



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-96-8-T
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PM

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 13 March 2009

JUDICIAL RECORDS ARCHIVE
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The PROSECUTOR

v.

Élie NDAYAMBAJE
Case No. 96-8-T

Joint Case No. ICTR-98-42-T

**DECISION ON NDAYAMBAJE'S EXTREMELY URGENT MOTION FOR
DISCLOSURE UNDER RULES 66 AND 68 AND FOR ADMISSION INTO
EVIDENCE OF TRANSCRIPTS IN THE KALIMANZIRA CASE**

Office of the Prosecutor

Ms. Holo Makwaia
Ms. Adelaide Whest
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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 en extrême urgence d’Élie Ndayambaje: en divulgation de documents selon les articles 66 et 68 du Règlement de procédure et de preuve, en versement en preuve de transcriptions d’audience de certains témoins du Procureur ayant témoigné dans l’affaire Callixte Kalimanzira*”, filed on 3 February 2009 (“Ndayambaje’s Motion”);

CONSIDERING the:

- i. “*Réponse du Procureur à la ‘Requête en extrême urgence d’Élie Ndayambaje en divulgation de documents selon les articles 66 et 68 du Règlement de procédure et de preuve, en versement en preuve de transcriptions d’audience de certains témoins du Procureur ayant témoigné dans l’affaire Callixte Kalimanzira’*”, filed confidentially on 6 February 2009 (“Prosecution’s Response”);
- ii. “*Réplique d’Élie Ndayambaje à la ‘Réponse du Procureur à la ‘Requête en extrême urgence d’Élie Ndayambaje en divulgation de documents selon les articles 66 et 68 du Règlement de procédure et de preuve, en versement en preuve de transcriptions d’audience de certains témoins du Procureur ayant témoigné dans l’affaire Kalimanzira’*”, filed on 9 February 2009 (“Ndayambaje’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 2 December 2008, the Chamber declared the instant case closed after the Accused Ndayambaje completed the presentation of his Defence. On 3 December 2008, the Defence for Ndayambaje, through a correspondence titled: “*Demande de communication de documents en vertu des articles 66 (B) et 68 (A) du Règlement de procédure et de preuve*”,¹ asked the Prosecution to be provided with any prior witness statements relating to the Gisagara and Kabuye Hill events in April 1994, in the *Kalimanzira* and *Ntawukuriryayo* cases; the *Gacaca* files or judicial records of these witnesses and the transcripts of the testimony of witnesses who testified on the Gisagara and Kabuye Hill events in the *Kalimanzira* case. On 15 January 2009, the Defence for Ndayambaje sent a reminder of its letter of 3 December 2008 to the Prosecution on the same subject. In its response dated 21 January 2009, the Prosecution indicated that after having checked its database, it had no material which might fall under Rules 66 (B) and 68 (A) in connection with the *Kalimanzira* and *Ntawukuriryayo* cases. The Prosecution further stated that the Prosecution witnesses’ testimony on the Kabuye Hill events in the *Kalimanzira* case did not contain any exculpatory evidence for Ndayambaje. In addition, the Prosecution indicated that it had in its possession the *Gacaca* files of two witnesses in the *Kalimanzira* case but who did not mention

¹ Unofficial Translation: “Request for Disclosure of Documents Under Rules 66 (B) and 68 (A) of the Rule”

Ndayambaje's name. On 3 February 2009, the Defence for Ndayambaje filed the instant Motion.

SUBMISSIONS OF THE PARTIES

Ndayambaje's Motion

2. The Defence requests the disclosure by the Prosecution of the following material: (a) any prior witness statements relating to the Gisagara and Kabuye Hill events in April 1994, in the *Kalimanzira* and *Ntawukuriryayo* cases; (b) the transcripts of the testimony of witnesses who testified on the same events in the *Kalimanzira* case; (c) the *Gacaca* files of two witnesses mentioned in the Prosecution's letter dated 21 January 2009. In addition, the Defence seeks the admission into evidence of the transcripts of Witnesses BCF, BWO, BWK, BDC and BXG, all of whom testified in the *Kalimanzira* case. Finally, the Defence requests that the Office of the Prosecutor be sanctioned on the basis of Rule 46 as a result of the violation of its obligations for disclosure under Rules 66 (B) and 68 (A).

3. The Defence submits that there cannot be three different versions of the events at Gisagara and Kabuye during the same time periods. However, the Prosecution presented multiple and contradictory versions of these events within the context of the *Ndayambaje*, *Kalimanzira* and *Ntawukuriryayo* cases. The Defence points out that nowhere in the indictments against Kalimanzira and Ntawukuriryayo is Ndayambaje's name mentioned as having been implicated in the Gisagara and Kabuye events during the month of April 1994. The Defence also requests the disclosure of the 17 Prosecution witnesses' statements listed in the Pre-Trial Brief of the *Kalimanzira* case as being expected to testify about the Gisagara and Kabuye events in April 1994.² The Defence further requests that the Prosecution provide it with all the Prosecution witness statements in its possession dealing with said events in the *Ntawukuriryayo* case.

4. The Defence alleges that according to the guiding principles applied by the Chambers of the ICTR and ICTY in relation to the application of Rule 68 (A),³ the Prosecution is bound to disclose all exculpatory documents that may also infringe upon the credibility of the witnesses in the indictment. The Defence argues that the documents currently sought to be disclosed are linked to allegations or charges made against the Accused Ndayambaje as required by the jurisprudence.⁴ The Defence further refers to the *Muvunyi* case, in which the Chamber granted a Defence Motion for disclosure and ordered the Prosecution to disclose the documents immediately to the Defence.⁵

5. The Defence submits that Witnesses BCF, BWO, BWK, BDC and BXG in the *Kalimanzira* case fundamentally contradict the version of events in Gisagara and Kabuye given in the testimonies presented by the Prosecution witnesses in the *Ndayambaje* case. The Defence further asserts that these testimonies fully exonerate Ndayambaje of the allegations regarding Gisagara and Kabuye and cast doubt on the credibility of the Prosecution evidence relating thereto.

² These Prosecution Witnesses are: BBB, BBO, BCI, BCL, BCF, BCN, BCP, BCX, BCZ, BCD, BDJ, BDK, BEF, BWK, BWO, BXG and BXK.

³ The Defence points out paragraphs 9-12 of the said guiding principles.

⁴ The Defence mentions two decisions: *The Prosecutor v. 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 and "Decision on Nyiramasuhuko's Motion for Stay of Proceedings", 15 January 2009.

⁵ *The Prosecutor v. Muvunyi*, Case No. ICTR-0055-T, T. 14 January 2009, p. 4.

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6. The Defence submits that when Counsel for Ndayambaje proceeded with the cross-examination of the Prosecution witnesses in 2004, they were not in a position to use the version of events of these five witnesses in order to test the credibility of the witnesses in the Ndayambaje case. The Defence submits that the Prosecution was aware that these witnesses could exonerate Ndayambaje with regards to the events in Gisagara and Kabuye and was consequently obliged to disclose these statements to it.

7. The Defence submits that Ndayambaje has suffered prejudice as a result of the non-disclosure of the said documents depriving him of essential documents for the preparation of his defence. The Defence argues that while the determination of the appropriate remedy rests with the Chamber, the following measures might be applied in the instant case: (a) the exclusion of testimonies of Prosecution Witnesses EV, TP, RT, TW, QAQ, QBZ, FAU, RV, FAG and QAL; (b) the recall of these Witnesses to be cross-examined on the material received pursuant to Rule 68 (A); (c) an injunction issued to the Prosecution, requesting the disclosure of all the statements in its possession from the *Kalimanzira* and *Ntawukuriryayo* cases relating to the events in Gisagara and Kabuye, as well as all the transcripts of the witnesses heard in the *Kalimanzira* case; and (d) the admission into evidence of the transcripts of Witnesses BCF, BWO, BWK, BDC and BXG. The Defence submits that the remedy referred to at point (d) falls within the remit of Rule 89 (C) and is in compliance with the Chamber's Decision dated 14 November 2008 in the *Ntahobali* case, in which the Chamber revisited the implementing provisions for Rule 89 (C).

8. The Defence points out that it has not delayed in presenting the current Motion as the indictments against *Kalimanzira* and *Ntawukuriryayo* were made public only towards the end of 2005 and 2007 respectively, at the time when the Defence for Ndayambaje was in full preparation for the commencement of the defence phase in accordance with different scheduling orders issued by the Chamber. The Defence further argues that the Prosecution evidence in the *Kalimanzira* case took place in May and June 2008 and that the Defence for Ndayambaje closed its case on 2 December 2008. On 3 December 2008, a request was addressed to the Prosecution to obtain the above-mentioned documents on the basis of Rules 66 and 68.

The Prosecution's Response

9. The Prosecution notes that with respect to the events at Gisagara and Kabuye, Ndayambaje need not have acted alone, and that the crimes alleged against the Accused were the result of a concerted effort by several authorities. It is not surprising that Callixte Kalimanzira is being prosecuted for the crimes that occurred on Kabuye Hill as he was a native of Muganza *commune*, from where most of the Tutsi victims on Kabuye originated; Master of Ceremonies at the Butare meeting of 19 April 1994; and acting Minister of the Interior, in which capacity he accompanied President Sindikubwabo, who gave inciting speeches in Ndora on 19 and 21 April 1994, wherever he traveled.

10. The Prosecution submits that the witnesses in the *Kalimanzira* case simply corroborated the Prosecution's theory that policemen were among the assailants and that the majority of the refugees came from Kibayi and Muganza. The omission of Ndayambaje's name among the attackers could not be considered as a reason for disclosure on the basis of Rule 68.

11. The Prosecution argues that the presence of Ntawukuriryayo, the *sous-préfet* of Gisagara, in Kabuye is not unsurprising, especially when President Sindikubwabo's 19 April

speech was followed by the one on 21 April in Ndora. As *Sous-Préfet*, he depended administratively on Kalimanzira and Sindikubwabo.

12. The Prosecution submits that the transcripts from the *Kalimanzira* case confirm that there was no exculpatory evidence given in favour of Ndayambaje. Witnesses who testified about the Kabuye events in this case simply described how the crimes were committed.

13. The Prosecution argues that the Chamber's oral decision with respect to Witness FAH in the *Muvunyi* case is not applicable in this instance and that the Defence has not explained how this is similar to the circumstances of *Kalimanzira* and *Ntawukuriryayo*.

14. The Prosecution further submits that there is no legal basis for the admission into evidence of the CD containing the transcripts of the testimonies of Witnesses BCF, BWO, BWK, BDC and BXG in the *Kalimanzira* case.

15. With respect to the statements given by Witnesses BBB, BBO, BCI, BCL, BCF, BCN, BCP, BCX, BCZ, BCD, BDJ, BDK, BEF, BWK, BWO, BXG and BXK that are contained in the Prosecution's Pre-Trial Brief, the Prosecution submits that this constitutes a "fishing expedition" on the part of the Defence.

16. The Prosecution notes the jurisprudence of the Tribunal, which states that the simple omission of a meeting in a statement does not mean that the witnesses in question did not attend the meeting in question or that it did not take place.⁶ Following this jurisprudence, the Prosecution argues that the fact that the *Kalimanzira* and *Ntawukuriryayo* witnesses did not mention Ndayambaje does not mean that he did not participate in the events at Kabuye.

17. The Prosecution notes that it is not required to consult the Accused in the exercise of its Rule 68 obligations, as has been determined by the Appeals Chamber.⁷

18. Finally, the Prosecution submits that the Defence for Ndayambaje has not demonstrated how the non-communication of the documents in question has caused the Accused prejudice, that the motion is vague and that it has not demonstrated that the statements could constitute exculpatory evidence.

The Defence Reply

19. The Defence submits that Paragraphs 6.30 to 6.32 of the Indictment against Ndayambaje do not refer to Callixte Kalimanzira or Dominique Ntawukuriryayo or to any other authority as being involved in the events at Gisagara and Kabuye. Furthermore, none of the witnesses who testified about the Kabuye events in the *Nyiramasuhuko et al.* case mentioned Callixte Kalimanzira or Dominique Ntawukuriryayo as having jointly taken part with Ndayambaje in the organisation, supervision and execution of massacres at Kabuye Hill.

20. In the *Kalimanzira* case, many witnesses described the circumstances under which refugees from Gisagara were moved to Kabuye and nowhere in that context was Ndayambaje's name mentioned. According to the Defence, this constitutes exculpatory evidence under Rule 68. Similarly, Ndayambaje's name was not mentioned in testimony describing the events that occurred before and during the massacres at Kabuye Hill.

⁶ *The Prosecutor v. Eliezer Niyitegeka*, Appeals Chamber, 30 June 2006, para. 70.

⁷ *The Prosecutor v. Blaskić*, Case No. IT-95-14-A, 29 July 2004, para. 264; *The Prosecutor v. Karemera*, "Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure", 30 June 2006, para. 9.

21. The Defence argues that the testimonies of Witnesses BCF, BWO, BWK, BDC and BXG on the Gisagara and Kabuye events in the *Kalimanzira* case significantly differ from those of the witnesses who testified in the *Nyiramasuhuko et al.* case, affecting the credibility of Prosecution evidence in the current case.

22. The Defence submits that the request for admission of the transcripts of testimony given by Witnesses BCF, BWO, BWK, BDC and BXG in the *Nyiramasuhuko et al.* case is justified under Rule 89 (C). Furthermore, Witnesses BCF, BWO, BWK, BDC and BXG's respective transcripts meet the requirements of Rule 92 (D) [*sic*].⁸

23. The Defence contends that the statements of the 17 witnesses mentioned in the pre-trial brief in the *Kalimanzira* case which he seeks to be disclosed amount to exculpatory evidence for Ndayambaje and affect the Prosecution evidence in the current case.

DELIBERATIONS

- ***Request for Disclosure Under Rule 66 (B)***

24. The Chamber recalls the provisions of Rule 66 (B): "At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused."

25. The Defence is only required to demonstrate one of the three conditions laid out under Sub-Rule (B) before the Chamber may grant permission to inspect the enumerated items. The Defence is required to demonstrate the *prima facie* materiality of the evidence in question to the preparation of its case, as well as that the said evidence is in the custody or control of the Prosecution. The requirement that the documents are in the custody or control of the Prosecution implies that "Defence Counsel must make specific identification of any requested documentation, thus enabling the Trial Chamber to take action."⁹ A plain reading of this Rule shows that the Prosecutor is obliged, subject to Sub-Rule (C) to permit the Defence to inspect the items enumerated, and is not obliged to disclose them.¹⁰

26. In the instant case, the Defence appears to be making a request for disclosure whereas Rule 66 (B), upon which it relies, refers to a request for inspection. The Chamber recalls that the Defence submitted its first request under Rule 66 (B) on 3 December 2008 followed by the current motion filed on 3 February 2009, that is, after the close of the case. The Chamber does not consider that *prima facie* materiality of the request has been demonstrated at this stage of the proceedings. Therefore, the Chamber denies the request. The Chamber will address disclosure issues under Rule 68(A) below.

⁸ *The Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, "Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis", 9 March 2004, para. 16.

⁹ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, "Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and all Other Documents or Information Pertaining to the Judicial Proceedings in their Respect", 18 September 2001, para. 12; *the Prosecutor v. Delalić et al.*, Case No. IT-96-21-212, "Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence", 6 September 1996, para. 11.

¹⁰ *The Prosecutor v. Nyiramashuko et al.*, Case No. 98-42-T, "Decision on Arsène Shalom Ntahobali's Motion For Disclosure of Documents", 31 January 2006, para. 22.

• ***Request for Disclosure Under Rule 68 (A)***

27. 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.¹¹ 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.¹² Rule 68 imposes a categorical obligation on the Prosecution. Therefore, it cannot refrain from disclosing exculpatory material on the grounds that the document also includes material that incriminates the accused.¹³ 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.¹⁴

28. 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.¹⁵

29. 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.¹⁶

¹¹ *The Prosecutor v. Blaskić*, 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.

¹² *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.

¹³ *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.

¹⁴ *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. 12, citing *Prosecutor v. Dario Kordić 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.

¹⁵ 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.

¹⁶ *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. 14.

30. 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).

• ***Request for Disclosure of Any Prior Witness Statements Relating to the Gisagara and Kabuye Hill Events in April 1994, in the Kalimanzira and Ntawukuriryayo Cases Including Those of the 17 Witnesses Listed in the Pre-Trial Brief for Kalimanzira***

31. The Chamber notes that the Defence request lacks specificity in failing to demonstrate, *prima facie*, the possible exculpatory nature of the statements requested. Consequently, the request is denied.

• ***Request for Disclosure of the Transcripts of the Testimony of Prosecution Witnesses BCF, BWO, BWK, BDC and BXG who Testified on the Gisagara and Kabuye Hill Events in April 1994 in the Kalimanzira case***

32. Having reviewed the testimonies of Prosecution Witnesses BCF, BWO, BWK, BDC and BXG in the *Kalimanzira* case attached to the Motion, the Chamber observes that none of these witnesses specifically mentioned Ndayambaje or linked him to the events in question. However, in the context of the events at Gisagara and Kabuye Hills, the Chamber considers that the fact that Ndayambaje's name was not mentioned does not amount to exculpatory evidence taking into account that the areas appear to have been expansive and the number of individuals involved may have been large and at varying timeframes. As a result, the request for disclosure under Rule 68 (A) is denied.

• ***Request for Disclosure of the Gacaca Files of Two Witnesses Mentioned in the Prosecution's Letter Dated 21 January 2009***

33. The Chamber notes a correspondence from the Prosecution dated 21 January 2009¹⁷ in response to the Defence reminder of 15 January 2009 regarding the request for the *Gacaca* files. In the said correspondence, the Prosecution indicated that it had in its possession the *Gacaca* files of two witnesses in the *Kalimanzira* case who allegedly do not mention Ndayambaje's name. The Chamber does not consider that the Defence has demonstrated the exculpatory nature of these files. The Chamber reiterates that the fact that Ndayambaje's name may not have been mentioned by some witnesses in a specific context does not in itself amount to exculpatory evidence. Therefore, the Chamber denies the request.

34. Moreover, the Chamber observes that the issue at stake in the instant case differs from that in the *Muvunyi* case cited by the Defence. Indeed, in the *Muvunyi* case, the Chamber, pursuant to Rule 68 (A), ordered the immediate disclosure of a witness' testimony heard in the *Nyiramasuhuko et al.* case on the grounds that the said witness had also testified in the *Muvunyi* case.

35. Given that the Defence request for disclosure is denied, its further requests for sanction to the Prosecution under Rule 46 and for remedy including the exclusion of testimonies of Prosecution Witnesses EV, TP, RT, TW, QAQ, QBZ, FAU, RV, FAG and QAL and/or the recall of these Witnesses to be cross-examined on the material received pursuant to Rule 68 (A), become unfounded and moot.

¹⁷ Annex 3 of the Motion.

• **Request for Admission into Evidence of the Testimonies of Prosecution Witnesses BCF, BWO, BWK, BDC and BXG**

36. Under Rule 89 (C), the Chamber has broad discretion to admit any evidence that it deems to be relevant and of probative value.¹⁸ Documents need not be produced through a witness but may be directly introduced into evidence.¹⁹ A distinction must be drawn between admissibility of evidence and the exact probative weight to be attached to it, this will be assessed by the Trial Chamber at a later stage.²⁰

37. At the admissibility stage, the moving party needs to show *prima facie* that the document is relevant and has probative value.²¹ It must also show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment to be relevant.²² The probative value of a document depends on its authenticity. For the document to be considered authentic, the Chamber must be satisfied that there are “sufficient indicia of reliability” to warrant its admission.²³ The requirements for reliability are low at the initial stage of admissibility and the moving party need only demonstrate the beginning of proof that the evidence is reliable.²⁴ Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.²⁵

38. The Chamber does not see how the testimonies of these witnesses could be relevant to the accused Ndayambaje when they apparently did not even contain a reference to his name. As a result, the Chamber considers that the testimonies of Prosecution Witnesses BCF, BWO, BWK, BDC and BXG are inadmissible under Rule 89 (C).

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

¹⁸ *The Prosecutor v Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, “Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence”, 04 October 2004, paras. 5, 7.

¹⁹ *Prosecutor v Karemera et al.*, Case No. ICTR-98-44-T, “Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence”, 25 January 2008, para. 7.

²⁰ *The Prosecutor v Nyiramasuhuko et al.*, Appeal Decision, Case No. ICTR-98-42-A, 04 October 2004, paras. 6, 7.

²¹ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, “Decision on Ntabakuze Motion to Deposit Certain United Nations Documents”, 19 March 2007, paras. 2, 3.

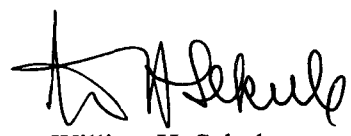
²² *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73.2, “Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence” (AC), 4 October 2004, paras. 7, 8.

²³ *The Prosecutor v. Bagosora et al.*, Case No. 98-41-T, “Decision on the Request to Admit United Nations Documents into Evidence Under Rule 89 (C)” (TC), 25 May 2006, para. 4; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, “Decision on Ntabakuze Motion to Deposit Certain United Nations Documents”, 19 March 2007, paras. 2,3.

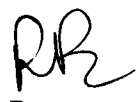
²⁴ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. 98-42-T, “Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence”, 04 October 2004 para. 7.

²⁵ *The Prosecutor v Karemera et al.*, Case No. ICTR-98-44-T, “Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence”, 25 January 2008, para. 5.

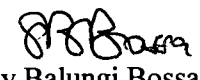
Arusha, 13 March 2009



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge



[Seal of the Tribunal]