find a single mention of CHC's evidence.
6. There is no reasonable way for the defence to learn of this testimony prior to the time it was disclosed. If it had been timely disclosed, Mugiraneza would have called the witness to obtain the same evidence in his trial.

II. NO PREJUDICE TO THE PROSECUTOR

7. The Prosecutor will not be prejudiced by admission of this evidence pursuant to Rule 115(A) because most of the evidence Mugiraneza seeks to introduce was adduced by the Prosecutor in cross examination of CHC. The remainder was adduced on reexamination. Therefore, the Prosecutor not only had the opportunity to cross examine the witness on the issues presented but in fact adduced most of the evidence itself.
8. Stated simply, Mugiraneza relies on evidence presented by the Prosecutor, not by a defendant. While CHC was a defence witness, the testimony sought to be admitted was the Prosecutor's evidence.

III. EVIDENCE SOUGHT TO BE INTRODUCED PURSUANT TO RULE 115(A)

9. The Trial Chamber in the instant case found that it had no doubt that the Butare prefect was removed to support genocide. Judgment, para. 1246.² The evidence sought to be introduced from CHC's evidence includes the following:
 - a. Ntagerura, and by implication all ministers at Gitarama, were required to attend the 17 April cabinet

¹Mugiraneza's prior lead counsel was discharged on 23 May 2002. RP 2690-93. The record does not include the decision assigning current counsel.

²"In light of all the circumstances, the only reasonable conclusion is that Mugenzi, Mugiraneza, Kambansa and other members of the Interim Government who agreed to remove Habyalimana, made this decision with the intention to undercut the real and symbolic resistance of the Tutsi prefect posed to the targeted killings of Tutsi civilians inhabiting or seeking refuge in Butare."

meeting. Tr. 32.³

- b. The reason for the prefet's removal presented to the full cabinet was based on non-genocidal reasons. Tr. 43-45.
- c. During cabinet discussions of the removal of the Butare prefet, his resistance to genocide was not mentioned. Tr. 45.
- d. The hiring and firing of prefets during the multiparty era was based on parties. The party would make a recommendation to the prime minister and the person was appointed. To remove a prefet, the party did the opposite. Tr. 111-13.

IV. SIGNIFICANCE TO MUGIRANEZA'S DEFENCE

- 10. Mugiraneza and other defence witnesses who attended the 17 April meeting in which the Interim Government removed the prefet contended that the reasons given for his removal were non-genocidal reasons. CHC's testimony is testimony from a non-accused and a person not charged with an offence in the genocide which confirms that testimony. The Trial Chamber rejected testimony from Mugiraneza, Andre Ntagerura and Emmanuel Ndindabahizi that the prefet's removal was based on the desires of the applicable political parties. Judgment 1232.

A. Mugiraneza's Theory of the Case

- 11. Mugiraneza's position was that the prefet was removed based on a deal between political parties and for other, security-related and competence reasons. It is his position that those were the reasons presented in the 17 April cabinet meeting. CHC's testimony is evidence from a non-accused, non-acquitted person who was present who confirms Mugiraneza's view of the events.

B. CHC's Relevance to Mugiraneza's Theory of the Case

- 12. Mugiraneza does not know if others had a hidden agenda for the prefet's removal. All he knows was what was presented to the cabinet on 17 April. If those reasons are not the "true" reasons, there is no evidence that he knew of the "true" reasons. CHC's testimony (on reexamination) that attendance at the 17 April cabinet meeting was mandatory. It therefore is relevant to Mugiraneza's claim of duress.
- 13. Persons are held responsible for actions or omissions taken based on the information available to them at the time of the action or omission. For example, in the *Hostages Case, United States v. List*, 11/2 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1230, 1296-97 (1948), the Tribunal held that an officer is not guilty of wonton destruction of property for a scorched earth policy when conditions appeared to him at the time to honestly conclude that the orders for destruction were necessary.
- 14. CHC's testimony was more than cumulative of testimony already before the Trial Chamber. It was testimony adduced by the Prosecutor from a person who was neither an accused nor a former accused who had been acquitted. CHC was the secretary-general of the cabinet. It was his job to attend meetings and to be aware of what occurred. His testimony in response to questions from the Prosecutor strongly corroborate the testimony from Mugiraneza, Ntagerura and Ndindabahizi relating the reasons for the prefet's removal which were presented to the cabinet.
- 15. Mugiraneza asserted at the Trial Chamber and continues to assert that removal of the Butare prefet was a crime

³The cross examination was in pages 3-95 of the transcript. The remainder was reexamination.

only if he 1) assented to the removal 2) with genocidal intent and 3) with the knowledge that the action was for genocidal reasons. If the removal was for non-genocidal reasons, it was not a crime regardless of the reason for the removal. The "true" reason could have been smart, stupid, for good reasons or bad as long as it was non-genocidal. Mugiraneza should be judged under the same standard as Gen. Rendulic in the *Hostages Case*. If he reasonably relied on information that could honestly decide to remove the prefet for non-genocidal reasons, he committed no crime.⁴

V. PREJUDICE TO MUGIRANEZA IF THE EVIDENCE IS NOT ADMITTED

- 16. CHC was as close to a neutral witness as anyone who was present at the 17 April cabinet meeting. He was not an accused nor an acquitted former accused before this Tribunal. His testimony is the best direct evidence of the information presented to the cabinet on 17 April concerning the removal of the Butare prefet.
- 17. The Trial Chamber found, without benefit of any direct evidence, that Mugiraneza assented to the removal for genocidal reasons with genocidal intent. The crucial evidence from CHC was withheld from the defence until just a few days before appellate argument.
- 18. The Appeals Chamber in reviewing the sufficiency of the evidence could consider this evidence in two ways:
 - a. First, it is evidence raising a reasonable alternative hypothesis inconsistent with Mugiraneza's guilt if it views the Count 1 conviction as a circumstantial evidence case. In that case, the evidence of Mugiraneza's guilt of conspiracy to commit genocide based on assenting to the prefet's removal would be legally insufficient.⁵
 - b. Second, consider this evidence adduced by the Prosecutor as the only reliable direct evidence of the information given to the full cabinet on 17 April. In the absence of evidence that Mugiraneza somehow knew of a "true" genocidal motive for the action, he should be acquitted.

VI. WHY THIS INFORMATION COULD HAVE A DECISIVE FACTOR AT TRIAL

- 19. The Trial Chamber rejected Mugiraneza's testimony and those of other witnesses present at the 17 April cabinet meeting based suspicion as to the testimony of defendants in this case or another case or Ntagerura as a person who, while acquitted, might still have an interest in challenging the Prosecutor. CHC fits none of those reasons for rejecting testimony.
- 20. Mugiraneza's conviction on Count 1 was based solely on circumstantial evidence and the Trial Chamber's finding that Mugiraneza's guilt was the only reasonable conclusion. This third-party evidence adduced mostly by the Prosecutor clearly would have raised a reasonable hypothesis other than Mugiraneza's guilt. Conversely, it would have been the *only* third party testimony of what occurred at the 17 April cabinet meeting showing that the reasons given for the prefet's removal were non-genocidal.
- 21. In either case, it could have been a decisive factor in finding a reasonable doubt that Mugiraneza joined the Count 1 conspiracy by agreeing to remove the prefet for genocidal reasons.

VII. REQUESTED RELIEF

- 22. The relief which can be given is limited by the Prosecutor's inexcusable delays in providing this Rule 68 material.

⁴Mugiraneza continues to assert that he abstained and did not assent to the removal. However, even if he assented he is not guilty of a criminal act if he acted on information allowing him to honestly determine that the action was for non-genocidal reasons.

⁵Mugiraneza believes this is the correct view.

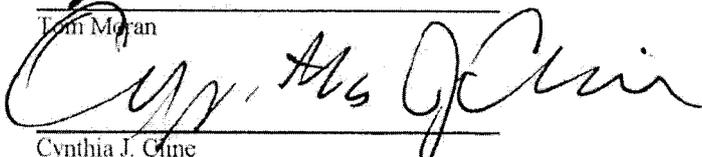
Mugiraneza believes it is important for him to be able to argue the CHC evidence during oral arguments. Mugiraneza believes there are four possible courses of action available to the Appeals Chamber:

- a. Rule on this motion prior to the beginning of oral arguments on 8 October 2012. This seems to be impossible given the short time the motion will be before the Chamber prior to the commencement of arguments.
- b. Allow arguments including CHC's testimony pending the Chamber's resolution of this motion on the merits.
- c. Set off the oral arguments, in whole or in part, pending the Chamber's action on this motion. In this regard, the Chamber could:
 - i. Set off the entire oral argument pending the decision on this motion; or
 - ii. Order limited reargument at a later date if relief is granted.
- d. Order a hearing in which CHC's testimony is taken live before the Appeals Chamber and order either full or limited reargument.

Word Count: 1951.



Tom Moran



Cynthia J. Gine

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Appendix
Testimony Sought to be Admitted
Pursuant to Rule 115(A)

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO.: ICTR-99-46-T (Joinder) THE PROSECUTOR
ICTR-97-10A-T OF THE TRIBUNAL
ICTR-99-36-T

AGAINST

ANDRÉ NTAGERURA
EMMANUEL BAGAMBIKI
SAMUEL IMANISHIMWE

29 MAY 2002
0900H

CONTINUED TRIAL

Before: Judge Lloyd Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

For the Registry:
Mr. Constant K. Hometowu
Mr. Ramadhani Juma

For the Prosecution:
Mr. Richard Karegyesa
Ms. Andra Mobberley
Ms. Holo Makwaia

For the Accused Ntagerura:
Mr. Benoit Henry
Mr. Hamuli Rety

For the Accused Bagambiki:
Mr. Seydou Doumbia

For the Accused Imanishimwe:
Mr. Jean Pierre Fofe

Court Reporters:
Mr. Petrus Chijarira
Ms. Sithembiso Moyo
Ms. Gifty Harding

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1	I N D E X	
2		
3	WITNESSES	
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5	FOR THE DEFENCE:	
6	WITNESSES CHC	
7		
8	Cross-examination by Mr. Karegyesa (contd)	3
9	Re-examination by Mr. Rety	96
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1 well as South Africa. That is why Mbangura
2 was appointed to go to Cyangugu that I know.

3 Q. Are you aware that Mbangura, Daniel, went to
4 Cyangugu on May the 2nd, 1994?

5 A. Possible, possible.

6 Q. And I put it to you that Ntagerura went to
7 Cyangugu on the 17th of April 1994, a week
8 before his departure to Congo?

9 A. No, it is not true, because on the 17th of
10 April, there was a council of ministers'
11 meeting and Ntagerura's presence in that
12 meeting was compulsory; it was mandatory.

13 Q. Witness, I am telling you that your memory
14 was not functional then, and you cannot
15 recollect.

16 A. How? Not at all. Not at all, because I am
17 telling you. I am sorry.

18 MR. RETY:

19 Mr. President, we know that here we are
20 going beyond the bounds of decency. It is
21 absolutely normal, and that the witness
22 would have made a solemn declaration to
23 speak the truth. But I don't think he
24 should be insulted by saying that his memory
25 was defective, without establishing it

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1 MR. KAREGYESA:

2 Most obliged, Your Honours.

3 BY MR. KAREGYESA:

4 Q. Witness, now, to the best of your
5 recollection, for what administrative errors
6 was this préfet dismissed?

7 A. In the préfecture, as was the case in our
8 country, the préfet was in charge of
9 everything, including the safety and
10 security of persons. So, it may have
11 happened that -- well, what is certain is
12 that, during the council of ministers'
13 meetings, at no point in time was it said
14 that that préfet was dismissed because he
15 did not allow the killing of persons. That
16 was never said during the council of
17 ministers.

18
19 But what was said is that he did not
20 properly carry out or perform his duties,
21 his duties which included intervening or
22 informing the government of the serious
23 situation. He failed to discharge his
24 duties, and since we were in war, there was
25 no time to wait, and he had to be put aside.

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1 To my knowledge, that is what was said.

2 Q. Witness, you haven't answered my question,
3 which is, to give us the administrative
4 errors for which this préfet was dismissed.
5 Now, if it is not within your knowledge,
6 just say you do not know.

7 A. No. I know because, as I told you, in the
8 council of ministers it was never said that
9 the préfet -- the said préfet was dismissed
10 because he did not allow massacres to take
11 place. That was not said. But, he was
12 dismissed because he failed in his duties as
13 a préfet, a préfet being the protector of
14 the citizens. He failed to inform the
15 government of the situation in which his
16 préfecture was found at the specific time.

17
18 There was very unpleasant disorder in his
19 préfecture which -- this disorder led to
20 deaths. So, that is the major reason for
21 this gentleman -- this préfet was dismissed.

22 Q. Didn't you consider a while ago, Witness,
23 that the massacres in Butare started after
24 the 19th of April 1994, after his dismissal?

25 A. It all depends on one's point of view. What

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1 I said -- what I have just said is that the
2 said préfet did not inform, in time, the
3 government so that the government should
4 take measures to prevent the occurrence of
5 the unpleasant situation which happened.
6 That is the reality. Therefore, he was not
7 in a position to cope with the situation
8 which occurred during that war. That is the
9 reality.
10 Q. Witness, it is true that this was the only
11 Tutsi préfet; isn't it?
12 A. That is possible. What I know is that he
13 was from the PL party. But I don't know.
14 That is possible. What I know is that he
15 was from the PL party.
16 Q. And, isn't it actually true that he was
17 dismissed on the 19th of April 1994 for
18 resisting the massacres of innocent Tutsis?
19 A. That is possible, but it was not said during
20 the council of ministers. It was not said
21 during that meeting.
22 Q. Witness, you -- going back again to the
23 meeting of 16th April 1994, you told this
24 Chamber earlier, on that the council of
25 ministers was monitoring the massacres in

1 the countryside. Now, can you tell
 2 Their Lordships how this monitoring was
 3 achieved or how it was being done?
 4 A. Yes. Well, I could tell you, and what I
 5 said was that, indeed, the préfectures
 6 communicated with the government. They
 7 communicated information every time new
 8 events occurred. But only the government
 9 itself was in a position where it could not
 10 exercise its normal functions to protect the
 11 nation. It was weakened. It was destroyed.
 12 That is simply said. That is how it was.
 13 Q. Now, as part of the monitoring -- or, maybe,
 14 let me rephrase my question. You were at
 15 the centre of this government as its
 16 secretary general. Were you privy to all
 17 the reports that were coming in from the
 18 countryside, regarding the massacres?
 19 A. One observation: first, when we arrived in
 20 Gitarama --
 21 Q. Witness, please answer my question. Were
 22 you privy to this information. Yes or no?
 23 A. No.
 24 Q. So, would I be correct to suggest that you
 25 only got this information during council of

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1 do you remember how the president of the
2 republic dealt with the people who were
3 massacring others?
4 A. He dealt with that. He dealt with Rwandans
5 who were killing other Rwandans. He called
6 them criminals who deserved to be punished
7 seriously as the law called for, and he
8 preached that very seriously, indicating
9 that the government, unfortunately, didn't
10 have the means to deal with these problems,
11 but he was going to take care of that.
12 Q. Witness, when he talked about these people
13 and said they were criminals, was he talking
14 to the youth movement of the MRND?
15 A. No, he was talking to the killers
16 themselves.
17 Q. Now, Witness, can you tell the Chamber if
18 these killers are now the people we call,
19 generically, "Interahamwe"?
20 A. Yes, of course, that is understood that way.
21 We thought that everybody was Interahamwe.
22 That is what we said. Yes, it is a generic
23 term we use. Indeed, these people became
24 known as Interahamwe.
25 Q. Now, Witness, you remember a question was

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1 put to you -- several questions were put to
2 you concerning the firing of the Butare
3 préfet. You also said that this préfet was
4 a member of the PL party. So, my question
5 is the following: can you tell the Chamber
6 how were préfets within the council of
7 ministers appointed and let go, or fired?
8 A. Since the multiparty state in Rwanda came
9 into existence, the préfets, in order to be
10 nominated, needed to be chosen by the party
11 to which they belonged. The party to which
12 they belong would designate a member and
13 would propose the candidacy of that person
14 to the minister of the interior and the
15 prime minister, to appoint that person as
16 préfet. In the opposite case -- that is to
17 say, when you need to let somebody go -- the
18 parties would do the same thing.
19 Q. Can you tell the Chamber, Witness, in this
20 case, if there was a party that suggested
21 that the Butare préfet be fired?
22 A. Yes, there was a party. It is the party to
23 which he belonged, the *Partie libérale*.
24 Q. Lastly, Witness, can you tell the Chamber if
25 the council of ministers had much of a

1 choice -- many choices?

2 A. In reality, when the party acted in the way

3 it did, the government couldn't do

4 otherwise, because the préfet had to be a

5 native from that préfecture, so, there

6 wasn't any other choice. The government

7 only blessed what were the suggestions of

8 the parties.

9 Q. Thank you very much, Witness. I know that

10 this was very difficult to come before this

11 Chamber.

12 MR. RETY:

13 Mr. President, I have finished with my

14 examination, and I thank you.

15 MR. PRESIDENT:

16 Thank you, Mr. Rety.

17 MR. PRESIDENT:

18 Witness CHC, your testimony is now

19 concluded. We thank you for coming, and

20 now, you are free to leave. You are

21 excused.

22 THE WITNESS:

23 Thank you very much. Thank you very much,

24 Mr. President.

25 (Witness withdrew)



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(Art. 27 of the Directive for the Registry)

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From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Tom Moran (names)	<input type="checkbox"/> Prosecutor's Office (names) <input type="checkbox"/> Other: (names)
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Dates:	Transmitted: 5 Oct 2012		Document's date: 5 Oct 2012
No. of Pages:	16	Original Language:	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	Prosper Mugiraneza's Emergency Motion for Admission of Evidence Pursuant to Rule 115(A)		
Classification Level:	TRIM Document Type:		
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CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and will **not submit** any translated version.

Reference material is provided in annex to facilitate translation.

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Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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