ICTR-00-56-T
22-09-08
(67902-67899)

67902
PM

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

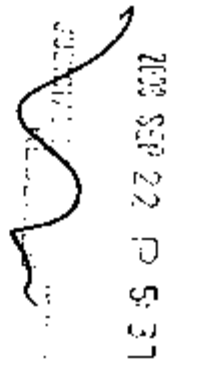
OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr. Adama Dieng

Date: 22 September 2008



The PROSECUTOR
v.
Augustin NDINDILIYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

DECISION ON DEFENCE MOTIONS ALLEGING VIOLATION OF THE PROSECUTOR'S DISCLOSURE OBLIGATIONS PURSUANT TO RULE 68

Office of the Prosecutor:
Mr. Alphonse Van
Mr. Moussa Sefon
Mr. Segun Jegede
Mr. Lloyd Strickland
Mr. Abubacarr Tambadou
Ms. Felistas Mushi
Ms. Faria Rekkas
Ms. Marlize Keefer

Counsel for the Defence:
Mr. Gilles St-Laurent and Mr. Benoît Henry **for Augustin Bizimungu**
Mr. Christopher Black and Mr. Vincent Lurquin **for Augustin Ndindiliyimana**
Mr. Charles Taku and Ms. Beth Lyons **for François-Xavier Nzuwonemeye**
Mr. Fabien Segatwa and Mr. Seydou Doumbia **for Innocent Sagahutu**

INTRODUCTION

1. On 4 February 2008, the Defence teams in this case presented oral submissions alleging violations of the Prosecutor's disclosure obligation pursuant to Rule 68 of the Rules of Procedure and Evidence (the "Rules").[1] On the same day, the Chamber ordered the Prosecution to review the documents in its possession and to disclose to the Defence all exculpatory material by the end of February.[2]

2. On 29 February 2008, the Prosecution disclosed to the Defence a total of 140 un-redacted witness statements comprising approximately 3000 pages. On 7 March 2008, the Chamber ordered the Defence to file any motions relating to the Prosecution's 29 February 2008 disclosure no later than 28 March 2008.[3]

3. The Defence for Sagahutu filed its Motion on 17 March 2008;[4] the Defence for Bizimungu and the Defence for Nzuwonemeye both filed their Motions on 28 March 2008;[5] the Defence for Ndindiliyimana filed its Motion on 31 March 2008,[6] three days outside the time limit set by the Chamber. The Prosecution responded to all the Motions.[7] Bizimungu and Nzuwonemeye replied on 7 April 2008; Ndindiliyimana filed a Reply on 8 April 2008.[8] The issue of late filings by the Ndindiliyimana Defence and the Prosecution has already been dealt with by the Chamber.[9]

4. The Prosecution made certain further disclosures containing redacted statements pertaining to RPF investigations on 19 March 2008, and other documents relevant to the RPF on 23 April 2008.

---

[1] T. 4 February 2008, pp. 1 – 13 (O.S.).
[2] T. 4 February 2008, pp. 12-13 (O.S.).
[3] Scheduling Order following the Status Conference of 5 and 6 March 2008 (TC), 7 March 2008.
[4] Requête aux fins de communication de pièces *(sic)* à décharge et autres éléments pertinents – Article 68 RPP, filed on 17 March 2008 ("Sagahutu Motion").
[5] Requête en arrêt des procédures et conclusions subsidiaires, filed on 28 March 2008 ("Bizimungu Motion"); Nzuwonemeye Defence Motion, Based on Prosecution's Violations of Rule 68 (Rules of Procedure and Evidence) and for Relief, and Pursuant to Rules 5, 90(G)(ii) and 90(G)(iii) (Rules of Procedure and Evidence), filed on 28 March 2008 ("Nzuwonemeye Motion").
[6] Augustin Ndindiliyimana's Motion for Disclosure Violations, Remedial and Punitive Measures, filed on 31 March 2008.
[7] Reponse du Procureur à la "requête aux fins de communication de pièces a decharge et autres elements pertinents - Article 68 RPP" presentee par la defense du capitaine Innocent Sagahutu le 17 Mars 2008, filed on 27 March 2008; Prosecutor's Joint Response to Major Francois-Xavier Nzuwonemeye based on Prosecutions Violations of Rule 68 and for Relief, pursuant to Rules 5, 90(g)(ii) and 90(g)(iii) RPE and Augustin Bizimungu's "*requête en arrêt des procédures et conclusions subsidiaires*", filed on 2 April 2008; Prosecutor's Response to Général Augustin Ndindiliyimana's "Motion for Disclosure, Violations, Remedial and Punitive measures", filed on 2 April 2008.
[8] *Réplique de Augustin Bizimungu à la* "Prosecutor's Joint Response to Major François Nzuwonemeye based on Prosecution's Violations of Rule 68 and for Relief, pursuant to Rules 5, 90(g)(ii) and 90(g)(iii) RPE and Augustin Bizimungu's "*requête en arrêt des procédures et conclusions subsidiaires*", filed on 7 April 2008 ("Bizimungu Reply"); Nzuwonemeye Defence Reply to Prosecution's [Joint Response] to Nzuwonemeye Defence Motion, Based on Prosecution's Violations of Rule 68 (Rules of Procedure and Evidence) and for Relief, and Pursuant to Rules 5, 90(G)(ii) and 90(G)(iii) (Rules of Procedure and Evidence), filed on 7 April 2008 ("Nzuwonemeye Reply"); Reply to Respondent's Response to Motion Re Disclosure and Remedial Measures, filed on 8 April 2008 ("Ndindiliyimana Reply").
[9] Interim Order on Defence Motions Regarding the Prosecution's Disclosure of Alleged Exculpatory Material (TC), 23 May 2008, para. 3 and Disposition.

5. On 23 May 2008, the Chamber issued an Interim Order directing (i) the Defence teams for Bizimungu, Ndindiliyimana, and Nzuwonemeye to file the alleged exculpatory documents provided to them through the Prosecution's disclosure of 29 February 2008 relevant to their case; (ii) the Prosecution to file confidentially for the exclusive use of the Chamber the un-redacted versions of only the alleged exculpatory documents listed in the Defence Motions, including the thirty-nine pages of RPF materials mentioned in Nzuwonemeye's Motion and documents numbered R0000280-283, and R0000299-302 referred to in Sagahutu's Motion; and (iii) the Prosecution to clearly indicate the specific dates on which it disclosed the six statements referred to in its Response to Ndindiliyimana's Motion and to file un-redacted versions of them with the Chamber. The Chamber ordered that all necessary disclosures be made within seven days of the date of the Interim Order.[10]

6. Following the Chamber's Interim Order, the Defence teams for Nzuwonemeye, Ndindiliyimana and Bizimungu provided copies of the redacted statements referred to in their earlier motions.[11] The Prosecution complied with the Order by providing extensive material containing un-redacted statements referred to in the Defence motions for the exclusive use of the Chamber.[12] The Defence for Nzuwonemeye filed further observations on the Prosecution's latest disclosure.[13]

7. Regarding disclosure of the RPF material, the representative of the Special Investigations Unit of the Office of the Prosecutor filed nine statements relating to the RPF investigations, for the exclusive use of the Chamber. The Prosecution further requested that if the Chamber was minded to order disclosure of any of the RPF statements to the Defence, it first hear the Prosecution *in camera* pursuant to Rule 68(D). On 10 July 2008, the Chamber after reviewing the RPF material, ordered the Prosecution to file written submissions on an *ex parte* basis to indicate why four out of the nine statements relating to the RPF should not be disclosed to the Defence.[14] The Prosecution sought a further extension of time to file its submissions, citing the absence of the representative of the Special Investigations Unit.[15] The Prosecution filed its submissions[16] following a further *ex parte* and confidential Order by the Chamber in which it found the request for additional

[10] Interim Order on Defence Motions regarding the Prosecution's Disclosure of Alleged Exculpatory Material (TC), 23 May 2008.
[11] Nzuwonemeye Defence Compliance with Interim Order, Dated 23 May 2008 in Reference to Prosecution Disclosure, Pursuant to Rule 68, filed on 29 May 2008; Augustin Ndindiliyimana's Filing in Compliance with the Interim Order of 23 May 2008 on Defence Motions Regarding the Prosecution's Disclosure of Alleged Exculpatory Material, filed on 30 May 2008; Annexes à la Requête en arrêt des procédures et conclusions subsidaires de la Défense du Général Augustin Bizimungu conformément à l'Ordonnance intérimaire du 23 mai 2008, filed on 30 May 2008.
[12] Prosecution's filing of un-redacted statements in compliance with the Interim Order of Trial Chamber II dated 23 May 2008, filed on 30 May 2008.
[13] Nzuwonemeye's Defence Observations on Prosecution Disclosure, dated 30 May 2008, filed on 9 June 2008.
[14] *Ex Parte* and Confidential Order Regarding the Prosecution's Disclosure of RPF Material Pursuant to Rule 68 (TC), 10 July 2008.
[15] Prosecutor's Filing Pursuant to the Trial Chamber's Ex Parte and Confidential Order regarding the Prosecutor's Disclosure of RPF Materials pursuant to Rule 68, filed on 11 July 2008.
[16] Prosecutor's Ex Parte and Confidendial (*sic*) Submissions Regarding the Prosecutor's Disclosure of RPF Material Pursuant to Rule 68, filed on 15 July 2008.

time unreasonable.[17] In its submissions, the Prosecution objected to the disclosure of three out of the four statements identified in the Chamber's Order, on the grounds that such disclosure may endanger the security of the witnesses and prejudice ongoing investigations.

8. On 12 August 2008, the Chamber issued a further Interim Order in which it directed the Parties to file, within 7 days, written submissions on whether the alleged pre-trial disclosure of the so-called "Belgian Files" by the Prosecution in May 2004, was redacted or not, and if redacted, to inform the Chamber about the extent of those redactions.[18] The Prosecution and the Defence teams for Nzuwonemeye, Ndindiliyimana and Sagahutu filed submissions in response, which will be dealt with in a later part of this decision.

DELIBERATIONS

(i) Applicable Law:

9. Rule 68(A) requires the Prosecution to disclose "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 Prosecution evidence."[19] The expression "actual knowledge" has been consistently interpreted as requiring that the requested material be in the Prosecutor's custody or control.[20] In *Karemera et al*, the Appeals Chamber approved the *dicta* of the *Bagosora et al* Trial Chamber to the effect that "Whether information 'may suggest the innocence or mitigate the guilt of the Accused' must depend on an evaluation of whether there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the Accused."[21] The initial determination of what material is exculpatory, which is a fact-based judgement, rests with the Prosecution.[22]

---

[17] *Ex Parte* and Confidential Order Regarding the Prosecution's Request for Additional Time to File Written Submissions Pursuant to Rule 68 (TC), 14 July 2008.

[18] Interim Order on Defence Motions Regarding the Prosecutor's Disclosure of Alleged Exculpatory Materials (TC), 12 August 2008.

[19] The meaning of exculpatory evidence is supported by a wide body of international jurisprudence. *See Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal regarding the role of the Prosecutor's Electronic Disclosure Suite in discharging Disclosure Obligations (AC), 30 June 2006 (*Karemera* Decision of 30 June 2006), para. 9; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14A, Judgement (AC), 29 July 2004 (*Blaskic* Appeals Judgement), paras. 263–267. *See also* the recent decision of *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Consequences of non-disclosure of exculpatory materials covered by Article 54(3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (TC), 13 June 2008 (*Lubanga* Decision of 13 June 2008), paras. 88-89.

[20] *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262 ("Defence must first establish that the evidence was in the possession of the Prosecution"); *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (Application must "be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution").

[21] *Karemera et al*, Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion (AC), 14 May 2008 (*Karemera* Decision of 14 May 2008), para 12, citing with approval *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 5.

[22] *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006 (*Karemera* Decision of 28 April 2006), para. 16; *Blaskic* Appeals Judgement, para. 264; *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 (AC), 8 December

10. As a rule of disclosure, the provision in Rule 68 imposes a categorical obligation on the Prosecution which is not subject to a balancing test.[23] The Prosecution therefore cannot refrain from disclosing exculpatory material on the ground that the document also includes material that incriminates the Accused.[24]

11. The Prosecution is also expected to actively review the material in its possession for exculpatory content, and at the very least, inform the accused of its existence.[25] This disclosure obligation extends beyond simply making the entire evidence collection available in a searchable format. A search engine such as the Prosecution's Electronic Disclosure Suite (EDS) cannot serve as a surrogate for the Prosecution's individualised consideration of the material in its possession.[26] According to the Appeals Chamber, "...EDS [does not] make documents reasonably accessible as a general matter, nor .. [can] the Defence ... be assumed to know about all materials included in it." The Appeals Chamber further observed that "[i]t might be helpful if the Prosecution either separates a special file for Rule 68 material or draws the attention of the Defence to such material in writing and permanently updates the special file or the written notice."[27]

12. The Prosecution's obligation to disclose exculpatory material is essential to a fair trial.[28] In determining whether Rule 68 has been violated, considerations of fairness are the overriding factor.[29] According to the Appeals Chamber, the obligation to disclose exculpatory material forms part of the Prosecution's duty to assist in the administration of justice, and is as important as the obligation to prosecute.[30] The duty to disclose exculpatory material under Rule 68(A) is of a positive and continuing nature, notwithstanding the public or confidential character of the material. In discharging its

---

2006 (*Nahimana et al.* Decision of 8 December 2006), para. 34, referring to *inter alia Ferdinand Nahimana et al v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaraguza Be Expunged from the Record (AC), 30 October 2006, para. 6.

[23] *Karemera* Decision of 14 May 2008, para 12.

[24] *See Karemera* Decision of 14 May 2008, para 12; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1311-Anx2, Decision Issuing a Confidential and a Public Redacted Version of 'Decision on Disclosure issues, responsibilities for protective measures and other procedural matters (TC), 8 May 2008, para. 94, where the ICC Trial Chamber notes that the Accused has "an absolute entitlement" to potentially exculpatory evidence. The Trial Chamber added "The fact that it may be undermined by other evidence, or the witness may also provide incriminating evidence ... are all irrelevant for these purposes. If the real possibility exists that this evidence may contribute to a resolution of material issues in the case in favour of the accused, he is to be provided with it [...]".

[25] *Karemera* Decision of 30 June 2006, para. 10.

[26] *Karemera* Decision of 30 June 2006, para. 10.

[27] *Karemera* Decision of 30 June 2006, para. 15.

[28] *Karemera* Decision of 30 June 2006, para. 9.

[29] *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, para. 180. See also *Prosecutor v. Naser Oric*, Case No. IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 (TC), 13 December 2005 (*Oric* Decision of 13 December 2005), para 20, "... the disclosure of Rule 68 material to the Defence is of paramount importance to ensure the fairness of proceedings before this Tribunal."

[30] *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No.IT-95-14/2-A, Decision on Motions to Extend for Filing Appellant's Briefs (AC), 11 May 2001, para. 14.

obligation under Rule 68(A), the Prosecutor will be presumed to be acting in good faith, unless the moving party adduces *prima facie* evidence proving otherwise.[31]

13. In order to succeed on a motion for disclosure of exculpatory information under Rule 68(A), the Defence must: (i) define or identify the material sought with reasonable specificity; (ii) if disputed, satisfy the Chamber on a *prima facie* basis of the Prosecutor's custody and control of the requested material; and (iii) if disputed, satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the requested material.[32]

14. However, not every violation of the duty to disclose exculpatory material warrants a remedy. Before granting a remedy for a breach of Rule 68 obligations, the Chamber must ascertain that material prejudice has been caused to the accused, amounting to an infringement of his or her right to a fair trial.[33] Likewise, the choice of remedy is a matter falling within the Trial Chamber's discretion and must be determined on a case-by-case basis taking into account the scope and significance of the violation *vis-à-vis* the allegations in the Indictment, the persistence of the Prosecution's non-compliance, and the timing of any late disclosure in light of the stage of the proceedings.[34] For example, where the Prosecution shows persistent disregard or lack of diligence in discharging its Rule 68 obligation to such an extent that he could be deemed to be obstructing the proceedings or the interests of justice, the Trial Chamber may consider imposing sanctions against the Prosecutor.[35] On the other hand, where the Prosecution delays the disclosure of exculpatory material until its case closes, the Trial Chamber may consider recalling some prosecution witnesses for further cross-examination by the Defence based on the lately-disclosed material.[36] In addition, or in the alternative, the Trial Chamber may allow the Defence to submit a list of additional witnesses it wishes to call in order to testify on the specific areas relevant to the lately disclosed exculpatory material.[37] According to the *Oric* Decision, a Trial Chamber may, where the violation of the disclosure obligation is so extensive or occurs at such a late stage of the proceedings that it would violate the right of the accused to trial without undue delay, or where it would be impossible or impractical to recall prosecution witnesses without effectively re-opening the case in its entirety, opt to draw

[31] *Kordic and Cerkez*, Judgement (AC), 17 December 2004, para. 183 ("the general practice of the International Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution execution of that function in good faith"); *Karemera* Decision of 28 April 2006, para. 17.

[32] *Karemera* Decision of 14 May 2008, para. 9; (*Nahimana et al.* Decision of 8 December 2006), para. 34; *Blaskic* Appeals Judgement, para. 268; *Karemera* Decision of 28 April 2006, para.13; *Bagosora et al.*,Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para.2; *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para.3. *See also Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of the Procedure and Evidence" (TC), 29 April 1998, para. 14.

[33] *Karemera* Decision of 28 April 2006, para. 7

[34] *Karemera* Decision of 28 April 2006, paras. 8-9.

[35] *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution (TC), 19 October 2006, paras. 16-17.

[36] *Oric*, Decision on Urgent Defence Motion Regarding Prosecutorial non-Compliance with Rule 68 (TC), 27 October 2005, p. 5; *see also Karemera et al.*, Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness (TC), 4 March 2008 para. 19.

[37] *Ibid.*

reasonable inferences from the disclosed material at the stage of its definitive evaluation of the evidence.[38]

15. Where material requested by the Defence under Rule 68 is known and could be retrieved by the Defence with relative ease, then material prejudice cannot be shown.[39] By parity of reasoning, "something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)."[40] Therefore, if the sought material is not in the possession of or accessible to the Prosecutor, he cannot be obliged to disclose it.[41]

(ii) Alleged Violation of Disclosure Obligations relating to the 'Belgian Files':

16. In response to the Chamber's Interim Order of 12 August 2008, the Prosecution filed submissions indicating that after a perusal of its disclosure records, it was in a position to confirm that the "Belgian Files" were disclosed in un-redacted format.[42]

17. In its submissions, the Ndindiliyimana Defence cursorily submitted that it had never received the "Belgian files" in any format, redacted or un-redacted.[43] On the other hand, the Nzuwonemeye Defence admitted that the documents it received as part of the "Belgian Files" were not redacted.[44] While the Defence for Sagahutu stated that the Chamber's Interim Order did not concern its case because the documents that it requested in its motion were not part of the pre-trial disclosure referred to as the "Belgian Files",[45] the Defence for Bizimungu did not respond.

18. Having fully considered the submissions of the Parties, the Chamber finds that the pre-trial disclosure of the "Belgian files" in May and July 2004 by the Prosecution was not redacted. This is borne out by the submissions of the Prosecution and the candid admission by the Defence for Nzuwonemeye. Since the practice of the Prosecution is to make all relevant disclosures to all the Defence teams at the same time, there is no reason to believe that anything other than un-redacted disclosure of the Belgian files was made by the Prosecution in 2004. The Chamber therefore will not rely on the submissions made by the Defence for Ndindiliyimana that the Belgian files were never disclosed to it.

19. The Chamber finds that the Defence teams have been in possession of the Belgian files in un-redacted form since 2004, and therefore, they cannot claim that the Prosecution violated its obligation to disclose exculpatory documents contained in that

[38] *Oric* Decision of 13 December 2005, para. 35.
[39] *Blaskic*, Decision on the Appellant's Motions for the Production of Material, Suspension or extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000 (*Blaskic* Decision of 26 September 2000), para. 38.
[40] *Prosecutor v Niyitegeka*, Case No.ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 35.
[41] *Karemera et al.*, Decision on Disclosure of Witness Reconfirmation Statements (TC), 23 February 2005, para. 7.
[42] Prosecutor's Response to Chamber's "Interim Order on Defence Motions regarding the Prosecutor's Disclosure of Alleged Exculpatory Material dated 11 August 2008", filed on 15 August 2008, para. 9.
[43] Reply to Chamber's Interim Order dated August 11, 2008 Re Disclosure of Exculpatory Material, filed by the Defence for Ndindiliyimana on 18 August 2008, para. 1.
[44] Nzuwonemeye Defence Response in Compliance with Interim Order, dated 11 August 2008, filed on 18 August 2008, paras. 2-3.
[45] Réponse à la "Interim Order on Defence Motions regarding the Prosecutor's Disclosure of Alleged Exculpatory Material", filed by the Defence for Sagahutu on 15 August 2008, paras. 7-8.

disclosure. The Appeals Chamber has held that the Prosecution is relieved of its Rule 68 disclosure obligation where the material sought is reasonably accessible to the Defence with the exercise of due diligence.[46] The Chamber concludes that the documents disclosed by the Prosecution in May and July 2004 as part of the "Belgian files", and more fully described in Confidential Annexe 1 to this Decision. have been in the possession of the Defence from the pre-trial phase in un-redacted form. Therefore, the Prosecution has not violated its obligation under Rule 68 in respect of those documents.

20. As a result of this conclusion, the Chamber finds that there cannot be any violation of the Prosecution's disclosure obligations in respect of the following statements since they were fully disclosed as part of the "Belgian files" at the pre-trial phase: (i) Statements of IB dated 16 June 1995 and 27 December 1994, (Ndindiliyimana and Nzuwonemeye); (ii) Statements of MG, dated 27 December 1994 and 16 June 1995[47], (Nzuwonemeye and Ndindiliyimana); (iii) Statement of AV, dated 5 February 1997,(Ndindiliyimana); (iv) Statement of AL dated 21 April 1995, (Ndindiliyimana); (v) Statement of AN dated 10 January 1997, (Ndindilyimana); (vi) Statement of VNM, dated 11 March 1997, (Ndindiliyimana); (vii) Statements of LR dated 6 October 1995 and 27 March 1998, (Ndindiliyimana and Nzuwonemeye) and (viii) Statement of JDT dated 4 January 1995,(Nzuwonemeye.)

(iii) Alleged Violation of Disclosure Obligations relating to RPF Material:

21. The Defence for Sagahutu specifically requests for the disclosure of two un-redacted statements pertaining to the Prosecution's investigations into the role of the RPF in the events that transpired in Rwanda in 1994, numbered R0000280 to R0000283, and R0000299 to R0000302.[48] It claims that part of the criminal conduct attributed to the Accused in this case, were acts committed by the RPF.[49] The Prosecution opposes the disclosure of both these statements, on the grounds that such disclosure may endanger the security of the witnesses, and cause prejudice to ongoing investigations.[50]

22. The Defence for Nzuwonemeye submits that the Prosecution's disclosure of 39 pages of heavily redacted RPF statements (six witness statements) on 19 March 2008, violates the letter and spirit of Rule 68, and requests for the disclosure of these statements *in* un-redacted form.[51] It submits that the identity of the individuals who made statements to the Office of the Prosecutor concerning the RPF is inextricably connected to the content of the statements, and as such, the redacted statements do not satisfy the disclosure requirements under Rule 68.[52] The Defence for Bizimungu specifically claims that the Prosecution's disclosure of redacted RPF materials on 19 March 2008 was not justified

[46] *Blaskic* Appeals Judgement, para. 296.
[47] In relation to the 16 June 1995 statement, the Prosecution responds that the 16 June 1995 statement was disclosed in redacted form on 24 August 2001, and then on 29 May 2008. (*See* Prosecution filing of 30 May 2008). The Nzuwonemeye Defence, however, claims in its latest submission that the 16 June 1995 statement was also disclosed in un-redacted form as part of the Belgian files. (*See* Nzuwonemeye Defence Response in Compliance with Interim Order, dated 11 August 2008, filed on 15 August 2008, para. 2).
[48] Sagahutu Motion, para. 24.
[49] Sagahutu Motion, para. 26.
[50] Prosecution Response to Sagahutu Motion, para. 4; Prosecution Ex Parte and Confidential Submissions, paras. 13- 14.
[51] Nzuwonemeye Motion, paras. 17, 22.
[52] Nzuwonemeye Motion, para. 20.

pursuant to Rule 39 (ii) of the Rules, and the Prosecution was required instead to request special measures of protection for such witnesses from the Chamber.[53] The Prosecution disputes the exculpatory nature of these statements, in that they do not contain any references to Nzuwonemeye, nor to the RECCE battalion at all times relevant to the charges against him.[54] Accordingly, the Prosecution claims that the disclosure of the identifying information of the authors of the statements is without legal basis "because the request is based on speculation that the statements might become exculpatory if the makers of the statements are known."[55]

23. The Chamber is not convinced by the Prosecution submission above. The Chamber notes that the purpose of disclosure of exculpatory material is to permit the Accused to make effective use of it. This purpose will be defeated if the Prosecution is allowed to redact the statement so extensively as to conceal its exculpatory content or otherwise render it useless for the purposes of the defence.[56] Rule 39 (ii) allows the Prosecutor to take special measures for the safety of potential witnesses and informants. Such measures may include reasonable redaction of information in witness statements so as to remove any danger to their security. However, where the identity of the witness or the maker of the exculpatory statement in question is so closely linked to the contents of the statement as to render the latter meaningless without the former, it would be impermissible to redact the identity of the witness.[57]

24. Rule 68 (D) requires the Prosecutor to apply to the Chamber to be relieved from the obligation to disclose exculpatory material if such disclosure may prejudice further or ongoing investigations or is contrary to the public interest. Notwithstanding these provisions, in order to have meaningful disclosure under Rule 68, the redacted versions of exculpatory material must be "sufficiently cohesive, understandable and usable."[58] In other words, the Defence must be in a position to make effective use of the disclosed material and present it to the Trial Chamber.

25. The Chamber has now had the opportunity to examine the un-redacted RPF statements provided to it by the Prosecution on an *ex parte* and confidential basis. Regarding the specific request by the Nzuwonemeye Defence for the un-redacted disclosure of the six statements contained in the 19 March 2008 disclosure, the Chamber finds that statements numbered R000-0284-0288, R000-0189-0196, R000-0056-0061, R000-0040-0043, and R000-0034-0036 do not contain exculpatory material relevant to the charges in this case, and do not relate to the credibility of the Prosecution evidence. The sixth statement (R000-0259-0268) will be analysed in the following paragraph.

[53] Bizimungu Motion, paras. 58–59.
[54] Prosecution Joint Response, para. 25.
[55] Prosecution Joint Response, para. 27.
[56] *Blaskic*, Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence" (TC), 29 April 1998 (*Blaksic* Decision on Sanctions), para. 16: "...an established extraction of [exculpatory] evidence from its context would not, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope."
[57] *Bagosora et al*, Decision on Disclosure of Identity of Prosecution Informant (TC), 24 May 2006, para. 5; *Karemera et al*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 20.
[58] *Blaskic* Decision on Sanctions, para 19.

26. Of the four RPF statements on which the Prosecution filed written submissions following the Interim Order, the Chamber notes that the Prosecution objects to the disclosure of three statements, i.e., R0000297-R0000302 dated 28 March 2002 (Statement 1); R0000280-R0000283 dated 18 May 2002 (Statement 2); and R0000259-R0000268 dated 25 April 2002 and 2 May 2002 (Statement 3). On a careful further appraisal, the Chamber finds that Statement 3 does not contain any Rule 68 material, and does not need to be disclosed to the Defence.

27. The Chamber, however, notes that Statements 1 and 2 are specifically requested by the Defence teams for Nzuwonemeye and Sagahutu and relate to the possible role of the RPF in the events of 1994 at CND among other locations. They provide particular information on the role of the 'RPF technicians' in the killings that occurred in various locations in Kigali in 1994 and may be relevant to the crimes attributed to the Accused in those locations. Despite the Prosecution's objections to such disclosure, the Chamber retains its discretion to grant such disclosure in the interests of justice and in order to uphold the fair trial rights of the Accused. The Chamber notes that the case for disclosure is reinforced by the fact that the Prosecution has been in possession of these statements since 2002. This amounts to an impermissible disregard of the Prosecution's obligation to make timely disclosure of Rule 68 material.[59] The Chamber, however, notes that Statement 2 belongs to a witness (ALPHA-1) who has appeared for the Nzuwonemeye Defence in the last session. To some extent, this fact mitigates the actual prejudice caused to the Defence. The Chamber will take into account this mitigating circumstance when determining an appropriate remedy. The Chamber further finds that statement R0000303-R0000306 (Statement 4), requested by the Nzuwonemeye Defence, contains exculpatory material on the role of RPF "technicians" in the killings of Lando Ndasingwa and Kavaruganda (the President of the Constitutional Court) among others, which are crimes ascribed to the Accused in paragraphs 48 and 49 of the Indictment. The Prosecution does not object to the disclosure of this statement. In light of the above reasoning, the Chamber, therefore, orders the Prosecution to disclose Statements 1, 2 and 4 to the Defence in un-redacted form (details provided in the confidential annex.)

28. The Defence teams for Sagahutu and Bizimungu further make blanket requests for all materials contained in the RPF dossier.[60] The Prosecution claims that the Defence has neither identified the required documents nor demonstrated their exculpatory basis.[61] The Chamber finds that the requests for blanket disclosure of all material in the RPF dossier lack specificity and must be denied.[62]

---

[59] The Bizimungu Defence also makes submissions on the lateness of the Prosecution disclosure (Bizimungu Motion, paras. 48–49)

[60] Sagahutu Motion, para. 31 ; Bizimungu Motion, para. 50.

[61] Prosecution Joint Response, para. 35.

[62] *Bagosora et al*, Decision on the Ntakabuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2, where the Trial Chamber noted that a defendant claiming that Rule 68 has been violated by the Prosecution must, among other things, define the exculpatory material with reasonable specificity. See also *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request"); *Blaskic* Appeal Judgement, 29 July 2004, para. 268.

(iv) Request for Documents of the Rwandan Ministry of Defence:

29. The Defence for Sagahutu requests disclosure of all internal documents of the Ministry of Defence in Rwanda prior to the overthrow of the government in 1994.[63] The Defence for Bizimungu also requests disclosure of all documents pertaining to the Ministry of National Defence of Rwanda in relation to the Chiefs of Staff of the Army and the Gendarmerie, as well as "SITREPS", general orders, operational telegrams and other documents pertaining to the Rwandan army – particularly for the period between 1 January and 17 July 1994.[64] It indicates that the documents could demonstrate the functioning of the army during that period.[65] The Prosecution responds that the Defence has failed to show that such documents are in the Prosecution's possession, and that they are exculpatory in nature.[66] The Bizimungu defence insists that the Prosecution is in possession of all documents emanating from MINADEF, since it had made such disclosure in *Bagosora et al.*[67] The Chamber, however, finds that such wholesale requests of both the Defence teams are not sufficiently specific, and must therefore fail.

(v) Analysis of Bizimungu's Motion in Respect of Other Materials:

30. The Bizimungu Defence claims that the Prosecution's disclosure of 29 February 2008 did not contain statements of witnesses who saw Joseph Nzirorera and Casimir Bizimungu in Kigali on the night of 6 – 7 April 1994 and in the morning of 7 April 1994.[68] The Defence, however, does not refer to any particular witness who may have provided information on this issue. The Prosecution states that the statement of NB disclosed on 29 February 2008 indicates that Nzirorera took part in a meeting in Kigali on 7 April 1994 with Bagosora and other MRND leaders.[69] Irrespective of the Prosecution's submission, the Chamber finds that it is unclear which witnesses the Bizimungu defence is referring to in their submissions and will therefore not speculate on the identity of the witnesses on behalf of the Defence. The Defence has therefore not discharged its burden in this respect.

31. The Prosecution disclosed as part of its Response to the Bizimungu motion dated 2 April 2008 the document of the *commission rogatoire* of 7 June 2001 pertaining to Joseph Nzirorera, in which the latter says that he was in Kigali on 6 – 7 April 1994.[70] The Defence claims that it has been prejudiced by this late disclosure as it was denied the opportunity to use this document to test the credibility of witnesses who alleged that Nzirorera was in Ruhengeri on 6 – 7 April 1994.[71] The Chamber finds that the Prosecution's disclosure of the *commission rogatoire* document relating to Nzirorera is an admission of its exculpatory nature, and that such belated disclosure, despite having it in its possession since 2001, constitutes a violation of its obligation.

32. The Defence further asks for the specific statement of Casimir Bizimungu at the enquiry conducted by Judge Brugière in 2001 and claims that it is exculpatory for reasons

[63] Sagahutu Motion, para. 32.
[64] Bizimungu Motion, para. 34.
[65] Bizimungu Reply, para. 30.
[66] Prosecution Response to Sagahutu Motion, para. 22; Prosecution Joint Response, para. 30.
[67] Bizimungu Reply, paras. 25–29.
[68] Bizimungu Motion, para. 35.
[69] Prosecution Joint Response, para. 31.
[70] Prosecution Joint Response, para. 31
[71] Bizimungu Reply, paras. 33–34.

similar to the Nzirorera statement.[72] The Defence has, however, not established that such report is in the Prosecution's possession, nor specifically the *prima facie* exculpatory nature of that report. Therefore, the request in regard to the statement of Casimir Bizimungu must fail.

33. The Defence submits that the statement of Witness ANU dated 9 June 1999, who testified in the trial of *Karemera et al.*, allegedly contradicts the testimony of Prosecution Witness GAP on the presence of the Accused Bizimungu at the Busogo Parish on 8 April 1994.[73] The Defence further submits that the Prosecution was in possession of this statement since June 1999, but disclosed it only in March 2008, after Witness ANU's testimony in the case of *Karemera et al.*[74] The Defence claims that it has suffered definite prejudice in not being able to use ANU's statement during the testimony of Witness GAP.[75] In response, the Prosecution does not address the issue of prejudice to the Defence, but chooses to limit its submission to the non-contentious fact that the Defence was already in possession of ANU's statement and transcripts from the *Karemera et al.* case. The Prosecution further annexes the statement to its Response.[76] The Chamber notes that the statement was recorded by Prosecution investigators on 9 June 1999, but only disclosed it to the Defence in 2008. This represents an inordinately long period for the Prosecution to have kept from the Defence a statement that may directly contradict evidence given by a Prosecution witness. The Chamber reiterates that the Prosecution's disclosure obligation under Rule 68 is a continuous one which subsists throughout the proceedings and even during the appeal stage.[77] The Chamber finds that due to the Prosecution's non-disclosure, the Defence was denied the opportunity to use the statement in cross-examining Witness GAP, and the Defence has therefore suffered prejudice.

34. The Defence for Bizimungu requests disclosure of the statements of Belgian officers present in Camp Bigogwe during the period when the alleged training of *Interahamwe* took place at that location.[78] The Prosecution claims that the Defence failed to show that it is in possession of these statements or their exculpatory basis.[79] Since the Defence failed to provide any further details, the Chamber finds that this request lacks specificity and denies it accordingly.

35. The Defence states that among the exculpatory documents disclosed on 29 February 2008 is the statement of journalist MFC who indicates that the Rwandan army was pre-occupied with the war, and that the death of President Habyarimana was the trigger for the events that occurred in Rwanda. According to the Defence, this contradicts the testimony of Prosecution Witness Alison des Forges, among others.[80] The Prosecution submits that the Defence is already in possession of the statements as disclosed on 29 February 2008.[81] The Chamber has reviewed the un-redacted version of this statement filed by the Defence on 30 May 2008. The Chamber finds that the statement does not contain

[72] Bizimungu Reply, para. 35.
[73] Bizimungu Motion, para. 36.
[74] Bizimungu Motion, para. 37.
[75] Bizimungu Motion, para. 38.
[76] Prosecution Joint Response, para. 33.
[77] *Blaskic* Appeals Judgement, para. 267.
[78] Bizimungu Motion, para. 39.
[79] Prosecution Joint Motion, para. 30; Bizimungu Reply, para. 23.
[80] Bizimungu Motion, para. 41.
[81] Prosecution Joint Response, para. 34.

any material that might be considered to be exculpatory towards Bizimungu. There is therefore no violation by the Prosecution in this regard.

36. According to the Defence, the statement made by one soldier of the 52nd battalion is exculpatory of the Accused and was in the possession of the Prosecution since April 1998.[82] This soldier allegedly states that Bizimungu was often found encouraging the soldiers to conduct themselves well.[83] The Chamber finds that it is unclear which statement the Defence is referring to. This unspecific request is therefore denied.

37. Finally, the Defence requests disclosure of exculpatory documents "in the possession of anyone working for the Tribunal."[84] The Prosecution states that the Defence has failed to specify the documents and adds that it does not have such a category of documents in its possession.[85] The Defence replies that the burden of identifying and disclosing potentially exculpatory documents rests with the Prosecutor rather than the Defence.[86] The Chamber recalls that it is for the Defence to identify the documents with sufficient specificity, and if disputed, to also establish on a *prima facie* basis that the Prosecution is in possession of the said documents. Since the Defence has failed to do so in this case, the request is denied.

(vi) Analysis of Statements commonly relied upon by Nzuwonemeye and Ndindiliyimana:

38. The Defence teams for Nzuwonemeye and Ndindiliyimana submit that the statements of PCK (6 November 1997 & 2 March 1999) contain exculpatory material pertaining to the ENI Report. In particular, Ndindiliyimana submits that PCK describes the genesis of the ENI commission in a manner that could not be attributed to Ndindiliyimana, and that such a document was never distributed to the gendarmes under Ndindiliyimana.[87] Nzuwonemeye states that while the Prosecution has sought to reduce the ENI Report to one of its points that defined the enemy as Tutsis, PCK provided a contradictory opinion that the Report went further than defining the enemy and encompassed a wide array of issues that included criticism of the RAF management.[88] The two statements of PCK state *inter alia*, that the full ENI report was never published and that only the excerpted part of the report which dealt with the definition of the enemy along ethnic lines was circulated to units of the Rwandan army. PCK states that he does not believe the report was circulated to the *gendarmerie*. The statements also contain information to the effect that the *gendarmerie* were considered by the MRND leadership as accomplices of the enemy: that gendarmes collaborated with UNAMIR to search for weapons in Kigali; that the meeting of senior military officers held on 7 April 1994 at ESM did not support the proposal for a military take-over of the country; that Ndindiliyimana was visibly agitated by news of the death of Prime Minister Agathe and said "things would not work" if people were being killed in that manner; and that Presidential Guard soldiers were eliminating opposition leaders in the morning of 7 April 1994. In light of the charges against Ndindiliyimana and Nzuwonemeye including conspiracy to commit genocide, the Chamber finds that the statements of PCK contain material falling within the ambit of Rule 68 and should have

[82] Bizimungu Motion, paras. 42–43.
[83] Bizimungu Motion, para. 43.
[84] Bizimungu Motion, para. 46.
[85] Prosecution Joint Response, para. 32.
[86] Bizimungu Reply, paras. 36–39.
[87] Ndindiliyimana Motion, para. 22 (k).
[88] Nzuwonemeye Motion, paras. 51–53.

been disclosed to the Defence in a timely manner. The Prosecution submits that it disclosed the statements in redacted form on 26 May 2000 and in un-redacted form on 29 May 2008.[89] The Chamber concludes that the Prosecution has violated its obligation to disclose these statements "as soon as practicable" - a requirement that is certainly not satisfied by disclosure several years after the trial has started.

39. The Defence teams for Nzuwonemeye and Ndindiliyimana submit that the statements of CR dated 6 October 1995, 27 March 1998 and 4 March 1999 are exculpatory, in that they show that the decision taken at the ESM meeting of 7 April 1994 was to support the Arusha Accords and the institutions established under those Accords.[90] The Chamber agrees that the various statements describe the decisions taken at the meeting of 7 April 1994; the establishment and leadership of the Crisis Committee on 6-7 April 1994; the killing of Prime Minister Agathe and the ten Belgian soldiers; the establishment and membership of the ENI Commission; the massacre of Tutsi refugees who were housed at the ETO and the efforts made by Ndindiliyimana to save those refugees; the signing of a communiqué by ten senior officers of the Rwandan army on 12 April 1994 calling for an end to the massacre of civilians and condemning the killing of the Belgian soldiers; Ndindiliyimana's efforts to get RTLM and Radio Rwanda to tone down their ethnic rhetoric; Ndindiliyimana's saving of a Tutsi major from attack by the *Interahamwe*; as well as the efforts of Ndindiliyimana and Bizimungu to ask political leaders in Gitarama to stop the massacres. The Prosecution submits that it disclosed the statements dated 6 October 1995 and 27 March 1998 on 11 May 2004 as part of the Belgian files, and again on 29 May 2008. Since this Chamber has already found that the Belgian Files were disclosed in un-redacted form, there cannot be a violation by the Prosecution in respect of these two statements. However, the statement dated 4 March 1999 was disclosed for the first time on 29 February 2008. As regards the latter, the Prosecution is, therefore, in violation of its disclosure obligations, since it provided un-redacted disclosure only as late as 2008.

40. Ndindiliyimana and Nzuwonemeye submit that the statements of JDT contain exculpatory material. Nzuwonemeye relies on the part of the statement in which JDT states that members of the Presidential Guard led by Captain Hategekimana were responsible for the death of the Prime Minister, contrary to the testimonies of Prosecution Witnesses ALN, ANK/XAF, HP, DCK and DA.[91] Since the Chamber has already found that there is no violation with respect to the 4 January 1995 statement because it was disclosed in un-redacted form as part of the Belgian files, it will not address Nzuwonemeye's submission any further. According to Ndindiliyimana, JDT states in a document dated 27 October 2000 that he (JDT) was informed by a certain Lieutenant that he had received a telegram from Ndindiliyimana asking him to do everything possible to prevent the people from killing each other after the death of the President.[92] The Chamber finds that this statement could have been used by the Ndindiliyimana Defence in confronting Prosecution witnesses who testified that Ndindiliyimana sent a telegram asking gendarmes to collaborate with the *Interahamwe* and to provide them with weapons to further the attacks. The Prosecution's failure to disclose this statement until 29 February 2008 constitutes an impermissible violation of its disclosure obligation under Rule 68. As a result, the Defence has been prejudiced in its right to a fair trial.

[89] Prosecution filing, 30 May 2008.
[90] Nzuwonemeye Motion, para. 56; Ndindiliyimana Motion, para. 22 (i).
[91] Nzuwonemeye Motion, Table of Exculpatory Evidence, p. 18.
[92] Ndindiliyimana Motion, para. 24 (d).

(vii) Analysis of Statements Relied upon by Nzuwonemeye:

41. The Defence for Nzuwonemeye claims that the recent disclosure of the statement of CN dated 15 September 2000 caused irreparable prejudice to the Defence, since it was given by someone who claims to be Nzuwonemeye's military chauffeur on 6 and 7 April 1994. The Defence refers to the evidence of Prosecution Witness ALN who had claimed to be Nzuwonemeye's driver on those days, and submits that it was prevented by this late disclosure from confronting Witness ALN with this information.[93] The Defence further submits that the September 2000 statement of CN contains exculpatory information on the assassination of the Prime Minister, which could affect the conspiracy charge against the Accused.[94] The Prosecution submits that the Defence is mistaken in its characterisation of the statement, in that CN only states that he was "the driver of the battalion commander until 1994", and not that he was "his driver on 6 and 7 April 1994". The Prosecution further asserts that the Accused failed to challenge Witness ALN's identity as Nzuwonemeye's driver during his testimony. The Prosecution adds that Witness ALN only stated that he was one of the Accused's personal drivers, which is not contradicted by CN's statement. In the end, the Prosecution disputes the exculpatory nature of the statement.[95]

42. The Chamber has examined the statement at issue and finds that it contains material relating to the identity of the killers of Prime Minister Agathe Uwilingimana, the circumstances surrounding the death of the ten Belgian UNAMIR soldiers at camp Kigali on 7 April 1994, the identity of the Corporal who launched a grenade into the building in which Belgian soldiers sought refuge in order to escape from the Rwandan soldiers at Camp Kigali, and the identity of the senior officer who gave the order for the Corporal to be issued with grenades for the purpose of the attack on the Belgian soldiers. Since most of this information appears to contradict the evidence given by Prosecution Witness ALN and other Prosecution witnesses, it constitutes material that should have been disclosed under Rule 68 either because it suggests the innocence of the Accused person, or could be utilised by the Defence in cross-examining Prosecution witnesses. The Chamber notes that, by the Prosecution's own admission, CN's statement was only disclosed on 29 February 2008, nearly eight years after it was recorded and over three years after the commencement of trial. The Chamber finds that the Prosecution has violated its obligation to disclose exculpatory material under Rule 68.

43. The Defence claims that the statement of JG (29 March 1997) contains exculpatory material pertaining to the ENI Report.[96] The Prosecution claims that the statement was with the Defence at the time of the testimony of Alison des Forges, since it formed part of the Prosecution's earlier disclosure.[97] It further claims that the opinion of JG is contained in his book, which is available in the public domain and could therefore have been retrieved by the Defence with relative ease.[98] The Chamber finds that JG clearly states that the version of the ENI report that was in circulation was an abridged one. He noted that

[93] Nzuwonemeye Motion, paras. 26 – 31.
[94] Nzuwonemeye Motion, para. 32.
[95] Prosecution Joint Response, para. 28 (i).
[96] Nzuwonemeye Motion, paras. 44–50.
[97] Prosecution Joint Response, para. 28 (ii) (a). The Prosecution filing of 30 May 2008 indicates that this statement was only disclosed on 29 February 2008.
[98] Prosecution Joint Response, para. 28 (ii) (a).

the report was wrongly interpreted and taken out of context and adds that one of its authors was a well-known human rights defender who opposed ethnic divisions. The Chamber does not find this statement to be exculpatory, since it does note deny Prosecution evidence to the effect that the version of the ENI report which was circulated to members of the Rwandan Armed Forces contained a chapter titled "Definition of the Enemy" which identified the enemy as the Tutsi inside and outside Rwanda. The Chamber therefore finds that there is no violation by the Prosecution of its disclosure obligation.

44. Regarding the *Centre hospitalier de Kigali* (CHK) allegations, the Defence submits that the Prosecution failed to make timely disclosure of the statement of AN1, which contradicted the testimony of Prosecution Witnesses DAR and ZA, and is therefore potentially exculpatory.[99] The Prosecution disputes the exculpatory nature of the statement, since the AN1 fails to specify with exactitude the two weeks he spent at CHK during the months of April and May 1994.[100] The Chamber has considered this statement to the effect that over a period of two weeks between 19 April 1994 and the end of May 1994, AN1 went from ESM to CHK to receive treatment for war-related injuries, but that he did not witness any massacres at the hospital in the course of his visits. The Chamber finds that this statement could have been used by the defence to cross-examine prosecution witnesses who testified about rape and killing of civilians at CHK. The Prosecution's failure to disclose the above statement violates its Rule 68 disclosure obligation.

45. The Defence further claims that in a statement dated 14 August 1998, JPF indicated that during the attack on Belgian soldiers at Camp Kigali on 7 April 1994, one "corporal" launched a grenade given to him by Lieutenant Colonel Nubaha "to finish off the Belgians" who at the time, had locked themselves up in a building.[101] According to JPF's statement Colonel Nubaha ordered Adjutant Sebutiyongera to give the corporal six grenades. The corporal in turn, launched the grenades through the window of the building in which the Belgians were holed up, which eventually killed them. In its response, the Prosecution states that the statement also contains incriminating material.[102] The Chamber recalls that the Prosecution's obligation under Rule 68 is not subject to a balancing test. The mere fact that a statement contains incriminating material does not relieve the Prosecution of its obligation under Rule 68 if the statement also includes exculpatory material.[103] The Chamber finds that this evidence could have been used by the Defence for the purpose of cross-examining the Prosecution witnesses who testified about the killing of the Belgian soldiers, the identity of perpetrators, and of the senior official who gave the order for weapons to be issued for the attack on the Belgians. The Prosecution's failure to disclose it was a clear violation of Rule 68.

46. The Defence for Nzuwonemeye relies on the statements of NB dated 21 and 24 February 1997 to the effect that Nzuwonemeye did not attend the meeting at the Army headquarters on the night of 6 April 1994, and that the RECCE battalion among others did not have any direct link with the Director of Cabinet at MINADEF.[104] The Prosecution submits that the statements contain several allegations that are not exculpatory to the

[99] Nzuwonemeye Motion, paras. 75–79.
[100] Prosecution Joint Response, para. 28 (ii) (e).
[101] Nzuwonemeye Motion, Table of Exculpatory Evidence, p. 18.
[102] Prosecution Joint Response, para. 28 (ii) (f).
[103] *Karemera* Decision of 14 May 2008, para. 12.
[104] Nzuwonemeye Motion, Table of Exculpatory Evidence, p. 19.

Accused.[105] The Chamber has reviewed this statement and recalls that the Prosecution obligation is not limited to the disclosure of materials that are entirely exculpatory in content, pursuant to Rule 68. The Prosecution only disclosed it on 29 February 2008 and even that was in redacted form. The Defence has therefore been prejudiced by this violation.

47. According to the Nzuwonemeye Defence, the statements of JVN (1999-2000 and 18 July 1996) indicate that "a great majority opted for the implementation of the institutions mentioned in the Arusha Accords" at the ESM meeting of 7 April 1994.[106] The Prosecution merely responds that the Nzuwonemeye Defence is at liberty to call JVN as a witness.[107] The Defence states that this submission of the Prosecution is an admission of the exculpatory content of the statements.[108] The Chamber notes that the identified statements contain material exculpatory to the Accused, including information regarding the ESM meeting. The Prosecution admits that it only disclosed this statement on 29 February 2008. The Chamber finds that the statements contain information that could have been useful to the cross-examination of Prosecution witnesses who gave evidence on these issues and therefore should have been disclosed pursuant to Rule 68. This recent disclosure, over three years after the trial has started, clearly violates the requirement that the Prosecution must disclose exculpatory material "as soon as practicable."

48. The Defence for Nzuwonemeye also reiterates its request for the disclosure of the supporting materials on which the *Karemera et al.* Indictment is based.[109] The Defence for Sagahutu makes a similar argument.[110] This Chamber is not seized of the *Karemera et al* case. Therefore, without a specific showing by the Defence that there is *Karemera et al* material in the possession of the Prosecution falling within the scope of Rule 68 with respect to Nzuwonemeye and/or Sagahutu, the Chamber will not concern itself with materials pertaining to proceedings before another Trial Chamber.[111]

(viii) Analysis of the Remainder of Ndindiliyimana's Motion:

49. According to the Defence for Ndindiliyimana, LR's statement of November 1997 shows that the RTLM referred to Ndindiliyimana as *Inyenzi* for saving Tutsis.[112] In its response, the Prosecution submits that this statement was disclosed to the Defence on 29 February 2008.[113] The Chamber has reviewed the said statement and finds that it contains important information which is potentially relevant to the Defence. In particular, the Chamber notes that LR claims to have attended a meeting of the *gendarmerie* general staff in May or early June 1994 which was convened so as to discuss the deteriorating security

[105] Prosecution Joint Motion, para. 28 (ii) (g).
[106] Nzuwonemeye Motion, para. 57.
[107] Prosecution Joint Response, para. 28 (ii) (c).
[108] Nzuwonemeye Reply, para. 73.
[109] Nzuwonemeye Motion, para. 61.
[110] Sagahutu Motion, paras. 16–21.
[111] *See Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 45; *Ndindiliyimana et al* Decision on Nzuwonemeye's Supplemental Motions on Alleged Defects in the Form of the Indictment (TC), 15 July 2008, para. 10.
[112] Ndindiliyimana Motion, para. 23 (d).
[113] Prosecution Response, para. 10.

situation in the country; he attributed this situation to the actions of the *Interahamwe* militia. He further claims that Ndindiliyimana appeared powerless to deal with the situation. Furthermore, the *gendarmerie* as a group was powerless to fight against the *Interahamwe* because the latter was supported by the government in place, the army and the Presidential Guard. The Chamber finds that this statement should have been disclosed to the Defence because it contains material that the Ndindiliyimana defence could have used in its cross-examination of Prosecution witnesses who testified about the role of the gendarmes in the massacres and therefore failure to disclose it in a timely manner has prejudiced the Defence.

50. The Defence submits that the statement of JH indicates that the Accused had been involved in saving Tutsis in Nyaruhengeri.[114] The Chamber has closely examined this statement and notes that JH gives a detailed account of efforts by Mrs. Ndindiliyimana to save the lives of two Tutsi children. In itself, Mrs. Ndindiliyimana's actions do not exculpate her husband from any of the allegations in the Indictment. However, JH also adds that the Kansi Parish massacre was the responsibility of the communal police and Burundian refugees, rather than gendarmes stationed at the Ndindiliyimana's house in Nyaruhengeri. For the latter reason, the Chamber finds that the statement falls within the ambit of Rule 68 in respect of the alleged responsibility of gendarmes for the massacre at Kansi Parish, as contained in Paragraph 73 of the Indictment. Since the statement was disclosed only on 29 February 2008,[115] the Prosecution has violated its obligation to make timely disclosure.

51. The Defence alleges that the statements of both PV[116] and SN[117] also indicate Ndindiliyimana's involvement in saving Tutsis. The Chamber finds that SN's statement relates generally to Ndindiliyimana's character and has no direct relevance to the charges in the Indictment. This statement therefore does not fall within the scope of Rule 68 material. The Chamber is unable to make a finding on the statement of PV because it is written in Dutch.

52. The Defence also relies on the statements of DM and FU to show that the gendarmes were not involved in the commission of atrocities.[118] DM's statement of 14 August 2000 contains information that two busloads of Presidential Guard soldiers came to Butare shortly after 6 April 1994. Together with the *Interahamwe*, these soldiers insulted the gendarmes in Butare and accused them of being *Inkotanyi* accomplices. He adds that because of their opposition to the massacres that were taking place, the Butare gendarmes were ordered to redeploy to Kigali around 19 April 1994. Soon after their redeployment, wide-scale killing of civilians commenced in Butare. He also states that he never heard that gendarmes at Ndindiliyimana's house in Nyaruhengeri had committed any atrocities. In his statement of 16 March 1997, FU also states that Ndindiliyimana, along with Colonel Rusatira wanted the massacres to end. The Chamber finds that these statements may contradict Prosecution evidence regarding the responsibility of gendarmes for massacres, particularly in Butare, and should have been disclosed pursuant to Rule 68. Both statements

[114] Ndindiliyimana Motion, para. 24 (e).
[115] Prosecution filing, 30 May 2008.
[116] Ndindiliyimana Motion, para. 22 (e)
[117] Ndindiliyimana Motion, para. 22 (f).
[118] Ndindiliyimana Motion, paras. 23 (a), and (c).

were disclosed for the first time on 29 February 2008.[119] This violation by the Prosecution has prejudiced the Defence in a significant manner.

53. The Defence for Ndindiliyimana submits that the statement of NC contradicts Witness ANC concerning the events in Kacyiru on 6 – 7 April 1994. The Defence further claims that exculpatory information was redacted by the Prosecution and that the redactions were not limited to the identity of the witness.[120] The Chamber notes that the statement dated 16 September 2003 contains information to the effect that Ndindiliyimana evacuated members of the civilian population, including Tutsi from Kigali to Gitarama in May 1994. Ndindiliyimana also assigned gendarmes to protect the Tutsi families whom he had lodged at the *Hotel Tourisme Sport* in Gitarama. The Chamber finds that this information should have been disclosed to the Ndindiliyimana Defence, but this was not done until 29 February 2008. This violates the Prosecution's obligation under Rule 68 and has occasioned prejudice to the Ndindiliyimana Defence.

54. The Defence submits that the statement of JPB indicates that Ndindiliyimana offered to send gendarmes to ETO after the departure of the Belgian UNAMIR soldiers who were protecting the refugees, but the refugees themselves declined the offer since they thought the gendarmes would kill them.[121] On reviewing the statement dated 9 May 1997, the Chamber finds that the statement contains potentially exculpatory material relevant to Ndindiliyimana. The disclosure of the statement for the first time on 29 February 2008 constitutes a violation by the Prosecution of its obligation under Rule 68.[122]

55. According to the Defence, the statement of AD dated 7 September 2000, confirms that in April 1994, Ndindiliyimana visited the gendarmes in Butare and discussed the Arusha Accords and said it was necessary to reconcile with the RPF.[123] The statement also contains material that blames the gendarmes for some of the killings that took place in Butare, and states that Ndindiliyimana was not against the massacres. Notwithstanding the fact that this statement contains both incriminating and potentially exculpatory material, the Prosecution has an obligation to disclose it under Rule 68. The Chamber finds the Prosecutor in violation of its disclosure obligation since this statement was disclosed only on 29 February 2008.

56. The Defence submits that even though the Prosecution had in its possession statements from 11 Tutsi members of the Rwandan army or gendarmerie, it continued to lead evidence to portray the Rwandan army as mono-ethnic.[124] The Defence admits that all these statements may not be completely exculpatory in nature, but maintains that they need to be disclosed.[125] The Prosecution states that the fact that the Rwandan Armed Forces was also comprised of members of the Tutsi ethnic group does not, by itself, trigger its disclosure obligation under Rule 68, since it is irrelevant to the Indictment.[126] The Chamber finds that the mere fact that there were Tutsi in the Rwandan Army does not provide any

[119] Prosecution filing, 30 May 2008.
[120] Ndindiliyimana Motion, para. 22 (e).
[121] Ndindiliyimana Motion, para. 24 (a).
[122] Prosecution filing, 30 May 2008.
[123] Ndindiliyimana Motion, paras. 23 (f) and (g).
[124] Ndindiliyimana Motion, para. 18; Ndindiliyimana Reply, para. 8.
[125] Ndindiliyimana Motion, para. 19.
[126] Prosecution Response, para. 16.

basis for Rule 68 disclosure in this case. The Defence has not identified any particular statement to support its submissions and the Chamber therefore finds the request to be unspecific. It is accordingly dismissed.

57. The Defence avers that despite the Chamber's order, other exculpatory material in the possession of the Prosecution is yet to be disclosed, including the documents pertaining to the job interview of Nsanzimfura (the former G4 (logistics) in the gendarmerie) prior to his enrolment with the Office of the Prosecutor,[127] the investigative file relating to Paul Kagame, and a letter written by Alison Des Forges to the Prosecutor in favour of Mr. Rusatira.[128] According to the Prosecution, the general allegation that exculpatory statements are missing is too vague to trigger its obligations under Rule 68.[129] The Chamber finds that the Defence has failed to make a *prima facie* showing of the exculpatory content of the materials requested. This request is therefore denied.

58. Lastly, the Defence requests the Chamber to order the Prosecution to disclose sufficient identifying information for all 20 witnesses whose statements are deemed exculpatory by the Defence.[130] The Prosecution contends that the disclosed materials contain adequate information to enable the Defence to locate the witnesses.[131] The Chamber finds that the un-redacted statements contain enough material with which the Defence can investigate the current whereabouts of the witnesses and therefore there is no need to order the Prosecution to disclose further identifying material.

(ix) Remedies:

59. The Chamber finds the Prosecution to have persistently violated its disclosure obligation under Rule 68. The Chamber recalls that the Prosecution closed its case on 7 December 2006; the Defence cases for two of the Accused persons (Bizimungu and Ndindiliyimana) have also closed. The Nzuwonemeye Defence case is in progress and the Sagahutu Defence is scheduled to commence immediately afterwards. The Chamber therefore finds that the Prosecution has shown a lack of diligence in the disclosure of exculpatory material and its violations have prejudiced all the Defence teams in the preparation of their defences. The Accused in this case were deprived the opportunity of using the exculpatory material to test the credibility of Prosecution witnesses. Furthermore, Ndindiliyimana and Bizimungu were denied the opportunity of considering the exculpatory material and deciding whether or not to call any of the witnesses to testify on their behalf. The Prosecution's conduct therefore violates the right of the Accused to a fair trial. In particular the rights of the Accused to examine or have examined the witnesses against them or to obtain the attendance and examination of witnesses on their behalf have been flagrantly infringed. Such a violation cannot go without remedy.

60. The Defence for both Bizimungu and Ndindiliyimana request the Chamber to dismiss all charges against the Accused, or in the alternative, permit the Defence to call additional witnesses.[132] The Defence for Nzuwonemeye asks for a range of remedies

[127] Ndindiliyimana Motion, paras. 16–17.
[128] Ndindiliyimana Reply, para. 11.
[129] Prosecution Response, para. 17.
[130] Ndindiliyimana Motion, para. 26; Ndindiliyimana Reply, para.2.
[131] Prosecution Response, para. 3.
[132] Bizimungu Motion, para. 62 ff; Ndindiliyimana Motion, paras. 25–26.

including withdrawal of charges, exclusion of testimonies of Prosecution witnesses, and stay of proceedings to permit further investigations.[133] The Defence for Sagahutu requests for the withdrawal of certain charges in the Indictment, based on the disclosures.[134] The Defence teams for Bizimungu, Ndindiliyimana and Nzuwonemeye request for sanctions against the Prosecution for its blatant and systematic violation of its disclosure obligations.

61. The determination of a suitable remedy falls within the Chamber's inherent power and responsibility to secure justice and ensure a fair trial for the Accused persons. The Chamber must consider a remedy that is appropriate in the circumstances of this case and that preserves the integrity of the judicial process. In that respect, a large number of remedial options are available to the Chamber. These include recalling relevant prosecution witnesses for further cross-examination, allowing the Defence teams to call additional defence witnesses, excluding relevant parts of the prosecution evidence, drawing necessary inferences from the exculpatory material, dismissing charges touched upon by the exculpatory material, and ordering a stay of proceedings.[135] In determining which of these remedies is the most suitable, the Chamber must take into account the nature and significance of the Prosecution's violations in light of the current stage of proceedings, the rights of the Accused, the need to preserve the integrity of the proceedings, and its obligation to discover the truth about the events that happened in Rwanda in 1994.

62. The Chamber notes that dismissal of charges,[136] exclusion of evidence,[137] a stay of proceedings,[138] and drawing necessary inferences from the evidence[139] are severe forms of remedy that should be invoked only in exceptional circumstances where less severe measures reasonably capable of remedying the Prosecution's violation are unavailable. The Chamber finds that none of these remedies are warranted at this stage of the proceedings.

63. The Chamber considers, however, that it is still feasible to recall certain Prosecution witnesses for further cross-examination and, if necessary, to call additional Defence witnesses. Taking all relevant factors into account, the Chamber finds that this would be the most practical way of remedying the Prosecution's disclosure violations while preserving the rights of the Accused to a full and fair defence and maintaining the integrity of the trial proceedings.

64. The Chamber is fully aware of the possible effect of its finding on the anticipated completion of this trial. However, as a judicial body, the Chamber must, in this situation,

[133] Nzuwonemeye Motion, para. 82.
[134] Sagahutu Motion, page 6.
[135] See *infra*, notes 136-139.
[136] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Decision on the Preliminary Motion Filed by the Defence (TC), 6 November 1996 where the Trial Chamber held that it had no statutory power to annul the Indictment.
[137] *Karemera et al.*, Decision on Joseph Nzirorera's Seventeenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures (TC), 20 February 2008, para. 20.
[138] *Lubanga* Decision of 13 June 2008, paras. 90, 91 citing the ICC Appeals Chamber that "Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed." *See The Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of the Court pursuant to article 19(2) of the Statute of 3 October 2006 (AC), 14 December 2006, para. 36.
[139] *Oric* Decision of 13 December 2005, para. 35, holding *inter alia*, that the Chamber may only draw necessary inferences from the exculpatory material where it is not feasible to recall prosecution witnesses for further cross-examination or call additional defence witnesses.

balance the competing rights of the Accused to a trial without undue delay, with their right to examine witnesses called for and against them bearing in mind the ultimate objective of ensuring a fair trial. The Chamber finds that at this stage of the proceedings, the right balance is struck by giving the Defence an opportunity to further cross-examine selected Prosecution witnesses and, if necessary, call additional witnesses based on the exculpatory material to be disclosed pursuant to this Decision.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS IN PART the Defence Motions;

FINDS that the Prosecution has violated its obligations under Rule 68 in respect of several documents discussed above;[140]

ORDERS the Prosecution to immediately disclose to the Defence in un-redacted format all the documents listed in confidential Annexes 2 and 3 to this Decision;

ORDERS that if they wish to do so, each defence team must within 14 days of the date of this Decision, file a Motion to recall identified prosecution witnesses or additional defence witnesses based on the statements for which the Prosecution has been found in violation of its Rule 68 obligations, provided that the Defence teams shall not call any other witness whose statement does not constitute the subject of violation found by the Chamber in this Decision;

ISSUES a reprimand to the Prosecutor of the ICTR in respect of the Prosecution's lack of diligence in the disclosure of exculpatory material in this case and reminds the Prosecution of its responsibility as ministers of justice to assist the Chamber discover the truth about the allegations in the Indictment and to do justice to the international community, the victims and the accused. The Prosecution must always exercise the highest standards of integrity and care in discharging its obligations;

REQUESTS the Registry to serve the present Decision on the Prosecutor in person.

Arusha, 22 September 2008.

Read and approved by

Asoka de Silva
Presiding Judge

Taghrid Hikmet
Judge
(Absent at the time of Signature)

Seon Ki Park
Judge

[Seal of the Tribunal]

[140] See Confidential Annexes 2 and 3 for details.