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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Adama Dieng

**Date:** 25 February 2009

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**The PROSECUTOR**  
v.  
**Augustin NDINDILYIMANA**  
**Augustin BIZIMUNGU**  
**François-Xavier NZUWONEMEYE**  
**Innocent SAGAHUTU**  
*Case No. ICTR-00-56-T*

**DECISION ON NDINDILYIMANA'S 2<sup>nd</sup> MOTION FOR DISCLOSURE  
VIOLATIONS**

*Rule 68 of the Rules of Procedure and Evidence*

**Office of the Prosecution:**

Mr Alphonse Van  
Mr Moussa Sefon  
Mr Lloyd Strickland  
Mr Abubacarr Tambadou  
Ms Faria Rekkas

**Counsel for the Defence:**

Mr Gilles St-Laurent and Mr Benoît Henry for Augustin Bizimungu  
Mr Christopher Black and Mr Vincent Lurquin for Augustin Ndingilyimana  
Mr Charles Taku and Ms Beth Lyons for François-Xavier Nzuwonemeye  
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

## INTRODUCTION

1. On 1 December 2008, the Defence for Ndingilyimana filed a motion alleging that the Prosecutor violated his Rule 68 disclosure obligations ("Defence Motion")<sup>1</sup>. The Defence Motion refers to three statements from the Special Investigations Unit of the Office of the Prosecutor ("Rwanda Files") posted on the Electronic Disclosure System ("EDS").<sup>2</sup> The Defence states that the contents of these statements are exculpatory within the meaning of Rule 68 of the Rules of Procedure and Evidence ("Rules") and should therefore have been disclosed by the Prosecutor pursuant to Rule 68.

2. The Defence further contends it has suffered prejudice as a result of the Prosecutor's failure to disclose the statements in violation of his obligation under Rule 68. The Defence contends that some of the statements are heavily redacted and therefore requests the Chamber to order the Prosecutor to disclose un-redacted versions of the statements. In order to remedy the prejudice suffered by the Accused as a result of the failure to disclose the statements in question, the Defence requests the Chamber to stay all the charges against the Accused and order his immediate release. In the alternative, the Defence requests the Trial Chamber to draw reasonable inferences from the alleged exculpatory statements.

3. In his Response, the Prosecution disputes the Defence claim that the aforesaid statements are exculpatory ("Prosecutor's Response"). The Prosecution further requests the Chamber to impose sanctions on Counsel for the Accused for distorting the contents of the statement, dated 3 April 2002 ("April 2002 statement"). The Prosecution submits that the Defence deliberately attempted to mislead the Chamber.<sup>3</sup>

4. The Prosecution further indicated that it will disclose the un-redacted versions of the aforesaid statements for the exclusive review of the Trial Chamber. On 5 December 2008, the Prosecution disclosed to the Chamber on a confidential basis the un-redacted versions of the statements.

5. In its rejoinder, the Defence reiterated its submission that the said statements are exculpatory within the meaning of Rule 68 and denied that it deliberately sought to distort the April 2002 statement.<sup>4</sup>

## DELIBERATIONS

### *Applicable law*

6. The Chamber recalls that Rule 68(A) requires the Prosecutor 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."<sup>5</sup> The

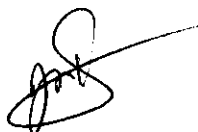
<sup>1</sup> Augustin Ndingilyimana's 2<sup>nd</sup> Motion for Disclosure Violations, Remedial and Punitive Measures dated 26 November 2008, filed on 1 December 2008.

<sup>2</sup> See statement dated 29 March 2002, No. R0000145-R0000151 ("March 2002 statement"); statement dated 3 April 2002, No. R000022-R000024 ("April 2002 statement"); and statement dated 10 May 2002, No. R0000138-R0000144 ("May 2002 statement").

<sup>3</sup> The Prosecutor's response to "Augustin Ndingilyimana's 2<sup>nd</sup> Motion for Disclosure Violations, Remedial and Punitive Measures" filed on 4 December 2008.

<sup>4</sup> Augustin Ndingilyimana's Rejoinder to the Prosecutor's Reply to His 2<sup>nd</sup> Motion for Disclosure Violations, Remedial and Punitive Measures, filed on 8<sup>th</sup> December 2008

<sup>5</sup> The meaning of exculpatory evidence is supported by a wide body of jurisprudence at the ICTR and ICTY. 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



expression "actual knowledge" has been consistently interpreted as requiring that the requested material be in the Prosecutor's custody or control.<sup>6</sup> In *Karemera et al.*, the Appeals Chamber confirmed that information falls within Rule 68 when it could be relevant to the Defence of the Accused.<sup>7</sup> The initial determination of what material is exculpatory, which is a fact-based judgement, rests with the Prosecutor.<sup>8</sup>

7. 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.<sup>9</sup>

*May 2002 Statement*<sup>10</sup>

8. The Defence contends that the above statement, given by a former RPF soldier, is exculpatory and should have been disclosed pursuant to Rule 68. According to the statement, from May to August 1994, a named RPF Colonel instructed an officer of the high command unit of the RPF, to choose some soldiers to kill Hutu persons who had been arrested by RPF soldiers in various areas in Rwanda including Rwamagana, Musha, Nyagasambo, Rugende, Kicukiro and Masaka. The statement further alleges that the selected RPF soldiers killed between 5 to 20 Hutu persons using small hoes called "UBUFUNI". The author of the statement adds that the mission continued to "Camp G.P in Kigali" and that killings were

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.

<sup>6</sup> *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 Brđjanin*, 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").

<sup>7</sup> *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.

<sup>8</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006 (*Karemera* Decision of 28 April 2006), para. 16; *The Prosecutor v. Blaskic*, Judgement, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004, (*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 2006 (*Nahimana et al.* Decision of 8 December 2006), para. 34, referring, *inter alia*, to *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 Bagaragaza Be Expunged from the Record (AC), 30 October 2006, para. 6.

<sup>9</sup> *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.

<sup>10</sup> The Chamber notes that all the Parties erroneously refer to this statement as the "5 October 2002 statement". The Witness was interviewed by investigators on 2 and 3 October 2001, and again on 10 May 2002 when he signed the statement. For that reason, the Chamber will refer to the statement as the "May 2002 statement."

carried out in a forest behind the Camp.<sup>11</sup>

9. The Defence contends that the statement contradicts the Prosecution's theory that General Ndindiliyimana exerted control or authority over Kigali, including Kicukiro. According to the Defence, the author of the statement alleges that a certain RPF Colonel was in control of Kigali town and is therefore responsible for the crimes that took place in that city, including crimes for which the Accused has been charged. The Defence further argues that the exculpatory nature of the statement is underscored by the fact that it contradicts the evidence of Prosecution witnesses Luc Lemaire, DW and AP who testified about the role of *gendarmes* in the crimes that took place in the Kicukiro area in Kigali.

10. In response, the Prosecution denies that the statement is exculpatory. It argues that the presence of elements of the RPF in Kicukiro should not be equated with control of the area. The Prosecution adds that there is nothing in the statement to contradict its evidence that *gendarmes* under Ndindiliyimana's command collaborated with *Interahamwe* militia to kill Tutsi in Kicukiro and other areas, and further, that the mere fact that the RPF was also engaged in killing Hutu in that area, does not absolve the Accused of responsibility.

11. The Chamber notes that according to the jurisprudence of the Tribunal, statements relating to the RPF activities may be exculpatory if they tend to disprove a material fact alleged against the accused, or if they undermine the credibility of the evidence intended to disprove those material facts. The assessment of the exculpatory character of the statements alluding to the RPF activities depends on the nature of the charges and evidence led against the accused. Specific information relating to RPF activities could provide contextual information which may assist the Chamber in understanding the conduct ascribed to the accused; but information alluding to RPF activities which have a remote connection to the crimes alleged against the accused, such as RPF operations at times or places unrelated to allegations against the accused, are not exculpatory.<sup>12</sup>

12. The Chamber has reviewed the un-redacted version of the statement and notes that there is little evidence to support the Defence's proposition that the RPF was in control of various areas in Kigali. The Chamber notes that information to the effect that the RPF were arresting Hutu from various parts of the country including Kicukiro in Kigali does not lend support to the Defence proposition that the RPF was in control of large parts of the capital. Furthermore, the statement only refers to Kicukiro as the only place in Kigali where the RPF soldiers had arrested Hutu and does not refer to other areas which fall within the geographical ambit of Kigali. It therefore unreasonable to conclude that the RPF colonel named in the said statement was in control of the whole of Kigali.

13. The Chamber has carefully appraised the evidence of the aforesaid Prosecution witnesses in light of the statement of May 2002 and notes that there is no discernible relationship between the information provided in the aforesaid statement and the facts described in the testimony of Prosecution witnesses Lemaire, DW and AP. The Chamber notes that the determination of whether information is exculpatory depends on its relationship to the charges against the accused or the evidence adduced in support of such charges. The

<sup>11</sup> See the Statement dated 10 May 2002, pp. 6-7.

<sup>12</sup> *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution files, 4,5, 6 October 2006, paras.4,5; *The Prosecutor v. Karemera et al.*, Case No. ICTR -98-44-T, Decision on Motion for Disclosure of RPF Material and for Sanctions against the Prosecution, 19 October 2006, para. 6.



Chamber notes that the witnesses testified about the killings of Tutsi civilians in various parts in Kigali such as Nyamirambo, Kicukiro, Remera, Karama hill in Rubungo commune and at Kibagabaga Catholic church while the statement refers to the killings of Hutu by RPF operatives. The Chamber is therefore not convinced that such information can be deemed to be germane to the testimony of the aforesaid witnesses who alleged that *Interahamwe* and gendarmes committed crimes against Tutsi civilians.

14. Furthermore, the said statement refers to the RPF operations in Rwamagana, Musha, Nyagasambo, Rugende, Kicukiro and Masaka, while the evidence of Prosecution witnesses refers to the activities of gendarmes and *Interahamwe* militia in specific areas in Kigali such as Nyamirambo, Kicukiro, Remera, Karama hill in Rubungo commune and at Kibagabaga Catholic church. The Chamber is not convinced that a statement that refers to the RPF operations in geographic areas that are physically distant from the areas alluded to in the testimony of the said witnesses can be deemed to exonerate or mitigate the culpability of the accused or those under his command for alleged crimes against Tutsi civilians in those areas. For the reasons articulated above, the Chamber finds that the said statement does not have plausible bearing on the facts as narrated in the evidence of the aforesaid Prosecution witnesses. The Chamber is therefore not satisfied that the Defence has shown on a *prima facie* basis that the content of the statement dated 5 October 2002 is exculpatory within the import of Rule 68.

#### *March 2002 Statement*

15. The Defence submits that the March 2002 statement is exculpatory because the author indicates that on 6 April 1994, many refugees went into hiding at the CND complex in Kigali where an RPF battalion was based. The statement goes on to say that an RPF officer was instrumental in expelling these refugees from the CND complex and that the refugees were all killed at a roundabout in Kimihurura as they were heading towards Remera.<sup>13</sup> The Defence avers that the aforesaid statement is redacted to such an extent that one cannot ascertain its real content. The Defence therefore requests the Chamber to order the Prosecutor to disclose an un-redacted version of the statement to enable it to determine the importance of the statement.

16. The Chamber has carefully reviewed the un-redacted version of the statement and compared it with the redacted version. It is clear that the redactions relate to the identity of the author, the names of other officers and certain place names. With respect to the specific part of the statement that addresses the CND events, the redactions relate to the identity of the RPF Major allegedly responsible for expelling the refugees from the CND, and the name of the RPF soldier who gave that information to the author of the statement. The Chamber finds that these limited redactions neither render the statement unintelligible, nor do they prevent the Defence from attempting to show the *prima facie* exculpatory nature of the statement. The Defence submission on this statement is therefore dismissed.

#### *April 2002 Statement*

17. The Defence contends that the April 2002 statement contains information that members of the RPF force had infiltrated a roadblock which was situated close to the St. André College in Nyamirambo and were in control of the *Interahamwe* militia operating in that area. The Defence submits that the statement controverts the evidence of Prosecution

<sup>13</sup> See Statement dated 29 March 2002, p. 6



Witnesses WG, GLJ, DBJ and GCB who testified that members of the *Interahamwe* worked in close collaboration with *gendarmes* in killing Tutsi civilians in Nyamirambo.<sup>14</sup> In response, the Prosecution submits that even assuming that the April 2002 statement suggested that RPF elements had infiltrated the ranks of the *Interahamwe* militia and committed crimes, this fact alone would not detract from the responsibility of the *gendarmes* for failing to perform their lawful duty of protecting the civilian population from the killers. In addition, the Prosecution alleges that the Defence deliberately distorted the contents of the statement to suit its arguments and requests that sanctions be accordingly imposed on the Defence.<sup>15</sup>

18. The Chamber notes that the said statement refers to the infiltration of a roadblock in Nyamirambo area by RPF operatives rather than the control of *Interahamwe* by the RPF forces. The statement is also devoid of any information that might reveal the extent of the alleged RPF infiltration in Nyamirambo area or the exact nature of the operations that they carried out in that area that might support the inference that the RPF was in control of the *Interahamwe* in that area. The Chamber therefore concludes that the Defence averment that RPF controlled the *Interahamwe* in Nyamirambo area simply because they had infiltrated a roadblock in the area is not supported by the information contained in the statement.

19. Furthermore, the Defence submits that the said statement is exculpatory because it contradicts the evidence of the Prosecution witnesses WG, DBJ, GCB and GLJ with respect to the events that took place in Nyamirambo area. The Chamber notes that information is deemed to be exculpatory only if it tends to disprove a material fact alleged against the accused, or if it undermines the credibility of evidence intended to prove those material facts. This depends on the nature of the charges and evidence heard against the accused.<sup>16</sup>


20. The Chamber notes that the said statement refers to an infiltration of a roadblock by RPF operatives in an area where the Accused or those under his command are alleged to have committed crimes according to the evidence elicited from Prosecution witnesses DBJ, GCB, GLJ and WG. The Chamber notes that the presence of RPF soldiers at specific locations where the accused or his subordinates are alleged to have committed crimes could, depending on the nature of the information, be deemed to fall within the ambit of Rule 68 as exculpatory information. In this instance, the Chamber is not satisfied that the nature of the information contained in the statement is exculpatory within the meaning of Rule 68. The Chamber notes that the aforesaid Prosecution witnesses attributed a prominent role to the *gendarmes* in the crimes against Tutsi civilians that they claim to have witnessed in Nyamirambo area. In contrast, the said statement is devoid of any reference to the *gendarmes* in the Nyamirambo area. Given the significance of the role that the witnesses attributed to the *gendarmes* in the alleged crimes that they allege to have witnessed in Nyamirambo area, the Chamber is not satisfied that a statement that does not refer to *gendarmes* in Nyamirambo area can be deemed to suggest the innocence or mitigate the culpability of the accused or the *gendarmes* under his command for the crimes that they are alleged to have committed in the Nyamirambo area. The Chamber is therefore not persuaded that the Defence has demonstrated on a *prima facie* basis that the information contained in the said statement is exculpatory within the meaning of Rule 68.

21. The Chamber notes with consternation that in his motion, Counsel for Ndingilyimana distorted the contents of the statement dated 3 April 2002 by inserting the word

<sup>14</sup>See Defence Motion, para. 28

<sup>15</sup> Prosecution Response, paras. 21-23.

<sup>16</sup> *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 10.



distorted the contents of the statement dated 3 April 2002 by inserting the word "Interahamwe" in his translation of an excerpt of the said statement in order to insinuate that soldiers belonging to the RPF had infiltrated a roadblock near St André College in Nyanirambo area and disguised themselves as *Interahamwe*. The portion of the statement as quoted in the motion reads as follows: "and then a few minutes later a response came back from the RPF soldiers at the Barricade disguised as *Interahamwe* in code."<sup>17</sup> The Chamber notes that the original version of the statement does not contain any reference to the word "Interahamwe". The Chamber finds the Counsel's behaviour to be misleading and urges him to desist from such conduct.

22. The Defence request to stay the proceedings or dismiss all charges against Nindiliyimana and to order his immediate release is dismissed.


**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Defence Motion in its entirety.

At Kigali, 25 February 2009, done in English.

  
Aboka de Silva

Presiding Judge

  
Taghrid Hikmet

Judge

  
Seon Ki Park

Judge

[Seal of the Tribunal]



<sup>17</sup> See Nindiliyimana's Motion, para. 26