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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 29 April 2008

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The PROSECUTOR v. Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

DECISION ON NYIRAMASUHUKO'S MOTION FOR DISCLOSURE OF
DOCUMENTS UNDER RULE 68 AND FOR RE-OPENING OF HER CASE

Office of the Prosecutor

Ms. Holo Makwaia
Ms. Adelaide Whest
Ms. Madeleine Schwarz
Ms. Althea Alexis Windsor
Mr. Fergal Gaynor
Mr. Cheikh Tidiane Mara
Ms. Astou Mbow, Case Manager
Ms. Alison McFarlane, Case Manager

Counsel for Nyiramasuhuko

Ms. Nicole Bergevin
Mr. Guy Poupart

Counsel for Kanyabashi

Mr. Michel Marchand
Ms. Simone Santerre

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "*Requête de Pauline Nyiramasuhuko aux fins de divulgation en vertu de l'article 68 du RPP et en réouverture de preuve*," filed on 20 March 2008 (the "Motion");

CONSIDERING the:

- i. "*Réponse de Joseph Kanyabashi à la requête de Pauline Nyiramasuhuko aux fins de divulgation en vertu de l'article 68 et en réouverture de preuve*," filed on 31 March 2008 ("Kanyabashi's Response");
- ii. "Prosecutor's Response to the '*Requête de Pauline Nyiramasuhuko aux fins de divulgation en vertu de l'article 68 du RPP et en réouverture de preuve*,'" filed on 31 March 2008 ("Prosecution's Response");
- iii. "*Réplique de Pauline Nyiramasuhuko aux réponses du Procureur et de la Défense de Joseph Kanyabashi à sa requête aux fins de divulgation en vertu de l'article 68 du RPP et en réouverture de preuve*," filed on 4 April 2008 (Nyiramasuhuko's Reply);

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motions pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 29 March 2008, Nyiramasuhuko filed a Motion requesting disclosure of documents under Rule 68 and the reopening of her case. Five Annexes totalling 379 pages are attached to the Motion.
2. Annex 1 contains "Justin Mugenzi's Motion for Further Certificated Disclosure and for Leave to Reopen his Defence" filed on 25 February 2008 including seven Annexes: four Prosecution witness statements (R000 0280-0283; R000 00297-0302; R000 0022-0024; R000 0289-0296) (Annex 1); an indictment in Spanish issued by Judge Merelles dated 6 February 2008 and a partial English translation of the indictment (Annexes 2 and 3); a CD, transcript and English translation of a French interview with Des Forges on Voice of America, 8 February 2008, (Annexes 4, 5 and 6) and an extract from interview of Tharcisse Karugarama, Rwandan Minister of Justice from the website of New Times, 13 February 2008 (Annex 7).
3. Annex 2 contains four Prosecution witness statements (R000 0022-0024; R000 0280-0283; R000 0297-0302; R000 0022-0024; R000 0289-0296).



- 4. Annex 3 contains the "Prosecutor's Response to Mr. Justin Mugenzi's Motion for Further Certificated Disclosure and for Leave to Reopen his Defence", filed on 12 March 2008.
- 5. Annex 4 contains Prosecution witness statements and a summary of UNHCR Presentation before Commission of Experts (R000 0016-0021; R000 0289-0296; R000 0000-0015; R000 0299-302; R000 0280-283; R000 022- 024; R000 2907- 2920; R000 0305-0307).
- 6. Finally, Annex 5 contains "Justin Mugenzi's Reply to the Prosecutor's Response to Justin Mugenzi's Motion for Further Certificated Disclosure and for Leave to Reopen his Defence", filed on 14 March 2008.

SUBMISSIONS OF THE PARTIES

Nyiramasuhuko's Motion

- 7. The Defence for Nyiramasuhuko submits that on 18 February 2008, the Prosecution disclosed four redacted witness statements to Accused Joseph Mugenzi. The statements, attached in Annex 2 of the Motion, date from between 28 March and 15 May 2002. According to the Defence, the Prosecution has been in possession of these statements since March and April 2002.
- 8. The Defence alleges that the aforesaid statements are of exculpatory character to Nyiramasuhuko's case and should have been disclosed to the Defence pursuant to Rule 68 in 2002 or in any event, before the beginning of Nyiramasuhuko's Defence. If disclosed in due time, the statements would have been used for the preparation of Nyiramasuhuko's Defence and for the cross-examination of Prosecution and Defence witnesses, in particular the Prosecution's expert witnesses and Kanyabashi's Defence Witnesses Filip Reyntjens and D-2-YYYY.
- 9. According to the Defence, the statements indicate that the RPF planned to take over power in Rwanda by way of creating ethnic separation and systematically eliminating the Hutu elite and reducing the number of Hutu to equal them to the number of Tutsi living in Rwanda; that since 1990, the RPF recruited Tutsi within Rwanda and particularly in Butare as combatants and infiltrators. The Defence asserts that this information modifies the historical context of the events in Rwanda between April and July 1994 and affects several accusations against Nyiramasuhuko in connection with the existence of a plan or the organisation and the erection of roadblocks.
- 10. The Defence refers to the Prosecution's Response to Mugenzi's motion, filed on 12 March 2008 (attached to the Motion in Annex 3) and submits that the Prosecution appears to possess at least four additional statements besides the four statements disclosed to Joseph Mugenzi (attached to the Motion in Annex 4).
- 11. The Defence contends that the Prosecution has breached the Appeals Chamber Decision of 30 June 2006¹ even if the said documents were accessible through the Prosecution's Electronic Disclosure Suite (EDS) because the Prosecution entered the

¹ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-A, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, paras 10, 12.

documents in an almost entirely redacted version in EDS only four years after it obtained them and after the closure of Nyiramasuhuko's Defence; furthermore it did not inform Nyiramasuhuko of its existence. The Defence submits that following the Prosecution's breach of its disclosure obligation, the presumption that the Prosecution acts in good faith regarding its compliance with Rule 68 no longer applies.

12. Therefore, the Defence requests the Chamber to order the Prosecution to immediately disclose to it the four witness statements disclosed to Justin Mugenzi (attached in Annex 2), as well as the unredacted four statements (attached in Annex 4) identified in Prosecution's Response to Mugenzi's Motion;

13. The Defence requests the Chamber to order the Prosecution to examine all the documents in its possession and control, including items collected during its investigations into crimes allegedly committed by the RPF in 1994 and elements falling within the numerical sequence beginning with the letter "R"; to verify if those documents contain evidence which is exculpatory under Rule 68 and, if this is the case, disclose them as soon as possible to the Defence.

14. The Defence requests the Chamber to order the Prosecution to provide a written, signed and sworn report containing the names of the persons who carried out the said examination, the dates during which it was carried out, a clause in which the persons who carried out the examination declare themselves convinced and swear that they had full and unrestricted access to all evidence within the possession or control of the Prosecutor and are conscious that the obligation under Rule 68 is continuing; that they further specify the items with which they are familiar and on the basis of which they make these sworn assertions.

15. The Defence further requests the Chamber to impose sanctions for the Prosecution's failure to comply with its disclosure obligations under Rule 68.

16. The Defence requests the Chamber to note the Prosecution's admission that the facts contained in the said statements as well as other exculpatory items are accurate.

17. In addition, the Defence requests the Chamber to order the reopening of the Defence case; to recall the Prosecution and Defence witnesses whom the Defence seeks to cross-examine on facts contained in the witness statements; to order that the Prosecution and the other Parties be similarly restrained in their questioning to the subjects covered by the said statements and further documents, which the Prosecution will discover in its further examination; to authorise the Defence to call the authors of those statements already known and identified by the Prosecution and of any further statements which the Prosecution will discover during its examination.

Kanyabashi's Response

18. The Defence for Kanyabashi partly joins the Motion regarding the request to disclose documents under Rule 68.

19. The Defence submits that the statements attached to the Motion concerning the role and presence of the RPF in Rwanda in 1994 could have had an impact on his defence strategy and should have been disclosed in 2002. The statements would have been relevant in relation to several points, namely the alleged existence of a conspiracy (*complot*) as stated in

paragraphs 5.1 and 6.22 of the Indictment; the role of the civil defence in Butare; the cross-examination of Prosecution Witness QI; and the credibility of expert Witnesses Des Forges and Guichaoua. If the Defence had received the statements in due time, including the names of the informants and further details, it would have been in a better position to prepare its case.

20. The Defence deems it premature to request the re-call of any witness at this stage without knowing the unredacted statements concerning the role of the RPF. Therefore, the Prosecution should be bound to review all materials in its possession and immediately disclose those which fall under Rule 68, not only the statements subject-matter of the Motion but any other exculpatory material which might affect the credibility of Prosecution witnesses.

21. The Defence objects to Nyiramasuhuko's request that the Prosecution and the other Parties be equally restrained in using elements contained in the said statements or in any other disclosed documents. Kanyabashi further objects to Nyiramasuhuko's request to recall expert Witness Reyntjens and Witness D-2-YYYY stating that Nyiramasuhuko did not specify on which elements she intends to cross-examine these witnesses.

22. The Defence requests the Chamber to order the Prosecution: to immediately disclose the unredacted versions of the statements identified in the Motion, to inform the Chamber and the accused about further materials that fall under Rule 68 and to disclose them within 10 days after the Decision has been rendered.

23. The Defence finally requests to reserve his rights to take further steps following the Prosecution's failure to disclose the documents.

Prosecution's Response

24. The Prosecution objects to the Motion arguing that it determined in good faith that the statements referred to in the Motion did not fall within Rule 68 (A) of the Rules. It states that there exists a presumption that the Prosecution discharges its obligation under Rule 68 in good faith; that the determination of what material meets Rule 68 disclosure requirements falls within the Prosecution's responsibility; and that the Prosecution may be relieved of its disclosure obligation under Rule 68 if the relevant exculpatory evidence is known and accessible to the defendant.

25. Referring to the ICTR case law, the Prosecution asserts that documents concerning activities of and crimes committed by the RPF do not necessarily fall under Rule 68 (A). It depends on the nature of the charges and evidence heard against the accused. RPF operations which have only a remote connection to the crimes alleged against the Accused are not exculpatory.

26. The Prosecution submits that Nyiramasuhuko's Defence has failed to present a *prima facie* case which would make probable the exculpatory nature of the statements referred to in the Motion, and has therefore failed to meet the test regarding disclosure obligations under Rule 68 (A). The Prosecution contends that Nyiramasuhuko's indictment deals primarily with incidents within Butare prefecture, which happened prior to the RPF's occupation of Butare in July 1994, while the four statements deal only marginally with events in Butare

prior to July 1994 and therefore only have a remote connection to the crimes alleged against the Accused.

27. The Prosecution submits that even if its Rule 68 (A) assessments of the statements were erroneous, the Defence did not satisfactorily explain the nature of the alleged prejudice.

28. The Prosecution states that the Defence has also failed to present a *prima facie* case that the Prosecution misapplied Rule 68 (A) in general. Even if the Chamber would find that parts of the four statements attached to the Motion fall within Rule 68 (A) it could not be concluded that the Prosecution has generally misapplied Rule 68 (A); to order a fresh review of all material would be a disproportionate measure.

29. Referring to ICTR and ICTY jurisprudence, the Prosecution finally submits that the Defence has failed to set forth sufficient reasons to justify the reopening of her case. In light of the negative impact of further delay on the right to trial without undue delay and the right to an expeditious trial enjoyed by all co-accused, applications to reopen should be granted only in exceptional circumstance; a case cannot be reopened to enable a Defence team to buttress a point already made before the Chamber.

Nyiramasuhuko's Reply

30. The Defence for Nyiramasuhuko submits that the Prosecution does not contest its possession of the statements for which Nyiramasuhuko seeks disclosure.

31. The Defence asserts that it has already established *prima facie* that the said statements are of exculpatory nature to her case or affect the credibility of Prosecution witnesses; the Defence states that it would have used the said statements in connection with several passages of the Indictment and allegations made by Alison Des Forges and Guichaoua. The Defence also contends that the four statements attached in Annex 2 of her Motion were disclosed to the Accused Mugenzi pursuant to Rule 68 (A).

32. The Defence submits that Nyiramasuhuko has suffered prejudice by the non-disclosure of the statements because she was unable to use the detailed and accurate information contained in the said statements for cross-examining Prosecution and Defence witnesses; that the non-disclosure deprived her of the right contained in Article 20 of the Statute to call the authors of the said statements as her Defence witnesses.

33. The Defence submits that after the close of Nyiramasuhuko's case, the reopening of the case remains the only adequate remedy for disclosure violations pursuant to Rule 68.

34. With regard to Kanyabashi's Response, the Defence submits that the identified statements suffice to request the reopening of its case. The fact that the Defence is unaware of the identities of the statement's authors does not impede the reopening of the case. Finally, the Defence states that Kanyabashi did not give any convincing reasons why he should not similarly be restrained from using the said statements.

DELIBERATIONS

Rule 68 (A) Principles

35. Rule 68 (A) provides that “[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence.” Pursuant to Rule 68 (E), the Prosecution’s disclosure obligations under Rule 68 (A) are ongoing.²

36. The initial determination as to whether a document is exculpatory pursuant to Rule 68 (A) is primarily a fact-based judgement made by and under the responsibility of the Prosecution which has a positive obligation to disclose exculpatory material in its possession. The Prosecution is presumed to discharge its obligation in good faith.³ If the Defence requests the Trial Chamber to order disclosure pursuant to Rule 68 (A), it must sufficiently identify the material sought; satisfy the Chamber on a *prima facie* basis of the Prosecution’s custody or control of the materials requested; and present a *prima facie* case that the material is exculpatory or potentially exculpatory⁴ or may affect the credibility of the Prosecution evidence. If the Chamber is satisfied that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber examines whether the Defence has been prejudiced by that failure.⁵

37. In *Bagosora* and *Karemera*, the Trial Chambers dealt with the alleged exculpatory nature of statements relating to RPF activities and found that such information is exculpatory if it “tends to disprove a material fact alleged against the Accused, or if it undermines the credibility of evidence intended to prove those material facts. This assessment depends on the

² *The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32; *The Prosecutor v. Bizimungu*, Case No. IT-99-50-T, Decision on Prosper Mugiraneza’s Motion for Records of all Payments made directly or indirectly to Witness D, 18 February 2008, para. 4.

³ *The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 264; *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-A, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, paras. 16, 17; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2. *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-AR, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, para. 16; *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-AR, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suites in Discharging Disclosure Obligations. (AC), 30 June 2006, paras. 8,9; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para 2.

⁴ *The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 268; *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262; *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-A, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, para. 13; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68, 6 October 2006, para. 2; *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-T, Decision on Joseph Nzirorera’s Fifth Notice of Rule 68 Violations and Motions for Remedial and Punitive Measures, 13 November 2007, para. 6; *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-T, Decision on Joseph Nzirorera’s Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures, 5 February 2008, para. 5.

⁵ *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262; *Prosecutor v. Niyitegeka*, Case No. ICTR-98-44A-A, Appeals Chamber Decision, p. 7. *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Seventeenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures, 20 February 2008, para 14: “The fact that material relevant for the Defence has not been disclosed in a timely manner does not always create prejudice to the accused.⁵ It is for the Defence to demonstrate that he has suffered material prejudice as a result of the late disclosure.”

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nature of the charges and evidence heard against the Accused.”⁶ In *Bagosora*, the Chamber concluded that specific information relating to RPF activities could “provide context information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case”; but that evidence of RPF activities which have only a remote connection to the crimes alleged against the Accused, such as operations at times or places unrelated to allegations against the accused, were not exculpatory.⁷ The admission of any particular element of evidence will depend on the purpose for which it is tendered; whether the disclosure is necessary for that purpose; and the Chamber’s discretion to avoid needless consumption of time.⁸

38. Bearing in mind the principles stated above, the Chamber will consider if the documents attached in Annexes 2 and 4 of the Motion should have been disclosed to the Defence under Rule 68 (A).

Nyiramasuhuko’s request for disclosure of documents attached to the Motion in Annexes 2 and 4

39. The Chamber is satisfied that the statements attached in Annexes 2 and 4 of the Motion have been sufficiently identified and are in the Prosecution’s possession.

40. The Chamber notes the Defence’s submission that the documents attached in Annexes 2 and 4 concern charges against Nyiramasuhuko connecting her with the existence of a genocidal plan and the erection of roadblocks.⁹

41. Annex 2 contains four statements relating to alleged RPF activities mainly within the Kigali area. The statements contain information on the RPF’s destabilisation policy since 1990 and its strategies to gain power in Rwanda; the RPF’s infiltration tactics regarding the civilian population and government related institutions such as the *Interahamwe*; the RPF’s involvement in the assassination of President Habyarimana; and the RPF’s systematic killings of civilians and RPF opponents before, during and after 1994.¹⁰

⁶ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 4; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Disclosure of RPF Material and For Sanctions against Prosecution, 19 October 2006, para. 6.

⁷ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, paras. 4, 5.

⁸ *The Prosecutor v. Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, paras. 6, 7; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, paras. 4, 5.

⁹ Nyiramasuhuko’s Reply relates to the following paragraphs of her indictments: 1.12-1.15; 1.20; 1.26-1.30; 2.5, 2.6; 5.1; 5.7-5.8; 5.10; 5.13; 5.14; 5.16; 6.4; 6.5; 6.9; 6.10; 6.15,6.17; 6.27;6.28; 6.49; 6.50; 6.54; 6.56.

¹⁰ The statements contain the following information:

- Statement R 2000 0280-0283 is that of an RPF combatant, explaining the infiltration tactics of the RPF; his knowledge of killings perpetrated by the RPF in the Kigali area during April 1994 and thereafter. The statement details information that between December 1993 and April 1994 civilians, coming among others from Butare préfecture, were trained at firearms at CND (in Kigali); afterwards they were send back in the population.
- Statement R 2000 0280-0283 contains information about RPF military units and personnel; RPF violent acts by infiltrators prior to April 1994 and killings of civilians by RPF personnel in Kigali area, Musha and Bicumbi commune during May and June 1994; the recruitment of soldiers in 1994; the killing of Gatabazi by RPF “technicians” (infiltrators).

42. Annex 4 contains three additional statements, which also relate to the RPF's alleged activities aiming at the seizure and maintenance of power in Rwanda since 1990 through infiltration tactics or the killing and persecution of civilians in RPF occupied zones.¹¹ Annex 4 further includes a document entitled "summary of the UNHCR presentation before the commission of experts on 10 October 1994", observing that RPF related killings and persecutions in Butare, Kibungo and parts of Kigali *préfectures* started "depending on the location between April and July 1994, immediately following the expulsion from each area of former Government military, militia and surrogate forces".¹²

43. Recalling that evidence is exculpatory if it tends to disprove a material fact alleged against the Accused, the Chamber notes that the charges against Nyiramasuhuko are restricted to crimes committed within Butare *préfecture* between April and July 1994. The Chamber notes that none of the statements referred to above appears to provide specific information linked to allegations or charges made against the Accused; rather the statements deal with alleged RPF operations at times or places unrelated to allegations against the Accused and may be remotely connected to Nyiramasuhuko's case.

44. With regard to the UNHCR report, the Chamber notes that it contains general information on alleged massacres and persecution by the RPF in Butare, Kibungo and parts of Kigali *préfectures* after their occupation by the RPF between April and July 1994. The Chamber is not satisfied that such general facts unrelated to specific charges against the Accused may be exculpatory or mitigating.

45. The Chamber notes that the Defence also submits that the documents attached in Annexes 2 and 4 would have been relevant for testing the credibility of Prosecution witnesses, particularly Expert Witnesses André Guichaoua and Alison Des Forges. The Chamber observes that the Defence's assertion remains general without pointing out which specific aspects of the witnesses' credibility would have been affected by the said documents. The Chamber further observes that the concerned documents are not directly related to allegations against Nyiramasuhuko. Therefore, the Chamber considers that the Defence has

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- Statement R 2000 0022-0024 details information about activities between April and June 1994 mainly in Kigali area; about RPF infiltration of Interahamwe controlled roadblocks; about RPF's policy to use the opportunity of the death of Habyarimana to gain power and to systematically eliminate Hutu to attain numerical equality between Hutu and Tutsi in Rwanda. The author's travel to Butare *préfecture* after 6 April 1994 and on 5 July 1994 is mentioned without detailing any information about the situation in Butare.
 - Statement R 2000 0289-0296 is that of a former student at the University in Butare and his and his friends' recruitment for RPF by civilian cadres of the RPF in 1992; his training in Uganda and his participation in fighting in early April 1994 around Kigali; his knowledge of killings perpetrated by the RPF in the Kigali area; the RPF's infiltration strategy in Kigali area; the killing of Gatabazi by RPF.

¹¹ The statements contain the following information:

- Statement R 000 016-021 is that of a former RPF officer speaking about the organisation of the RPF after 1998; the killing within RPF occupied zones in Mulindi in 1992; infiltration tactics of RPF in Kigali and Rwanda; the election campaign of Robert Kajuga as president of Interahamwe had been financed by the RPF. (7451bis R000 0019)
- Statement R 000 000-015 is that of a RPF combatant detailing his RPF training in Uganda in 1990; the structure of RPF forces; RPF activities to obstruct the Arusha peace Accord; RPF killing operations in Nyamugali an in Cyeru in 1993; RPF tactics to destabilize the Habyarimana "regime" through infiltration in Kigali; RPF activities after April 1994.
- Statement R 000 0305-0307 contains the assertion that massacres caused by RPF started the war after 6 April 1994; it also relates to killings by the RPF in Kigali after 6 April 1994.

¹² See R 000 2911 (report, p. 4) and R 000 2916, (report p. 9).

not shown how the documents would have undermined the Prosecution witnesses' credibility.

46. In light of the above, the Chamber considers that the Defence has failed to show how the use of these documents for preparing the cross-examination of Prosecution and Defence witnesses, such as Filip Reyntjens and D-2-YYYY, might have had any exculpatory or mitigating effect on Nyiramasuhuko's Defence or might have affected the Prosecutions witnesses' credibility.

47. Therefore, the Chamber is not satisfied that the documents attached in Annexes 2 and 4 meet the requirements of Rule 68 (A).

Nyiramasuhuko's request for disclosure of documents falling within the numerical sequence beginning with the letter "R" and similar documents in the Prosecution's possession

48. The Chamber is not satisfied that the specific numeration of the documents attached in Annexes 2 and 4 with the serial number beginning with the letter "R" establishes *prima facie* that the Prosecution is in possession of additional RPF related documents, as asserted by the Defence.¹³ Besides, the Defence failed to show that such documents might be of exculpatory nature to the Defence case, considering that the documents, attached to the Motion in Annexes 2 and 4, do not fall under Rule 68 (A). Therefore, the Chamber relies on the presumption of the Prosecution's good faith regarding its obligations under Rule 68 (A).

Nyiramasuhuko's request for reopening of her case and further requests

49. Considering that the Defence has failed to show *prima facie* the exculpatory nature of the documents under Rule 68 (A), the Chamber finds the request for the reopening of Nyiramasuhuko's case to be unfounded. In any case, the Chamber recalls that the ICTR and ICTY jurisprudence allow for the reopening of a case only under "exceptional circumstances".¹⁴

50. Finally, the Chamber considers the other requests by the Defence to be unfounded, including the request to order the Prosecution to provide a certified report; to impose sanction against the Prosecution; and to restrain the Prosecution and other Parties in their use of the

¹³ Nyiramasuhuko's Motion, paras. 40, 42, The Defence reasons that that all documents attached in Annexes 2 and 4 relate to RPF activities in Rwanda; that the documents are numerated with specific serial numbers beginning with the letter "R"; and that some – but not all – of the documents are marked with consecutive "R" serial numbers. The numeration of Annex 2 documents is R000 0022-0024, R000 0280-0283, R 000 0289-0296 and R000 0297-0302,) indicating that the Prosecution is in possession of further documents marked with the R numbers between the inconsecutive numbered documents (such as between R 000 9924 and R 000 0280).

¹⁴ *The Prosecutor v. Delalic et al.*, Appeal Judgement, para. 290; *The Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-Ling, 16 November 2006, paras. 15, 16; citing *Prosecutor v. Milosević*, Case No. IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 12; *The Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses, 14 August 2007, para. 7: "Trial Chambers have exercised discretion to order the reopening of the Prosecution's case to admit rebuttal or fresh evidence in exceptional circumstances" citing *Prosecutor v. Zejnil Delalic, Zdravko Mucic*, Case No: IT-96-21-T, Judgement (AC), 20 February 2001, paras. 283-292.

said documents. The Chamber notes that there are other legal avenues to access certain documents such as applications under Rule 66 (B).

Kanyabashi's Request for disclosure of documents attached to the Motion in Annexes 2 and 4

51. As a preliminary matter, the Chamber recalls that the purpose of a response is to give a full answer to the issues raised in a motion by the moving party but not to submit separate or additional requests. The proper procedure for Kanyabashi would have been to submit his own requests through an independent motion under Rule 73 (A).

52. Nevertheless, in the interest of justice and judicial economy, the Chamber will deal with Kanyabashi's request. The Chamber notes the Defence's submission that the documents attached in Annexes 2 and 4 may be relevant to paragraphs 5.1 and 6.22 of Kanyabashi's Indictment¹⁵ and in connection to all aspects of civil defence in Butare.¹⁶

53. As noted above, the said documents do not provide direct information about the RPF activities within the Butare area between April and July 1994. Therefore, the Chamber is not satisfied of the exculpatory or mitigating nature of these documents in relation to allegations against Kanyabashi; nor of their relevance for testing the credibility of Prosecution Witnesses Q1 and Experts Des Forges and Guichaoua.

54. For these reasons the Chamber is not satisfied that the Defence has shown *prima facie* that the documents should have been disclosed to Kanyabashi under Rule 68 (A).

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

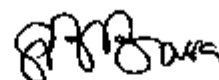
Arusha, 29 April 2008



William H. Sekule
Presiding Judge



Arlette Ramarosan
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

¹⁵ Point 5.1 of the Indictment alleges "the existence of a plan to exterminate the civilian Tutsi population and members of the opposition among others by recourse to hatred and ethnic violence; the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated." Point 6.22 of the Indictment asserts that the speeches held during the meeting on 19 April 1994 in Butare indicated that the government ordered the commission of massacres against Tutsi civilian.

¹⁶ Kanyabashi's Response, para. 12.