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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le
Rwanda

Case No. ICTR-97-21-T

ANGLAIS

Original : FRANÇAIS

United Nations
Nations Unies

TRIAL CHAMBER II

Before: Judge Laïty Kama
Registry: John M. Kiyeyeu
Antoine Mindua
Decision of: 1 November 2000

THE PROSECUTOR

vs.

**Pauline NYIRAMASUHUKO
and
Arsène NTAHOBALI**

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DECISION ON DEFENCE MOTION FOR DISCLOSURE OF EVIDENCE

Office of the Prosecutor:

Japhet Mono
Ibukunolu Alao Babajide
Andra Mobberley

Defence Council:

Nicole Bergevin, Lead Counsel
Guy Poupart, Co-Council

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("THE TRIBUNAL")

SITTING as Judge Laïty Kama, Presiding judge of the Chamber, single Judge designated to hear this Motion pursuant to Rule 73 of the Rules of Procedure and Evidence ("the Rules");

SEIZED by the Defence of Pauline Nyiramasuhuko of a "Motion for the disclosure of evidence" filed on 11 April pursuant to Rule 73 of the Rules;

CONSIDERING the Statute of the Tribunal, in particular Article 21 and Rules 66, 68, 70, 73, and 94*bis* of the Rules;

HAVING HEARD THE PARTIES at a hearing held on 8 June 2000;

ARGUMENTS OF THE PARTIES:

Defence submissions:

In its Motion, the Defence mainly submits the following:

1. As a result of Chamber's 5 October 1999 decision allowing a joinder of the proceedings against the Accused and her co-Accused, Arsène Ntahobali, with those against Sylvain Nsabimana, Joseph Kanyabashi, Elie Ndayambaje and Alphonse Nteziryayo, the Prosecutor was required under Rule 66 (A) (i) to disclose to the Defence of Pauline Nyiramasuhuko, the statements of each of the other Accused involved in the proceedings as well as the supporting material which accompanied their indictments. The Defence submits in this respect that Chamber has as early as the hearing of 10 February, agreed that such duty to disclose extended to statements and supporting material to the indictment of the co-Accused Ntahobali. In the submission of the Defence, the same approach should apply with respect to the Accused in a joinder of proceedings.
2. The Defence argued that it has yet to receive a response to its request for the disclosure of the statements by Sylvain Nsabimana and Joseph Kanyabashi made to the Prosecutor as early as 28 October 1997 and reiterated on 3 July, 17 March and 22 December 1999, as well as the one in respect of Alphonse Nteziryayo and Elie Ndayambaje, made on 22 November 1999.
3. The Defence for Pauline Nyiramasuhuko argues that the Prosecutor is required, pursuant to Rule 66 (A) (ii) of the Rules, to disclose forthwith, although no date has yet been set for the commencement of the trial, copies of the statements of all the witnesses whom she intended to call to testify at trial and which are presently in her possession, including statements allegedly taken by the Prosecutor following fresh investigations carried out in Butare, as well as the complete statements of witnesses ZB, ZC, and ZD that she reportedly drew from the supporting material to the indictment. The Defence submits that the International Criminal Tribunal for the former Yugoslavia ("ICTY") has upheld the principle of sequential disclosure of prosecution

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witnesses' statements as they come into the possession of the Prosecutor (*Case No. IT-95-14/2, the Prosecutor vs. Dario Kordic, Order on Motion to compel compliance by the Prosecutor with Rule 66(a) and 68*). The Defence submits that failure by the Prosecutor to disclose such statements in a timely fashion would constitute a violation of the right of the Accused to an expeditious and fair trial pursuant to Articles 19 and 20 of the Statute of the Tribunal.

4. The Defence furthermore argues that it is paramount that the Prosecutor disclose the Prosecution witnesses' statements in the language in which they will be made, so that the true contents thereof may be understood and compared with any translations thereof. Indeed, it is the Defence's submission that the majority of the witnesses called before the Tribunal speak only Kinyarwanda, which is also the language of the Accused and the complexity and subtleties of which have been documented, including during the George Rutaganda trial and which do not always lend themselves to an accurate translation. The Defence further contends that the notes taken by the Prosecution investigators, the recordings, the list of questions asked, as well as any other information collected during the interviews must also be disclosed in their original language.
5. The Defence further requests the Prosecutor to disclose all depositions, information and oral statements recorded as part of other investigations which relate to the Accused as a person and in her capacity as former minister of the interim Government, including all the statements made by Jean Kambanda, the former Head of the said Government. The Defence also notes in this respect that, on the one hand Jean Kambanda pleaded guilty of all the charges brought against him after having entered into a plea agreement with the Office of the Prosecutor and that, on the other hand, the name of the Accused appears on several occasions in the indictment against Jean Kambanda, particularly in paragraphs 3.8, 3.11 and 3.14.
6. The Defence contends that pursuant to Rule 66 (B) of the Rules, the right to the disclosure of all material covers those that may be only secondarily relevant to the issues at bar and argues that the Supreme Court of Canada upheld such an interpretation by asserting that *"the Defence knows its evidence better than the State and something that may not seem relevant to the State may be of importance to the Defence"* (Compendium of Decisions of the Supreme Court of Canada, *Decision The Crown vs. Dixon*, 1998, IRCS, 244, para. 2.8).
7. The Defence contends that pursuant to Rule 66 (B) of the Rules, the Prosecutor shall not only permit the Defence to inspect any books, documents, photographs and tangible objects in its custody or control and which are relevant to the Accused, but also to serve it with copies thereof so that it may in particular ascertain some documents by handwriting experts.
8. The Defence similarly requests copies of material intended for use by the Prosecutor as evidence against all the other Accused and all materials seized upon their individual arrests.
9. The Defence seeks particularly disclosure of all the documents seized at the Butare *Préfecture* - where some of the Accused had held office- and at the seat of the Government, in Kigali,

- Gitarama or Gisenyi. The Defence stands convinced that such documents are in the possession or under the control of the Prosecutor and insists particularly that the various documents concerning Sylvain Nsabimana, one of the Accused, be disclosed to it, as they are material to the Defence of the Accused.
10. The Defence requests the Prosecutor to disclose, where such material exist, copies of the record of the search and seizure carried out at the residence of Pauline Nyiramasuhuko on 18 July 1997 as well as the inventory of all the material seized at that time.
 11. The Defence contends, furthermore, that since the various indictments filed by the Prosecutor as well as the judgements handed down by the Tribunal underscore the major role played by the media during the massacres perpetrated in Rwanda in 1994, the Prosecutor must disclose the sound recordings, transcripts and notes on the programmes broadcast by Radio Muhabura between 1 January and 31 December 1994.
 12. The Defence submits that the Prosecutor must also disclose copy of any written agreement entered into by the Prosecutor and witness ZC.
 13. The Defence further seeks a copy of the diaries of Jean Kambanda for 1994, 1995 and 1996 since these were mentioned in the supporting material which accompanied the new indictment brought against the Accused.
 14. The Defence requests the Prosecutor to disclose as early as possible the identities of all the Prosecution's witnesses that she intends to call to testify against the Accused or each of the other Accused, pursuant to Rule 67 (A) (I). It submits that the protection of these witnesses will be secured if the Prosecutor were to disclose their identities at a hearing held in camera and that furthermore, in a Decision of 4 February 2000, Trial Chamber II of the Tribunal reminded the Prosecutor that witness protection did not relieve her of her duty to disclose under Rule 66 (A) (ii) of the Rules (*the Prosecutor vs. Niyitegeka*, No. ICTR-96-14, para. 19). Moreover, the Defence contends that no order on Prosecution witness protection has been issued in the instant case.
 15. The Defence seeks from the Prosecutor disclosure of the list of expert witnesses she intends to call to testify, the credentials of such experts, their specific field of expertise and the purpose of their testimony. The Defence also seeks disclosure of all documents, reports or written material drafted by or in collaboration with said experts, if they are material to the latter's testimony before the Tribunal.
 16. In addition the Defence seeks from the Prosecutor disclosure of statements made by the witnesses listed in paragraph 96 of her Motion.

PROSECUTOR'S RESPONSE

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In her response, the Prosecutor mainly argues as follows:

17. Regarding the language in which the documents and other material seized ought to be disclosed to the Defence, the Prosecutor recalls that pursuant to Rule 3 of the Rules, the working languages of the Tribunal shall be English and French, with the result that she is required to

disclose witness statements in one of these two languages only, regardless of the language in which they were recorded.

18. As to the timing of the disclosure of evidence, the Prosecutor submits that disclosure is already under way, although it has been delayed by the complexity and, in its own words, *the heinous nature of the crimes the Accused are charged with*, which makes the compilation of documents seized difficult. The Prosecutor further submits that she will disclose certain evidence, without saying which, only at the time of the pre-trial conference, pursuant to Rule 73bis of the Rules.
19. In the Prosecutor's submission, at this stage of the proceedings, the disclosure of the 23 documents listed by the Defence in its motion would seriously undermine her ability to conduct an effective prosecution and, thus, to fulfil the mandate entrusted to her under the Statute of the Tribunal.
20. The Prosecutor seeks relief from her disclosure obligation under Rule 70 of the Rules, with respect of the material listed in paragraphs 5, 6, 13, 17, 21 and 22 of the last part of the Defence Motion.
21. The Prosecutor further argues that she is not bound to disclose material that may not be tendered during the trial, particularly the statements of witnesses ZB, ZC and the material listed in paragraphs 6, 8, 9, 10, 11, 12, 14, 16, 17, 18, 21, 22 and 23 of the last part of the Defence Motion.
22. Moreover, the Prosecutor asserts that the list of witnesses drawn by the Defence is *antithetic* to the witness protection order issued. Since no date has been set for the commencement of trial, it would be inappropriate to disclose their identities.
23. The Prosecutor further requests the Defence to state whether it intends to rely on an alibi defence pursuant to Rule 67 (A) (ii) of the Rules.
24. The Prosecution submits that at this stage of the proceedings, she is not in possession of any exculpatory evidence, but undertakes to disclose any such evidence to the Defence whenever she had them in her possession.
25. Since the Defence had filed a Motion under Rule 66 (B) of the Rules, the Prosecutor requests the mutual disclosure of evidence pursuant to Rule 67 (C) of the Rules.
26. During the hearing, the Prosecutor finally admitted that *it was a matter of common practice at Law*, that all the Accused in the same proceedings must be *adequately informed*. She therefore undertakes to provide each of them " *as soon as the dates of the proceedings are set*" (unofficial translation) with all they documents they require.

27. In conclusion, the Prosecutor requests that the Defence Motion be denied.

AFTER HAVING DELIBERATED,

28. As a preliminary observation, we remind the Prosecutor that the date of the joinder has already been set by a Decision of the Chamber dated 5 October 1999. We therefore request her to abide by her pledge as made at the hearing of 8 June 2000, to disclose all the documents in her possession or under her control which are material to the Defence of all the Accused.
29. Furthermore, whereas certain national jurisdictions do not distinguish between Accused whose indictments are joined and those whose proceedings are joined and although the Tribunal has to date made no clear distinction between those categories in its case law, we wish to make it clear that only the Accused Nyiramasuhuko and Ntahobali were joined in the same indictment and are thus [co-Accused]. The other Accused who are the subject of joint proceedings are [Accused whose proceedings are joined]. For practical reasons, however, we shall make distinctions among the Accused as to their status only where necessary.
30. Moreover, the Defence argues that under Rule 66 (A) (ii) of the Rules and in a joint trial, the duty to disclose to the Defence of one of the Accused the prior statements of the other Accused, supporting material to their indictments and the statements of witnesses that the Prosecutor intends to call at trial, covers not only such material as relate to one or all the Accused whose proceedings are joined, but also those concerning accused under separate indictments. The Prosecutor did not address this issue.
31. As mentioned earlier, the Accused in the instant case have distinct statuses according to whether they are jointly accused or not.
32. With respect to Rule 66 (A) (I), it is our view that the obligation to disclose provided for thereunder should be construed as follows:
- Only the Accused under a joint indictment must be given access to the prior statements of their co-Accused in addition to the supporting material accompanying the indictment;
 - In the event that certain statements made by other Accused in the same proceedings and certain supporting material to their indictment were material to the Defence of Accused who were part of the same proceedings but were under separate indictments, the Defence of one or the other Accused concerned may inspect such material upon request pursuant to Rule 66 (B) of the Rules.
33. As regards Rule 66 (A) (ii) of the Rules, we consider that each of the Accused in the same proceedings must receive disclosure of the statements of all the witnesses whom the Prosecutor intends to call at their joint trial, so that the Defence of each of the Accused may be in a position to prepare their Defence and in particular to fully cross-examine the witnesses of its

choice, in the course of the hearing.

34. Lastly and as a general order, we direct the Prosecutor to disclose anew and as early as practicable within fifteen days from this Decision, the material mentioned by the Defence in its Motion, which it had already served upon it but copies of which turned out to be illegible, or incomplete or otherwise missing.

Disclosure to the Defence of prior statements of the Accused and of supporting material which accompanied their indictments (Rule 66 (A) (i) of the Rules).

35. If the prior statements of Pauline Nyiramasuhuko or the supporting material which accompanied her indictment have not been disclosed to date, we direct the Prosecutor to comply with her duty as soon as possible and at any rate within ten days from this Decision.
36. Regarding the disclosure of the statements of Arsène Ntahobali, we recall that at the hearing of 25 February 2000, the Prosecutor had already pledged to disclose such statements to the Defence of the Accused as soon as practicable, which she has failed to do. In the absence of any explanation from her, we direct the Prosecutor to effect such disclosure as soon as possible and in any event within ten days of this Decision. The Prosecutor is also directed to disclose the material accompanying the indictment of co-Accused Ntahobali, if such material have not been disclosed to date and subject to the provisions of Rules 66 (C) and 70 (A) of the Rules.
37. The Defence further seeks disclosure of the prior statements of the Accused without making a distinction between those directly taken by the Prosecution and those obtained from separate proceedings. We note in this connection that Trial Chamber I of ICTY, in *the Blaskic case* admitted in a *Decision on the production of discovery materials* dated 27 January 1997, that:

The reference to the legal standards in effect in developed legal systems - such as those of the United States or France - leads to the same conclusion, namely that the Accused must have access to his own statements, no matter how the Prosecution has obtained them.

In this respect it should be noted that Article 16 (a) (1) (A) of the United States Code of Criminal Procedure whose wording is very similar to that of Rule 66, states:

□ Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing, any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. □

Said Trial Chamber I of ICTY concluded therefrom that Rule 66 (A) (I) covered □ *all prior*

statements of the Accused which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source, as it later construed them in its Decision of 15 July 1998, to refer to *all statements made by the Accused during questioning in any type of judicial proceeding, which may be, in the possession of the Prosecutor, but only such statements.*

38. Following the ruling of Trial Chamber I of ICTY in the case of Kordic and Cerkez in an Order on Motion to compel the compliance by the Prosecutor with Rule 66 (A) and 68 of 26 February 1999, we order the Prosecution to disclose in the shortest possible time and in any event within ten days of this Decision, *any undisclosed prior statements of [co] Accused in the possession of the Prosecution made in any type of judicial proceedings, and whether collected by the Prosecution or originating from any other source, save for any material covered by Rule 70 (A) of the Rules which have not been disclosed* (□).

Disclosure to the Defence of the statements of all witnesses whom the Prosecutor intends to call to testify (Rule 66 (A) (ii) of the Rules.

39. The Defence of the Accused seeks disclosure of prior statements of all the witnesses whom the Prosecutor intends to call against each of the Accused, as soon as possible and without waiting for a date for the commencement of trial to be set.
40. Rule 66 (A) (ii) provides that the Prosecutor shall disclose copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial *no later than sixty days before the date set for trial.* (Emphasis added).

A cursory review of the case-law of international criminal Tribunals on this issue shows the following:

- The instant Chamber noted, in a Decision on Defence Motion for the disclosure of all the material that the Prosecutor intends to rely on, issued on 16 February 2000 in the case of *the Prosecutor vs. Nsabimana (ICTR-97-29-T)*, in the light of Rule 66 of the Rules, that *since the adversarial nature of the hearing provides that the Prosecutor must have already disclosed to the Defence all the evidentially material she intends to rely on during the trial, within a reasonable time, to allow it to prepare itself (□) the Prosecutor shall promptly comply with all the obligations imposed by Rule 66 of the Rules, in order not to cause prejudice to the rights of the Accused to be tried without undue delay and to have the necessary time and facilities to prepare its Defence such as granted by Article 20 of the Statute.*
- Similarly, Trial Chamber II of the Tribunal, in a decision of 21 October 1998 in the case of *the Prosecutor vs. Bagambiki, Imanishimwe and Munyazaki (ICTR-97-36-I)* referred to *a general principle* that *the Prosecutor should not necessarily wait for the arrival of the 60th day before the commencement of trial, to fulfil her disclosure obligation* under Rule 66 (A) of the Rules (Decision on the Defence Motion for disclosure in respect of Samuel Imanishimwe, ICTR 97-36-I, of 21 October 1998);
- Lastly, Trial Chamber I of ICTY, in the case of *the Prosecutor vs. Kordic and Cerkez* noted, in the aforementioned Order of 26 February 1999, pursuant to Rule 66 (A) (ii)

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of the Rules, that *the obligation to provide prior witness statements (D) is intended to assist the Defence in its understanding of the case against the accused in accordance with his rights under Article 21 of the Statute (D); [and that] such statements should thus be provided to the Defence as far in advance of the trial as is possible, even if this means that statements are disclosed sequentially and that statements are disclosed of witnesses who eventually are not called to testify in the matter* (Emphasis added)

It is thus clear that the Prosecutor's disclosure obligation under Rule 66 of the Rules and, more specifically, under its Sub-Rule (A) (ii) is continuing or yet *permanent* (ICTY, *Delalic and al. No. IT-96-21, Decision on Accused Zejnir Delalic's Motion for disclosure of evidence*, 26 September 1996, para. 4). Such a duty is incumbent upon the Prosecution as it includes in its file evidence that it intends to use against the Accused. In the instant, therefore, the Prosecutor is required to disclose to the Defence of the Accused as soon as possible and as they come into her possession, without waiting for a date to be set for the commencement, copies of all prior statements of all the witnesses she intends to call against all the Accused - save for the documents referred to by Rules 66 (C) and 70 (A) and (B) of the Rules, which the Prosecutor will, if necessary, have to show good cause for before the Chamber.

41. As regards witness statements, the Defence seeks disclosure of those that were collected in Kinyarwanda, the language of the Accused, both in their original versions and in their translated versions in either working language of the Tribunal. The Prosecutor contends, on her part, that since Rule 3 (A) of the Rules provides that *the working languages of the Tribunal shall be English and French*, she is required to disclose documents only in those two languages. However, Article 20 (4) (f) of the Statute provides that *in the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality, [to] have the ... assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda* and Rule 3 (B) of the Rules provides that *The accused shall have the right to use his own language*. In the instant, therefore, we find that these latter provisions justify that, in as far as the Defence of Accused Pauline Nyiramasuhuko has made a Motion to that effect, the Prosecutor must disclose to it the witness statements collected in Kinyarwanda - both in their original versions- if they are available-and in their version translated into one of the working languages of the Tribunal
42. Rule 94bis provides for the disclosure of expert witness statement to the opposing party *as early as possible*, without setting a deadline. In as far as this Rule applies "notwithstanding" the provisions of Rule 66 (A) (ii), which deals with the statements of Prosecution witnesses in general; moreover, in as far as the Prosecutor's expert witnesses are *witnesses whom the Prosecutor intends to call to testify at trial* within the meaning of Rule 66 (A) (ii), we are asking her to disclose to the Defence of Pauline Nyiramasuhuko, the statements of the expert witnesses she intends to call against each of the accused in the instant case, within the same time-limits as those of the witnesses that she intends to call in general, that is to say:

- *As early as possible* under Rule 94 bis of the Rules, as they come into her possession and;
- *No later than 60 days before the date set for trial* under Rule 66 (A) (ii) of the Rules.

Disclosure of the names of the Prosecution witnesses whom the Prosecutor intends to call to testify at trial (Rule 67 (A) (i) of the Rules).

43. Pursuant to Rule 47 (A) (i), the Defence seeks notification of the *particulars* (a word understood broadly to include the names, sexes, dates of birth, names of parents, places of origin and places of residence) of the witnesses whom the Prosecutor intends to call. We note that said Rule only provides for the disclosure of the names of the Prosecution's witnesses. The Prosecutor should therefore notify the Defence of the accused, *as early as reasonably practicable, and in any event prior to the commencement of the trial*-even if they were not to be called ultimately-, the names of the witnesses that she intends to call against all the accused in the instant case.
44. As relates to expert witnesses, Rule 94bis of the Rules which deals specifically with this issue, only refers to the disclosure of their prior statements. Rule 67 (A) (i) does however seem to cover the list of expert witnesses as long as the Prosecutor intends to call them to testify at trial. In the case at bar, the Prosecutor must therefore disclose to the Defence of Pauline Nyiramasuhuko the complete list of expert witnesses that she intends to call in the instant case, within the same time-limits as indicated above.
45. Disclosure by the Office of the Prosecutor of the list of witnesses, including expert witnesses must however be effected subject to these witnesses not being under any protective measures or likely to be granted such measures.

In this respect, we direct the Prosecutor to file as early as possible any motions for witness protection measures in the instant case it may wish.

Consideration of the evidence under Rule 66 (B) of the Rules.

46. Pursuant to Rule 66 (B) and subject to Rules 66 (C) and 70 (A) and (B), *the Prosecutor shall (D) permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained or belonged to the accused.*
47. In this connection, the Defence seeks leave to inspect the following materials which related to the Accused joined in the same proceedings:
 - The prior statements of the said Accused;

- The supporting material accompanying their indictments;
- The documents and other objects seized upon their arrest.

We could grant such a request only if the Defence provided specific indications on such material and showed that such material were material to its defence. At this juncture, we note that such a showing has not been made.

48. The Defence of Pauline Nyiramasuhuko has argued that certain documents concerning Jean Kambanda were material to its case, since the name of the Accused has been mentioned several times in the latter's indictment. We find this request meritorious and therefore order the Prosecutor to permit the Defence of the Accused to inspect, subject to Rules 66 (C) and 70 (A):

- The diaries of Jean Kambanda for 1994, 1995 and 1996 (which are also mentioned in the supporting material submitted by the Prosecutor in support of her Request for leave to amend the indictment of the Accused, dated 17 August 1998);
- The notes taken by Mr. Chris McGreal following the interview he had with Jean Kambanda at Bukavu in August 1994, subject to Rule 66 (C) and in as far as such notes do not fall under Rule 70 (A) as *interrogation notes of the investigators [or] internal reports of the Office of the Prosecutor* (aforementioned Blaskic ICTY case law dated 27 January 1997), which the Prosecutor will have to prove, if necessary, before the Chamber.

49. Regarding the statements of Jean Kambanda and particularly a 90 -hour recording of the latter's statements, which in the submission of the Defence is in the possession of the Prosecutor, the latter argued during the hearing that they were covered by Rule 70 of the Rules without specifying whether she was referring to Sub-Rule (A) or (B) thereof. In the absence of any specific indication on her part, we hold that the Defence of the Accused should be able to inspect such statements, unless the Prosecutor proves before this Chamber that these are *reports, memoranda or other internal documents prepared by [the Prosecutor], her assistants or representatives" (Rule 70 (A) of the Rules), or "information provided to her on a confidential basis [] solely for the purpose of generating new evidence" (Rule 70 (B) of the Rules). We observe that in the latter case, Rule 70 (B) provides that the Prosecutor shall secure the consent of Jean Kambanda before disclosing such material and that she [shall in any event not give them in evidence without prior disclosure to the Accused."*

50. The Prosecutor also requests that pursuant to Rule 70 statements and investigators' notes concerning the applicant and collected as part of investigations concerning any other Accused be ruled as matters not subject to disclosure. It is our opinion that such notes and statements should be inspected unless the Prosecutor proves before the Chamber that such material are, either *" reports, memoranda or other internal documents prepared by the [Prosecutor], her assistants or representatives (Rule 70 (A) of the Rules) or information provided to her on a confidential basis solely for the [] purpose of generating new evidence "* (Rule 70 (B)). We observe that in the latter case, Rule 70 (B) provides that the Prosecutor shall secure the consent

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of the investigators concerned prior to disclosing such material and may not in any event give these in evidence without prior disclosure to the Accused".

51. Moreover, the Defence seeks [disclosure of any potential agreement between the Prosecutor and witness ZC] on the basis of excerpts of an interview between the latter and the Office of the Prosecutor, which appear in the supporting material submitted by the Prosecutor in support of her request for leave to amend the indictment against the Accused. We find that there is no evidence from a reading of the document referred to by the Defence, such as would allow the conclusion that there exists, even potentially, any agreement whatsoever between the witness in question and the Office of the Prosecutor.
52. Regarding the inspection of all documents, reports or papers prepared by or in collaboration with expert witnesses, other than their prior statements within the instant case, we agree with Trial Chamber I of ICTY's finding in the Blaskic case in the aforementioned Decision of 27 January 1997, that "*the books, articles and bibliographies of (D) expert witnesses (D) should be considered as belonging to the public domain and must not therefore be disclosed*". If other such non-public documents were in her file, the Prosecutor would have to disclose them, unless she proves before the Chamber that such documents are not subject to disclosure pursuant to Rule 70 (A) and (B) of the Rules.
53. On the other hand, the Prosecutor would have to permit the Defence of the Accused to inspect, subject to Rules 66 (C) and 70 of the Rules:
 - The documents seized at the Butare *Préfecture* and at the different seats of Government at the time in Kigali, Gitarama or Gisenyi in so far as they relate to the events which occurred in Rwanda in 1994;
 - As well as the sound recordings, transcripts and programme notes of Radio Muhabura broadcasts between 1 January and 31 December 1994, if such material is in her possession, on account of the importance conferred on the media in the indictments filed with the Tribunal, including the one against Pauline Nyiramasuhuko.
54. Moreover, we note that all the interviews of Sylvain Nsabimana, just as the Manuscript he wrote, entitled *The truth about the massacres in Butare*, were given by Sylvain Nsabimana himself to *Human Rights Watch and the International Human Rights Federation* as part of their research which resulted in the book entitled *let no one live to tell the story*. We therefore believe that the Defence of Pauline Nyiramasuhuko must seek a copy thereof directly from Sylvain Nsabimana.
55. Regarding the material seized during the search of the residence of Pauline Nyiramasuhuko on 18 July 1997, we recall that the Prosecutor did not deny at the hearing of 8 June 2000, that she had not drawn up a record of the search and seizure nor an inventory of the material seized. We

recall, in this respect, that this Trial Chamber ordered in the case at bar, on 12 October 2000, by its Decision *on the Defence Motion for exclusion of evidence and restitution of property seized*, that the said material be examined, inventoried and sealed and that, if during the examination of the said property both parties agreed that any part of it is not necessary for the purpose of the prosecution, such property would immediately be returned to the Accused, with all these operations to be conducted within a month from the said Decision and a comprehensive record duly signed by the Parties to be prepared thereof.

56. Furthermore and as a general rule, regarding the form and scope of the obligations provided under Rule 66 (B), the Defence seeks disclosure of copies of all the documents. We reiterate, in this respect, the findings of this Chamber in its aforementioned Decision of 16 February 2000 in the matter of Nsabimana, which stipulated that *[the Prosecutor shall not only permit the Defence to inspect [the evidence in question], but as well as far as practicable provide it with certified copies]*.
57. Lastly, for the sake of reciprocity, the Defence having filed a Motion under Rule 66 (B) and the Prosecutor having made a similar request, the Defence should allow her, upon her request, to inspect all the books, documents, photographs and other tangible objects in its possession or under its control, that it intends to use as evidence at trial pursuant to Rule 67 (C) of the Rules.

FOR ALL THESE REASONS,

WE, Judge Laïty Kama, Presiding Judge of Trial Chamber II, designated pursuant to Rule 73 of the Rules to hear the instant Motion hereby,

- I. **ORDER** the Prosecutor to disclose to the Defence of the Accused, as early as practicable and at the latest within fifteen days from this Decision, all the documents cited by the Defence in its Motion and which were already disclosed, but copies of which were illegible or incomplete or otherwise missing;
- II. **ORDER** the Prosecutor to disclose to the Defence of the Accused, as early as practicable and in any event within ten days from this Decision, pursuant to Rule 66 (A) (i) of the Rules and subject to Rules 66 (C) and 70 (A):
- (a) The prior statements of the Accused which are allegedly yet to be served upon it and the complete statements of her co-Accused made in any type of any judicial proceedings, whether collected by the Prosecution or originating from any other source;
 - (b) The supporting material which accompanied the indictment against the Accused and her co-Accused which are allegedly yet to be disclosed to it;
- III. **ORDER** the Prosecutor to disclose as early as possible to the Defence of the Accused, as they

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come into her possession and without waiting for a date of the trial to be set for, pursuant to Rules 66 (A) (ii) and 94bis of the Rules, copies of the prior statements of the witnesses, including the expert witnesses that she intends to call at trial against all the Accused, in either working language of the Tribunal and, where necessary, in their original Kinyarwanda versions, save for the documents referred to under Rules 66 (C) and 70 (A) or (B), in which case the Prosecutor will have to show good cause there for before the Chamber;

- IV. **ORDER** the Prosecutor to disclose as early as reasonably practicable to the Defence of the Accused, pursuant to Rule 67 (A) of the Rules, the list of witnesses, including expert witnesses that the Prosecutor intends to call in support of her case against all of the Accused in the instant, subject to such witnesses not being under or potentially under protective measures;
- V. **ORDER** the Prosecutor to permit as soon as practicable the Defence of the Accused to inspect the following material, if these are indeed in her possession and to provide it with copies thereof as far as practicable, pursuant to Rules 66 (B) and subject to Rules 66 (C), 70 (B) of the Rules:
- (A) The diaries of Jean Kambanda for 1994, 1995 and 1996,
 - (B) The documents seized at the Butare *Préfecture* and at the various seat of Government at Kigali, Gitarama and Gisenyi;
 - (C) The sound recordings, transcripts and programme notes of Radio Muhabura broadcasts between 1 January and 31 December 1994;
- VI. **ORDER** the Prosecutor to permit the Defence of the Accused, as early as practicable, to inspect the following material, if they are indeed in her possession and to provide it with copies thereof to the extent practicable, pursuant to Rule 66 (B), unless the Prosecutor proves before the Chamber that such material fall under Rules 66 (C), 70 (A) or 70 (B) of the Rules:
- (A) The notes taken by Mr. Chris McGreal following the interview he had with Jean Kambanda at Bukavu in August 1994;
 - (B) The statements of Jean Kambanda;
 - (C) The statements and investigators' notes concerning the Applicant which were collected as part of investigations on any other accused;
- VII. **ORDER** the Defence of the Accused, pursuant to Rule 67 (C) of the Rules, to permit the Prosecutor to inspect, upon her request, all books, documents, photographs and other tangible objects in its possession or under its control and that it intends to use as evidence at trial.

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Done at Arusha, 1 November 2000.

Laïty Kama
Presiding Judge of the Chamber



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