



Mechanism for International Criminal Tribunals

Case No. MICT-12-29-A

Date: 15 April 2014

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge
Judge Burton Hall
Judge Liu Daqun

Registrar: Mr. John Hocking

Decision of: 15 April 2014

AUGUSTIN NGIRABATWARE

v.

THE PROSECUTOR

PUBLIC

**DECISION ON AUGUSTIN NGIRABATWARE'S MOTION
FOR SANCTIONS FOR THE PROSECUTION AND FOR AN
ORDER FOR DISCLOSURE**

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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of the “Defence Motion for Sanctions of the Prosecution and for an Order for Disclosure (Rules 71(A)(ii), 72(D), 73(A) and 74 of the MICT Rules of Procedure and Evidence)” filed publicly with confidential Annex G on 9 May 2013 (“Motion”) by Augustin Ngirabatware. The Prosecution filed a confidential response on 20 May 2013.¹ Mr. Ngirabatware filed a confidential reply on 22 May 2013.²

I. BACKGROUND

2. Mr. Ngirabatware was a member of the *Mouvement Républicain National pour la Démocratie et le Développement* (“MRND”) political party and served as Minister of Planning in the Interim Government from 9 April to 14 July 1994.³ On 20 December 2012, Trial Chamber II of the International Criminal Tribunal for Rwanda (“Trial Chamber” and “ICTR”, respectively) convicted Mr. Ngirabatware for instigating and aiding and abetting genocide, committing direct and public incitement to commit genocide, and committing, through his participation in a joint criminal enterprise, the crime of rape as a crime against humanity.⁴ Mr. Ngirabatware was sentenced to 35 years of imprisonment.⁵ His appeal against the Trial Judgement is currently pending.⁶

3. In the course of the trial, André Delvaux, an investigator for the Prosecution, testified about a number of meetings between members of the Prosecution team and Prosecution witnesses.⁷ On 30 September 2009, at the conclusion of Witness Delvaux’s testimony, Mr. Ngirabatware requested disclosure of all the notes taken during the Prosecution’s meetings with 12 witnesses.⁸ In its decision of the same date, the Trial Chamber denied the request, observing that matters concerning the Prosecution’s assessment of witnesses fell within the scope of Rule 70(A) of the ICTR Rules of Procedure and Evidence (“ICTR Rules”) and that Mr. Ngirabatware had not established that the

¹ Prosecution Response Regarding Ngirabatware’s Motion for Sanctions and Disclosure, 20 May 2013 (confidential) (“Response”).

² Defence Reply to Prosecution Response Regarding Ngirabatware’s Motion for Sanctions and Disclosure, 22 May 2013 (confidential) (“Reply”).

³ See *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Judgement and Sentence, 20 December 2012 (“Trial Judgement”), paras. 6-7.

⁴ Trial Judgement, paras. 1345, 1370, 1393, 1394.

⁵ Trial Judgement, para. 1420.

⁶ See Augustin Ngirabatware’s Notice of Appeal, 9 April 2013; Dr. Ngirabatware’s Appeal Brief, 18 June 2013 (confidential); Corrigendum to Dr. Ngirabatware’s Appeal Brief, 16 July 2013 (confidential). The amended public redacted version of the Appeal Brief was filed on 1 August 2013.

⁷ Witness Delvaux, T. 29 September 2009 pp. 24, 27, 31-32. Witness Delvaux explained that, in some meetings, he put questions and took notes of the witnesses’ answers and in others members of the Prosecution team assessed the witnesses, at times taking notes. See Witness Delvaux, T. 29 September 2009 pp. 24, 27, 31-32, 35-36, 41-45, 48-49, 56-58. See also Witness Delvaux, T. 30 September 2009 p. 15.

⁸ T. 30 September 2009 p. 18. Mr. Ngirabatware’s request concerned in particular Prosecution Witnesses ANAJ, ANAG, ANAO, ANAP, ANAE, ANAM, ANAA, ANAD, ANAK, ANAN, ANAL, and ANAF. T. 30 September 2009 p. 19.

Prosecution took statements subject to disclosure during these meetings.⁹ On 5 October 2009, Mr. Ngirabatware requested certification to appeal the Trial Chamber's decision,¹⁰ and on 2 December 2009 certification was denied.¹¹ On 22 February 2010, Mr. Ngirabatware requested the Trial Chamber to reconsider its decision given the late disclosure of additional notes from an interview with Witness ANAP which, according to Mr. Ngirabatware, demonstrated that statements were taken during the meetings listed by Witness Delvaux.¹² The Trial Chamber denied the request finding that Mr. Ngirabatware had not demonstrated that notes containing such statements existed and were subject to disclosure.¹³ The Trial Chamber added that, should such notes be found, the Prosecution would be required to disclose them.¹⁴

4. After reviewing the evidence relied upon by the Trial Chamber in the Trial Judgement, Mr. Ngirabatware requested on 10 April 2013 the Prosecution to disclose its notes from meetings with nine Prosecution witnesses.¹⁵ He also requested disclosure of any material potentially affecting the credibility of Prosecution witnesses as well as material pertaining to his alibi for 7 April 1994 and to the circumstances of the attack against Safari Nyambwega in the Nyamyumba Commune.¹⁶ On 16 April 2013, the Prosecution responded that the notes requested were not subject to disclosure and that its search had not revealed new or additional statements from any Prosecution witness in this case.¹⁷ The Prosecution also confirmed that it continued to review the material in its possession and would provide Mr. Ngirabatware with any exculpatory material identified.¹⁸ In his subsequent letters to the Prosecution, Mr. Ngirabatware renewed his request for disclosure, identifying, in particular, the complete transcripts of the testimony of Casimir Bizimungu and Prosper Mugiranza

⁹ T. 30 September 2009 pp. 22-23. *See also* T. 29 September 2009 pp. 22, 28 (decision concerning a similar request related to Prosecution meetings with Witness ANAI). The Trial Chamber also clarified that matters concerning a witness's assessment by counsel fell within the scope of Rule 70(A) of the ICTR Rules and should be distinguished from notes taken by an investigator and additional statements, particularly if given in question and answer format. *See* T. 29 September 2009 p. 47.

¹⁰ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion for Certification to Appeal Oral Rulings of 29 and 30 September 2009, 5 October 2009; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Corrigendum to the Defence Motion for Certification to Appeal Oral Rulings of 29 and 30 September 2009, 6 October 2009.

¹¹ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification of the Chamber's Oral Rulings of 29 and 30 September 2009, 2 December 2009.

¹² T. 22 February 2010 pp. 52, 55-56. *See* Motion, para. 5; Motion, Annex G (confidential).

¹³ T. 22 February 2010 p. 57.

¹⁴ T. 22 February 2010 p. 57.

¹⁵ Motion, para. 10; Motion, Annex B, RP. 967-966. In particular, Mr. Ngirabatware requested disclosure of the questions and answers recorded during the following meetings between members of the Prosecution team and Prosecution witnesses: (i) meeting with Witness ANAE on 25 October 2007, 21 March 2009, and 28 August 2009; (ii) meeting with Witness ANAG on 25 October 2007 and 21 March 2009; (iii) meeting with Witness ANAM on 28 March 2009; (iv) meeting with Witness ANAO on 29 October 2008 and 19 March 2009; (v) meeting with Witness ANAD on 26 October 2007 and 22 March 2009; (vi) meeting with Witness ANAJ on 27 October 2009 and 20 March 2009; (vii) meeting with Witness ANAN on 15 November 2007 and 5 August 2009; (viii) meeting with Witness ANAL on 19 March 2009; (ix) meeting with Witness ANAF on 24 October 2007 and 18 March 2009.

¹⁶ Motion, para. 10; Motion, Annex B, paras. 2-7.

¹⁷ Motion, Annex C, RP. 959-958.

¹⁸ Motion, Annex C, RP. 958.

in the case of *The Prosecutor v. Casimir Bizimungu et al.*¹⁹ On 3 May 2013, the Prosecution disclosed the open-session transcripts requested.²⁰

II. SUBMISSIONS

5. In the Motion, Mr. Ngirabatware requests the Appeals Chamber to find that the Prosecution breached its disclosure obligations in relation to: (i) its failure to disclose notes taken by members of the Prosecution team during the assessment meetings with Witnesses ANAE, ANAG, ANAM, ANAO, ANAD, ANAJ, ANAN, ANAL, and ANAF; and (ii) its failure to disclose in a timely manner the transcripts of the testimony of Mr. Bizimungu and Mr. Mugiraneza in the *Bizimungu et al.* case.²¹ In addition, Mr. Ngirabatware requests the Appeals Chamber to order disclosure of the above-mentioned notes, and any other material that might affect the credibility of Prosecution witnesses or support his alibi for 7 April 1994.²²

6. In relation to the notes, Mr. Ngirabatware argues that these are subject to disclosure pursuant to Rules 71(A)(ii) and 72(D) of the Mechanism's Rules of Procedure and Evidence ("Rules").²³ He points to several factors which, in his view, demonstrate the existence of such notes and warrant their disclosure: (i) the testimony of Witness Delvaux and the notes from Witness ANAP's interview showing that during witness assessment meetings questions were put to the witnesses and new facts, which were not included in their previous statements, were communicated to the Prosecution; (ii) the Prosecution never suggested that the records of these meetings only contain comments and observations by Witness Delvaux; and (iii) the Indictment was amended in 2009 following the discovery of new evidence after investigations which would have included the notes sought.²⁴

7. As to the alleged delayed disclosure of the transcripts of the testimony of Mr. Mugiraneza and Mr. Bizimungu, Mr. Ngirabatware argues that the evidence is exculpatory as it supports his alibi for 7 April 1994.²⁵ He also submits that the delayed disclosure by the Prosecution caused him prejudice as he was deprived of the opportunity to use the evidence at trial.²⁶ The Prosecution's

¹⁹ Motion, Annex D, RP. 955; Motion, Annex E.

²⁰ Motion, Annex F, RP. 951-950.

²¹ Motion, paras. 10, 16, 29, 41.

²² Motion, paras. 10, 16, 41. In the Motion, Mr. Ngirabatware also requests the Appeals Chamber to order the Prosecution to disclose "any relevant statements and exhibits in relation to the issues testified to by Bizimungu and Mugiraneza". See Motion, para. 41. In his Reply, however, Mr. Ngirabatware asked the Appeals Chamber to declare moot this particular request. See Reply, para. 28(ii).

²³ Motion, paras. 17-24.

²⁴ Motion, paras. 25-26.

²⁵ Motion, paras. 34-35.

²⁶ Motion, para. 39-40. See also Reply, para. 27.

failure to disclose the evidence in a timely manner warrants, in his view, the imposition of sanctions under Rule 74 of the Rules.²⁷

8. In response, the Prosecution denies any violation of its disclosure obligations.²⁸ The Prosecution also discloses the “draft unsigned summary of [W]itness ANAN’s interview” dated 5 August 2009 which, it claims, is not exculpatory in nature, and submits that all other records containing questions put to and answered by witnesses have been already disclosed to Mr. Ngirabatware.²⁹ The Prosecution maintains that “[t]he only other remaining undisclosed records of witness interviews” are contained in mission reports prepared by Prosecution trial attorneys for the purpose of the internal assessment of the witnesses.³⁰

9. In relation to the transcripts of the testimony of Mr. Bizimungu and Mr. Mugiraneza, the Prosecution submits that at his trial Mr. Ngirabatware was aware that their evidence could support his alibi and could have accessed the publicly available transcripts.³¹ It adds that, in any event, Mr. Ngirabatware was not materially prejudiced given that the testimonies are of limited probative value and, at best, cumulative with other evidence on the trial record.³²

10. In reply, Mr. Ngirabatware submits that the Prosecution’s reference to “remaining undisclosed records of witness interviews” and the recently disclosed summary of Witness ANAN’s interview suggest that the Prosecution is in possession of additional records which are subject to disclosure.³³ Mr. Ngirabatware further contends that Witness ANAN’s interview was not a mere assessment made for internal purposes; rather, the interview was inconsistent with the witness’s testimony at trial, and its late disclosure violated the Prosecution’s disclosure obligations.³⁴ As to the transcripts of the testimony of Mr. Bizimungu and Mr. Mugiraneza, Mr. Ngirabatware argues that the Prosecution misapprehends its disclosure obligations,³⁵ and denies being aware of the

²⁷ Motion, para. 39. *See also* Reply, para. 27.

²⁸ Response, paras. 2-3, 6, 23.

²⁹ Response, paras. 7, 9, 11. *See also* Response, Annex.

³⁰ Response, para. 8.

³¹ Response, paras. 12-17, referring to *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Pre-Defence Brief, 21 October 2010 (confidential), RP. 8930-8929; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Additional Alibi Notice, 22 March 2010 (strictly confidential), paras. 4-5.

³² Response, paras. 2, 18-21.

³³ Reply, paras. 8-11. The Appeals Chamber notes that, in his Reply, Mr. Ngirabatware appears to also request for the first time the disclosure of records of meetings held with Prosecution Witness ANAI. *See* Reply, para. 6, referring to Witness Delvaux, T. 29 September 2009 pp. 24, 27. The Appeals Chamber recalls that a party’s reply should be limited to arguments contained in the opponent’s response so that the latter is not deprived of the opportunity to respond. The Appeals Chamber, therefore, will not consider this matter further.

³⁴ Reply, paras. 11-13.

³⁵ Reply, paras. 15-18. The Appeals Chamber observes that, in his Reply, Mr. Ngirabatware complains for the first time of the alleged late disclosure on 10 May 2013 of statements by Mr. Mugiraneza dated 8 and 19 April 1999. *See* Reply, paras. 22-27. The Appeals Chamber recalls that a party’s reply should be limited to arguments contained in the opponent’s response. Accordingly, the Appeals Chamber will not consider Mr. Ngirabatware’s submissions on this matter. In any event, the Appeals Chamber notes that Mr. Ngirabatware made further submissions on the alleged

contents of the testimonies at trial.³⁶ Mr. Ngirabatware submits that the prejudice resulting from their late disclosure is demonstrated by the Trial Chamber's rejection of his alibi and warrants the imposition of sanctions on the Prosecution.³⁷

III. APPLICABLE LAW

11. Pursuant to Rule 71(A)(ii) of the Rules, the Prosecution is obliged to make available to the defence copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial.³⁸ Under Rule 72(D) of the Rules, the Prosecution has the duty to disclose to the defence any additional evidence or material which should have been disclosed earlier as soon as it is discovered.³⁹ Notwithstanding these provisions, under Rule 76(A) of the Rules "reports, memoranda or other internal documents prepared by a Party, its assistants, or representatives in connection with the investigation, preparation, or presentation of the case are not subject to disclosure or notification".⁴⁰

12. The Prosecution also has a positive and continuous obligation under Rule 73(A) of the Rules to, "as soon as practicable, disclose to the Defence any material that in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".⁴¹ The determination as to which material is subject to disclosure under this provision is a fact-based enquiry made by the Prosecution.⁴² Therefore, the Appeals Chamber will not intervene in the exercise of the Prosecution's discretion unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith.⁴³ The Appeals Chamber recalls that the Prosecution's obligation to disclose

delayed disclosure of Mr. Mugiraneza's statements dated 8 and 19 April 1999 and sought their admission as additional evidence on appeal in his Confidential Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, filed on 25 July 2013. The Appeals Chamber will consider this matter in deciding that motion.

³⁶ Reply, paras. 19-20.

³⁷ Reply, paras. 26-27, citing Trial Judgement, para. 685.

³⁸ See also Rule 66(A)(ii) of the ICTR Rules.

³⁹ See also Rule 67(D) of the ICTR Rules.

⁴⁰ See also Rule 70(A) of the ICTR Rules.

⁴¹ See also Rule 68(A) of the ICTR Rules.

⁴² See *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 Appeal Decision*"), para. 7; *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, filed confidentially on 23 March 2011, public redacted version filed on 9 November 2011 ("*Setako Appeal Decision*"), para. 13; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010 ("*Kamuhanda Appeal Decision*"), para. 14. *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para. 183.

⁴³ See *Mugenzi Appeal Decision*, para. 7; *Kamuhanda Appeal Decision*, para. 14; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34.

exculpatory material is essential to a fair trial, and notes that this obligation has always been interpreted broadly.⁴⁴

13. To establish that the Prosecution is in breach of its disclosure obligations under Rule 73 of the Rules, the Defence 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.⁴⁵ If the defence satisfies the chamber that the Prosecution has failed to comply with its Rule 73 obligations, the chamber must examine whether the defence has been prejudiced by that failure before considering whether a remedy is appropriate.⁴⁶

IV. DISCUSSION

A. Notes from Witness Assessment Meetings

14. At the outset, the Appeals Chamber recalls that records of questions put to witnesses by the Prosecution and of the answers given constitute witness statements pursuant to Rule 71(A)(ii) of the Rules and are, therefore, subject to disclosure.⁴⁷ Such records have to be distinguished from “internal documents prepared by a Party” which are not subject to disclosure under Rule 76 of the Rules.⁴⁸

15. The Appeals Chamber notes that, as part of its Response, the Prosecution disclosed the summary of Witness ANAN’s interview which was taken on 5 August 2009.⁴⁹ The document records the witness’s answers to questions and thus falls within the scope of Rule 71(A)(ii) of the Rules. Accordingly, the Appeals Chamber finds that the Prosecution violated its obligation pursuant to Rule 71(A)(ii) of the Rules by failing to timely disclose this statement.⁵⁰ Moreover, the statement appears to contradict Witness ANAN’s testimony to the extent that it suggests that there was a

⁴⁴ *Mugenzi* Appeal Decision, para. 7; *Setako* Appeal Decision, para. 12; *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 (“*Kalimanzira* Appeal Judgement”), para. 18.

⁴⁵ See *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Judgement, 4 February 2013, (“*Mugenzi and Mugiraneza* Appeal Judgement”), para. 39; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motions for Disclosure, 18 January 2011, para. 7; *Kamuhanda* Appeal Decision, para. 14.

⁴⁶ *Mugenzi and Mugiraneza* Appeal Judgement, para. 39; *Setako* Appeal Decision, para. 14; *Kalimanzira* Appeal Judgement, para. 18.

⁴⁷ See *Ellézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka* Appeal Judgement”), para. 33, referring to Rule 66(A)(ii) of the ICTR Rules.

⁴⁸ *Niyitegeka* Appeal Judgement, para. 34 (explaining that internal documents can include notes of questions not put to the witness and notes made in relation to the questioning of a witness unless it has been put to the witness).

⁴⁹ See Response, Annex.

⁵⁰ This also amounted to a violation of Rule 66(A)(ii) of the ICTR Rules.

roadblock near a customs office.⁵¹ Such inconsistencies are matters which could affect the witness's credibility as well as the probative value of his evidence. Consequently, the Appeals Chamber considers that the Prosecution violated its obligations under Rule 73 of the Rules by disclosing this statement only on 20 May 2013 and thus by failing to disclose this potentially exculpatory material as soon as practicable, given that it had been in its possession since 5 August 2009.⁵²

16. As Mr. Ngirabatware was denied the opportunity to rely upon this evidence at trial, the Appeals Chamber turns to consider whether the prejudice suffered merits the imposition of sanctions. The Appeals Chamber notes that an inconsistency in relation to the location of the roadblock, between another prior statement by Witness ANAN and his testimony, was identified and considered by the Trial Chamber.⁵³ In addition, in the course of the trial, Mr. Ngirabatware called Witness ANAN's credibility into question, relying on various inconsistencies between his testimony and earlier statements. Having considered these submissions, the Trial Chamber found them insufficient to render the witness unreliable.⁵⁴ Furthermore, in assessing Witness ANAN's credibility, the Trial Chamber took note that he had pleaded guilty to genocide and that he was a possible accomplice of Mr. Ngirabatware, and indicated that it will treat his evidence with the appropriate caution.⁵⁵ In these circumstances, the Appeals Chamber considers that any prejudice suffered by Mr. Ngirabatware from the late disclosure does not warrant the imposition of sanctions pursuant to Rule 74 of the Rules.

17. The Appeals Chamber now turns to Mr. Ngirabatware's submission that the Prosecution breached its disclosure obligations by failing to disclose other notes from witness assessment meetings.⁵⁶ In particular, Mr. Ngirabatware seeks to rely on the testimony of Witness Delvaux that during such meetings, questions were put to and answers were provided by the witnesses.⁵⁷ The Appeals Chamber notes that, at trial, Witness Delvaux testified that assessment meetings were aimed at exploring whether a person was suitable to be called to testify, and, as a general rule, a new witness statement was taken if questions put by the Prosecution's team led to new

⁵¹ The statement suggests that the Customs roadblock was situated near the customs office whereas in discussing the location of that roadblock in the course of his testimony Witness ANAN stated that there was no customs office. *See* T. 8 February 2010 p. 94 (closed session).

⁵² This also amounted to a violation of Rule 68 of the ICTR Rules.

⁵³ In the Trial Judgement, the Trial Chamber observed that, in a prior statement, Witness ANAN described the location of a particular roadblock as at the customs office on the Cyanika-Gisa road; however, in his testimony in court the witness stated that there was no customs office in Cyanika, but the roadblock was located in Cyanika on Cyanika road. On this basis, the Trial Chamber found that the Indictment was factually incorrect in identifying the location of the Cyanika-Gisa roadblock as at the customs office. *See* Trial Judgement, para. 228.

⁵⁴ *See* Trial Judgement, paras. 194-197, 292-293, 318.

⁵⁵ *See* Trial Judgement, paras. 192-193.

⁵⁶ Motion, paras. 10, 16-28.

⁵⁷ Motion, para. 25(a); Reply, para. 6.

information.⁵⁸ Witness Delvaux further testified that Witness ANAN did not provide a statement during the two assessment meetings held with members of the Prosecution team. In fact, he was not certain whether any notes were taken during these meetings.⁵⁹ Similarly, in relation to the assessment meetings of Witnesses ANAL and ANAF, Witness Delvaux's evidence is inconclusive as to whether any notes were taken.⁶⁰ In relation to the remaining witnesses listed in the Motion, Witness Delvaux testified that he took a statement only from Witness ANAO,⁶¹ which, according to the Prosecution, was disclosed to Mr. Ngirabatware on 19 January 2009.⁶² Accordingly, contrary to Mr. Ngirabatware's submission, the testimony of Witness Delvaux does not demonstrate that, during the assessment meetings with the witnesses listed in the Motion, members of the Prosecution team took notes that are subject to disclosure.

18. Further, the Appeals Chamber is not persuaded by Mr. Ngirabatware's speculative submission that the notes from the assessment meetings with Witnesses ANAP and ANAN demonstrate that other notes from assessment meetings exist, are of similar nature and are, therefore, subject to disclosure. The Appeals Chamber also finds unsubstantiated Mr. Ngirabatware's submission that the amendment of the Indictment in 2009 demonstrates the existence of such notes.⁶³

19. Finally, in relation to Mr. Ngirabatware's argument that the Prosecution's reference to records of witness interviews contained in mission reports suggests that such material is subject to disclosure,⁶⁴ the Appeals Chamber notes the Prosecution's submission that these records "do not include questions put to and answers provided by the witnesses."⁶⁵ The Appeals Chamber further notes the Prosecution's statement that all records containing questions put to and answers provided by witnesses have been disclosed to Mr. Ngirabatware.⁶⁶ In the absence of any evidence to the contrary, the Appeals Chamber assumes that the Prosecution's representations are made in good

⁵⁸ Witness Delvaux, T. 30 September 2009 p. 13.

⁵⁹ Witness Delvaux, T. 29 September 2009 pp. 41-42.

⁶⁰ Witness Delvaux, T. 29 September 2009 pp. 44, 48-49.

⁶¹ Witness Delvaux, T. 29 September 2009 pp. 15, 56-57. *See also* Defence Exhibit 2.

⁶² Response, para. 9, fn. 17.

⁶³ *See* Motion, para. 26, referring to *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Prosecutor's Motion for Leave to Amend the Indictment (made pursuant to Rules 50(A) and 54 of the Rules of Procedure and Evidence, and other enabling provisions), 23 October 2008, paras. 26, 28, *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009, para. 4, *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 29.

⁶⁴ Reply, para. 8.

⁶⁵ Response, para. 8.

⁶⁶ Response, paras. 2, 9.

faith.⁶⁷ Consequently, Mr. Ngirabatware has failed to demonstrate the existence of additional records in the Prosecution's possession which are subject to disclosure.

B. Transcripts of the testimony of Mr. Bizimungu and Mr. Mugiraneza

20. At trial, the Prosecution alleged that, on 7 and 8 April 1994, Mr. Ngirabatware was present in Nyamyumba Commune where he distributed weapons and incited members of the population to kill Tutsis.⁶⁸ Mr. Ngirabatware presented an alibi according to which on 7 and 8 April 1994 he was in Kigali.⁶⁹ In particular, he claimed that, on the evening of 6 April 1994, he and his family were escorted to the Presidential Guard Camp where they stayed until the morning of 8 April 1994 when they relocated to the French embassy where they spent the whole day.⁷⁰ The Trial Chamber did not find Mr. Ngirabatware's alibi for 7 April 1994 to be reasonably possibly true.⁷¹ However, it accepted his alibi in relation to his whereabouts on 8 April 1994.⁷²

21. In the Motion, Mr. Ngirabatware identifies portions of the testimony of Mr. Bizimungu and Mr. Mugiraneza which he claims support his alibi.⁷³ In particular, he refers to the written statement of another witness which was put to Mr. Bizimungu by the Prosecution, to the effect that, by midnight on 6 April 1994, all the ministers from the MRND party had been evacuated by members of the Presidential Guard.⁷⁴ Further, Mr. Ngirabatware refers to Mr. Mugiraneza's testimony that on the evening of 6 April 1994: (i) Mr. Mugiraneza had telephone contact with Mr. Ngirabatware; (ii) Mr. Mugiraneza was told by André Ntagerura that all MRND ministers were evacuated to the Presidential Guard Camp and that members of the Presidential Guard could take him there; (iii) on the way to the camp, Mr. Mugiraneza stopped at Mr. Ngirabatware's house; and (iv) upon Mr. Mugiraneza's arrival at the Presidential Guard Camp at around midnight, he saw all MRND ministers, except for the Minister of Interior and the Minister of Defence.⁷⁵ The Appeals Chamber considers that the material in question may provide direct or circumstantial support for the alibi evidence presented by Mr. Ngirabatware concerning his whereabouts on the morning of

⁶⁷ See *supra* para. 12.

⁶⁸ See, e.g., Trial Judgement, paras. 650, 697.

⁶⁹ Trial Judgement, para. 492.

⁷⁰ Trial Judgement, para. 492.

⁷¹ Trial Judgement, paras. 685, 696.

⁷² Trial Judgement, paras. 695-696.

⁷³ Motion, paras. 33, 35. See also Motion, Annex B, para. 5; Motion, Annex D.

⁷⁴ Motion, Annex B, para. 5, citing *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Bizimungu, T. 11 June 2007 p. 31.

⁷⁵ Motion, Annex B, para. 5, citing *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Mugiraneza, T. 22 May 2008 pp. 24-25.

7 April 1994.⁷⁶ Consequently, the Appeals Chamber is satisfied that the material identified is *prima facie* exculpatory.

22. The Appeals Chamber observes that the identified portions of the testimonies of Mr. Bizimungu and Mr. Mugiraneza were given in open session and that, therefore, the public transcripts were accessible to Mr. Ngirabatware. Nonetheless, the Appeals Chamber recalls that the Prosecution's disclosure obligations generally encompass open session testimonies of witnesses in other proceedings conducted before the ICTR.⁷⁷ Although Mr. Bizimungu and Mr. Mugiraneza testified in the *Bizimungu et al.* case in June 2007 and May 2008, respectively, the public transcripts of their testimony were not provided to Mr. Ngirabatware until May 2013.⁷⁸ The Appeals Chamber accordingly finds that the Prosecution failed to comply with its obligation under Rule 73 of the Rules to disclose this material as soon as practicable.⁷⁹

23. As a result of the Prosecution's breach of its disclosure obligations, Mr. Ngirabatware was deprived of the opportunity to use this material at trial. The Appeals Chamber observes, however, that Mr. Ngirabatware presented other evidence in support of his claim that he was at the Presidential Guard Camp on the night of 6 April 1994.⁸⁰ Beyond simply submitting that the material supports his alibi, Mr. Ngirabatware fails to explain how this material might have altered his defence or the Trial Chamber's consideration of the evidence tendered in support of his alibi.⁸¹ As a result, the Appeals Chamber is not satisfied that Mr. Ngirabatware has substantiated his claim that the Prosecution's failure to timely disclose this material resulted in "serious prejudice" warranting sanctions.⁸²

C. Other material affecting the credibility of Prosecution witnesses or supporting

Mr. Ngirabatware's alibi for 7 April 1994

24. The Appeals Chamber considers that Mr. Ngirabatware has failed to sufficiently demonstrate that the Prosecution holds additional undisclosed material which might affect the credibility of Prosecution witnesses or support his alibi. The Appeals Chamber further notes the Prosecution's submission that it continues to review its databases and will disclose material as soon

⁷⁶ See Trial Judgement, paras. 499-500, 502, 532-533, 551, 571-572, 580, 596.

⁷⁷ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008, para. 27, referring to *Prosecutor v. Dario Kordić*, Case No. IT-95-14/2-A, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation under Rule 68 of the Rules, 11 February 2004, para. 20. See also *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 4.

⁷⁸ Motion, para. 32; Motion, Annex F; Reply, para. 27.

⁷⁹ This also amounted to a violation of Rule 68 of the ICTR Rules.

⁸⁰ Trial Judgement, paras. 664-665.

⁸¹ See Motion, para. 39.

as practicable, consistent with its obligations under Rule 73 of the Rules.⁸³ In the absence of evidence to the contrary, the Appeals Chamber has no reason to doubt that the Prosecution is complying with its continuous disclosure obligations in good faith.

D. Conclusion

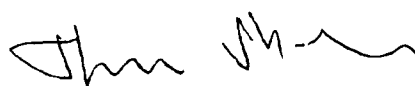
25. The Appeals Chamber has found that the Prosecution violated its disclosure obligations as a result of the late disclosure of the notes from Witness ANAN's interview of 5 August 2009 and of the transcripts of the testimony of Mr. Bizimungu and Mr. Mugiraneza in the *Bizimungu et al.* case. Mr. Ngirabatware, however, has not demonstrated that sanctions are warranted in the present case pursuant to Rule 74 of the Rules.

V. DISPOSITION

26. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion, in part, and **FINDS** that the Prosecution has violated Rules 71(A)(ii) and 73(A) of the Rules in relation to the notes of Witness ANAN's interview and the transcripts of the testimony of Mr. Bizimungu and Mr. Mugiraneza in the *Bizimungu et al.* case, **DISMISSES** as moot Mr. Ngirabatware's request for the disclosure of this material, and **DENIES** the Motion in all other respects.

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

Done this 15th day of April 2014,
At The Hague,
The Netherlands



Judge Theodor Meron, Presiding

[Seal of the Mechanism]



⁸² See Motion, para. 39. See also Reply, para. 27.

⁸³ Response, paras. 3, 24.



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