



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-98-42-I  
15-01-2009  
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OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Mr. Adama Dieng

Date: 15 January 2009

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**The PROSECUTOR v. Pauline NYIRAMASUHUKO**

Case No. ICTR-97-21-T

**The PROSECUTOR v. Joseph KANYABASHI**

Case No. ICTR-96-15-T

*Joint Case No. ICTR-98-42-T*

**DECISION ON NYIRAMASUHUKO'S MOTION FOR STAY OF PROCEEDINGS  
FOR VIOLATIONS OF HER RIGHT TO A FAIR TRIAL FOLLOWING THE  
NON-DISCLOSURE OF EVIDENCE UNDER RULE 68**

**Office of the Prosecutor**

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**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 en arrêt des procédures pour violations de son droit à un procès équitable suite à la non divulgation de preuves pertinentes à sa défense – articles 15, 46, 54, 66 B) et 68 A) du Règlement de procédure et de preuve*”, filed on 18 November 2008 (“Nyiramasuhuko’s Motion”);

**CONSIDERING:**

- i. “Alphonse Nteziryayo’s Response to ‘*Requête de Pauline Nyiramasuhuko en arrêt des procédures pour violations de son droit à un procès équitable suite à la non divulgation de preuves pertinentes à sa défense – articles 15, 46, 54, 66 B) et 68 A) du règlement de procédure et du RPP*’”, filed on 26 November 2008 (“Nteziryayo’s Response”);
- ii. “*Réponse de Joseph Kanyabashi à la requête de Pauline Nyiramasuhuko en arrêt des procédures pour violations de son droit à un procès équitable suite à la non divulgation de preuves pertinentes à sa défense*”, filed on 27 November 2008 (“Kanyabashi’s Response”);
- iii. “*Réponse du Procureur à la requête de Pauline Nyiramasuhuko en arrêt des procédures suite à la non divulgation de preuves pertinentes à sa défense*”, filed on 27 November 2008 (“Prosecution’s Response”);
- iv. “*Réplique de Pauline Nyiramasuhuko à la réponse du Procureur à sa requête en arrêt des procédures pour violations de son droit à un procès équitable suite à la non divulgation de preuves pertinentes à sa défense*”, filed on 2 December 2008 (“Nyiramasuhuko’s Reply”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

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

**INTRODUCTION**

1. On 27 October 2008, the Defence obtained 15 statements relating to RPF activities in Rwanda between 1990 and 1995 gathered by the Prosecution between 2000 and 2002. In a 29 April 2008 Decision, the Chamber denied the introduction into evidence of three of these statements.<sup>1</sup> On 18 November 2008, Nyiramasuhuko filed a Motion for a stay of proceedings for violations of her right to a fair trial because of the non-disclosure of the statements.

<sup>1</sup> See *The Prosecutor v. Pauline Nyiramasuhuko*, 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, 29 April 2008.



## SUBMISSIONS OF THE PARTIES

*Nyiramasuhuko's Motion*

2. The Defence for Nyiramasuhuko submits that the Prosecution has violated its disclosure obligation under Rule 68 and caused grave prejudice to Nyiramasuhuko. In consequence, the Defence requests the Chamber to order the Prosecution to disclose the 12 unredacted statements identified in this Motion and not subject to the Chamber's 29 April 2008 Decision;<sup>2</sup> to order the Prosecution to search for any documents relating to similar facts concerning the RPF; to order the Prosecution to disclose any documents under its control or possession obtained in its investigation of the assassination of bishops at Kabgayi at the beginning of June 1994; and to order a stay of proceedings.

3. The Defence submits that on 27 October 2008, it learned, fortuitously, that the Prosecution had been in possession of these statements since 2000, 2001 and 2002. The Defence submits that the 12 statements were given by civilians and by persons who had held military or political positions within the RPF before and between April and July 1994. The Defence alleges that the statements relate to the witnesses' participation in crimes, including killings, executions, and massacres of Hutu, and confirm the existence of an RPF plan to seize exclusive power over Rwanda by armed force and to eliminate as many members of the Hutu population as possible. The statements would also confirm that the RPF had a strategy meant to create and then to increase tension inside Rwanda in every sphere of the population using diverse means: this tension culminated on 6 April 1994, when the RPF assassinated President Habyarimana and proceeded toward the systematic elimination of the Hutu population.

4. The Defence submits that the Prosecution has violated its duty under Rule 68 in not disclosing these statements as well as any other statement or document related to the activities of the RPF between 1 October 1990 and 31 December 1994. The Defence submits that the information contained in the statements constitutes evidence relevant to the preparation of Nyiramasuhuko's defence. The statements confirm or corroborate evidence that the Defence sought to present in relation, in particular, to Paragraph 5.1 of the Indictment, which, contrary to the heading under which it appears, does not relate to the "Historical Context" but comprises factual allegations. The information contained in the statements would have affected the credibility of the evidence in chief related to the accusations made in this Paragraph and in paragraphs tied to it, and in particular, the allegation that Nyiramasuhuko belonged to the "presidential entourage" that planned the genocide of the Tutsi because they did not want to lose power. These statements show that the strategy imputed to the presidential entourage, to the MRND, and then to the Interim Government and, through all these groups, to Nyiramasuhuko, could have been, instead, the strategy of the RPF.

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<sup>2</sup> Statements:

- 1 – R0025-R0033: 19 May 2002.
- 2 – R0067-R0069: 3-4 March 2000.
- 3 – R0111-R0116: 24 March 2002.
- 4 – R-0117-R0132: 24 March 2002.
- 5 – R0156-R0164: 11 and 13 October 2001.
- 6 – R0165-R0170: 27 March 2002.
- 7 – R0171-R0188: 10-11 January 2002.
- 8 – R0213-R0216: 18 May 2002.
- 9 – R000-0217-R000-0222 19 May 2002.
- 10 – R0223-R0226: 9 February 2002.
- 11 – R0242-R0247: 7 May 2002.
- 12 – R0253-R0258: 9 May 2002.



5. The Defence further submits that the Prosecution has violated its duty under Rule 68, in not disclosing a file resulting from its investigation into the removal of bishops from Kabgayi in Gitarama *préfecture* at the beginning of June 1994, and their subsequent assassination on 5 June 1994. The Defence submits that this investigation file is in the Prosecution's possession. The information contained in this file is relevant to Nyiramasuhuko's defence, in particular *vis-à-vis* Prosecution Expert Witness Guichaoua's assertions that the Government, including Nyiramasuhuko, left Gitarama on 10 June 1994 and not on 1 June 1994, as Nyiramasuhuko herself testified.

6. The Defence submits that the failure to disclose this material has caused serious prejudice to Nyiramasuhuko and has violated her right to a fair trial. The factual evidence contained in these documents could have corroborated the Defence's assertions as to the powerlessness of the government and Nyiramasuhuko's own powerlessness within the government, in the face of the planning by the RPF of its strategy to take exclusive power once and for all by force, and to contradict the expert witnesses on this subject. The Defence further alleges that this evidence would have explained the uncontrollable reaction of the Hutu population as attributable to the RPF's pursuit of its war of aggression, and to contradict the expert witnesses on this subject.

7. The Defence submits that the only available remedy in these circumstances of extreme prejudice and extreme violation of duty is a stay of proceedings.

***Nteziryayo's Response***

8. The Defence for Nteziryayo supports the Motion.

***Kanyabashi's Response***

9. The Defence for Kanyabashi agrees with the disclosure aspect of the Motion. It submits that the statements mentioned in this Motion have the same relevance as those that were the subject of the Nyiramasuhuko Motion decided on 29 April 2008. The statements attached to Nyiramasuhuko's Motion could have had an impact on Kanyabashi's defence strategy, as they are relevant to the alleged existence of a conspiracy, as stated in Paragraphs 5.1 and 6.22 of his Indictment; to the function and aims of the Civil Defence programme; to the cross-examination of Prosecution Witness QI; and to the credibility of Expert Witnesses Des Forges and Guichaoua.

10. The Defence requests the Chamber to order the Prosecution to immediately disclose the unredacted versions of the statements identified in Nyiramasuhuko's Motion; to order the Prosecution to inform the Chamber and the Accused about further materials that fall under their disclosure obligations pursuant to Rule 68 and to disclose them within 10 days after the Decision has been rendered. The Defence reserves its right to file its own Motion concerning this issue.

***Prosecution's Response***

11. The Prosecution opposes the Motion and refers to the presumption that the Prosecution meets its Rule 68 obligations in good faith. It submits that the statements cited by the Defence do not fall within the ambit of Rule 68 (A) and that the Defence has failed to show how the cited statements constitute exonerating evidence. Even if the Chamber comes to a different conclusion, the Defence has failed to demonstrate that Nyiramasuhuko has suffered any prejudice from the non-disclosure. It notes that the crimes specified in the Indictment took place in Butare *préfecture*, while most of the cited statements concern operations that

occurred in other *préfectures*. Furthermore, the crimes presumed to have been committed by the RPF in Butare would not justify any other crime unless the Defence could show that the crimes said to have been committed by Nyiramasuhuko were committed by the RPF.

12. The Prosecution submits that the Defence has not demonstrated why the file concerning the assassination of bishops at Kabgayi should be disclosed. Furthermore the Prosecution has never disclosed documents concerning the investigation into this event to the Rwandan government. Besides, this trial was open to the public and the Defence could have sought these documents without the help of the Prosecution.

13. With regard to the Defence's request to disclose all documents in the possession of the Prosecution relating to RPF activities, the Prosecution submits that the disclosure of an entire category of material should not be ordered unless this category meets the conditions for disclosure.

#### ***Nyiramasuhuko's Reply***

14. The Defence states that the Prosecution does not give any reason for its assertion that the statements cited in the Motion are not subject to Rule 68 disclosure. The Defence states that it accepts the presumption of good faith but that it has shown explicitly that the Prosecution has violated its disclosure obligation.

15. The Defence states that the non-disclosure has prejudiced the Accused. The statements in question indicate that the Government and the whole territory which was not occupied by the RPF were infiltrated by RPF accomplices. This information could lead the Chamber to the conclusion that roadblocks were erected on the order of the government for stopping this infiltration and may raise a reasonable doubt on the allegation that the terms "accomplices" and "infiltrators" meant the Tutsi population.

16. Concerning the assassination of the bishops in Kabgayi, the Defences asserts that the Prosecution does not tell the truth when stating that it did not make any inquiries on this subject. These inquiries are in the Prosecution's possession or in its control.

### **DELIBERATIONS**

#### **Nyiramasuhuko's Disclosure Requests under Rule 68 (A)**

##### ***Applicable Law***

17. Rule 68 (A) provides that the 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.<sup>3</sup>

18. 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.

<sup>3</sup> *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 et al.*, 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.



The Prosecution is presumed to discharge its obligation in good faith.<sup>4</sup> Rule 68 imposes a categorical obligation on the Prosecution. Therefore, it cannot refrain from disclosing exculpatory material on the ground that the document also includes material that incriminates the accused.<sup>5</sup> The Prosecution's obligation to disclose exculpatory material is essential to a fair trial. 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.<sup>6</sup>

19. When making a request for disclosure pursuant to Rule 68 (A), the Defence must (i) sufficiently identify the material sought; (ii) satisfy the Chamber on a *prima facie* basis of the Prosecution's custody or control of the materials requested; and (iii) present a *prima facie* case that the material is potentially exculpatory 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 will examine whether the accused has been prejudiced by a failure amounting to a violation of his right to a fair trial. Where the 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.<sup>7</sup>

20. If prejudice is established by the failure to disclose under Rule 68 (A), the Chamber may decide on an appropriate remedy. 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.<sup>8</sup>

21. According to ICTR jurisprudence, statements relating to RPF activities may be exculpatory if they tend to disprove a material fact alleged against the accused, or if they undermine the credibility of evidence intended to prove those material facts. This assessment depends on the nature of the charges and evidence heard against the accused.<sup>9</sup> Specific information relating to RPF activities could provide contextual information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case; but evidence of RPF activities which have only a remote connection to the crimes alleged against the accused, such as operations at times or

<sup>4</sup> *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.

<sup>5</sup> *The Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T. Decision on Defence Motions alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 10.

<sup>6</sup> *The Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T. Decision on Defence Motions alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 12, citing *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.

<sup>7</sup> See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, 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, 29 April 2008, para 36, referring to other case law.

<sup>8</sup> *The Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T. Decision on Defence Motions alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 14.

<sup>9</sup> *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.

places unrelated to allegations against the accused, are not exculpatory.<sup>10</sup> Statements relating to RPF activities in specific locations have potential exculpatory character if their content may be relevant to the crimes attributed to the accused in specific locations and if they appear to contain information contradictory to the evidence of Prosecution witnesses.<sup>11</sup>

22. Bearing in mind the principles stated above, the Chamber will consider if the statements referred to in the Motion should have been disclosed to the Defence under Rule 68 (A).

#### ***The 12 RPF Statements Attached to the Motion***

23. On a careful appraisal, the Chamber finds that none of the 12 statements attached to the Motion contain any Rule 68 material requiring their disclosure to the Defence. None of the statements 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 Nyiramasuhuko and are, if at all, only remotely connected to Nyiramasuhuko's case. Furthermore, none of the statements appear to contain specific information contradicting the evidence of Prosecution witnesses. For these reasons, the Chamber denies the request to order the Prosecution to disclose the 12 unredacted statements identified in this Motion.

#### ***Other Documents Related to RPF Activities***

24. The Chamber considers that the Defence request for the disclosure of all statements and documents relating to RPF activities between 1 October 1990 and 31 December 1994 lacks specificity. Therefore, there is no basis for a Rule 68 disclosure and the Chamber denies the request to order the Prosecution to search for any documents that relate to similar facts concerning RPF activities between 1 October 1990 and 31 December 1994.

#### ***Investigation Report***

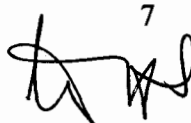
25. The Defence has not shown any basis for its assertion that the Prosecution is in possession of an investigative file concerning the assassination of bishops at Kabgayi in June 1994. The Defence failed to satisfy the Chamber on a *prima facie* basis of the Prosecution's custody or control of documents obtained in an investigation of the assassination of bishops at Kabgayi at the beginning of June 1994 and disclosed to the Rwandan government. Therefore, there is no basis for a Rule 68 disclosure and the Chamber denies the request to order the Prosecution to disclose such documents.

#### ***Nyiramasuhuko's Request to Order a Stay of Proceedings***

26. The Chamber considers that as the Prosecution did not violate its disclosure obligation under Rule 68, the Accused has not suffered any prejudice and there is no basis for the request to order a stay of proceedings. Therefore, the Chamber denies the Motion in this respect.

<sup>10</sup> *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.

<sup>11</sup> *The Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T. Decision on Defence Motions alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, paras. 27-30.

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**Kanyabashi's Request for Disclosure of Documents Attached to the Motion**

27. 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 and not to submit separate or additional requests. The Chamber further recalls that in its Decision of 29 April 2008, it already reminded the Defence for Kanyabashi that the proper procedure for Kanyabashi would have been to submit his own requests through an independent motion under Rule 73 (A).<sup>12</sup> Therefore, the Chamber declines to consider the requests raised in Kanyabashi's Response. In any event the Chamber notes that since the filing of its Response, the Defence for Kanyabashi has filed its own motion regarding this issue.<sup>13</sup>

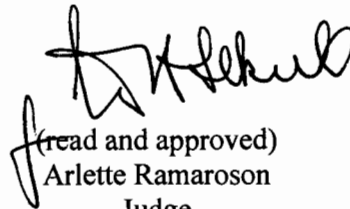
**FOR THE ABOVE REASONS, THE TRIBUNAL**

**DENIES** the Motion in its entirety.

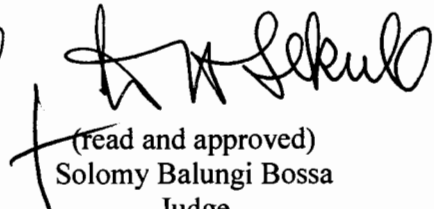
Arusha, 15 January 2009



William H. Sekule  
Presiding Judge



(read and approved)  
Arlette Ramarason  
Judge  
(absent at the time of  
signature)



(read and approved)  
Solomy Balungi Bossa  
Judge  
(absent at the time of  
signature)



<sup>12</sup> *The Prosecutor v. Pauline Nyiramasuhuko*, 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, 29 April 2008, para. 51.

<sup>13</sup> *Requête de Joseph Kanyabashi en divulgation selon l'article 68 du Règlement*, filed on 22 December 2008.