ICTR-99-50-A
12-11-2012
1369/A - 1362/A

1369/A

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Patrick Robinson** **Judge Liu Daqun** **Judge Andrésia Vaz** **Judge Bakhtiyar Tuzmukhamedov**
Acting Registrar:	**Mr. Pascal Besnier**
Filing of:	**12 November 2012**

JUSTIN MUGENZI
PROSPER MUGIRANEZA

v.

THE PROSECUTOR

Case No. ICTR-99-50-A

JUSTIN MUGENZI'S REPLY TO PROSECUTION RESPONSE TO MOTION FOR RELIEF FOR VIOLATIONS OF RULE 68 AND FOR ADMISSION OF ADDITIONAL EVIDENCE

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

Office of the Prosecutor
Hassan Bubacar Jallow
James J. Arguin
George W. Mugwanya
Evelyn Kamau
Aisha Kagabo
Ndeye Marie Ka

I. SUBMISSIONS

A. Introduction

1. The Prosecution admits in its Response that it violated Rule 68 by failing to disclose Witness CHC's testimony.[1] It also admits that "the non-disclosure… denied [Mr.] Mugiraneza and [Mr.] Mugenzi the opportunity to rely upon his evidence at trial."[2] The only issue in dispute, therefore, is the appropriate remedy for having deprived the Defence of this opportunity.

2. The Prosecution argues that no remedy at all is warranted, asserting that this additional evidence could not have raised a reasonable doubt at trial about the motivation for removing *Préfet* Habyalimana.[3] The Prosecution seeks to minimize the impact of this evidence by, for example, alleging that Witness CHC was an "accomplice" to genocide whose credibility should be discounted accordingly. The nature of the Prosecution's own reasoning – attacking the witness's credibility – is compelling evidence that, indeed, this witness' evidence could have raised a reasonable doubt. All the Prosecution's arguments concern matters that could *only* have been assessed by the Trial Chamber. The Prosecution not only denied the Defence access to this evidence, but denied access to any fuller answers that could have been provided by the witness if asked more directly or extensively about the event in question. The non-disclosure reflects an egregiously ineffective system of disclosure, was manifestly prejudicial to Mr. Mugenzi, and has concretely tainted the course of justice.

B. The Quality of the Prosecution Disclosure

3. The Prosecution attempts to minimize its responsibility for the non-disclosure of Witness CHC's evidence, claiming that it searched diligently for exculpatory material prior to making its certification of disclosure in its Respondent's Brief on appeal in 2012.[4]

4. The Defence has no knowledge of the internal mechanisms that have been adopted by the Prosecution to ensure compliance with Rule 68 and is not, therefore, in any position to comment on the Prosecution's claims specifically. The Defence is nonetheless able to observe, however, that it has not received a steady flow of Rule 68 disclosure notwithstanding ongoing trials with overlapping subject-matter. This is a *prima facie* indication that the Prosecution has

[1] *The Prosecutor v. Mugenzi and Mugiraneza*, Case No. ICTR-99-50-A, Prosecution Response to Prosper Mugiraneza's and Justin Mugenzi's Motions Under Rule 68 and for the Admission of Evidence pursuant to Rule 115, 5 November 2012 ("Prosecution Response"), para. 3.
[2] Prosecution Response, para. 26.
[3] Prosecution Response, paras. 35, 70.
[4] Prosecution Response, paras. 4-7.

not implemented an effective and comprehensive mechanism for identifying and disclosing Rule 68 material.

5. Even accepting the explanation given by the Prosecution (namely an error in the manner in which it searched for exculpatory material prior to making its certification on appeal), this neither explains nor excuses the Prosecution's failure to have immediately disclosed the testimony as soon as it was heard in 2002, by which time Mr. Mugenzi had already been detained for 3 years on the basis of an indictment that encompassed this Cabinet meeting when the Butare *préfet* was replaced.[5] Nor does it explain why it was not disclosed in 2004 or 2005 when the Prosecution led evidence concerning its theory of the Butare *prefet*'s removal[6] which was directly contradicted by Witness CHC's testimony which was in the Prosecution's possession. Nor does it explain why it was not disclosed in 2005 to 2008 when it became clear that it was directly corroborative of the Defence evidence and theory of the case;[7] nor in 2008 when the Prosecution argued for a genocide conviction on the basis of the replacement of the Butare *préfet* in its Final Trial Brief.[8] During this nearly decade-long period of non-disclosure, Witness CHC was still alive.[9]

6. Further, the Prosecution's explanation, in itself, raises serious questions about the manner in which it is discharging its Rule 68 obligations. Those obligations, as the Appeals Chamber has previously emphasized,[10] are ongoing and continuous. They do not arise suddenly when the Prosecution is required to make its certification pursuant to Rule 112(B). Why was the Prosecution ever in the position of engaging in a rushed review of 34,499 documents only on the eve of an appeal? The Prosecution cannot rely on the Appeals Chamber decision of 24 September 2012 as having suddenly revealed to the Prosecution the content of its disclosure obligations; its flagrant misapprehension of the scope of its disclosure obligations must fall squarely on its own shoulders. The Prosecution's own submissions imply that it failed to put in place systems or "establish procedures" to comply with its obligations under Rule 68 during the

---

[5] *The Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Indictment, 13 September 1999, para. 6.21.
[6] Judgement, paras. 1196-1206.
[7] Judgement, paras. 1207-1221.
[8] Prosecutor's Closing Brief, 1 October 2008, paras. 69-70, 208, 701, 720, 1016.
[9] Mr. Mugenzi has received information that Witness CHC passed away in 2011. *See* Confidential Annex G to Justin Mugenzi's Motion for Relief for Violations of Rule 68 and for Admission of Additional Evidence, 15 October 2012 ("Mugenzi Request"), Death Certificate.
[10] *The Prosecutor v. Mugenzi and Mugiraneza*, Case No. ICTR-99-50-A, Decision on Motion for Relief for Violation of Rule 68, 24 September 2012, para. 7; See also *The Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September 2004, at para. 8.

pre-trial and trial period of the *Government II* proceedings. [11]

7. Rather than an aberration, it appears that the non-disclosure of Witness CHC's evidence was an entirely predictable corollary of having failed to implement an appropriate and proper system for disclosure of information for at least a decade. If any further evidence is required, it is provided by the long and lamentable record of Rule 68 violations in the present case.[12]

C. Witness CHC's evidence was exculpatory and its non-disclosure caused actual prejudice requiring an effective remedy

8. The Prosecution presents two conflicting arguments to allege that Mr. Mugenzi deserves no remedy to address the Prosecution's failure to disclose Witness CHC's evidence.

9. Firstly, the Prosecution asserts that Witness CHC's evidence is "only cumulative of other evidence on the record,"[13] and as such the prejudice suffered is minimal. For the reasons set out in the Mugenzi Request, Witness CHC's evidence is not merely cumulative of that heard during the *Government II* proceedings. More importantly, this argument ignores the fact that prejudice does not arise only from the fact that the Trial Chamber did not have access to Witness CHC's transcripts between 2008 and 2011 when deliberating as to the Interim Government's motivations for replacing the Butare *préfet*. The prejudice suffered is far more extensive; including preventing Mr. Mugenzi's counsel from contacting and interviewing Witness CHC, seeking further information and details about his knowledge of the circumstances behind (and motivation for) the replacement of the Butare *préfet* on 17 April 1994, and determining whether Witness CHC had any information concerning other witnesses with whom it would have been important to speak, or other avenues of investigation to be followed. It also prevented Mr. Mugenzi's counsel from determining whether Witness CHC had any contemporaneous (or subsequent) written notes, minutes, or other material concerning the replacement of the Butare *préfet* (which is particularly relevant given his position as Secretary-General of the Interim Government). It also prevented Mr. Mugenzi from eliciting and relying on Witness CHC's evidence in the *Government II* proceedings, and presenting him for further elaboration and questioning by the other parties and the Trial Chamber.

10. None of the accused in the *Ntagerura et al.* proceedings was charged in relation to the

[11] *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 302; *The Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 44.
[12] Mugenzi Request, paras. 5-12.
[13] Prosecution Response, para. 28.

Interim Government's decision to replace the Butare *préfet* on 17 April 1994.[14] As such, Witness CHC's examination in the *Ntagerura et al.* case could not have been expected to (and did not) focus on this point. The Prosecution's non-disclosure of Witness CHC's transcripts until after the witness' death rendered any elaboration on this point impossible. The prejudice, rather than being "minimal", is extensive and irreparable.

11. Secondly, the Prosecution argues that Witness CHC's evidence is "of limited probative value" because he was not a member of the Interim Government, but only the Secretary General of the Interim Government, and "only became aware of issues during the actual interim government meetings".[15] Mr. Mugenzi was charged with what transpired at the actual Interim Government meeting on 17 April 1994. Witness CHC was present at this meeting. It is difficult to imagine evidence of more relevance or probative value than that of another attendee. The Prosecution's argument is particularly disingenuous considering it presented no direct evidence of what happened at the meeting, and held out witnesses such as Alison des Forges, Fidele Uwizeye, and the infamous "Witness D" as providing reliable testimony as to the events of that day.[16] Moreover, making arguments as to the probative value of Witness CHC's evidence is precisely what Mr. Mugenzi would have been able to do in front of the Trial Chamber had the Prosecution not breached its obligation under Rule 68 to disclose his testimony in the pre-trial or trial phase.

12. The Prosecution also argues that Witness CHC's testimony would not have advanced Mr. Mugenzi's case, given that it is inconsistent with aspects of Mr. Ndindabahizi's testimony concerning what was discussed at the 17 April meeting.[17] The Prosecution thus puts itself in the place of the Trial Chamber, arguing that even with the additional evidence of Witness CHC, the Chamber would have preferred Mr. Ndindabahizi's testimony to that of Mr. Mugenzi and Mr. Mugiraneza. The Defence strongly contests this claim. Witness CHC would have provided important corroboration that, indeed, *Préfet* Habyalimana's performance and non-communication was the reason for his removal. Judicial fact-finding often relies on such corroboration as the determinative element in determining whether a fact is proven beyond a reasonable doubt or, alternatively, whether a reasonable doubt is raised.[18]

13. Finally, the Prosecution makes the extraordinary and baseless accusation that Witness

[14] *Prosecutor v. Ntagerura*, ICTR-96-10-I, Indictment, 29 January 1998; *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36-I, Indictment, 13 October 1997.
[15] Prosecution Response, paras. 28-29.
[16] Judgement, paras. 1196-1206.
[17] Prosecution Response, para. 29.
[18] Judgement, para. 1235.

CHC's allegiance to the Interim Government renders him an "accomplice" to genocide;[19] and as such the Trial Chamber would "have had to treat the evidence with caution."[20] The Prosecution also argues that Witness CHC should be deemed inherently unreliable because he denied criminal wrong-doing by the Interim Government. Paragraph 33 of the Response contains outrageous mischaracterizations of Witness CHC's testimony, or draws manifestly fallacious conclusions about his credibility based on the unproven allegation that the Interim Government was engaged in a wide-ranging conspiracy to commit genocide. The Prosecution's reasoning is as follows: Witness CHC's testimony must be deemed unreliable because it does not accord with the Prosecution's own theories about the criminal nature of the Interim Government. The circularity is manifest, and assists in explaining why many of the Prosecution's cases against members of the Interim Government have ended in acquittal.[21] But in any event, these are matters that all should have been assessed and adjudicated by the Trial Chamber. The Prosecution's violation of Rule 68 rendered this impossible.

D. The Criteria for Rule 115 has been met

14. The Prosecution asserts that Witness CHC's evidence was available and discoverable through due diligence on the part of Defence Counsel. In effect, the Prosecution is asking the Appeals Chamber to accept that (a) Witness CHC's testimony in *Ntagerura et al.* was too difficult for the Prosecution to locate during the course of a decade,[22] but that (b) Defence Counsel in the *Government II* trial should have found it. This argument is undermined by the fact that the disclosed transcript does not appear to be available on on the Public Judicial Records Database.[23]

15. The Prosecution then asserts that this testimony was discoverable because "CHC testified under his own name".[24] The Prosecution disclosed only one day of Witness CHC's testimony to Mr. Mugenzi, that of 29 May 2002, during which the witness was referred to by his pseudonym throughout. On 9 October 2012, Mr. Mugenzi's counsel wrote to the Prosecution asking for the disclosure of "the full witness particulars of Witness CHC; any prior

[19] Prosecution Response, para. 32
[20] Prosecution Response, paras. 32-34.
[21] Mr. André Ntagerura, former Minister for Transport and Communications: *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgement, 1 September 2009; Mr. André Rwamakuba, former Minister of Primary and Secondary Education: *Prosecutor v. Rwamakuba*, ICTR-99-46C-T, Judgement, 20 September 2006; Mr. Casimir Bizimungu, former Minister for Health, Judgement; Mr. Jerome Bicamumpaka, former Minister for Foreign Affairs, Judgement.
[22] Prosecution Response, paras. 3-7.
[23] http://trim.unictr.org/.
[24] Prosecution Response, para. 40.

statements of Witness CHC in the possession of the Prosecution; and all the transcripts of Witness CHC's evidence in this and any other cases".[25] The Prosecution never responded. As such Mr. Mugenzi has no way of verifying whether this witness was referred to by his own name on other days of his testimony. Regardless, the transcript of 29 May 2002 does not appear to be publicly available, as a review of the Public Judicial Records Database demonstrates. It would not have become discoverable simply because Witness CHC testified under his own name.

16. Even had Witness CHC's transcripts been available, the Prosecution is asserting that that Defence Counsel – responsible for investigations, trial preparation and representing an accused in court – also have a concurrent obligation to review all transcripts of each of the past and ongoing trials at the ICTR to determine whether they contain any information which the Prosecution should have disclosed under Rule 68. Given the scale and length of the trials at the ICTR, this would mean an obligation to review transcript pages that would run into the hundreds of thousands. Given the payment scheme in place for ICTR Defence Counsel during *Government II* proceedings, where payment was linked to specific and identified pre-trial and trial tasks, Defence Counsel would have been required to undertake this voluminous transcript review on a *pro bono* basis. Such an obligation is palpably unreasonable and manifestly unworkable.

17. The argument that because Witness CHC testified in the *Ntagerura et al.* trial, and Mr. Ntagerura testified in the *Government II* proceedings, a diligent Defence Counsel had an "obligation" to read the transcripts of that case,[26] must also fail. Mr. Ntagerura, who was not called by Mr. Mugenzi, was one of 171 witnesses who gave evidence during the *Government II* proceedings.[27] To suggest that the calling of a witness called by a co-accused would give rise to an "obligation" to read approximately 2.5 years of transcripts from another case is also manifestly unreasonable.[28] Nor is there any evidence in the current proceedings that Mr. Mugenzi was aware of Witness CHC's presence at the meeting, precluding any argument that diligent Defence counsel would have themselves located Witness CHC and called him as a defence witness in the *Government II* proceedings.

---

[25] Letter Mugenzi Defence Counsel to the Prosecution, 9 October 2012, annexed as "Annex 3" to the Mugenzi Request.
[26] Prosecution Response, para. 43.
[27] Judgement, Procedural History, paras. 57, 114.
[28] The case minutes of the *Prosecutor v. Ntagerura et al* case, as published on the ICTR website, indicate that the proceedings commenced in February 2002, and ended in August 2003:
http://www.unictr.org/Cases/tabid/127/PID/54/default.aspx?id=2&mnid=6

1360/A

18. The Prosecution then argues that the exclusion of Witness CHC's evidence would not result in any prejudice because "the same evidence was available to the Trial Chamber from [Mr.] Mugenzi and [Mr.] Mugiraneza".[29] As with any trier of fact, the corroboration of evidence was a key element for the Trial Chamber in assessing the reliability of evidence. The Trial Chamber consistently considered whether particular testimony was corroborated when determining its weight against conflicting evidence. The Chamber also consistently looked to whether the testimony of the accused was corroborated by other non-accused witnesses. In rejecting the Prosecution's allegations concerning the speech of 16 January 1994, for example, the Chamber noted that Mr. Mugenzi's explanation as to its meaning was corroborated by other non-accused witnesses.[30] Any argument that Witness CHC's evidence can safely be excluded without prejudice to Mr. Mugenzi, simply because Witness CHC corroborated the testimony of the accused themselves, must fail. It is in fact this apparent corroboration from which the prejudice stems.

19. The Prosecution otherwise repeats the same arguments as those in its response to Mr. Mugenzi's request under Rule 68, to which Mr. Mugenzi responds with the arguments set out above.

Respectfully Submitted:

katejibson

Kate Gibson
Lead Counsel of Justin Mugenzi

Christopher Gosnell
Co-Counsel of Justin Mugenzi

Word Count: 2499

Dated: 12 November 2012

[29] Prosecution Response, para. 46.
[30] Judgement, paras. 451, 457.

United Nations
Nations Unies

TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	☒ Team I N. M. Diallo	☐ Team II R. N. Kouambo	☐ Team III C. K. Hometowu
	☐ OIC, JLSD P. Besnier	☐ OIC, JPU C. K. Hometowu	☐ Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison

From:	☐ Chamber (names)	☒ Defence **Kate GIBSON for Mr. Justin MUGENZI**	☐ Prosecutor's Office (names)	☐ Other: (names)

Case Name:	Mugenzi & Mugiraneza v. The Prosecutor	**Case Number:**	ICTR-99-50-A
Dates:	Transmitted: **12 NOVEMBER 2012**	Document's date: **12 NOVEMBER 2012**	
No. of Pages:	**8**	**Original Language:**	☒ English ☐ French ☐ Kinyarwanda
Title of Document:	**JUSTIN MUGENZI'S REPLY TO PROSECUTION RESPONSE TO MOTION FOR RELIEF FOR VIOLATIONS OF RULE 68 AND FOR ADMISSION OF ADDITIONAL EVIDENCE**		

Classification Level:
☐ Ex Parte
☐ Strictly Confidential / Under Seal
☐ Confidential
☒ Public

TRIM Document Type:

☐ Indictment	☐ Warrant	☒ Correspondence	☐ Submission from non-parties
☐ Decision	☐ Affidavit	☐ Notice of Appeal	☐ Submission from parties
☐ Disclosure	☐ Order	☐ Appeal Book	☐ Accused particulars
☐ Judgement	☐ Motion	☐ Book of Authorities	

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

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.

Target Language(s):
☐ English ☐ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	☐ English	☐ French	☐ Kinyarwanda
Translation	in	☐ English	☐ French	☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

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

KINDLY FILL IN THE BOXES BELOW

☐ **The OTP** is overseeing translation.
The document is submitted for translation to:
☐ The Language Services Section of the ICTR / Arusha.
☐ The Language Services Section of the ICTR / The Hague.
☐ An accredited service for translation; see details below:
Name of contact person:
Name of service:
Address:
E-mail / Tel. / Fax:

☐ **DEFENCE** is overseeing translation.
The document is submitted to an accredited service for translation (fees will be submitted to DCDMS):
Name of contact person:
Name of service:
Address:
E-mail / Tel. / Fax:

III - TRANSLATION PRIORITISATION (For Official use ONLY)

☐ Top priority	**COMMENTS**	☐ Required date:
☐ Urgent		☐ Hearing date: