UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-12-29-A

Date: 21 November 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: **21 November 2014**

AUGUSTIN NGIRABATWARE

v.

THE PROSECUTOR

PUBLIC

DECISION ON NGIRABATWARE'S MOTIONS FOR RELIEF FOR RULE 73 VIOLATIONS AND ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL

Counsel for Augustin Ngirabatware:

Mylène Dimitri
Guénaël Mettraux

The Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
Inneke Onsea

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of three motions filed by Augustin Ngirabatware on 25 July 2013,[1] 2 September 2013,[2] and 7 May 2104,[3] seeking relief for violations of Rule 73 of the Rules of Procedure and Evidence of the Mechanism ("Rules") and requesting the admission of additional evidence on appeal pursuant to Rule 142 of the Rules. The Prosecution responded on 13 August 2013,[4] 2 October 2013,[5] and 6 June 2014.[6] Ngirabatware filed replies on 21 August 2013[7] and 9 June 2014.[8]

I. BACKGROUND

2. On 20 December 2012, Trial Chamber II of the International Criminal Tribunal for Rwanda ("Trial Chamber" and "ICTR", respectively) convicted Ngirabatware of instigating and aiding and abetting genocide, committing direct and public incitement to commit genocide, and committing, pursuant to the extended form of joint criminal enterprise, rape as a crime against humanity.[9] The Trial Chamber sentenced Ngirabatware to 35 years of imprisonment.[10] Ngirabatware advances seven grounds of appeal against his convictions and sentence.[11] Under his second ground of appeal, Ngirabatware alleges that the Trial Chamber erred in rejecting his alibi for 7 April 1994.[12] Ngirabatware's appeal against the Trial Judgement is pending.

3. At trial, the ICTR Prosecution alleged that, on 7 and 8 April 1994, Ngirabatware was distributing weapons and exhorting members of the population to kill Tutsis in the Nyamyumba

---

[1] Dr. Ngirabatware's Confidential Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, 25 July 2013 (with confidential Annexes A and B) ("First Motion").
[2] Dr. Ngirabatware's Second Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, 2 September 2013 (with confidential Annex A and public Annex B) ("Second Motion"). Annex A was filed separately. *See* Annex A to Dr. Ngirabatware's Second Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence: Prosecution Letter of 17 May 2013 to Ngirabatware's Lead Counsel and Confidential Index of Disclosed Material, 2 September 2013 (confidential). Noting the non-sequential numbering of some paragraphs in the Second Motion, the Appeals Chamber will refer to the relevant submissions as if the paragraphs had correct numbering.
[3] Supplementary Motion for Admission of Additional Evidence on Appeal, 7 May 2014 (confidential with Annexes A, B, C, D, E, F and G) ("Third Motion").
[4] Prosecution's Response to Ngirabatware's Rules 73, 74 and 142 Motion, 13 August 2013 ("First Response").
[5] Prosecution Response to Ngirabatware's Second Rules 73, 74 and 142 Motion, 2 October 2013 ("Second Response").
[6] Prosecution's Response to Ngirabatware's Third Rule 142 Motion, 6 June 2014 (confidential) ("Third Response").
[7] Dr. Ngirabatware's Reply to Prosecution's Response to Dr. Ngirabatware's Confidential Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, 21 August 2013 (confidential) ("Reply to the First Response"). The Appeals Chamber notes that the Reply to the First Response has been incorrectly numbered in that numbered paragraph 25 on page 10 should be numbered paragraph 36. The Appeals Chamber shall refer to the correct numbering.
[8] Defence Reply to Prosecution's Response to Ngirabatware's Third Rule 142 Motion, 9 June 2014 (confidential) ("Reply to the Third Response").
[9] *The Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Judgement and Sentence, 20 December 2012 ("Trial Judgement"), paras. 1345, 1370, 1393-1394. The Trial Judgement was issued in writing on 21 February 2013.
[10] Trial Judgement, para. 1420.
[11] *See* Augustin Ngirabatware's Notice of Appeal, 9 April 2013 ("Notice of Appeal"); Dr. Ngirabatware's Appeal Brief, 18 June 2013 (confidential) ("Appeal Brief"); Corrigendum to Dr. Ngirabatware's Appeal Brief, 16 July 2013 (confidential), paras. 77-146. The amended public redacted version of the Appeal Brief was filed on 1 August 2013.

Commune in Gisenyi Prefecture.[13] Ngirabatware presented an alibi that he was at the Presidential Guard Camp in Kigali from the evening of 6 April 1994 until he relocated to the French Embassy on the morning of 8 April 1994.[14] In support of his alibi, Ngirabatware relied on his own testimony and that of Defence Witnesses Winifred Musabeyezu-Kabuga, Léoncie Bongwa, DWAN-122, DWAN-7, DWAN-150, DWAN-55, Jean Damascéne Kayitana, Jean Baptiste Byilingiro, Jérôme-Clément Bicamumpaka, and Joseph Habinshuti and referred to the evidence of Prosecution Witnesses Joseph Ngarambe, DAK, and ANAW.[15] Ngirabatware also relied on a diplomatic telegram sent from the French Embassy, which included his name on a list of persons who had sought refuge at the embassy on 8 April 1994.[16]

4. The Trial Chamber considered that the witnesses who testified in support of Ngirabatware's alibi for 7 April 1994 were individually and collectively not credible.[17] It also noted that, since Ngirabatware filed his notice of alibi after all the Prosecution witnesses had testified, there was "a high probability that the alibi was tailored and fabricated to fit the Prosecution case".[18] Consequently, the Trial Chamber did not find Ngirabatware's alibi for 7 April 1994 to be reasonably possibly true.[19] However, relying principally on the French Embassy telegram of 8 April 1994, the Trial Chamber found Ngirabatware's alibi to be reasonably possibly true in that he may have been at the French Embassy around early afternoon on 8 April 1994, possibly arriving there before 11.58 a.m.[20]

5. In his First Motion, Ngirabatware requests that the Appeals Chamber admit as additional evidence on appeal a series of transcripts of interviews conducted by ICTR investigators with Prosper Mugiraneza dated 8, 13, and 19 April 1999 ("Mugiraneza's 1999 Statement")[21] and/or call Mugiraneza as a witness on appeal.[22] In the alternative, Ngirabatware requests that the Appeals Chamber take notice that in April 1999, Mugiraneza informed the Prosecution that Ngirabatware was present at the Presidential Guard Camp in Kigali on 6 and 7 April 1994.[23]

6. In his Second Motion, Ngirabatware requests that the Appeals Chamber admit as additional evidence on appeal the testimony of Pauline Nyiramasuhuko given in the *Karemera et al.* case in

---

[12] Notice of Appeal, paras. 15-23; Appeal Brief, paras. 77-146.
[13] Trial Judgement, paras. 491, 650.
[14] Trial Judgement, para. 492
[15] Trial Judgement, para. 492.
[16] Trial Judgement, para. 687.
[17] Trial Judgement, para. 685. *See* Trial Judgement, paras. 663-684.
[18] Trial Judgement, para. 685. *See also* Trial Judgement, para. 696.
[19] Trial Judgement, para. 696.
[20] Trial Judgement, paras. 653, 685, 695-696.
[21] First Motion, Annex B.
[22] First Motion, para. 30(ii).
[23] First Motion, paras. 29, 30(iii).

May 2010 ("Nyiramasuhuko's 2010 Testimony") and find that the Prosecution has breached its disclosure obligations in relation to this material.[24] In the alternative, Ngirabatware requests that the Appeals Chamber take judicial notice of certain aspects of Nyiramasuhuko's 2010 Testimony, including that she saw Ngirabatware at the Presidential Guard Camp at some point between the night of 6 April and the morning of 8 April 1994.[25]

7. In his Third Motion, Ngirabatware requests that the Appeals Chamber admit as additional evidence on appeal defence counsel's interview with Mugiraneza dated 7 May 2014 ("Mugiraneza's 2014 Statement") and/or call Mugiraneza as a witness on appeal.[26] Ngirabatware claims that Mugiraneza's 2014 Statement confirms that he was at the Presidential Guard Camp on the evening of 6 April and during the day on 7 April 1994.[27]

8. The Prosecution responds that all three motions should be dismissed.[28] However, should Mugiraneza's 2014 Statement be admitted into evidence, the Prosecution requests permission to cross-examine Mugiraneza and to present additional evidence in rebuttal.[29]

9. On 26 June 2014, the Pre-Appeal Judge, after having consulted the bench in this case, deferred deciding on the three motions until after the appeal hearing had taken place.[30] The appeal hearing was held on 30 June 2014.

II. PRELIMINARY ISSUES

A. Confidentiality

10. The Appeals Chamber notes that the First and Third Motion were filed confidentially. Ngirabatware explains that he filed the First Motion confidentially "out of abundance of caution because [he] does not know to what extent Mr. Mugiraneza needs to be protected as a potential witness".[31] In light of the nature of the tendered material, the Appeals Chamber understands the same rationale to apply to the confidential status of the Third Motion. The Appeals Chamber recalls, however, that under Rules 92 and 131 of the Rules all proceedings before the Appeals

[24] Second Motion, paras. 1, 26(ii)-(iii).
[25] Second Motion, paras. 16, 26(iv). *See also* Second Motion, Annex B, RP. 2520-2519.
[26] Third Motion, paras. 2, 33(ii). The Appeals Chamber notes that, according to the interview transcript, the interview was conducted on 7 May 2014 (*see* Third Motion, Annex G). Having considered the totality of Ngirabatware's submissions, the Appeals Chamber considers that the reference to 7 May 2014 is a typographical error and that the interview was, in fact, conducted on 5 May 2014 (*see* Third Motion, para. 2; *see also* Third Motion, Annex F).
[27] Third Motion, paras. 9-16.
[28] First Response, para. 40; Second Response, para. 12; Third Response, para. 25.
[29] Third Response, para. 26.
[30] Decision Deferring Consideration of Ngirabatware's Motions for the Admission of Additional Evidence on Appeal, 26 June 2014, p. 1.
[31] Reply to the First Response, n. 1.

Chamber, including the Appeals Chamber's orders and decisions, shall be public unless there are exceptional reasons for keeping them confidential. Ngirabatware has not provided any explanation as to why Mugiraneza might require protective measures, and therefore the Appeals Chamber is not satisfied that there are exceptional reasons for keeping the present decision confidential. Accordingly, the Appeals Chamber renders the present decision publicly.

B. Timeliness

11. Pursuant to Rule 142(A) of the Rules, a party may submit a request to present additional evidence before the Appeals Chamber no later than 30 days from the date of filing of the brief in reply unless good cause or, after the appeal hearing, cogent reasons are shown for the delay.

12. Ngirabatware filed his brief in reply on 13 August 2013.[32] Consequently, the 30 day time limit prescribed under Rule 142 of the Rules for filing a motion for admission of additional evidence on appeal expired on 12 September 2013. The Appeals Chamber notes that the First and Second Motion were filed within the time limit prescribed under the Rule. However, Ngirabatware filed the Third Motion on 7 May 2014, which is nearly eight months after the relevant time limit had expired. In these circumstances, Ngirabatware must show that good cause exists for the delayed filing of the Third Motion.[33] The Appeals Chamber recalls that the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the relevant time limit, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted.[34]

13. Ngirabatware submits that, following the Prosecution's disclosure of Mugiraneza's 1999 Statement, he took immediate steps to contact Mugiraneza with the view of obtaining a statement.[35] Ngirabatware contends that these circumstances justify the late filing of the Third Motion.[36] The Prosecution responds that Ngirabatware fails to show good cause for the late filing of the Third Motion, given that at trial he was aware that Mugiraneza could provide evidence in support of his alibi.[37]

---

[32] Dr. Ngirabatware's Brief in Reply to Prosecution Respondent's Brief (Pursuant to Rule 140 of the Rules of Procedure and Evidence), 13 August 2013.
[33] *See* Rule 142(A) of the Rules.
[34] *See, e.g., Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 2 May 2014 Decision on Vujadin Popović's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 May 2014 ("*Popović* Appeal Decision of 23 May 2014"), para. 19; *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 29 October 2008, para. 10.
[35] Third Motion, paras. 6-7.
[36] Third Motion, para. 8.
[37] Third Response, para. 7.

14. The Appeals Chamber notes that, prior to the expiration of the time limit prescribed under Rule 142 of the Rules, counsel for Ngirabatware made several efforts to meet with Mugiraneza.[38] He was ultimately able to meet with Mugiraneza on 5 May 2014[39] and filed the Third Motion, containing Mugiraneza's 2014 Statement, immediately thereafter. The Appeals Chamber further notes Ngirabatware's submission that the evidence proffered in the Third Motion "supplements, specifies and provides detailed clarification" of the evidence proposed in the First Motion, which was filed within the time limit.[40] In these circumstances, the Appeals Chamber is satisfied that good cause has been shown for the delayed filing of the Third Motion. Accordingly, the Appeals Chamber will proceed to examine the merits of all three motions.

III. DISCLOSURE OBLIGATIONS

A. Applicable Law

15. Under Rule 73(A) of the Rules, the Prosecution has a positive and continuous obligation 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 exculpatory material is essential to a fair trial, and notes that this obligation has always been interpreted broadly.[44]

---

[38] *See* Third Motion, Annex A.
[39] Third Motion, para. 2. *See also* Third Motion, Annex F.
[40] Third Motion, para. 2.
[41] *See also* Rule 68(A) of the ICTR Rules.
[42] *See, e.g.*, Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014 ("Appeal Decision of 15 April 2014"), para. 12, *referring to 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 of 24 September 2012"), 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 of 9 November 2011"), 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 of 4 March 2010"), para. 14, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 183.
[43] *See, e.g.*, Appeal Decision of 15 April 2014, para. 12, *referring to Mugenzi* Appeal Decision of 24 September 2012, para. 7, *Kamuhanda* Appeal Decision of 4 March 2010, 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 ("*Barayagwiza* Appeal Decision of 8 December 2006") para. 34.
[44] *See, e.g.*, Appeal Decision of 15 April 2014, para. 12, *referring to Mugenzi* Appeal Decision of 24 September 2012, para. 7; *Setako* Appeal Decision of 9 November 2011, para. 12; *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement"), para. 18.

16. In order to establish that the Prosecution is in breach of its disclosure obligations, the applicant 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 Appeals Chamber determines that the Prosecution is in breach of its disclosure obligations, the Appeals Chamber must examine whether the defence has been prejudiced by that failure before considering whether a remedy is appropriate.[46]

B. Discussion

17. The Prosecution disclosed Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony through correspondence dated 10 May and 17 May 2013, respectively.[47] According to Mugiraneza's 1999 Statement, Mugiraneza and Ngirabatware went to the Presidential Guard Camp on the night of 6 April 1994, arriving there sometime around midnight.[48] Mugiraneza saw Ngirabatware again on 8 April 1994 at the French Embassy.[49] Nyiramasuhuko testified that she went to the Presidential Guard Camp around midnight on 6 April 1994, where she remained until the morning of 8 April 1994.[50] Nyiramasuhuko further testified that Ngirabatware was at the Presidential Guard Camp when she was there.[51]

18. Ngirabatware submits that the Prosecution breached its disclosure obligations by failing to timely disclose Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony.[52] He claims that the disclosed material is exculpatory as it shows that the Trial Chamber's rejection of his alibi was erroneous.[53] Ngirabatware argues that he suffered prejudice as the Prosecution's failure to timely disclose Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony deprived him of the opportunity to present the evidence at trial and to generate additional evidence from the same sources.[54] In relation to Mugiraneza's 1999 Statement, Ngirabatware further submits that the late disclosure prevented him from making an informed decision as to whether Mugiraneza should be called as a witness at trial and from using the statement during the examination and cross-

[45] *See, e.g.*, Appeal Decision of 15 April 2014, para. 13, *referring to 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 of 4 March 2010, para. 14.
[46] *See, e.g.*, Appeal Decision of 15 April 2014, para. 13, *referring to Mugenzi* and *Mugiraneza* Appeal Judgement, para. 39; *Setako* Appeal Decision of 9 November 2011, para. 14; *Kalimanzira* Appeal Judgement, para. 18.
[47] *See* First Motion, Annex A; Second Motion, Annex A.
[48] First Motion, Annex B, RP. 1549.
[49] *See* First Motion, Annex B, RP. 1612-1611.
[50] Second Motion, Annex B, RP. 2550, 2520.
[51] Second Motion, Annex B, RP. 2520-2519.
[52] First Motion, para. 3; Second Motion, paras. 3, 5, 8-9; Reply to the First Response, paras. 7-9, 11.
[53] First Motion, para. 3; Second Motion, paras. 3-4.
[54] First Motion, paras. 4, 10, 15, 28; Second Motion, paras. 5, 14, 24.

examination of other witnesses.[55] As a remedy for the prejudice suffered, Ngirabatware submits that the Appeals Chamber may admit Mugiraneza's 1999 Statement as additional evidence on appeal with or without calling Mugiraneza as a witness[56] or, as sanction for the Prosecution's purported violation of its disclosure obligations, take notice that Mugiraneza informed the Prosecution in April 1999, before Ngirabatware was indicted by the ICTR Prosecution, that Ngirabatware was at the Presidential Guard Camp in Kigali on 6 and 7 April 1994.[57] In relation to Nyiramasuhuko's 2010 Testimony, Ngirabatware requests the Appeals Chamber to find that the Prosecution breached its disclosure obligations,[58] admit Nyiramasuhuko's testimony as a remedy for the prejudice suffered[59] or, as sanction for the Prosecution's purported violation of its disclosure obligations, take judicial notice of certain aspects of the proffered evidence.[60]

19. The Prosecution responds that Ngirabatware suffered no prejudice from the late disclosure of Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony and therefore no remedy is warranted.[61] The Prosecution further submits that it did not breach its disclosure obligations as Mugiraneza and Nyiramasuhuko testified in open session and therefore the substance of Mugiraneza's 1999 Statement and Nyiramasuhuko's testimony were reasonably accessible to Ngirabatware through the exercise of due diligence.[62]

20. The Appeals Chamber notes that Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony may provide direct or circumstantial support for the alibi evidence presented by Ngirabatware in relation to his whereabouts from 6 to 8 April 1994.[63] Consequently, the Appeals Chamber is satisfied that the proffered material is *prima facie* exculpatory.

21. The Appeals Chamber observes that Nyiramasuhuko testified in open session and that, therefore, the public transcripts were accessible to 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.[64] Considering that

---

[55] First Motion, paras. 10, 28. *See also* First Motion, paras. 5-9; Reply to the First Response, paras. 12-14.
[56] First Motion, paras. 4, 17, 25, 28, 30(ii).
[57] First Motion, paras. 29, 30(iii). Having considered the totality of the Ngirabatware's submissions, the Appeals Chamber understands that he seeks a finding by the Appeals Chamber that the Prosecution breached its disclosure obligations with respect to Mugiraneza's 1999 Statement.
[58] Second Motion, para. 26(ii).
[59] Second Motion, paras. 6, 25, 26(iii).
[60] Second Motion, paras. 6, 26 (iv). *See also* Second Motion, para. 16.
[61] Response to First Motion, paras. 6, 9, 19. Response to Second Motion, para. 5. *See also* Response to First Motion, paras. 11-18.
[62] Response to First Motion, paras. 9-10; Response to Second Motion, paras. 3-4.
[63] First Motion, Annex B, RP. 1617, 1614-1611, 1593, 1549; Second Motion, Annex B, RP. 2550, 2520-2518, 2513.
[64] *See, e.g.*, Appeal Decision of 15 April 2014, para. 22, *referring to Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008, para. 27; *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; *Prosecutor v. Radoslav Brđanin*,

Ngirabatware was arrested in Germany on 17 September 2007 and transferred to the ICTR's custody on 8 October 2008,[65] the Prosecution's disclosure in May 2013 of Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony was significantly delayed.[66] The Appeals Chamber accordingly finds that the Prosecution has failed to comply with its obligation under Rule 73 of the Rules to disclose this material as soon as practicable.[67] Nonetheless, for the reasons set out below, the Appeals Chamber finds, Judge Moloto dissenting, that the prejudice suffered by Ngirabatware as a result of the Prosecution's disclosure violation to be minimal.

22. In rejecting Ngirabatware's alibi, the Trial Chamber explicitly considered the evidence of Ngirabatware and Witnesses Musabeyezu-Kabuga, Byilingiro, Bongwa, and Bicamumpaka that Ngirabatware was at the Presidential Guard Camp in the late hours of 6 April 1994 and during the course of 7 April 1994 and that, on 8 April 1994, he moved together with his family to the French Embassy.[68] The Trial Chamber also relied on the French Embassy telegram in finding that Ngirabatware may have been at the French Embassy around early afternoon on 8 April 1994, possibly arriving there before 11.58 a.m.[69] The Appeals Chamber, therefore, considers Mugiraneza's 1999 Statement, indicating that he arrived with Ngirabatware at the Presidential Guard Camp around midnight on 6 April 1994, left Ngirabatware at the camp on 7 April 1994,[70] and saw Ngirabatware again on 8 April 1994,[71] and Nyiramasuhuko's 2010 Testimony, indicating that Ngirabatware was present at the Presidential Guard Camp from 6 until 8 April 1994,[72] are cumulative of other evidence on the record.

23. The Appeals Chamber also finds, Judge Moloto dissenting, no merit in Ngirabatware's arguments that the late disclosure deprived him of the opportunity to take an informed decision as to whether Mugiraneza should be called as a witness and to obtain further evidence from Mugiraneza and Nyiramasuhuko. In this regard, the Appeals Chamber notes that Ngirabatware was fully aware that Mugiraneza and Nyiramasuhuko might provide evidence in support of his alibi. In particular, he testified that Mugiraneza and Nyiramasuhuko were also present at the Presidential Guard Camp,[73] and, more importantly, listed Mugiraneza and Nyiramasuhuko as potential alibi

---

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.

[65] Trial Judgement, para. 11.

[66] *See* First Motion, Annex A; Second Motion, Annex A (confidential).

[67] This also amounted to a violation of Rule 68 of the ICTR Rules.

[68] Trial Judgement, paras. 664-675, 686-694.

[69] Trial Judgement, paras. 653, 685, 695-696.

[70] First Motion, Annex B, RP. 1617-1616, 1613-1611, 1549.

[71] First Motion, Annex B, RP. 1611.

[72] Second Motion, Annex B, RP. 2520-2518.

[73] *See* Trial Judgement, paras. 500-501; Ngirabatware, T. 25 November 2010 pp. 17-20 (stating that he and his family left for the Presidential Guard Camp with Mugiraneza, his "closest neighbour", and his family); T. 25 November 2010 pp. 26 (stating that on the evening of 7 April 1994 there were many people who left the Presidential Guard Camp and

witnesses prior to the commencement of his defence case.[74] Moreover, the Appeals Chamber observes that the counsel of Ngirabatware indicated that it "managed to contact people who were on [this] list of [potential alibi witnesses]", and that the Defence met with Ngirabatware "to discuss with him the alibi issue".[75] The Appeals Chamber also observes that, in a subsequent filing, Ngirabatware no longer included Nyiramasuhuko or Mugiraneza as potential alibi witnesses[76] From these representations, it appears that Ngirabatware was aware of the possible evidence that Mugiraneza and Nyiramasuhuko might provide in support of his alibi and made an informed decision not to call them at trial. Even if this were not the case, Ngirabatware could have requested, if necessary, the Trial Chamber's assistance to interview Mugiraneza and Nyiramasuhuko at trial. Accordingly, the Prosecution's failure to timely disclose Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony were not decisive for Ngirabatware's ability to obtain further evidence from these sources in support of his alibi. The Appeals Chamber, Judge Moloto dissenting, therefore does not consider that the prejudice suffered as a result of the Prosecution's disclosure failure warrants the relief sought by Ngirabatware. While the Appeals Chamber strongly reminds the Prosecution of the importance of its disclosure obligations, the Appeals Chamber, Judge Moloto dissenting, finds that no further remedy is warranted in this instance.

IV. REQUEST FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL

A. Applicable Law

24. For additional evidence to be admissible under Rule 142 of the Rules, the applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence.[77] The applicant's duty to act with due diligence includes making appropriate use of all mechanisms of protection and compulsion available under the ICTR Statute and the ICTR Rules of Procedure and Evidence to bring evidence

---

those included Mugiraneza), 33 (stating that Mugiraneza left with his wife on 7 April 1994); T. 3 February 2011 p. 4 (stating that Mugiraneza left on 7 April 1994); 33 (stating that once he arrived at the French Embassy he "first recognised" those who had been with him at the Presidential Guard Camp, "in particular Mugiraneza"); T. 3 February 2011 p. 4 (stating that Nyiramasuhuko stayed at the Presidential Guard Camp from 7 to 8 April 1994).

[74] *See The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Additional Alibi Notice, 22 March 2010 (strictly confidential) ("Ngirabatware's Additional Alibi Notice"), para. 3, RP. 5716-5714. *See also* Trial Judgement, para. 12.

[75] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Second Additional Notice of Alibi, 4 May 2010 (strictly confidential) ("Ngirabatware's Second Additional Alibi Notice"), paras. 5-6. *See* Ngirabatware's Additional Alibi Notice, RP. 5716-5714.

[76] Ngirabatware's Second Additional Alibi Notice, para. 6.

[77] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 7; *Ildéphonse Nizeyimana. v. The Prosecutor*, Case No. ICTR-00-55C-A, Decision on Appellant's Confidential Motion for Fresh Evidence and Corollary Relief, 23 April 2014 ("*Nizeyimana* Appeal Decision of 23 April 2014"), para. 5.

on behalf of an accused before the trial chamber.[78] The applicant is therefore expected to apprise the trial chamber of all the difficulties he encounters in obtaining the evidence in question.[79]

25. The applicant must then show that the evidence is both relevant to a material issue and credible.[80] Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence.[81] Evidence is credible if it appears to be reasonably capable of belief or reliance.[82]

26. The applicant must further demonstrate that the evidence *could* have had an impact on the verdict, in other words, the evidence must be such that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe.[83] This will be the case if the Appeals Chamber ascertains that there is a realistic possibility that the trial chamber's verdict might have been different had the new evidence been admitted.[84]

27. If the evidence was available at trial or could have been obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant shows that the exclusion of the additional evidence would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.[85]

28. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the trial chamber's verdict.[86] An applicant who fails to do so runs the risk that the tendered material will be rejected without detailed consideration.[87]

29. Finally, the significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence presented at trial.[88]

---

[78] *See, e.g., Nizeyimana* Appeal Decision of 23 April 2014, para. 6; *Popović* Appeal Decision of 23 May 2014, para. 7.
[79] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 7; *Nizeyimana* Appeal Decision of 23 April 2014, para. 6.
[80] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 8; *Nizeyimana* Appeal Decision of 23 April 2014, para. 5.
[81] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 8
[82] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 8.
[83] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 9; *Nizeyimana* Appeal Decision of 23 April 2014, para. 6.
[84] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 9.
[85] *See* Rule 142(C) of the Rules. *See also, e.g., Popović* Appeal Decision of 23 May 2014, para. 10; *Nizeyimana* Appeal Decision of 23 April 2014, para. 7.
[86] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 11; *Nizeyimana* Appeal Decision of 23 April 2014, para. 8.
[87] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 11; *Nizeyimana* Appeal Decision of 23 April 2014, para. 8.
[88] *See, e.g., Popović* Appeal Decision of 23 May 2014, para. 12; *Nizeyimana* Appeal Decision of 23 April 2014, para. 9.

B. Discussion

1. Availability and Due Diligence

30. Ngirabatware argues that Mugiraneza's 1999 Statement, Mugiraneza's 2014 Statement, and Nyiramasuhuko's 2010 Testimony were unavailable to him at trial as a result of the Prosecution's failure to meet its disclosure obligations.[89] Ngirabatware submits that, although Mugiraneza was on his initial witness list, he was unaware of what Mugiraneza recollected regarding Ngirabatware's presence on 7 April 1994 at the Presidential Guard Camp.[90] Further, Ngirabatware argues that he had no reason to focus on 7 April 1994 in relation to his alibi as he had no notice that the alleged distribution of weapons in Nyamyumba Commune took place on that date.[91]

31. The Prosecution responds that, irrespective of whether Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony were disclosed to Ngirabatware at trial, the evidence was available to him and discoverable through the exercise of due diligence.[92] Similarly, in relation to Mugiraneza's 2014 Statement, the Prosecution argues that Ngirabatware could have obtained the statement during the trial proceedings.[93] The Prosecution further contends that Ngirabatware had notice that his alibi should focus on 7 April 1994.[94]

32. The Appeals Chamber notes that Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony were disclosed by the Prosecution in May 2013 which was after the conclusion of the trial.[95] However, the Appeals Chamber recalls that whether the proffered evidence was available at trial is not a question of whether the documents in question were available in a literal sense.[96] The question for the Appeals Chamber is whether the applicant could, by exercising due diligence, have obtained the information contained in the documents at an earlier date.[97]

---

[89] First Motion, para. 5; Second Motion , para. 7; Third Motion, para. 6; *See also* Reply to the First Response, paras. 6-9, 11.
[90] First Motion, paras. 6-9.
[91] First Motion, para. 9.
[92] Response to First Motion, paras. 21-25; Response to Second Motion, paras. 3-5.
[93] Response to Third Motion, paras. 4-5.
[94] First Response, para. 24.
[95] First Motion, para. 5; Second Motion, para. 4. The Trial Chamber heard Closing Arguments in July 2012. *See* Trial Judgement, para. 15.
[96] *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009 ("*Mrkšić* Appeal Decision of 13 February 2009"), para. 6. *See also Mrkšić* Appeal Decision of 13 February 2009, para. 15.
[97] *Mrkšić* Appeal Decision of 13 February 2009, para. 6, *citing Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115, 3 March 2006, para. 16. *See also Barayagwiza* Appeal Decision of 8 December 2006, para. 40, *referring to Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Decision on "Requête en extrême urgence aux fins d'admission de moyen de preuve supplémentaire en appel", 9 February 2006, para. 6; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version), para. 25.

33. The Appeals Chamber notes that Ngirabatware was aware that Mugiraneza and Nyiramasuhuko could give evidence on his alibi as he himself indicated in his testimony during trial that they were with him at the Presidential Guard Camp in Kigali on 7 April 1994, with Nyiramasuhuko remaining there until 8 April 1994, and that later he saw Mugiraneza at the French Embassy on 8 April 1994.[98] At trial, Ngirabatware also submitted a list of individuals who sought refuge at the French Embassy, among them Mugiraneza and Nyiramasuhuko, indicating that those listed were potential witnesses for his alibi defence and that they were contacted.[99] The Appeals Chamber recalls that the decision made by counsel not to call evidence at trial because of his litigation strategy or because of the view taken as to the probative value of such evidence does not make the evidence unavailable.[100]

34. Further, the Appeals Chamber recalls that the duty to act with due diligence requires the parties to make the best case in the first instance,[101] and includes making use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring evidence on behalf of an accused before the trial chamber.[102] Ngirabatware does not indicate that he made any further attempts to obtain evidence from either Mugiraneza or Nyiramasuhuko during trial. Considering that Ngirabatware's alibi was that he was in Kigali from 6 to 12 April 1994 and could not have committed crimes in Nyamyumba Commune during this time period,[103] the Appeals Chamber finds unpersuasive his arguments that he had no reason to focus specifically on 7 April 1994 in relation to his alibi.[104] Accordingly, the Appeals Chamber finds, Judge Moloto dissenting, that Ngirabatware has failed to demonstrate that at trial the evidence was neither available nor discoverable through the exercise of due diligence.

35. In light of the above, the Appeals Chamber will proceed to consider whether the tendered material satisfies the remainder of the criteria under Rule 142(C) of the Rules for admission as additional evidence on appeal, notably whether it is credible, relevant, and *would* have affected the verdict had it been before the Trial Chamber.

---

[98] *See supra* n. 73.
[99] Ngirabatware's Additional Alibi Notice, para. 3, RP. 5715; Ngirabatware's Second Additional Alibi Notice, para. 5. *See also supra* para. 23.
[100] *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević's Motion to Present Additional Evidence and on Prosecution's Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević's Rule 115 Motion, 26 January 2010 ("*Lazarević* Appeal Decision of 26 January 2010"), para. 7, *referring to Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 16 October 1998, para. 50, and references cited therein. The Appeals Chamber indicated that this is the case except where there is evidence of gross negligence.
[101] *Lukić* Appeal Decision of 11 March 2010, para. 20, *citing Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004, para. 30, and references cited therein.
[102] *See supra* para. 24.
[103] Trial Judgement, para. 492.
[104] *See* First Motion, para. 9.

2. Credibility, Relevance, and Impact on the Verdict

36. The Appeals Chamber notes that Mugiraneza's 1999 Statement is a series of transcripts of interviews conducted by ICTR investigators with Mugiraneza in April 1999.[105] According to the statement: (i) after learning of the death of President Habyarimana on the night of 6 April 1994, Mugiraneza called Ngirabatware who was his next-door neighbour;[106] (ii) Mugiraneza and Ngirabatware left their homes and went to the Presidential Guard Camp on the night of 6 April 1994, arriving there sometime around midnight;[107] (iii) Mugiraneza left the Presidential Guard Camp on 7 April 1994 at around 3.00 p.m. and arrived at the French Embassy around 4.00 p.m. the same day;[108] and (iv) Ngirabatware whom he left at the Presidential Guard Camp arrived at the French Embassy on the following day.[109]

37. Mugiraneza's 2014 Statement, dated 7 May 2014 and certified by a notary, records an interview of Mugiraneza by Ngirabatware's counsel.[110] According to the statement: (i) at around 9.00 p.m. on 6 April 1994, Mugiraneza had telephone contact with Ngirabatware;[111] (ii) Mugiraneza arrived at the Presidential Guard Camp with Ngirabatware at around midnight on 6 April 1994;[112] (iii) on 7 April 1994, Mugiraneza spoke to Ngirabatware at the Presidential Guard Camp at around 4.00 a.m., 10.00 a.m., and 3.00 p.m.;[113] and (iv) Mugiraneza saw Ngirabatware again the following day at around noon at the French Embassy.[114]

38. Nyiramasuhuko's 2010 Testimony is a transcript of the witness's testimony given on 3 May 2010 in the *Karemera et al* trial.[115] Nyiramasuhuko testified that she left her home on 6 April 1994 at around midnight and went to the Presidential Guard Camp, where she remained until the morning of 8 April 1994.[116] Nyiramasuhuko further testified that Ngirabatware was present at the Presidential Guard Camp at the time she was there.[117]

39. Ngirabatware submits that the proffered evidence is credible and relevant to his alibi for 7 April 1994.[118] He argues that it corroborates the evidence provided by other alibi witnesses that

[105] First Motion, Annex B.
[106] First Motion, Annex B, RP. 1594-1593.
[107] First Motion, Annex B, RP. 1549.
[108] First Motion, Annex B, RP. 1612-1611.
[109] First Motion, Annex B, RP. 1612-1611.
[110] Third Motion, Annex G.
[111] Third Motion, Annex G, p. 4.
[112] Third Motion, Annex G, p. 6.
[113] Third Motion, Annex G, pp. 7-9.
[114] Third Motion, Annex G, pp. 8-10.
[115] Second Motion, Annex B.
[116] Second Motion, Annex B, RP. 2550-2549, 2520.
[117] Second Motion, Annex B, RP. 2520-2519.
[118] First Motion, para. 12. *See also* Reply to the First Response, paras. 24-27; Second Motion, paras. 10-11, 15; Third Motion, paras. 20-23; Reply to the Third Response, paras. 3-4, 6.

he was at the Presidential Guard Camp on 7 April 1994, and undermines the Trial Chamber's conclusion that his alibi was fabricated.[119] In addition, Ngirabatware claims that Mugiraneza's 2014 Statement provides for the first time direct evidence on Ngirabatware's whereabouts at specific times on 6 and 7 April 1994[120] and shows that he could not have travelled from Kigali to Gisenyi on 7 April 1994.[121] Ngirabatware submits that failure to consider the proposed evidence would lead to a miscarriage of justice.[122]

40. The Prosecution responds that Mugiraneza's 1999 Statement has low probative value and is cumulative of other evidence on the record.[123] It further submits that the statement neither enhances Ngirabatware's alibi evidence as to his whereabouts on 7 April 1994 nor alleviates the Trial Chamber's suspicion that Ngirabatware sought out witnesses to accord with his alibi.[124] As to Mugiraneza's 2014 Statement, the Prosecution submits that, for various reasons, it is incapable of belief or reliance [125] and is cumulative of evidence already on the record. [126] Concerning Nyiramasuhuko's 2010 Testimony, the Prosecution claims that, even if the testimony had been admitted at trial, it provides no information on Ngirabatware's whereabouts on 7 April 1994 and is cumulative of other alibi evidence on the record.[127]

41. The Appeals Chamber recalls that, in relation to the credibility of Mugiraneza's 1999 and 2014 statements and Nyiramasuhuko's 2010 Testimony, it is required to ascertain whether the proposed evidence appears to be reasonably capable of belief or reliance, and need not at this stage make a finding as to the weight to be accorded to it.[128] The identification of the provenance of the evidence is important in this regard.[129] Bearing these principles in mind, the Appeals Chamber is satisfied that the proposed evidence bears sufficient indicia of credibility and is therefore reasonably

[119] First Motion, paras. 12-14, 16, 19. Reply to the First Response, paras. 22-23, 31-32; Second Motion, paras. 11-13, 16-17; Third Motion, paras. 11-13, 16, 25.
[120] Third Motion, paras. 4(iii). 14-15. *See also* Third Motion, para. 10.
[121] Third Motion, para. 19.
[122] First Motion, para. 27. *See also* First Motion, para. 24; Reply to the First Response, paras. 15-23; Second Motion, para. 23. *See also* Second Motion, paras. 20-21; Third Motion, para. 30. Reply to the Third Response, para. 5. Ngirabatware submits that, in assessing the impact of the proposed evidence on the verdict, the Appeals Chamber should consider Mugiraneza's 1999 and 2014 statements together. *See* Third Motion, para. 2.
[123] Response to First Motion, paras. 27, 31.
[124] Response to First Motion, paras. 29-36.
[125] Response to Third Motion, paras. 8-19.
[126] Response to Third Motion, paras. 21-24.
[127] Response to Second Motion, paras. 7-9. The Prosecution further argues that Nyiramasuhuko's 2010 Testimony would not have had an impact on the verdict as it goes to the acts and conduct of Ngirabatware and, pursuant to Rule 92*bis*(D) of the ICTR Rules, it would have been inadmissible at trial. *See* Response to Second Motion, para. 6.
[128] *Lazarević* Appeal Decision of 26 January 2010, para. 27, *referring, inter alia, to Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Further Motion to Present Additional Evidence, 9 April 2009, para. 6; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008, para. 6.
[129] *Lukić* Appeal Decision of 11 March 2010, para. 48.

capable of belief or reliance. It also appears relevant to an issue material to Ngirabatware's conviction, namely the rejection of his alibi that on 7 April 1994 he was in Kigali.[130]

42. Turning next to the potential impact of the proposed evidence on Ngirabatware's conviction, the Appeals Chamber views Mugiraneza's 1999 Statement, Nyiramasuhuko's 2010 Testimony, and Mugiraneza's 2014 Statement as going to Ngirabatware's whereabouts between the evening of 6 April 1994 and 8 April 1994, including 7 April 1994 when the Trial Chamber found that he was in Nyamyumba Commune distributing weapons.[131] In reaching this conclusion, the Appeals Chamber is aware that Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony do not specifically contain a detailed and full account of Ngirabatware's whereabouts for each day.[132] Nonetheless, the Appeals Chamber bears in mind that the focus of the questions during the 1999 interview of Mugiraneza may not have been Ngirabatware and that no further questions regarding Ngirabatware were asked in the *Karemera et al.* case. The Appeals Chamber also observes that Mugiraneza's 1999 Statement was given both prior to the issuance of an indictment against Ngirabatware and Ngirabatware's arrest.[133]

43. Nonetheless, the Appeals Chamber, Judge Moloto dissenting, is not satisfied that had Mugiraneza's 1999 Statement, Nyiramasuhuko's 2010 Testimony, or Mugiraneza's 2014 Statement been admitted at trial, it would have had an impact on the Trial Chamber's evaluation of the alibi witnesses' evidence in view of the totality of the reasons for the Trial Chamber's rejection of Ngirabatware's alibi. In particular, the Trial Chamber did not reject Ngirabatware's alibi for lack of corroboration, but instead did so based on: (i) the late and piecemeal manner in which Ngirabatware provided notice of his alibi, which raised the suspicion that he sought out witnesses to accord with his alibi after having heard the Prosecution case;[134] (ii) the various inconsistencies in the evidence of the witnesses, calling into question the truthfulness of their accounts;[135] and (iii) his close or professional relationship with many of the alibi witnesses.[136] In this regard, the Appeals Chamber observes, Judge Moloto dissenting, that Ngirabatware's request to admit the present evidence is also indicative of his piecemeal approach which concerned the Trial Chamber.[137] The Appeals Chamber

[130] Trial Judgement, paras. 685, 696.
[131] Trial Judgement, paras. 685, 869-870, 1335-1341.
[132] The Appeals Chamber notes that reference to the specific times when Ngirabatware was purportedly seen at the Presidential Guard Camp on 7 April 1994 appears for the first time in Mugiraneza's 2014 Statement.
[133] *See The Prosecutor v. Augustin Ngirabatware and Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-I, Confirmation of the Indictment and Order for Non-Disclosure, 4 October 1999. *See also supra* para. 21.
[134] Trial Judgement, paras. 648, 685, 696.
[135] *See* Trial Judgement, paras. 664-668. 670, 675, 696.
[136] *See* Trial Judgement, paras. 656, 664, 670, 672, 696.
[137] *See also supra* para. 23.

further observes Ngirabatware's close or professional relationships with Mugiraneza and Nyiramasuhuko.[138]

44. Accordingly, the Appeals Chamber, Judge Moloto dissenting, is not satisfied that the Trial Chamber would have come to a different conclusion had it considered Mugiraneza's 1999 and 2014 statements and Nyiramasuhuko's 2010 Testimony. Thus, the Appeals Chamber, Judge Moloto dissenting, is not convinced that if any of the proposed evidence had been admitted at trial it would have affected the verdict. Ngirabatware's further request for calling Mugiraneza as a witness on appeal is therefore moot.

45. The Appeals Chamber emphasizes that its findings in this decision pertain strictly to the admissibility of the proposed evidence and not to the merits of Ngirabatware's appeal. The Appeals Chamber will determine whether the Trial Chamber correctly assessed Ngirabatware's alibi when addressing the merits of Ngirabatware's appeal against the Trial Judgement.

V. DISPOSITION

46. For the foregoing reasons, the Appeals Chamber **GRANTS** the First Motion and the Second Motion, in part, **FINDS** that the Prosecution has violated Rule 73(A) of the Rules in relation to Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony, **DENIES, Judge Moloto dissenting,** the First Motion and the Second Motion in all other respects, and **DENIES** the Third Motion in its entirety.

[138] The Appeals Chamber observes that Ngirabatware, Mugiraneza, and Nyiramasuhuko were Ministers from the MRND and that Ngirabatware and Mugiraneza were next door neighbours. *See* Ngirabatware, T. 25 November 2010 pp. 15, 18; First Motion, Annex B, RP. 1619, 1593; Second Motion, Annex B, RP. 2552; Trial Judgement, paras. 6. 497.

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

Done this 21st day of November 2014,
At The Hague,
The Netherlands

Judge Theodor Meron, Presiding

Judge Bakone Justice Moloto appends a dissenting opinion.

[Seal of the Mechanism]

DISSENTING OPINION OF JUDGE BAKONE JUSTICE MOLOTO

1. The Statute of the MICT provides that Accused persons shall be tried fairly. They may lodge appeals when an error of fact has occurred which has occasioned a miscarriage of justice. I consider that in this instance, the Accused has suffered severe prejudice by not receiving the proposed additional evidence before or during the course of his trial. Conversely, I also do not consider that the Prosecution suffers *any* prejudice from admission of the proposed additional evidence that it itself had failed to disclose. In this dissenting opinion, I will focus on the proposed admission of *Mugiraneza*'s 1999 statement and *Nyiramasuhuko*'s 2010 testimony. But before I do so, I must recall the following.

2. This is not the first time the Appeals Chamber found that the Prosecution has violated its disclosure obligations under Rule 73 (A) of the Mechanism's Rules of Procedure and Evidence vis-à-vis Ngirabatware.[1] Previously, this Appeals Chamber considered in relation to the 2007 testimony of Mugiraneza that this should have been disclosed to Ngirabatware as exculpatory material – but that the Prosecution had only done so 6 years later, in May 2013.[2] The Appeals Chamber explicitly found that this omission had deprived Ngirabatware of the ability to use this material at his trial.[3]

3. In light of the Prosecution's prior disclosure violations, it therefore appears all the more puzzling why at this stage of the trial, the majority– again - decides against admission of the proposed additional evidence, and *Mugiraneza*'s 1999 statement in particular. For a proper understanding of the importance of *Mugiraneza*'s 1999 statement to Ngirabatware's case, the following finding made by the Trial Chamber is critical. In relation to Ngirabatware's alibi for 7 April 1994, the Trial Chamber in its Judgement considered "there is a high probability that the alibi was tailored and fabricated to fit the Prosecution case."[4]

4. I note that *Mugiraneza* gave the 1999 statement in another case, before the Indictment against Ngirabatware had been issued and 10 years prior to the commencement of Ngirabatware's trial.[5] The statement was not drawn up by the Defence, but by the Prosecution. I consider there can be no suggestion of any form of fabrication involved in this evidence. For this reason, I consider that while this evidence is cumulative of other evidence on the record, it confirms the evidence that places Ngirabatware at the Presidential Guard Camp on 7 April 1994 and severely undermines the Trial Chamber's assessment of the Defence evidence on this point.

---

[1] Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014.
[2] *Ibid*, para. 22.
[3] *Ibid*, para. 23. I note that the majority finds that the Prosecution disclosed Mugiraneza's 1999 Statement and Nyiramasuhuko's 2010 Testimony with a delay of nearly 14 years and three years, respectively.
[4] Trial Judgement, para. 685.
[5] On 9 September 1999, the Prosecution submitted a draft indictment against Augustin Ngirabatware and Jean de Dieu Kamuhanda. This indictment was found to be insufficient, and the Prosecutor withdrew it on 27 September 1999. On 28

5. I now turn to the content of *Mugiraneza*'s statement. *Mugiraneza* stated to Prosecution investigators in 1999 that on 6 April 1994, around midnight, he and his next-door neighbor, Augustin Ngirabatware, the Minister of Planning, left for the Presidential Guard camp.[6] They arrived around after midnight at the Presidential Guard Camp. The next day, 7 April, *Mugiraneza* left the Presidential Guard Camp at 3 p.m. and arrived at the French embassy at 4 p.m. He added that when he and others left the Presidential Guard Camp at 3 p.m., they had left Ngirabatware there.[7] In other words, according to *Mugiraneza*, Ngirabatware was present at the Presidential Guard camp on 7 April 1994 until around 3 p.m.

6. Turning to the evidence of *Nyiramasuhuko*, her evidence was also given in another trial, and was disclosed to Ngirabatware only after the Judgement in his trial had been issued. This evidence, too, concerns testimony that directly confirms an important part of Ngirabatware's alibi, namely regarding Ngirabatware's alleged whereabouts in the period of 6 to 8 April 1994. *Nyiramasuhuko* states unambiguously who was at the Presidential Guard Camp for the period of 6 to 8 April while she was there. It accounts for the entire period of 6 to 8 April 194, and confirms Ngirabatware's whereabouts at the Presidential Guard Camp on 7 April 2014.[8]

7. I will contrast the foregoing with the Trial Chamber's findings in this regard.

8. The Trial Chamber found that Ngirabatware delivered weapons in the Nyamyumba Commune in the morning of 7 April 1994. While the Trial Chamber in its findings does not explicitly refer to the time of day at which Ngirabatware would have delivered these weapons, it relies on the evidence of several witnesses that the deliveries took place before the attack on Safari Nyambwega, and explicitly relies on Witnesses ANAF and DWAN-3 to conclude that the deliveries took place on 7 April - whereas both witnesses testified that the attack on Safari Nyambwega took place on the morning of 7 April 1994.[9] Having contrasted this against *Mugiraneza*'s and *Nyiramasuhuko's* evidence that Ngirabatware was at the Presidential Guard Camp at that time, it appears of paramount importance that their evidence is admitted in this case, either pursuant to MICT Rules 110 or 111.[10] Although I believe that it should be unnecessary to mention at this stage of the proceedings – that is, the admission of additional evidence on appeal – I have further considered the following in my determination that admission of the evidence would have affected the verdict. The Trial Chamber appears to have accepted – albeit implicitly - that Ngirabatware was in Kigali on the morning of 7 April 1994 and twice traveled to the Nyamyumba Commune on the same morning to deliver weapons there. The Trial

---

September 1999, the Prosecution filed a modified indictment. On 1 October 1999, the indictment was confirmed and its non-disclosure was ordered. *See* Trial Judgement, Annex A, paras 1-2.

[6] Dr. Ngirabatware's Confidential Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, 25 July 2013 (with confidential Annexes A and B), Annex B ("Mugiraneza 1999 Statement"), pp. 1549 and 1617.

[7] Mugiraneza 1999 Statement, p. 1612.

[8] *See* Dr. Ngirabatware's Second Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, Annex B (Nyiramasuhuko 2010 testimony), 2 September 2013, pp. 2520-2519.

[9] *See* Trial Judgement, para. 732 (Witness ANAF) and para. 772 (Witness DWAN-3).

[10] I note that Rules 110 and 111 are the counterparts of Rules 92 *bis* and 92 *ter* of the ICTY Rules of Procedure and Evidence.

Chamber estimated this trip would have taken approximately 4 to 5 hours.[11] Thus, Ngirabatware would have had to travel from Kigali to the Nyamyumba Commune, a 4 to 5 hour drive, distribute weapons at the Bruxelles Roadblock, go back to fetch a second load of weapons, return to the Bruxelles Roadblock and distribute weapons again, all on the morning of 7 April 1994. Therefore, irrespective of the proposed additional evidence, I have difficulties to find internal consistency in the Trial Chamber's findings regarding the events that occurred on 7 April 1994.

9. For the foregoing reasons, I consider that the test for admission of the proposed additional evidence has been met, that is: if believed, admission of the proposed additional evidence would have affected the Trial Chamber's verdict.

10. Lastly, I note with concern that both *Mugiraneza* and Ngirabatware were left in the dark regarding the corroborative nature of each other's evidence, as the Prosecution similarly failed to disclose exculpatory evidence in Ngirabatware's case to *Mugiraneza*.[12] The *Mugiraneza* Trial Chamber found that the most appropriate remedy to the Prosecution's serious disclosure violations was to draw a reasonable inference in favour of the Accused from the exculpatory material.[13] I submit the Ngirabatware Trial Chamber would have done the same had it been aware of the Prosecution's manifest failures to disclose exculpatory evidence to the Accused.[14]

11. Ultimately, Ngirabatware requests that the Appeals Chamber reviews the evidence that is relevant to his alibi and has probative value. He requests to exercise a fundamental right conferred on him in Article 19 of the Statute, namely, his right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. While the majority agrees the proposed evidence is relevant to Ngirabatware's alibi and that it has probative value, it refers, *inter alia*, to the late and piecemeal manner in which Ngirabatware provided notice of his

---

[11] Trial Judgement, para. 659.

[12] *See*, amongst others, *Mugenzi and Mugiraneza v. The Prosecutor*, Appeal Judgement, para. 63.

[13] *Prosecutor v. Bizimungu et al.*, Trial Judgement of 30 September 2011, paras 175-177. Regarding these violations, the Mugiraneza Trial Chamber held that "The Prosecution's conduct in this matter is inexcusable. It failed to inform the Defence teams of exculpatory material, in some instances, for over a year. This material is clearly relevant, highly probative, and prima facie exculpatory of serious allegations upon which the Prosecution seeks conviction. The events, if proven, would also be highly relevant to the *mens rea* of certain Accused. When one of the Defence teams communicated its inability to access this material, the Prosecution failed to ensure access for a period of almost five additional months. This conduct stands in stark contrast to the Prosecution's fundamental obligations and to the interests of justice. Regardless of the root cause for the Prosecution's repeated failure to discharge one of its primary duties, this has materially prejudiced the Accused in this case. While the Defence teams should have raised this matter earlier, the reality is that the Prosecution only informed them of the exculpatory material once the Chamber was at an advanced stage in the process of drafting its judgement. Given this situation, the Chamber considers that the most appropriate remedy is to draw a reasonable inference in favour of the Accused from the exculpatory material. On a final note, the Chamber wishes to remind the Office of the Prosecutor that the Appeals Chamber has twice stated that 'the Office of the Prosecutor has a duty to establish procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence provided by such witnesses is re-examined in light of Rule 68 to determine whether any material has to be disclosed.' It is an unfortunate truth that these procedures were inadequate in the present case since at least 2006."

[14] I note that the Ngirabatware Trial Chamber was never informed of the Prosecution's serious Rule 68 disclosure violations because these violations only came to light *after* the Ngirabatware Trial Judgement had been issued.

alibi at trial to nonetheless reject admission of the proposed evidence. I consider this approach to be flawed and that the obligations described in the Rules, including MICT Rule 72 regarding alibi notice, cannot trump the fundamental statutory rights conferred upon persons tried before the Mechanism. I recall that Article 13 (4) of the MICT Statute provides that "the Rules of Procedure and Evidence and amendments thereto shall be consistent with this Statute". MICT Rule 105 regarding the admission of evidence provides that "in cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". There is no doubt in my mind that a fair determination of this matter, consonant with the text and spirit of the MICT Statute, requires admission of the proposed evidence. I therefore disagree with the majority's decision to deny admission of the said evidence.

12. In conclusion, I respectfully dissent from the view held by the majority that no prejudice follows from its refusal to admit the proposed evidence; instead, I conclude that the exclusion of this evidence has led to an irreparable miscarriage of justice vis-à-vis Ngirabatware. He is denied an opportunity to present relevant, reliable and probative evidence in his Defence which the Prosecution, in failing to comply with its strict duties to provide the Accused with all exculpatory material in his case, had not disclosed to him either before or during his trial, compromising its fairness as a whole.

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

Judge Bakone Justice Moloto

Dated this 21st day of November 2014
At The Hague
The Netherlands

[Seal of the Mechanism]

TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS/ *FICHE DE TRANSMISSION POUR LE DÉPÔT DE DOCUMENTS DEVANT LE MÉCANISME POUR LES TRIBUNAUX PÉNAUX INTERNATIONAUX*

I - FILING INFORMATION / *INFORMATIONS GÉNÉRALES*

To/ *À* :	MICT Registry/ *Greffe du MTPI*	☒ Arusha/ *Arusha*	☐ The Hague/ *La Haye*	
From/ *De* :	☒ Chambers/ *Chambre*	☐ Defence/ *Défense*	☐ Prosecution/ *Bureau du Procureur*	☐ Other/ *Autre :*
Case Name/ *Affaire* :	**Augustin Ngirabatware v. The Prosecutor**	**Case Number/ *Affaire n°* :**	**MICT-12-29-A**	
Date Created/ *Daté du* :	**21 November 2014**	**Date transmitted/ *Transmis le* :**	**21 November 2014**	**No. of Pages/ *Nombre de pages* :** **22**
Original Language / *Langue de l'original* :	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :
Title of Document/ *Titre du document* :	**Decision on Ngirabatware's motions for relief for rule 73 violations and admission of additional evidence on appeal**			
Classification Level/ *Catégories de classification* :	☒ Unclassified/ *Non classifié* ☐ Confidential/ *Confidentiel* ☐ Strictly Confidential/ *Strictement confidentiel*	☐ Ex Parte Defence excluded/ *Défense exclue* ☐ Ex Parte Prosecution excluded/ *Bureau du Procureur exclu* ☐ Ex Parte R86(H) applicant excluded/ *Art. 86 H) requérant exclu* ☐ Ex Parte Amicus Curiae excluded/ *Amicus curiae exclu* ☐ Ex Parte other exclusion/ *autre(s) partie(s) exclue(s)* (specify/*préciser*) :		
Document type/ *Type de document* :	☐ Motion/ *Requête* ☒ Decision/ *Décision* ☐ Order/ *Ordonnance* ☐ Judgement/ *Jugement/Arrêt*	☐ Submission from parties/ *Écritures déposées par des parties* ☐ Submission from non-parties/ *Écritures déposées par des tiers* ☐ Book of Authorities/ *Recueil de sources* ☐ Affidavit/ *Déclaration sous serment*	☐ Indictment/ *Acte d'accusation* ☐ Warrant/ *Mandat* ☐ Notice of Appeal/ *Acte d'appel*	

II - TRANSLATION STATUS ON THE FILING DATE/ *ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT*

☐ Translation not required/ *La traduction n'est pas requise*

☒ Filing Party hereby submits only the original, and requests the Registry to translate/
La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :
(Word version of the document is attached/ *La version Word est jointe)*

☐ English/ *Anglais* ☒ French/ *Français* ☒ Kinyarwanda ☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :

☐ Filing Party hereby submits both the original and the translated version for filing, as follows/
La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :

Original/ *Original en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
Translation/ *Traduction en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda	☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :

☐ Filing Party will be submitting the translated version(s) in due course in the following language(s)/
La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :

☐ English/ *Anglais* ☐ French/ *Français* ☐ Kinyarwanda ☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :

Send completed transmission sheet to/ *Veuillez soumettre cette fiche dûment remplie à :*
JudicialFilingsArusha@un.org OR/OU JudicialFilingsHague@un.org