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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 25 February 2009

The PROSECUTOR v. Joseph KANYABASHI

Case No. ICTR-96-15-T

Joint Case No. ICTR-98-42-T

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**DECISION ON KANYABASHI'S MOTION FOR DISCLOSURE PURSUANT TO
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 Joseph Kanyabashi en divulgation selon l'article 68 du règlement*", filed on 22 December 2008 ("Kanyabashi's Motion");

CONSIDERING the:

- i. "Prosecutor's Response to the Motion of Joseph Kanyabashi under Rule 68 of the Rules of Procedure and Evidence", filed on 29 December 2008 ("Prosecution's Response");
- ii. "*Réplique de Joseph Kanyabashi à la réponse du Procureur concernant sa requête en divulgation selon l'article 68 du règlement*", filed on 30 December 2008 ("Kanyabashi's Reply");

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

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

INTRODUCTION

1. On 18 November 2008, Nyiramasuhuko filed a motion for disclosure of RPF-related documents, supported by Kanyabashi.
2. On 24 November 2008, the Defence for Kanyabashi requested the Prosecution to disclose certain documents pursuant to Rule 68; on 28 November 2008, the Prosecution disclosed some of the documents sought, but denied the disclosure of others because it did not consider them exculpatory.

SUBMISSIONS OF THE PARTIES

Kanyabashi's Motion

3. The Defence requests the disclosure under Rule 68 of the remaining documents specified in its 24 November 2008 correspondence to the Prosecution, notably, the unredacted statements of Witnesses DM, FU, LR and AD mentioned in the *Ndindiliyimana* Decision of 22 September 2008¹ and which relate to the beginning of killings in Butare and the role played by *gendarmes*, *Interahamwe* and militia between April and July 1994.
4. According to the Defence, the statements of Witnesses DM and FU contain exculpatory information because they support the Defence theory that the beginning of massacres in Butare was triggered by forces from outside the *préfecture* and they may be relevant in view of the allegations in Paragraphs 6.20, 6.23 and 6.24 of Kanyabashi's Indictment. Witness LR's statement may contain information relevant for Kanyabashi's Defence which seeks to establish a link between the *Interahamwe* and the massacres in Ngoma *commune*. Witness

¹ *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-98-41, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008.

AD's statement may contain relevant information supporting the Defence theory that *gendarmes* participated in the Kabakobwa massacre; that local authorities such as Kanyabashi had no control over the events and could not have stopped the massacres in Ngoma *commune* contrary to the allegations in Paragraph 6.65 of the Indictment.

5. According to the Defence, the Prosecution erred when alleging that these witness statements were not exculpatory because they showed that the Interim Government was in control of the genocide. The Defence states that the Prosecution's false allegation that Kanyabashi had been part of the Interim Government has allowed the Prosecution not to disclose documents which may demonstrate that local authorities such as Kanyabashi were not able to rely on certain elements of the *gendarmerie*.

6. The Defence further requests the disclosure of documents numbered 1, 4, 5, 6, 7, 9, 10 and 12 in Nyiramasuhuko's Motion of 18 November 2008 relating to the RPF, which have been in the Prosecution's possession since 2002 and were deliberately withheld from the Defence.²

7. The Defence submits that these documents should have been disclosed under Rule 68 because they are relevant to Paragraphs 5.1 and 6.22 of the Indictment, which allege conspiracy to commit genocide; regarding the function of Civil Defence; regarding Kanyabashi's lack of *de facto* power; and regarding the testimony of Prosecution Witnesses QI, Des Forges and Guichaoua.

8. The Defence submits that the documents show that the RPF committed massacres before and during the period between April and July 1994, which may demonstrate that the conduct of the population in Butare was independent from any actions taken by the local authorities.

9. The Defence submits that RPF statements 4, 10, and 12 suggest that the attack against the presidential plane was committed by the RPF with the aim of destabilising the country. This information may be exculpatory because it indicates that roadblocks were erected to fight the RPF and not for the purpose of killing Tutsi in general. The statements further suggest that the Civil Defence was used to fight the RPF but not to kill all Tutsi.

10. The Defence submits that the statements detailing that the RPF was near Butare in May 1994 (statements 4 and 12) and the statements concerning the infiltration practices of the RPF in the non-occupied zones may be relevant for the Defence in providing a better explanation of the actions taken by local authorities regarding the Civil Defence.

11. The Defence also submits that documents containing information about the RPF activities in areas distant from Butare may be of an exculpatory nature. All acts by the RPF, independent of where they were perpetrated, could have had consequences on the establishment of roadblocks or on Civil Defence because these were based on governmental directions, which applied to all zones in the country not yet occupied by the RPF.

² Document 1- R0025-R0033: 19 May 2002; Document 4 – R-0117-R0132: 24 March 2002; Document 5 – R0156-R0164: 11 and 13 October 2001; Document 6 – R0165-R0170: 27 March 2002; Document 7 – R0171-R0188: 10-11 January 2002; Document 9 – R000-0217-R000-0222 19 May 2002; Document 10 – R0223-R0226: 9 February 2002; Document 12 – R0253-R0258: 9 May 2002.



12. The Defence finally states that the Prosecution applied an erroneous interpretation of its Rule 68 disclosure obligation and requests an order for the Prosecution to review all documents in its possession to ascertain that it has fulfilled its disclosure obligations under Rule 68. In particular, the Prosecution should re-examine all documents in its possession for matters related to the instant Motion applying the test outlined by the Appeals Chamber.³ It should disclose all documents containing information similar to that contained in the statements of Witnesses DM, FU, LR and AD; relating to the destabilisation of Rwanda by the RPF before 6 April 1994; relating to the implication of the RPF in the assassination of President Habyarimana; relating to the RPF's military advance towards Butare and its infiltration between 1 October 1990 and July 1994; and relating to the impact of all these elements on Civil Defence and Kanyabashi's *de facto* power.

13. The Defence submits that the Accused has suffered prejudice from the non-disclosure of the documents in question. The documents sought, if disclosed in time, would have allowed the Defence to conduct appropriate investigations and to call certain witnesses and/or adduce other evidence. In addition, they would have been used during the examination in chief of Witness Reyntjens and during the cross-examination of Prosecution Witnesses Des Forges, Guichaoua and QI.

Prosecution's Response

14. The Prosecution opposes the Motion. It submits that contrary to the Defence's assertion, it correctly applied Rule 68 in assessing the documents sought to be disclosed. Even if that were not the case, the Defence has failed to show how it has been prejudiced by this error.

15. The Prosecution submits that it has determined in good faith that the documents in question are not subject to any Rule 68 disclosure. None of the witness statements tends to show that Kanyabashi took any steps to stop the massacres. The Prosecution submits that Kanyabashi had been part of the Interim Government in his function as *bourgmestre*. The statement of Witness DM dated 14 August 2000 tends to show that the Interim Government sent *gendarmes* from Kigali to reinforce those already in Butare in furtherance of the massacres. The statement of Witness FU states that "the killers were an organized coalition of civilians, soldiers and gendarmes". Witnesses LR's and AD's statements also support the theory that the Interim Government was in control of the armed forces between April and July 1994.

16. The Prosecution submits that the RPF statements listed in Nyiramasuhuko's motion of 18 November 2008 are not subject to disclosure under Rule 68 (A). They do not provide any direct information about RPF activities within the Butare area between April and July 1994: neither are they of an exculpatory nature in relation to the allegations against Kanyabashi nor are they relevant for testing the credibility of Prosecution witnesses

17. Therefore, there is no good reason to order the Prosecution to re-examine the documents in its possession on the basis of the Appeals Chamber Decision of 14 May 2008.

³ The Defence refers to *The Prosecutor v. Karemera et al.*, Case No ICTR-98-44, Decision on Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 13 May 2008, para. 12.

Kanyabashi's Reply

18. The Defence states that the Prosecution has not applied the appropriate criteria for disclosure and, in so doing, cannot claim to be acting in good faith regarding its Rule 68 disclosure obligations.

19. The Defence submits that the Prosecution's refusal to disclose the witness statements in question is wrongly grounded in the Prosecution allegation that Kanyabashi was connected with the Interim Government, the army and the *Interahamwe*.

DELIBERATIONS

Applicable Law

20. 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.⁴

21. The initial determination as to whether a document is exculpatory pursuant to Rule 68 (A) is primarily a fact-based judgement made by and under the responsibility of the Prosecution which has a positive obligation to disclose exculpatory material in its possession. The Prosecution is presumed to discharge its obligation in good faith.⁵ 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.⁶

22. 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.⁷ If prejudice is established by the failure to disclose under Rule 68 (A), the Chamber may decide on an appropriate remedy.

⁴ *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.

⁵ *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.

⁶ *The Prosecutor v. Ndindiliyimana 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.

⁷ See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, 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



23. Bearing the above principles in mind, the Chamber shall now examine whether the documents whose disclosure is requested should have been disclosed to the Defence under Rule 68 (A).

Request for Disclosure of the Statements of Witnesses DM, FU, LR and AD

24. As a preliminary matter, the Chamber observes that the Defence has solely relied on excerpts of the statements of Witnesses DM, FU, LR and AD quoted in the *Ndindiliyimana* Decision of 22 September 2008 in support of its request for disclosure. The Chamber notes that the Defence has sufficiently identified these documents and that they are in the Prosecution's possession.

25. The Chamber has carefully analysed the excerpts of the statements of Witnesses DM, FU, LR and AD and Paragraphs 6.20, 6.23, 6.24 and 6.65 of the Kanyabashi Indictment. The Chamber observes that the excerpts do not provide specific information linked to allegations or charges made against the Accused Kanyabashi in the above paragraphs of his Indictment.⁸ The Chamber also notes that none of the excerpts presents a *prima facie* case that the material is exculpatory or potentially exculpatory or may affect the credibility of the Prosecution evidence within the context of Kanyabashi's Defence. Moreover, no prejudice has been shown to have arisen from the Prosecution's failure to disclose the statements of Witnesses DM, FU, LR and AD to the Defence. The Chamber thus denies the request to order the Prosecution to disclose the statements of Witnesses DM, FU, LR and AD to the Defence.

Request for Disclosure of RPF-Related Statements

26. As a preliminary matter, the Chamber is satisfied that the RPF-related statements attached to Nyiramasuhuko's Motion of 18 November 2008 are sufficiently identified and are in the Prosecution's possession.

27. According to the 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.⁹ 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 places unrelated to allegations against the accused, are not exculpatory.¹⁰ Statements relating to RPF activities in specific locations have potential exculpatory character if their content

Evidence under Rule 68, paras. 19, 20 and 21, quoting 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.

⁸ See *Ndindiliyimana et al.* Decision of 22 September 2008 (idem footnote 1), para. 49 (Witness LR), para. 52 (Witnesses DM and FU) and para. 55 (Witness AD).

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. 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.

¹⁰ *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.



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.¹¹

28. The Chamber has carefully analysed statements numbered 1, 4, 5, 6, 7, 9, 10 and 12 attached to Nyiramasuhuko's Motion of 18 November 2008 and Paragraphs 5.1 and 6.22 of the Kanyabashi Indictment, which are the subject of this Motion. None of the statements provide specific information linked to allegations or charges made against the Accused Kanyabashi; rather, the statements address alleged RPF operations at times or places unrelated to allegations against Kanyabashi and may be, if at all, only remotely connected to Kanyabashi's case. The Chamber also notes that none of the statements presents a *prima facie* case that the material is exculpatory or potentially exculpatory or may affect the credibility of the Prosecution evidence within the context of Kanyabashi's Defence. Moreover, no prejudice has been shown to have arisen from the Prosecution's failure to disclose the statements to the Defence. For these reasons, the Chamber denies the request to order the Prosecution to disclose the eight RPF-related statements to the Defence.

Further Disclosure Requests

29. The Chamber considers that the Defence request that the Prosecution reviews all documents in its possession to ascertain that it fulfilled its Rule 68 disclosure obligations lacks specificity. Therefore, the Chamber denies the request to order the Prosecution to conduct the said review.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Defence Motion in its entirety.

Arusha, 25 February 2009



William H. Sekule

Presiding Judge



Arlette Ramaroson

Judge



Solomy Balungi Bossa

Judge

[Seal of the Tribunal]



¹¹ *The Prosecutor v. Ndindiliyimana 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.