

ICTR-99-50-A  
(8-10-2012  
(1078/A - 1071/A))

1078/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:** 7 October 2012

**JUSTIN MUGENZI AND  
PROSPER MUGIRANEZA**

**VS.**

**THE PROSECUTOR**

2012 OCT - 8 18:53  
UNIT 11  
JUDICIAL RECORDS/ADMINISTRATIVE  
RECORDS

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**PROSPER MUGIRANEZA'S MOTION PURSUANT TO RULE  
115(A) FOR ADMISSION OF TESTIMONY OF  
AUGUSTIN NGIRABATWARE**

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**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. Mugiraneza moves the Appeals Chamber pursuant to Rule 115(A) to admit certain portions of the testimony of Augustin Ngirabatware on 7 December 2010 in *Prosecutor v. Ngirabatware*, No. ICTR-99-54-T.<sup>1</sup> Mugiraneza seeks to admit pursuant to Rule 115(A) pages 63 and 64.
2. The evidence sought to be introduced is relevant to Issues 15, 16, 17, 19, 21, 27, 29, 31, and 32.

#### I. THE EVIDENCE COULD NOT HAVE BEEN OBTAINED FOR TRIAL

3. It is self evident that this evidence was not available for admission during Mugiraneza's trial. The testimony was given in December 2010, about two years *after* final arguments in Mugiraneza's trial. He was transferred to the Tribunal on 8 October 2008, after the close of evidence in Mugiraneza's trial.

#### II. NO PREJUDICE TO THE PROSECUTOR

4. The testimony sought to be introduced was adduced from Ngirabatware during cross examination by the Prosecutor. Thus, the Prosecutor not only had the opportunity to cross examine him on the issue, it in fact *did* cross examine him on the issue.

#### III. EVIDENCE SOUGHT TO BE INTRODUCED

5. The appropriate pages of the transcript are attached hereto as an exhibit. Mugiraneza moves to introduce the following exchange:

BY MR. KAPAYA:

Q. Witness, did you attend the president's meeting, that is, President Sindikubwabo's meeting, in Butare on the 19th of April '94?

A. No.

Q. Why didn't you attend that meeting?

A. There was no obligation to do so.

Q. There is no obligation for a minister to attend a meeting which his president has called?

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<sup>1</sup>Ngirabatware is the former minister of planning. He is charged in a six-count indictment alleging conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement of genocide, extermination as a crime against humanity and rape as a crime against humanity. No judgment has been issued. Final arguments were scheduled for July 2012.

MR. HERBERT:

Is that a comment or a question? He has asked and answered that point.

MR. PRESIDENT:

Yes, Counsel.

BY MR. KAPAYA:

Is there no obligation for a minister to attend a meeting?

MR. HERBERT:

Mr. President, that does not -- there is no basis been laid for this. It really is completely disorganised. He has got to lay a basis for putting a suggestion like that. Otherwise there is no causative link. And my learned friend is giving evidence and asking a question on the basis of the evidence he has given. Nobody else. No Prosecution witness has given that evidence.

MR. KAPAYA:

Mr. President, I --

MR. PRESIDENT:

Just a minute.

We take it that it flows from the witness's answer. It can be put to the witness. We overrule the objection.

MR. KAPAYA:

I hope counsel will desist from making these unnecessary interruptions in my cross-examination because they really take time.

BY MR. KAPAYA:

Q. I ask you again, Mr. Ngirabatware: Is there no obligation for ministers in a government to attend a meeting called by the president of the republic, your employer?

A. No. Neither under Habyarimana, neither during the tenure of Dr. Sindikubwabo, we never had any such obligation, unless when the protocol service of the president's office invited you to attend. And even under Habyarimana, we did not have such an obligation. The minister did not always go about with all the 20 ministers. Even before and under Habyarimana, that was -- I never saw that. It was not an obligation unless you were required expressly to do so.

1075/A

MR. PRESIDENT:

Yes, Counsel.

BY MR. KAPAYA:

Q. Where were you on that day?

A. As I have already testified before the Court, I was in Gisenyi where my family had just arrived.

**IV. SIGNIFICANCE TO MUGIRANEZA'S DEFENCE**

6. The Trial Chamber found that Mugiraneza attended the 19 April speech as part of a conspiracy to commit genocide and to encourage the president in his genocidal speech. The Trial Chamber, *inter alia*, held that Mugiraneza's presence was part of a joint criminal enterprise to encourage genocide by the president's direct and public incitement of genocide. In doing so, the Trial Chamber necessarily rejected the following testimony from Mugiraneza:

BY MR. MORAN:

Q. Now, I want to jump ahead a couple of days to the 19th in Butare where the president gave another speech. First, were you there?

A. Oh, yes.

Q. What was the occasion for that speech?

A. That speech was delivered during the inaugural ceremony of the new Butare *préfet* replacing Jean-Baptiste Habyarimana.

Q. Why did you attend that ceremony?

A. I attended that ceremony because the state chief of protocol had told us that the president would be present at that occasion and he had asked that ministers who were present and available should accompany the president on the occasion of that ceremony. That was the protocol in place at the time. Whenever the president had to go somewhere, ministers who were present would accompany him.

Q. Prior to the time he began to make his speech, did you have any idea what he was going to say?

A. No, I had no idea of the speech he was going to deliver in Butare.

Q. By the way, as a practical matter, when the chief's -- the state chief of protocol went around asking the ministers to attend this, could you have said no?

A. I could have said no if, for one reason or the other, I was not available, but if I refused to accompany the president without a valid reason, that would have been considered some form of contempt.

Tr. (26 May 2008), pgs. 44-45.

7. The evidence sought to be admitted under Rule 115(A) is consistent with Mugiraneza's testimony before the Trial Chamber. It is in the context that he went to the Butare ceremony on 19 April because the chief of protocol told him to, creating an obligation to attend. It also is in the context that Mugiraneza had no idea what the president would say in his speech.
8. The evidence sought to be introduced clearly corroborates Mugiraneza's explanation of why he was at the 19 April speech and his testimony that his presence was for a non-genocidal purpose.

#### VI. CREDIBILITY OF THE NEW EVIDENCE

9. Mugiraneza's testimony was given *before* Ngirabatware was transferred to the Tribunal. There is no possibility they could have met and agreed to a common story. Mugiraneza's testimony was given without any knowledge of Ngirabatware's future testimony.
10. Ngirabatware gave his evidence on cross examination. He had no way of knowing the Prosecutor would ask him questions relevant to requirements that ministers attend presidential speeches. While it is conceptually possible that Mugiraneza and Ngirabatware met in the UNDF to plan the answer if appropriate questions were answered, the chances of this are slim. The question was asked of Ngirabatware apparently out-of-the-blue and his answer was given without prior planning. Because there apparently is no evidence he was at the 19 April Butare speech, the answer is irrelevant to his defence. His testimony includes all of the indicia of truth.

#### VII. WHY THIS INFORMATION COULD HAVE A DECISIVE FACTOR AT TRIAL

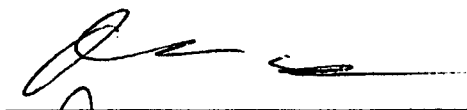
11. Mugiraneza's conviction on Count 4 is inexorably tied to the Count 1 conspiracy conviction. Also, the Count 4 conviction is based on a JCE theory. The convictions are based on circumstantial evidence. There is *no* direct evidence other than that rejected by the Trial Chamber as to what occurred at the 17 April cabinet meeting and his conviction

based on that meeting is therefore based solely on circumstantial evidence.

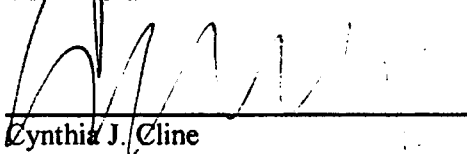
12. Likewise, other than the JCE and conspiracy based on the Count 1 conviction, there is no evidence of 1) *why* Mugiraneza attended the 19 April Butare speech and 2) his knowledge that the president's speech would be a call for genocide. The Trial Chamber necessarily rejected the direct evidence from Mugiraneza related to those issues.
13. Mugiraneza's position is he attended the 19 April speech 1) because he had an obligation to do so and 2) had no idea of the contents of the president's speech before it was given. The evidence sought to be introduced is relevant to the voluntariness of Mugiraneza's attendance at the 19 April speech. While Mugiraneza would have had reason to lie about the voluntariness of his attendance to negate his guilt, Ngirabatware had no such motive when he gave his evidence more than two years later in response to questions from the Prosecutor. Ngirabatware did not even have reason to expect the questions to be asked.
14. If the Trial Chamber had access to this important evidence, it is likely that the result would have been different. It would have been independent third party evidence giving a non-genocidal explanation for Mugiraneza's presence at the 19 April speech in Butare. Given the lack of direct evidence of the motive for Mugiraneza's attendance, it raises a reasonable alternative hypothesis other than Mugiraneza's guilt.

#### VIII. RELIEF SOUGHT

15. Mugiraneza requests the Appeals Chamber to admit the attached transcript as additional evidence pursuant to Rule 115(A). He also requests that the Appeals Chamber take such action as it believes appropriate for the Prosecutor's violation of Rule 68 by failing to timely disclose the testimony. This could include taking a factual inference based on the evidence against the Prosecutor.



Tom Moran



Cynthia J. Cline

1072/A

**Appendix  
Transcript Excerpts**

1071/A

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO.: ICTR-99-54-T  
CHAMBER II

THE PROSECUTOR  
OF THE TRIBUNAL  
v.  
AUGUSTIN NGIRABATWARE

TUESDAY, 7 DECEMBER 2010  
0921H  
CONTINUED TRIAL

Before the Judges:

William H. Sekule, Presiding  
Solomy Balungi Bossa  
Mparany Mamy Richard Rajohnson

For the Registry:

Mr. John Kiyeyeu  
Mr. Ibrahim Mwamasangula

For the Prosecution:

Mr. Wallace Kapaya  
Ms. Veronic Wright  
Mr. Patrick Gabaake  
Mr. Iskandar Ismail

For the Accused Augustin Ngirabatware:

Mr. Peter Herbert  
Ms. Mylène Dimitri

Court Reporters:

Ms. Tanya West  
Ms. Kirstin McLean  
Ms. Eleanor Bastian  
Mr. Joe Reynosa  
Ms. Jean Baigent  
Ms. Deirdre O'Mahony





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COURT MANAGEMENT SECTION  
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	<input type="checkbox"/> OIC, JLSO P. Besnier	<input type="checkbox"/> OIC, JPU C. K. Hometowu	<input checked="" type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison
<b>From:</b>	<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)
<b>Case Name:</b>	The Prosecutor vs. Mugiraneza		<b>Case Number:</b> ICTR-99-50-A
<b>Dates:</b>	Transmitted: 7 Oct 2012		Document's date:
<b>No. of Pages:</b>	11	<b>Original Language:</b>	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of Document:</b>	Prosper Mugiraneza's Motion Pursuant to Rule 115(A) for Admission of Testimony of Augustin Ngirabatware		
<b>Classification Level:</b>	<b>TRIM Document Type:</b>		
<input type="checkbox"/> Ex Parte	<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Strictly Confidential / Under Seal	<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input type="checkbox"/> Confidential	<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
<input checked="" type="checkbox"/> Public	<input type="checkbox"/> Judgement	<input checked="" type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
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			<input type="checkbox"/> Accused particulars

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**CMS SHALL NOT take any action regarding translation.**

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

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Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

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### III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: