



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 30 April 2012

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS SECTION
ICTR
30 APR 2012 10:20
KIGALI

CONSOLIDATED DECISION ON DEFENCE MOTION FOR APPROPRIATE RELIEF IN LIGHT OF PROSECUTION'S DELAYED DISCLOSURE TO THE ACCUSED OF EXCULPATORY EVIDENCE, DEFENCE MOTION IN LIGHT OF THE TRIAL CHAMBER'S *PROPRIO MOTU* ORDER OF 15 MARCH 2012, AND DEFENCE MOTION PURSUANT TO THE TRIAL CHAMBER'S ORDER OF 4 APRIL 2012

(Pursuant to Rule 68 of the Rules of Procedure and Evidence)

Office of the Prosecution:

Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse, Lead Counsel
Philippe Larochelle, Co-Counsel

INTRODUCTION

1. The Prosecution case commenced on 9 November 2009 and closed on 13 April 2010 after calling a total of 19 witnesses in a total of 25 trial days. The Trial Chamber allowed the Prosecution to call one rebuttal witness.¹ The Defence case commenced on 15 April 2010 and closed on 5 May 2011 after calling a total of 40 witnesses in a total of 61 trial days.

2. The Parties filed their Closing Briefs on 5 July 2011.² Following a Directive from the Trial Chamber ("Oral Directive"),³ the Defence filed an Abridged Brief ("Defence Abridged Brief") on 13 July 2011.⁴ On 13 September 2011, the Defence filed a Corrigendum to the Abridged Brief ("Corrigendum to Abridged Brief").⁵ On 20 and 21 October 2011, the Parties presented their Closing Arguments before the Trial Chamber ("Closing Arguments"). On 21 October 2011, the Trial Chamber ordered the proceedings adjourned *sine die*.⁶

3. On 14 February 2012, the Defence sent a letter to the Prosecution requesting transcripts of testimony from three previous ICTR trials, asking whether the Prosecution team had interviewed Defence Witness T77 ("T77") and for relevant written statements.⁷ On 17 February 2012, the Prosecution responded and sent to the Defence a CD-ROM containing transcripts of testimony from three previous ICTR trials ("CD-ROM").⁸

4. On 12 March 2012, the Defence filed "Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence" ("Motion").⁹ The Prosecution filed a Response on 14 March 2012 ("Response").¹⁰

5. On 15 March 2012, the Trial Chamber issued a *Proprio Motu* Order ("Proprio Motu Order"), ordering the Defence to file specific and comprehensive submissions regarding

¹ Prosecution Rebuttal Witness CNR1 testified on 5-6 May 2011.

² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Closing Brief, 5 July 2010 ("Prosecution Closing Brief"); *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Final Brief, 5 July 2010 ("Defence Closing Brief").

³ T. 6 May 2011 pp. 50-51 ("Oral Directive").

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Abridged Final Brief, 13 July 2010 ("Defence Abridged Brief").

⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Corrigendum to "Nzabonimana's Abridged Final Brief" dated 13 July 2010, 13 September 2011.

⁶ T. 21 October 2011 p. 25 ("Oral Order").

⁷ Letter from Defence Counsel to Prosecution Counsel, dated 14 February 2012.

⁸ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecution Response to Defence Request Dated 14 February 2012, 17 February 2012.

⁹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, 12 March 2012.

¹⁰ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, 14 March 2012.

potentially exculpatory material contained on the CD-ROM by 19 March 2012 and the Prosecution to respond by 23 March 2012.¹¹

6. In lieu of complying with this Order, on 19 March 2012, the Defence filed "Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012" ("Motion II").¹² The Prosecution filed its Response on 21 March 2012 ("Response II").¹³ On 23 March 2012, the Defence filed its Reply ("Reply II").¹⁴

7. Because the Defence asserted in Motion II that it had insufficient resources to review the CD-ROM, on 22 March 2012, the Chamber invited the Registrar to make submissions on the human and material resources available to the Defence in 2012 ("Order to Registry").¹⁵ On 26 March 2012, the Registrar filed its submissions ("Registrar's Submissions").¹⁶ The Registrar informed the Chamber that Defence Counsel and Detention Management Section ("DCDMS") received a request from Lead Counsel on 8 February 2012 for additional resources to comprehensively address the disclosures contained on the CD-ROM.¹⁷ On 10 February 2012, Defence Lead Counsel recommended to DCDMS an allocation of 150 hours for one Legal Assistant or alternatively 75 hours for each of two Legal Assistants and 30 hours for Lead Counsel or Co-Counsel.¹⁸ On 13 February 2012 DCDMS accepted the Defence request as it was considered reasonable in terms of material and human resources.¹⁹ On 14 and 16 February 2012, the contracts of two Legal Assistants were renewed for a period ending on 31 March 2012, and for a total allocation of 150 hours.²⁰ The Registrar also submitted that Lead Counsel is assigned for all stages of the case and that Co-Counsel is

¹¹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, *Proprio Motu* Order to the Parties Concerning Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, 15 March 2012.

¹² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 19 March 2012.

¹³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 21 March 2012.

¹⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Defence Reply to Prosecutor's Response to Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 23 March 2012.

¹⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order to the Registry for Submissions Concerning Resources Available to the Defence in 2012, 22 March 2012.

¹⁶ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Registrar's Submission in Respect of the Order to the Registry for Submissions Concerning Resources Available to the Defence in 2012, 26 March 2012.

¹⁷ Registrar's Submissions, para. 4. The Chamber notes that this date precedes the date the CD-ROM was delivered, on 17 February 2012.

¹⁸ Registrar's Submissions, para. 6.

¹⁹ Registrar's Submissions, para. 7.

²⁰ Registrar's Submissions, para. 10.

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assigned for the whole trial stage and should remain available until judgement delivery.²¹

Neither Lead Counsel nor Co-Counsel need be reassigned.²²

8. On 30 March 2012, the Defence requested leave to file a response to the Registrar's Submissions.²³ On the same day, the Chamber issued an Order granting the Defence leave to respond to the Registrar's Submissions ("Order to Defence").²⁴ On 2 April 2012, the Defence filed a document entitled "Motion in Response to the Registrar's Submissions dated 26 March 2012" ("Defence Submissions to Registrar") and the Prosecution filed submissions on the same day ("Prosecution Submissions to Registrar").²⁵ On 3 April 2012, the Registrar filed further submissions ("Registrar's Further Submissions").²⁶

9. On 4 April 2012, the Chamber ordered the Defence to file specific and comprehensive submissions regarding potentially exculpatory material contained on the CD-ROM on or before 13 April 2012 and the Prosecution to respond by 16 April 2012 ("4 April 2012 Order").²⁷

10. On 13 April 2012, the Defence filed its "Motion pursuant to the Trial Chamber's Order of 4 April 2012" ("Motion III").²⁸ The Prosecution filed its Response on 19 April 2012 instead of 16 April 2012 as per the 4 April 2012 Order ("Response III").²⁹ The Defence filed its Reply on 23 April 2012 ("Reply III").³⁰

²¹ Registrar's Submissions, para. 8.

²² Registrar's Submissions, para. 8.

²³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012, 30 March 2012.

²⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order on Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012, 30 March 2012.

²⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Motion in Response to the Registrar's Submissions Dated 26 March 2012, 2 April 2012; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Submissions Pursuant to Order on Defence Request for Leave to Respond to the Registrar's Submissions Dated 26 March 2012, 2 April 2012.

²⁶ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Registrar's Further Submissions on Resources Available to the Defence in 2012, 3 April 2012.

²⁷ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order to the Parties Concerning Submissions on Potentially Exculpatory Material Contained on the CD-ROM Disclosed by the Prosecution on 17 February 2012, 4 April 2012.

²⁸ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion Pursuant to the Trial Chamber's Order of 4 April 2012, 13 April 2012.

²⁹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Request for Condonation and Response to Nzabonimana's Motion Pursuant to Order of 4 April 2012, 19 April 2012.

³⁰ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Reply to the Prosecutor's Request for Condonation and Response to Nzabonimana's Motion Pursuant to Order of 4 April 2012, 23 April 2012.

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A. Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence ("Motion")

SUBMISSIONS OF THE PARTIES

Defence Motion

11. The Defence asserts that the Prosecution violated its Rule 68 disclosure obligations in failing to earlier disclose the materials contained on the CD-ROM.³¹

12. The Defence submits that the documents contained on the CD-ROM are highly exculpatory, and asserts that the Prosecution acknowledged that the documents come under Rule 68 in its letter responding to the Defence request for the documents. The Defence submits that the Prosecution was in possession of the documents before the close of the case and failed to disclose them until the end of February 2012, despite being under a strict and clear obligation to disclose the documents "as soon as practicable".³² In delaying disclosure, the Prosecutor wasted the Chamber's time and "considerable amounts of UN money".³³

13. The Defence asserts that the *Rukundo* trial transcripts contained on the CD-ROM confirm the exculpatory nature of the documents, and support Nzabonimana's claim that Paragraphs 16, 19 and 20 of the Indictment should be dropped. In his testimony during the *Rukundo* trial, Witness BCB did not mention Nzabonimana in relation to the attacks on Ntarabana Parish and the Nyabikenke *commune* office.³⁴ In addition, the testimony of Mugenzi and Mugiraneza in the *Bizimungu et al.* trial "could have information confirming Nzabonimana's alibi".³⁵

14. The Defence submits that the accused has suffered "extreme prejudice" as a result of the delayed disclosure.³⁶ On 24 February 2012, a CD-ROM containing 409 documents was disclosed, in addition to other documents disclosed the day prior, which form the subject of a separate motion.³⁷ The Defence submits that the *modus operandi* of this disclosure is the same as that relating to the disclosure from the *Ngirabatware* trial on 15 November 2011,

³¹ Motion, paras. 3, 15, 26-29.

³² Motion, para. 20.

³³ Motion, paras. 19-20.

³⁴ Motion, paras. 19, 21.

³⁵ Motion, para. 25.

³⁶ Motion, para. 17.

³⁷ Motion, para. 14.

which is also the subject of a separate motion.³⁸ The Prosecution filed a “huge quantity” of relevant documents after the close of trial.³⁹

15. The Defence submits that from the final hearings and closure of the case on 21 October 2011, Nzabonimana was no longer entitled to a Defence team when, in contrast, the Prosecution remains remunerated by the Tribunal.⁴⁰ The Defence asserts: “There is in fact no Defence team since October 2011 to perform the necessary analysis and review of the documents disclosed, let alone preparing the necessary motions in view of these sudden disclosures.”⁴¹

16. The Defence also submits that Nzabonimana has been prejudiced “throughout his trial” and that as a result of the conduct of the Prosecutor and the failure to disclose extremely relevant documents, the Accused has not been accorded a fair trial. The Defence considers that Nzabonimana has suffered a miscarriage of justice.⁴²

17. The Defence requests that the case be re-opened in order to allow the Defence to interview and potentially call relevant witnesses. The disclosure of the materials after the close of trial constitutes an exceptional circumstance in favour of re-opening the case. It further requests that the Chamber sanction the Prosecutor under Rule 46 for his belated disclosure pursuant to Rule 68 of the Rules of Procedure and Evidence (“Rules”).⁴³

Prosecution Response

18. The Prosecution requests that the Motion be denied. It submits that the documents disclosed do not constitute exculpatory material within the scope of Rule 68 disclosure obligations and that it never acknowledged the documents were exculpatory. It states that the Defence has not shown *prima facie* how the materials are exculpatory.⁴⁴ The Prosecution submits that the material was reviewed in good faith, determined not to be exculpatory, but nonetheless disclosed to the Defence out of courtesy and in response to a Defence request.⁴⁵ The Defence claim that the documents are exculpatory amounts to conjecture.⁴⁶

³⁸ Motion, para. 15.

³⁹ Motion, para. 15.

⁴⁰ Motion, para. 16.

⁴¹ Motion, para. 17.

⁴² Motion, para. 18.

⁴³ Motion, paras. 13, 22, 26.

⁴⁴ Response, paras. 2, 4, 11-12.

⁴⁵ Response, para. 3.

⁴⁶ Response, para. 12.

19. The Prosecution asserts that there is no exculpatory material in Witness BCB's testimony. The failure to mention Nzabonimana's name in the context of the attacks on Ntarabana Parish and the Nyabikenke *commune* office does not demonstrate that the testimony is potentially exculpatory, as Nzabonimana was not charged with being present during these attacks.⁴⁷

20. The Prosecution also submits that the Defence did not suffer prejudice and no remedy is required.⁴⁸ Should the material be found to be exculpatory, it lacks probative value and the Defence has not been materially prejudiced.⁴⁹ The Defence fails to demonstrate how Witness BCB's testimony supports the conclusion that Paragraphs 16, 19 and 20 of the Indictment should be dropped.⁵⁰

21. The Prosecution asserts that the testimony of Mugenzi and Mugiraneza was made in open session and therefore available to the Defence. The Defence was not dependent on the Prosecution to grant access to these transcripts. The Defence included a summary of Mugenzi's testimony in its disclosure of 31 March 2010. This material was accessible to the Defence with the exercise of due diligence and did not need to be disclosed.⁵¹

22. The Prosecution also submits that sanctions against the Prosecutor are not required.⁵² A sanction would require a prior warning in accordance with Rule 46(A) and no such warning has been issued.⁵³ In addition, no sanction is warranted because the Prosecution acted in good faith and the Defence was not prejudiced.⁵⁴

23. Further, while the Prosecutor is treated as a single unit for the purpose of discharging its disclosure obligations, delays may occur due to the Prosecution's inability to identify and assess exculpatory material quickly. In the present case, the Prosecution disclosed "the exculpatory material" as soon as the Nzabonimana Defence team requested it. There is therefore, no need for a warning or sanction.⁵⁵ Moreover, the Defence request to single out

⁴⁷ Response, paras. 13-14.

⁴⁸ Response, para. 15.

⁴⁹ Response, paras. 4, 15.

⁵⁰ Response, para. 15.

⁵¹ Response, para. 16.

⁵² Response, para. 18.

⁵³ Response, para. 19.

⁵⁴ Response, para. 20.

⁵⁵ Response, para. 20.

the Senior Trial Attorney in this case and impose specific and harsh sanctions on him personally without prior warning has no basis in law.⁵⁶

B. Nzabonimana's Motion in Light of the Trial Chamber's Proprio Motu Order of 15 March 2012 ("Motion II")

SUBMISSIONS OF THE PARTIES

Defence Motion

24. The Defence submits that it does not have the "time and resources to comprehensive [sic] address the recent disclosures by the prosecutor".⁵⁷ The Defence asserts that it is not able to carry out a sufficiently detailed analysis of the disclosed material because it was occupied with the disclosure of the written statements of Witness T77. The Defence therefore requests a temporary stay of proceedings to seek the resources it needs to address the disclosed documents.⁵⁸

25. The Defence asserts that the disclosure of the documents must be viewed in context with other issues arising during the course of trial. The Defence claims that Prosecutor Paul Ng'arua has disclosed exculpatory material in a belated manner during the *Bizimungu et al.* trial. Therefore, "the presumption that the Prosecutor is acting on good faith is reversed". The Defence claims that the disclosure of the materials must also be viewed in context with the 245,000 Rwandan Francs paid by Prosecution investigators to Rwandan authorities.⁵⁹

26. The Defence claims that the 267 documents disclosed are exculpatory and require additional time to be reviewed and assessed.⁶⁰ The Defence submits that the disclosed material reveals information relevant to Nzabonimana's case regarding events in Ruhango, Murambi and Nyabikenke *communes*. The transcripts of Witness BCB's testimony during the *Rukundo* trial discredit the testimony of Witnesses CNAY and CNAF regarding the Nyabikenke *commune* office attack.⁶¹ The Defence further submits that the testimony of Witness BCB contradicts Witness CNAI's testimony regarding Paragraph 19 of the Indictment,⁶² and discredits Witness CNAF as to Paragraph 45 of the Indictment.⁶³

⁵⁶ Response, para. 21.

⁵⁷ Motion II, para. 6.

⁵⁸ Motion II, paras. 6, 10, 36.

⁵⁹ Motion II, paras. 7-10.

⁶⁰ Motion II, para. 12.

⁶¹ Motion II, para. 13.

⁶² Motion II, para. 14.

⁶³ Motion II, para. 15.

27. The Defence further submits that the transcripts of Mugiraneza's testimony from the *Bizimungu et al.* trial discredit the testimony of Witness CNAL as to Paragraph 54 of the Indictment and undermine the credibility of Witnesses CNAА and CNAC in relation to the Murambi meeting.⁶⁴

28. The Defence further submits that the transcripts provide information which could "cover the gaps" in Nzabonimana's alibi and discredit the testimony of Prosecution Rebuttal Witness CNR1.⁶⁵

29. The Defence reiterates its submission that the Prosecution acknowledged the exculpatory nature of the documents.⁶⁶ Further, the Defence suffered heightened prejudice because the material was disclosed after the trial and therefore could not be used during the proceedings.⁶⁷ The Defence submits that it cannot seek admission of the disclosed material because it concerns acts and conduct of the accused and therefore does not fall within the purview of Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules").⁶⁸ Furthermore, the Defence submits that it does not know whether the relevant witnesses are willing to testify.⁶⁹

30. The Defence asserts that it was the Prosecution's duty to provide the exculpatory evidence and not the Defence's obligation to seek it out. It submits that upon receipt of the identities of potential Defence witnesses, the Prosecution's duty was to seek the statements made by said witnesses and disclose them to the Defence. Some of the witnesses bore pseudonyms and were covered by protective measures and therefore the Defence could not access this testimony.⁷⁰

31. As a remedy, the Defence seeks a temporary stay of proceedings in order to obtain the necessary resources and time to comprehensively address the issues arising from the disclosed material.⁷¹

32. In addition, the Defence requests that the Chamber direct whether it will hear additional evidence on the allegations against Nzabonimana. Should the Chamber hear additional evidence, the Defence indicates that it will either recall Prosecution witnesses for

⁶⁴ Motion II, para. 16.

⁶⁵ Motion II, paras. 18-19.

⁶⁶ Motion II, paras. 12, 29.

⁶⁷ Motion II, para. 30.

⁶⁸ Motion II, para. 31.

⁶⁹ Motion II, para. 32.

⁷⁰ Motion II, para. 33.

⁷¹ Motion II, para. 37.

further cross-examination, call additional witnesses, request the Chamber to draw a reasonable inference in favour of Nzabonimana, pray that the Chamber exclude relevant portions of the Prosecution evidence or order a stay of proceedings and dismiss charges against Nzabonimana.⁷²

33. The Defence also requests an investigation of the Prosecutor's database by a neutral third party mutually agreed to by the Parties.⁷³ The Defence additionally requests that the two Prosecution investigators be summoned to be cross-examined on how the 245,000 Rwandan Francs were used, or that an *amicus curiae* be appointed for this purpose. Depending on the results of this probing, the Defence may request an additional stay of proceedings.⁷⁴

34. The Defence submits that on 16 March 2012, the Defence for Mugenzi requested the Appeals Chamber to quash the conviction of Mugenzi because the Senior Trial Attorney belatedly disclosed exculpatory evidence.⁷⁵ Bicamumpaka was already acquitted of certain allegations against him because the same Prosecution withheld exculpatory evidence. Therefore the presumption that the Prosecution is acting in good faith is reversed. A probe of the Prosecution database by a competent, neutral third party would ensure that there is no additional exculpatory evidence.⁷⁶

35. The Defence further submits that although the Parties are awaiting a decision from the Appeals Chamber with regards to the prosecution of the two Prosecution investigators in connection with the disbursement of the 245,000 Rwandan Francs, the Defence requests that the two investigators be summoned under Rule 98 in the context of re-opening the case. Alternatively, an *amicus* entrusted with auditing the Prosecution database could investigate this issue further.⁷⁷

Prosecution Response

36. The Prosecution submits that the material disclosed to the Defence relating to Witness BCB, Justin Mugenzi and Prosper Mugiraneza, is not exculpatory material falling under Rule

⁷² Motion II, paras. 7, 10, 37.

⁷³ Motion II, para. 38.

⁷⁴ Motion II, paras. 39-40.

⁷⁵ The Chamber notes that Paul Ng'arua is also the Senior Trial Attorney in the *Nzabonimana* case.

⁷⁶ Motion II, para. 8.

⁷⁷ Motion II, para. 9.

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68 disclosure obligations and was simply provided to the Defence as a courtesy upon a Defence request.⁷⁸

37. The Prosecution asserts that the Defence submissions relating to the disclosed materials of Witness BCB and Witness T77 fall outside the purview of the *Proprio Motu* Order, because they were included in preceding motions.⁷⁹

38. The Prosecution asserts that Witness BCB's failure to mention Nzabonimana's presence at the Nyabikenke *commune* office is not exculpatory because Nzabonimana is charged with ordering the attack and not for being present during the attack. Furthermore, his testimony does not contradict the testimony of Witnesses CNAI and CNAF with regard to Paragraph 19 of the Indictment.⁸⁰

39. The Prosecution submits that the Defence suffered no prejudice and therefore no remedy is required.⁸¹ The Defence presented ample evidence during trial that Nzabonimana relocated to the French Embassy from the Presidential Guard camp on 7 April 1994. The Defence also cross-examined Witness CNR1 at length on this issue.⁸²

40. The Prosecution submits that Mugiraneza's testimony regarding the allegations contained in Paragraph 54 of the Indictment does not constitute exculpatory evidence. Furthermore, the Defence cross-examined Witness CNAL as to Nzabonimana's presence at the meeting.⁸³

41. Regarding the Murambi meeting, the Prosecution submits that the Defence provided summaries of at least sixteen witnesses who attended the meeting. The Defence interviewed witnesses present at the meeting and had documents in its possession which depicted that the meeting was peaceful. Accordingly, the Defence cross-examined Witnesses CNA A and CNAC with this information. Therefore, the Defence was not prejudiced by not having Mugiraneza's testimony at the time of trial.⁸⁴

42. The Prosecution asserts that the Defence request for the appointment of an *amicus curiae* to assess the Prosecution database has no basis in law. There has been no *prima facie*

⁷⁸ Response II, para. 1.

⁷⁹ Response II, para. 14.

⁸⁰ Response II, para. 2.

⁸¹ Response II, paras. 6-7.

⁸² Response II, para. 3.

⁸³ Response II paras. 18-19.

⁸⁴ Response II, para. 20.

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evidence of lack of good faith on the part of the Prosecution to justify such an appointment.⁸⁵ The Prosecution further submits that there is no basis for the Defence claim that it lacks adequate resources.⁸⁶

43. Lastly, the Defence request to re-open the case to summon the Prosecution investigators also falls outside the purview of the *Proprio Motu* Order and this issue has been litigated sufficiently in previous motions and a Trial Chamber Decision.⁸⁷

Defence Reply

44. The Defence reiterates the submissions made in its Motion.⁸⁸ The Defence asserts that the submissions it made in its Motion regarding exculpatory material were a “set of examples” but that because of a lack of resources, it “did not limit its arguments”.⁸⁹

45. The Defence submits that Paragraph 15 of the Indictment specifically accuses Nzabonimana of having “participated in the massacre of hundred [*sic*] of Tutsi at the Nyabikenke communal office”, therefore any documents which do not mention Nzabonimana in relation to this allegation are potentially exculpatory.⁹⁰

46. The Defence reaffirms that the testimony of Witness BCB contradicts Witnesses CNAI and CNAF in relation to Paragraph 19 of the Indictment.⁹¹ Furthermore, the testimony of Mugenzi and Mugiraneza contradicts the testimony of Witness CNR1. The Defence asserts that such material is exculpatory.⁹²

47. The Defence asserts that the Prosecution must disclose material, even if it relates to a witness who the Defence intends to call during its case-in-chief.⁹³ The Prosecution also has a duty to disclose exculpatory testimony when it appeared in open session, until the accused had notice of the testimony.⁹⁴ The Defence reasserts that the Prosecution has an obligation to disclose any exculpatory material, and such disclosure is not done out of “courtesy”.⁹⁵

⁸⁵ Response II, para. 21.

⁸⁶ Response II, para. 22.

⁸⁷ Response II, paras. 16-17, 24-27.

⁸⁸ Reply II, para. 8.

⁸⁹ Reply II, para. 10.

⁹⁰ Reply II, para. 12.

⁹¹ Reply II, para. 13.

⁹² Reply II, paras. 14, 21.

⁹³ Reply II, para. 18.

⁹⁴ Reply II, para. 18.

⁹⁵ Reply II, para. 10.

48. The Defence contends that the issue of the 245,000 Rwandan Francs is a disclosure issue which may affect the credibility of the Prosecution evidence. The fact that the Prosecution has not investigated how the money was used is tantamount to failing to investigate potentially exculpatory evidence and strengthens the Defence submission for a probe into the Prosecution database.⁹⁶ It asserts that the Chamber's *Proprio Motu* Order did not bar the Defence from addressing related issues.⁹⁷

49. The fact that the Prosecution in this case has also failed to expeditiously disclose exculpatory material in two other cases in this Tribunal, has belatedly disclosed exculpatory material to Nzabonimana and continues to deny the exculpatory nature of the material disclosed, shows the lack of good faith on the part of the Prosecution.⁹⁸ It requests the Trial Chamber to require the Prosecution to certify that it has complied with Rule 68,⁹⁹ and calls for an *amicus curiae* to be appointed.¹⁰⁰

50. The Defence submits that its request for necessary resources to address these issues is in line with the guarantees of a fair trial and refers to jurisprudence as to the unfairness of dissolving a Defence team after closing arguments.¹⁰¹

***C. Nzabonimana's Motion pursuant to the Trial Chamber's Order of 4 April 2012
("Motion III")***

SUBMISSIONS OF THE PARTIES

Defence Motion

51. The Defence submits that the Chamber's 4 April 2012 Order constitutes an abuse of discretion by the Trial Chamber and violates Nzabonimana's right to proper representation.¹⁰²

52. The Defence asserts that it does not have sufficient resources "to carry out a sufficiently detailed analysis of the material disclosed".¹⁰³ It submits that on 11 April 2012, the Registrar rejected its request for additional resources because there is a policy that resources beyond the final arguments are not allowed. The Defence claims that the absence of

⁹⁶ Reply II, para. 19.

⁹⁷ Reply II, paras. 20-21.

⁹⁸ Reply II, para. 23.

⁹⁹ Reply II, para. 10.

¹⁰⁰ Reply II, para. 23.

¹⁰¹ Reply II, para. 25.

¹⁰² Motion III, para. 13.

¹⁰³ Motion III, paras. 23-25, 37.

resources violates the right of the accused to have a defence until the end of trial.¹⁰⁴ The Defence reiterates its request for a temporary stay of proceedings because of its limited resources.¹⁰⁵

53. The Defence submits that following its “pro bono review” of the 267 documents disclosed by the Prosecution, it has determined that the documents are relevant and potentially exculpatory.¹⁰⁶ It reiterates its contention that the Prosecutor acknowledged the exculpatory nature of the documents in its 24 February 2012 letter to the Defence.¹⁰⁷

54. The Defence resubmits that the disclosed transcripts reveal information about events at Tambwe, Murambi and Nyabikenke; all relevant to Nzabonimana’s case. It asserts that Witness BCB’s testimony in *Rukundo*, which the Prosecution has had since 2007, discredits the testimony of Witnesses CNAY and CNAF in regard to Paragraph 20 of the Indictment.¹⁰⁸ It states that the Indictment specifically accuses Nzabonimana of having participated in the massacres and ordered others to kill Tutsi refugees at the *commune* office.¹⁰⁹ Witness BCB’s testimony also contradicts Witnesses CNAI and CNAX in relation to Paragraph 19 of the Indictment,¹¹⁰ and discredits Witness CNAF as to Paragraph 45 of the Indictment.¹¹¹ The Defence asserts that these transcripts are therefore exculpatory and it was not able to use this evidence in its cross-examination of Prosecution witnesses.¹¹²

55. The Defence asserts that the Bicomumpaka transcripts from *Bizimungu et al.*, contradicted the testimony of Witnesses CNAK and CNAJ with regard to Paragraph 44 of the Indictment. The Prosecution had these transcripts in its possession since 2007.¹¹³

56. The Defence asserts that the transcripts from the *Karemera et al.* trial contradicted the evidence of Witnesses CNAA and CNAC with regard to the allegation of the Murambi meeting, contained in Paragraph 26 of the Indictment. Ntagerura’s testimony contradicted that of Witness CNAA regarding the participants at the meeting. Niyitegeka’s testimony contradicted that of Witnesses CNAA and CNAC as to the presence of Ntagerura and Karemera at the meeting. Karemera also denied having participated in this meeting,

¹⁰⁴ Motion III, paras. 23-25.

¹⁰⁵ Motion III, paras. 60, 69.

¹⁰⁶ Motion III, paras. 38, 61-62.

¹⁰⁷ Motion III, para. 39.

¹⁰⁸ Motion III, para. 40.

¹⁰⁹ Motion III, para. 40.

¹¹⁰ Motion III, para. 41.

¹¹¹ Motion III, para. 42.

¹¹² Motion III, para. 42.

¹¹³ Motion III, para. 43.

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contradicting Witnesses CNA A and CNAC. Akayesu's testimony contradicted Witnesses CNA A and CNAC as to the presence of Nzabonimana at the meeting and as to whether Witness CNAC said during the meeting that he had problems with the *Interahamwe*.¹¹⁴

57. Furthermore, the testimony of Mugiraneza and Mugenzi in the *Bizimungu et al.* trial contradicted Witnesses CNA A and CNAC's testimony as to whether the purpose of the meeting was to support the massacres and to issue threats to those who did not collaborate with the *Interahamwe*.¹¹⁵ The Defence further submits that the testimony of Mugiraneza discredits the testimony of Witness CNAL as to Paragraph 54 of the Indictment.¹¹⁶ The Defence reiterates that disclosed materials provide information that could "cover the gaps" in Nzabonimana's alibi and thus counter the evidence of Witness CNR1.¹¹⁷ The testimony of Mugenzi and Mugiraneza also discredits Witness CNR1.¹¹⁸

58. The Defence asserts that the Prosecution has been in possession of these transcripts since 2005, 2007, 2008 and 2009 and that the Defence could have used them when cross-examining the relevant Prosecution witnesses.¹¹⁹ It asserts that the prejudice is heightened because the material was disclosed after the close of trial.¹²⁰

59. The Defence reasserts that it was the Prosecution's duty to provide the exculpatory evidence and not the Defence's obligation to seek it out. It resubmits that upon receipt of the identities of potential Defence witnesses, the Prosecutor's duty was to seek the statements made by said witnesses and disclose them to the Defence. Some of the witnesses bore pseudonyms and were covered by protective measures and therefore the Defence could not access this testimony.¹²¹

60. Regarding potential relief, the Defence asserts that it cannot seek admission of the material because it concerns acts and conduct of the accused and therefore does not fall within the purview of Rule 92 *bis*.¹²² The Defence also submits that it does not know whether the relevant witnesses are willing to testify.¹²³

¹¹⁴ Motion III, para. 44.

¹¹⁵ Motion III, para. 44.

¹¹⁶ Motion III, para. 45.

¹¹⁷ Motion III, paras. 18, 47.

¹¹⁸ Motion III, para. 19, 47.

¹¹⁹ Motion III, paras. 40, 42-45, 48.

¹²⁰ Motion III, para. 63.

¹²¹ Motion III, para. 66.

¹²² Motion III, para. 64.

¹²³ Motion III, para. 65.

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61. The Defence requests a temporary stay of proceedings pending a decision on resources and time for the Defence.¹²⁴ In the alternative, the Defence requests that the Chamber draw a "positive inference" in favour of Nzabonimana from the exculpatory material and disregard the allegations contained in Paragraphs 15, 19, 20, 26, 44, 45, 48 and 54 of the Indictment.¹²⁵

62. The Defence reiterates that the Prosecution should be sanctioned for its conduct and that an *amicus* should be appointed. The Defence recalls that on 16 March 2012, the Defence for Mugenzi requested the Appeals Chamber to quash the conviction of Mugenzi because the Senior Trial Attorney belatedly disclosed exculpatory evidence.¹²⁶ Bicomumpaka was already acquitted of certain allegations against him because the same Prosecution withheld exculpatory evidence. Therefore the presumption that the Prosecution is acting in good faith is reversed. The Defence requests that a probe of the Prosecution database by a competent, neutral third party would ensure that there is no additional exculpatory evidence.¹²⁷

63. The Defence also reiterates its submissions regarding the disclosed statements of Witness T77.¹²⁸ The Defence submits that although the Parties are awaiting a decision from the Appeals Chamber with regards to the prosecution of the two Prosecution investigators, in connection with the disbursement of the 245,000 Rwandan Francs, it requests that the two investigators be summoned under Rule 98 in the context of re-opening the case. Alternatively, an *amicus* entrusted with auditing the Prosecution database could investigate this issue further.¹²⁹ It asserts that although the issue of this money is not within the scope of the *Proprio Motu* Order of 15 March 2012, it is relevant to matters raised by the Defence in its submissions.¹³⁰ It requests that the Prosecution be sanctioned under Rule 46 for not providing adequate details about this money.¹³¹

Prosecution Response

64. The Prosecution submits that it received Motion III on 16 April 2012 although it was filed on 13 April 2012 and therefore requests that it be able to file its Response within the

¹²⁴ Motion III, para. 69.

¹²⁵ Motion III, para. 71.

¹²⁶ The Chamber notes that Paul Ng'arua is also the Senior Trial Attorney in the *Nzabonimana* case.

¹²⁷ Motion III, paras. 26, 54, 72-73.

¹²⁸ Motion III, paras. 22, 49-59, referring to *Prosecutor v. Nzabonimana*, (Case No. ICTR-98-44D-T), Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 23 February 2012 Relating to Witness T77, 6 March 2012 ("Witness T77 Motion").

¹²⁹ Motion III, paras. 30, 72.

¹³⁰ Motion III, para. 32.

¹³¹ Motion III, paras. 34-35, 73.

three-day time limit set by the Trial Chamber in the 4 April 2012 Order, applying from the date it received Motion III.¹³²

65. The Prosecution objects to Motion III, asserting that the Defence made submissions outside the scope of the 4 April 2012 Order. The Order informed the Defence to provide "specific and comprehensive submission on the potentially exculpatory material on the CD-ROM". The Prosecution submits that any "extraneous submissions" should be struck.¹³³ The Prosecution also objects to Motion III to the extent that it repeats arguments which are the subject of other litigation.¹³⁴

66. The Prosecution denies the Defence assertion that it conceded that the material contained on the CD-ROM is exculpatory.¹³⁵

67. The Prosecution asserts that the materials relating to Witness T77, Witness BCB, Ngirabatware, Mugenzi and Mugiraneza are the subject of earlier motions. The Prosecution incorporates its previous responses regarding these materials.¹³⁶ Regarding Karemera, the Prosecution incorporates its submissions contained in its 24 February 2012 letter to the Defence.¹³⁷

68. Regarding the testimony of Akayesu, the Prosecution asserts that Akayesu did not contradict Witnesses CNA and CNAC with regard to Nzabonimana's presence at the Murambi meeting.¹³⁸ The Prosecution submits that Akayesu in fact testified that Nzabonimana was present at the meeting.¹³⁹

69. The Prosecution submits that the Defence was aware of the Bicamumpaka transcripts as they used them to cross-examine Prosecution witnesses.¹⁴⁰ Therefore the Defence suffered no prejudice as a result of late disclosure of this testimony.¹⁴¹

70. With respect to Ntagerura's testimony, the Prosecution submits that Ntagerura testified in the *Karemera et al.* trial from 19 November to 24 November 2010, in open session. Ntagerura testified that he did not attend the Murambi meeting, whereas Witness

¹³² Response III, paras. 1-2.

¹³³ Response III, paras. 3-4, 9-10.

¹³⁴ Response III, paras. 3-4.

¹³⁵ Response III, para. 11.

¹³⁶ Response III, paras. 12, 14, 22.

¹³⁷ Response III, para. 23.

¹³⁸ Response III, para. 13.

¹³⁹ Response III, para. 13.

¹⁴⁰ Response III, para. 15.

¹⁴¹ Response III, para. 16.

CNAA testified during the *Nzabonimana* trial that Ntagerura was present.¹⁴² The Prosecution asserts that the Defence already knew about the presence or absence of Ntagerura at the meeting because it consulted 16 witnesses on this matter, including Mugenzi, Niyitegeka and Bicamumpaka and therefore knew whether Ntagerura was at the meeting or not and whether he spoke.¹⁴³ With regard to the credibility of Witness CNAA, the Chamber heard the testimony of Defence Witnesses T24, T72 and Mporanzi.¹⁴⁴ The Prosecution further submits that the Defence was not taken by surprise by Ntagerura's testimony, because Mporanzi testified that Ntagerura was not present at the meeting.¹⁴⁵

71. The Prosecution submits that Niyitegeka was well known to the Defence as he was listed in the Defence witness list with a pseudonym and alongside a summary of evidence on the Murambi meeting, in relation to Paragraph 26 of the Indictment. Furthermore his testimony was in open session and therefore the Defence had access to this information.¹⁴⁶

72. The Prosecution asserts that the Defence was not prejudiced and that issues raised by the Defence "were sufficiently ventilated during the trial". The Prosecution requests the Chamber to dismiss the Motion in its entirety.¹⁴⁷

Defence Reply

73. The Defence does not object to the late filing of the Prosecution Response and accordingly requests that it be granted equal latitude to submit its Reply within the three-day limit set in the 4 April 2012 Order.¹⁴⁸ The Defence reiterates its submissions as contained in Motion III.¹⁴⁹

74. The Defence submits that it did not make extraneous submissions in Motion III. The Defence reiterates that it has no resources and this affects to its ability to comply with the 4 April 2012 Order. The Defence also asserts that Rule 73(A) allows the Defence "unfettered license" to request appropriate relief from the Chamber. The Defence claims it does not make sense to address the issues contained in Paragraphs 23 to 35 of Motion III in a different motion, as these submissions affect the matters on which the Chamber sought submissions. Furthermore, the Prosecution's conduct has become "more and more egregious" and a

¹⁴² Response III, paras. 17-18.

¹⁴³ Response III, para. 19.

¹⁴⁴ Response III, para. 20. The Chamber notes that Witness T72 did not testify at trial.

¹⁴⁵ Response III, para. 20.

¹⁴⁶ Response III, para. 21.

¹⁴⁷ Response III, para. 24.

¹⁴⁸ Reply III, para. 1.

¹⁴⁹ Reply III, para. 3.

“compounded problem”, relating to the disclosure of 17 February 2012 and is both relevant and must be dealt with by the Chamber.¹⁵⁰

75. The Defence asserts that the Prosecution’s denial of the exculpatory nature of the documents is a vain attempt at alleviating itself of its Rule 68 disclosure obligations. It denies that it should have known the facts contained in the CD-ROM with the exercise of due diligence. It asserts that the resources of the Defence team pale in comparison to those allocated to the Prosecution and that “[d]ue diligence is not immune to the lack of human and material resources that afflicts the Defence.”¹⁵¹

76. With regard to the Witness T77, Witness BCB, Mugenzi and Mugiraneza materials, the Defence submits that the litigation remains unresolved as of the date of this filing and that the material is interrelated with the 4 April 2012 Order materials.¹⁵²

77. The Defence does not contest the Prosecution’s submission that Akayesu testified that Nzabonimana was present at the 18 April 1994 meeting. The Defence asserts that Akayesu’s testimony is still relevant as to the testimony of Witnesses CNAА and CNAC that there was a second, smaller meeting at which Nzabonimana was present.¹⁵³

78. The Defence submits that with regard to the Bicamumpaka transcripts, the Prosecution’s obligations to disclose are effected to an accused person and not the person’s counsel and therefore it is immaterial whether the same counsel interacted with said material in a previous case. It cites the *Bizimungu et al.* Trial Judgement as support for this proposition.¹⁵⁴

79. The Defence submits that the Prosecution confirms that the Ntagerura documents pertain to the credibility of Witness CNAА and therefore should have been disclosed pursuant to Rule 68. The Defence reiterates that this material undermines the credibility of Witness CNAА.¹⁵⁵

80. The Defence asserts that it did not necessarily meet with the witnesses placed on its witness list. The people on the list were persons of interest. It included approximately 200

¹⁵⁰ Reply III, paras. 4-7.

¹⁵¹ Reply III, paras. 8-9.

¹⁵² Reply III, paras. 10-11, 18.

¹⁵³ Reply III, para. 12.

¹⁵⁴ Reply III, para. 13.

¹⁵⁵ Reply III, para. 14.

names on the initial Defence list and the Chamber limited the Defence to four witnesses per Indictment paragraph.¹⁵⁶

81. With regard to the Niyitegeka transcripts the Defence asserts that the issue is not whether the Defence had access to the material but rather whether the Prosecution had an obligation to disclose said material pursuant to Rule 68.¹⁵⁷

82. With regard to the Karemera transcripts, the Defence submits that it cannot be expected to know exactly what is happening before every case at the Tribunal.¹⁵⁸

83. The Defence submits that the Prosecution is "disingenuous" in its Response and that much of the information disclosed on the CD-ROM was not sufficiently ventilated at trial as it was not available until after the trial, namely on 17 February 2012.¹⁵⁹ It submits that prejudice suffered by the Defence is "obvious". Had the information been disclosed in a timely manner, the Defence would have used it at trial.¹⁶⁰

DELIBERATIONS

Preliminary Matter

84. As a preliminary matter the Chamber notes that the Prosecution filed its Response on 19 April 2012, three days after the deadline imposed by the Chamber in its 4 April 2012 Order.¹⁶¹ The Prosecution asserts that it did not receive the Defence submissions until 16 April 2012. The Prosecution filed its Response on 19 April 2012 and requested therein to file the document "within the 3 day time limit" set out in the 4 April 2012 Order. The Chamber recalls that the Order did not grant the Prosecution three days to file its Response. It granted the Prosecution until 16 April 2012. If the Prosecution was in need of additional time, it should have filed a motion requesting an extension. It should not be the Chamber's responsibility to remind the Prosecution of such a basic litigation procedure. The Chamber directs the Prosecution to desist from such conduct, as it may warrant sanction if repeated.

85. The Chamber also notes that the Defence entitled its response to the 4 April 2012 Order as a "Motion". However, the Defence indicates in its filing that it "files these

¹⁵⁶ Reply III, para. 15.

¹⁵⁷ Reply III, para. 16.

¹⁵⁸ Reply III, para. 20.

¹⁵⁹ Reply III, para. 22.

¹⁶⁰ Reply III, para. 23.

¹⁶¹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Request for Condonation and Response to Nzabonimana's Motion Pursuant to Order of 4 April 2012, 19 April 2012.

submissions pursuant to the [4 April 2012] Order". The Chamber will therefore treat the Defence filing as its submissions pursuant to the 4 April 2012 Order.

86. The Chamber recalls that in the 4 April 2012 Order, the Chamber ordered the Defence "to strictly limit its submissions to the potentially exculpatory material contained on the CD-ROM". The Chamber observes that in its submissions pursuant to the Order, the Defence included numerous submissions unrelated to the material contained on the CD-ROM.¹⁶² The Defence claims that it has "unfettered license to seize the Chamber with a request for appropriate relief". However, in this instance, the Defence violated the explicit terms of the Chamber's 4 April 2012 Order. The Chamber directs the Defence to desist from such conduct, as it may warrant sanction if repeated.

87. The Trial Chamber observes that any submissions made with regard to the materials disclosed on 15 November 2011 pertaining to the *Ngirabatware* trial and those disclosed relating to Defence Witness T77, will be addressed in separate decisions.

Applicable Law

88. Rule 68(A) of the Rules of Procedure and Evidence ("Rules") states:

[t]he 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 Prosecution evidence.¹⁶³

89. The determination of which materials are subject to disclosure under this provision is a fact-based inquiry made by the Prosecution.¹⁶⁴ In order to establish a violation of Rule 68 disclosure obligations, the Defence must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its potential exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.¹⁶⁵ Information is considered exculpatory under Rule 68(A) if there is any possibility, in light of the

¹⁶² The Defence requests the appointment of an *amicus curiae* to probe the Prosecution database and thereby ensure that there is no additional exculpatory evidence contained therein; a temporary stay of proceedings because of its limited resources, which inhibit it from undertaking "a sufficiently detailed analysis of the material disclosed"; and makes submissions with regards to the 245,000 Rwandan Francs paid by the Prosecution to potential Prosecution witnesses.

¹⁶³ Rule 68(A) of the Rules of Procedure and Evidence.

¹⁶⁴ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.

¹⁶⁵ *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, para. 34; *Prosecutor v. Kalimanzira*, Judgement (AC), para. 18; *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13.

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submissions of the parties, that the information could be relevant to the defence of the accused.¹⁶⁶ The Prosecution may be relieved of this obligation if the existence of the relevant exculpatory evidence is known to the Defence and is reasonably accessible to the Defence through the exercise of due diligence.¹⁶⁷

90. The Prosecution's disclosure obligation generally encompasses open session testimony of witnesses in other proceedings conducted before the Tribunal.¹⁶⁸ However, the Prosecution may be relieved of this obligation if the Defence knew of the relevant exculpatory evidence and had access to it, as the Defence would not be prejudiced materially by this violation.¹⁶⁹ Defence counsel may contact the Registry and request certain public documents such as transcripts and the Registrar may, where possible, grant the request. If such a request was made to the Registry, and the Registry did not comply with it, the Accused could apply to the Trial Chamber by way of motion for assistance to obtain access to the documents.¹⁷⁰

91. Before considering whether a remedy is appropriate the Chamber must examine whether the Defence has been prejudiced by the failure to disclose potentially exculpatory material.¹⁷¹ In determining whether the Defence has been prejudiced, the Chamber may consider such factors as the potentially low probative value of the evidence, whether the Defence had sufficient time to examine the evidence and challenge it during cross-examination or seek admission of the material as additional evidence, whether the Defence

¹⁶⁶ *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

¹⁶⁷ *Nahimana et al.* 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, para. 33.

¹⁶⁸ *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review (AC), 23 January 2008, para. 27; *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with Its Disclosure Obligation under Rule 68 of the Rules (AC), 11 February 2004, para. 20.

¹⁶⁹ *Nahimana et al.* 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, para. 33; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 38; *Kordić*, Decision on Appellant's Notice of Prosecution Non-Compliance with Rule 68 (AC), para. 20.

¹⁷⁰ *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 54; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, 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, p. 3.

¹⁷¹ *Kalimanzira*, Judgement (AC), para. 18.

could call the relevant witness to testify, and the extent to which the Defence knew about the evidence and had access to it.¹⁷²

Analysis

92. The Trial Chamber recalls that the Prosecution has a positive and continuous obligation under Rule 68 to disclose potentially exculpatory material.¹⁷³ The material at issue is not in question as the Defence has identified the relevant materials from the transcripts on the disclosed CD-ROM and these materials were in the possession of the Prosecution. The Chamber will address the materials from the three separate trials in turn.

Bizimungu et al.

Whether the Defence presented a prima facie case that the material is potentially exculpatory

93. Of the materials disclosed which emanated from the *Bizimungu et al.* trial, the Defence points to the testimony of Bicamumpaka, Mugenzi and Mugiraneza as having potentially exculpatory value.¹⁷⁴ The Defence submits that the Bicamumpaka transcripts could impact the credibility of Prosecution Witnesses CNAK and CNAJ with regard to Paragraph 44 of the Indictment, as Bicamumpaka denies having participated in this meeting with Nzabonimana.¹⁷⁵ The Chamber notes that Witnesses CNAK and CNAJ both stated that Bicamumpaka spoke at the meeting.¹⁷⁶ Furthermore, the testimony of Mugiraneza and Mugenzi contradicts Prosecution Witnesses CNAA and CNAC as to Paragraph 26 of the Indictment and could have a bearing on their credibility.¹⁷⁷ Mugiraneza stated that no threats were issued at the meeting in relation to the consequences of not collaborating with the *Interahamwe*.¹⁷⁸ The Chamber notes that Witnesses CNAA and CNAC both stated that during the meeting various threats toward the *bourgmestres*, including death or removal from

¹⁷² *Kalimanzira*, Judgement (AC), para. 20; *Krstić* Judgement (AC), paras. 192, 197; *Blaškić*, Judgement (AC), paras. 282, 295, 298; *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 38.

¹⁷³ *Mugiraneza v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Prosper Mugiraneza's Motion for Disclosure (AC), 22 March 2012, para. 4.

¹⁷⁴ Motion III, paras. 43-45, 48.

¹⁷⁵ Motion III, para. 43.

¹⁷⁶ T. 25 November 2009 pp. 40, 42, 45-56 (Witness CNAK); The English transcripts erroneously say "Shalom Bicamumpaka". The French Transcripts indicate the individual was named Jérôme Bicamumpaka (See T. 25 November 2009 p. 43 (Witness CNAK) (French)); T. 13 April 2010 pp. 41-42 (ICS) (Witness CNAJ).

¹⁷⁷ Motion III, para. 44.

¹⁷⁸ Motion III, para. 44.

office, were made.¹⁷⁹ Furthermore, Mugenzi attests that the meeting did not support the massacres,¹⁸⁰ whereas Witnesses CNAC and CNAAC contradicted this.¹⁸¹

94. The Defence further submits that the testimony of Mugiraneza discredits the testimony of Prosecution Witness CNAL on Paragraph 54 of the Indictment.¹⁸² Mugiraneza testified that neither the Prime Minister nor Nzabonimana gave a speech condemning the killings.¹⁸³ Witness CNAL testified that although Nzabonimana did not speak, the Prime Minister did speak.¹⁸⁴

95. In addition, the Defence claims that the testimony of Mugenzi and Mugiraneza would discredit Prosecution Witness CNR1's rebuttal testimony as to Nzabonimana's whereabouts during the alibi period of 6-12 April 1994.¹⁸⁵

96. The Chamber considers that the Defence has made a *prima facie* case that the testimony of Bicamumpaka, Mugenzi and Mugiraneza contains potentially exculpatory material as to the allegations contained in Paragraphs 26, 44 and 54 of the Indictment and the alibi, as it could impact the credibility of the above named Prosecution witnesses.¹⁸⁶ Accordingly, the Chamber concludes that the *Bizimungu et al.* transcripts cited by the Defence contain potentially exculpatory information.

Whether the Prosecution violated its Rule 68 disclosure obligations

97. The Chamber must determine whether the documents were disclosed to the Defence "as soon as practicable" pursuant to Rule 68(A). The Chamber observes that the CD-ROM was disclosed to the Defence on 17 February 2012, while the transcripts of Mugenzi, Bicamumpaka and Mugiraneza were dated November 2005, September 2007 and May 2008 respectively.

98. The Trial Chamber notes that because the materials in possession of the Prosecution and/or in the custody of the Registry are so voluminous, delays in disclosure to the Defence may occur. It is often difficult for the various organs within the International Tribunal to

¹⁷⁹ T. 16 December 2009 p. 71 (ICS) (Witness CNAC); T. 15 December 2009 pp. 10-11 (ICS) (Witness CNAAC).

¹⁸⁰ Motion III, para. 44.

¹⁸¹ T. 15 December 2009 p. 10 (ICS) (Witness CNAAC); T. 16 December 2009 p. 71 (ICS) (Witness CNAC).

¹⁸² Motion III, para. 45.

¹⁸³ Motion III, para. 45.

¹⁸⁴ T. 1 December 2009 p. 27 (ICS) (Witness CNAL).

¹⁸⁵ Motion III, para. 48.

¹⁸⁶ *Bizimungu*, Judgement (TC), para. 136; *see also*, *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, paras. 12-14; *see also* *Kalimanzira*, Judgement (AC), para. 20.

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access documents. Indeed, the voluminous nature of the materials in the possession of the Prosecution may result in delayed disclosure, since the material in question may be identified only after the trial proceedings have concluded.¹⁸⁷ Nevertheless, the Prosecution must adhere to its disclosure obligations pursuant to Rule 68(A) as a single entity.¹⁸⁸

99. Taking into account the foregoing and given that the testimony occurred in 2005, 2007 and 2008, the Chamber considers that the 17 February 2012 disclosure was not made in a timely manner and was not "as soon as practicable" in accordance with Rule 68(A).

100. Accordingly, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68(A) with regard to the *Bizimungu et al.* testimony of Bicomumpaka, Mugenzi and Mugiraneza in relation to Paragraphs 26, 44 and 54 of the Indictment and Nzabonimana's alibi.

Whether the Defence was prejudiced

101. In assessing whether the late disclosure prejudiced the Defence, the Trial Chamber recalls that Co-Counsel for the Defence, Philippe Larochelle, also served as Co-Counsel for Jérôme Bicomumpaka in the *Bizimungu et al.* trial.¹⁸⁹ The Defence acknowledges that the testimony of Bicomumpaka, Mugenzi and Mugiraneza occurred prior to the start of the *Nzabonimana* trial.¹⁹⁰

102. Given Co-Counsel's status as Co-Counsel for Bicomumpaka, the Chamber considers it unfounded for the Defence to claim that it was not aware of this evidence. Furthermore, this evidence was reasonably accessible to the Defence through the exercise of due diligence. The Defence has not shown that the document was not reasonably accessible or that it took reasonable steps to obtain said material.¹⁹¹ In this regard, the Chamber observes that the material was both in open session and the relevant witnesses did not testify under protective measures.¹⁹²

103. The Chamber acknowledges the Defence submission that the Prosecution's obligations to disclose are effected to an accused person and not to counsel and therefore it is immaterial whether the same counsel interacted with said material in a previous case. The

¹⁸⁷ *Blaškić*, Judgement (AC), para. 300.

¹⁸⁸ *Bizimungu et al.*, Judgement (TC), para. 155.

¹⁸⁹ *Bizimungu et al.*, Judgement (TC). The Chamber notes that on the cover page of the Judgement Philippe Larochelle is listed as among the Counsel for Bicomumpaka.

¹⁹⁰ Motion III, paras. 40, 42-45, 48.

¹⁹¹ *Nahimana et al.*, 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, paras. 27, 33.

¹⁹² *Bizimungu et al.*, Judgement (TC), para. 153.

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Defence asserts that the *Bizimungu et al.* Trial Chamber affirmed this principle.¹⁹³ However, the circumstances in the present case are wholly different than those encountered in *Bizimungu et al.*¹⁹⁴ Most importantly, Bicamumpaka, Mugenzi and Mugiraneza all testified in open session and under their own names. There were no restrictions which prevented Co-Counsel from sharing the testimony of these witnesses with either the Accused or members of the Nzabonimana Defence team.

104. The Chamber also notes that the Defence listed Bicamumpaka and Mugenzi on its witness list appended to the Pre-Defence Brief, filed on 22 February 2010. The Defence specified that Bicamumpaka was expected to testify as to Paragraph 44 of the Indictment, and more specifically as to “the meeting which was held at Ruhango, at Marianne’s house, in April 1994”.¹⁹⁵ Mugenzi was expected to testify as to Paragraph 26 of the Indictment, particularly as to “the meeting taking place at the Murambi training centre, on 18 April 1994”.¹⁹⁶ Furthermore, the Chamber recalls that on 16 March 2010, the French government disclosed telegrams to the Defence which indicate that Mugiraneza and Mugenzi and their families were present at the French Embassy during the period in question. The Chamber admitted these telegrams into evidence as Defence Exhibit 15.¹⁹⁷

105. The Chamber recalls that the Defence has acknowledged that it met and interviewed all 191 witnesses contained on its witness list appended to the Pre-Defence Brief, including in this instance, Bicamumpaka and Mugenzi.¹⁹⁸ Requesting the admission of witness statements pursuant to Rule 92 *bis*, the Defence pled as follows:

The Defence submits that its Motion is in the “interests of justice”, particularly Mr. Nzabonimana’s right to a fair hearing and to adequately defend himself against the accusations levelled against him by the Prosecution. The Defence makes this assertion primarily because the Trial Chamber will not hear orally all of the 191 witnesses who were met and interviewed during the Defence investigations. Following the various decisions issued by the Trial Chamber on that issue, 41 Defence witnesses will provide oral

¹⁹³ Reply III, para. 13.

¹⁹⁴ *Bizimungu et al.*, Judgement (TC), para. 153 (where “protective measures in the *Nzabonimana* case may have prevented Defence Co-Counsel in that case from sharing, with the *Bizimungu et al.* Defence teams or with anyone else, information that would have led to the identification of the *Nzabonimana* witnesses:”).

¹⁹⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Pre-Defence Brief, Annex I, Defence Witness List, 22 February 2010. The Chamber notes that the Defence designated the witness as Witness T81.

¹⁹⁶ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Pre-Defence Brief, Annex I, Defence Witness List, 22 February 2010. The Chamber notes that the Defence designated the witness as Witness T82.

¹⁹⁷ Defence Exhibit 15 (French Embassy Telegrams).

¹⁹⁸ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Motion for the Admission of Written Witness Statements, 1 March 2011, para. 21; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana’s Motion for the Admission of Written Witness Statements, 10 May 2011.

evidence in this trial. The Defence was prepared to call each of the 191 witnesses on its Global List of Witnesses to testify before the Trial Chamber if it had been given the opportunity to do so. The Defence was prohibited from bringing before the Trial Chamber the full fruits of its investigations - that is, the majority of its witnesses who contradict portions of the Indictment.¹⁹⁹

106. The Chamber considers this as further evidence that the Defence knew of the existence of the potentially exculpatory evidence which Bicomumpaka and Mugenzi gave in *Bizimungu et al.*

107. Given the foregoing, the Chamber concludes that the Defence knew of this evidence and had access to it through the exercise of due diligence. The Chamber therefore concludes that the Prosecution was relieved of its obligation under Rule 68 as the Defence was not materially prejudiced by this violation.²⁰⁰

Karemera et al.

Whether the Defence presented a prima facie case that the material is exculpatory

108. Of the materials disclosed which emanated from the *Karemera et al.* trial, the Defence points to the testimony of Akayesu, Karemera, Niyitegeka and Ntagerura as having potentially exculpatory value. The Defence asserts that the transcripts will impact the credibility of Witnesses CNAAC and CNAC with regard to the allegation of the Murambi meeting, contained in Paragraph 26 of the Indictment. More specifically, Ntagerura's testimony contradicts Witness CNAAC regarding the participants at the meeting, Niyitegeka's testimony contradicts Witnesses CNAAC and CNAC as to the presence of Ntagerura and Karemera at the meeting and Karemera's denial that he participated in this meeting contradicts Witnesses CNAAC and CNAC.²⁰¹

109. The Chamber notes that Akayesu's testimony contradicted Witnesses CNAAC and CNAC as to the presence of Nzabonimana at the meeting and as to whether Witness CNAC said during the meeting that he had problems with the *Interahamwe*.²⁰² The Chamber notes that Witnesses CNAAC and CNAC testified that Nzabonimana was present at the Murambi

¹⁹⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Admission of Written Witness Statements, 1 March 2011, para. 21; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Admission of Written Witness Statements, 10 May 2011.

²⁰⁰ *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 38.

²⁰¹ Motion III, para. 44.

²⁰² Motion III, para. 44.

meeting,²⁰³ and Witness CNAC testified that the problems related to the *Interahamwe* were highlighted during the meeting.²⁰⁴ The Chamber notes that Akayesu also mentioned that Nzabonimana was present at the Murambi meeting.²⁰⁵ Nonetheless, the Chamber considers that the Defence has made a *prima facie* case that the testimony of Akayesu, Karemera, Niyitegeka and Ntagerura contains potentially exculpatory material as to Paragraph 26 of the Indictment.²⁰⁶

Whether the Prosecution violated its Rule 68 disclosure obligations

110. The Chamber must next determine whether the documents were disclosed to the Defence “as soon as practicable” as required by Rule 68(A). The Chamber recalls that the CD-ROM was disclosed to the Defence on 17 February 2012. The transcripts of Akayesu, Karemera, Niyitegeka and Ntagerura were dated May 2008, May 2009, February 2010 and November 2010 respectively.

111. The Trial Chamber notes that because the materials in possession of the Prosecution and/or in the custody of the Registry are so voluminous, delays in disclosure to the Defence may occur. It is often difficult for the various organs within the International Tribunal to access documents. Indeed, the voluminous nature of the materials in the possession of the Prosecution may result in delayed disclosure, since the material in question may be identified only after the trial proceedings have concluded.²⁰⁷ Nevertheless, the Prosecution must adhere to its disclosure obligations pursuant to Rule 68(A) as a single entity.²⁰⁸

112. Taking into account the foregoing and given that the testimony occurred in 2008, 2009 and 2010, the Chamber considers that the 17 February 2012 disclosure was not made in a timely manner and was not “as soon as practicable” in accordance with Rule 68(A).

113. Accordingly, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68(A) with regard to the *Karemera et al.* transcripts.

²⁰³ T. 14 December 2009 p. 64; T. 15 December 2009 p. 7 (ICS) (Witness CNA); T. 16 December 2009 p. 55;

T. 16 December 2009 p. 57 (ICS) (Witness CNAC).

²⁰⁴ T. 16 December 2009 p. 71 (ICS) (Witness CNAC).

²⁰⁵ Response III, para. 13.

²⁰⁶ *Bizimungu*, Judgement (TC), para. 136; *see also Karemera et al.*, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” (AC), 14 May 2008, paras. 12-14; *see also Kalimanzira* Judgement (AC), para. 20.

²⁰⁷ *Blaškić*, Judgement (AC), para. 300.

²⁰⁸ *Bizimungu*, Judgement (TC), para. 155.

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Whether the Defence was prejudiced

A. Akayesu, Karemera and Niyitegeka Transcripts

114. In assessing the resultant prejudice to the Defence, if any, the Chamber recalls that Paragraph 26 of the Indictment specifically identified Mugiraneza and Karemera as being present at the Murambi meeting.²⁰⁹ The Chamber further recalls that on 15 and 16 December 2009, Witness CNAА testified for the Prosecution regarding Paragraph 26 of the Indictment. During cross-examination, Witness CNAА affirmed that he had previously accused Karemera and that he testified in Karemera's trial in 2007.²¹⁰ The Prosecution disclosed Witness CNAА's testimony in *Karemera et al.* to the Defence in February 2009 and the Defence subsequently used this testimony during its cross-examination of Witness CNAА, including portions of his testimony which referred to the Murambi meeting.²¹¹

115. Therefore, the Chamber considers that the Defence was put on notice at the time the Indictment was filed that Karemera was implicated in the Murambi meeting. Furthermore, since at least February 2009, the Defence was put on notice that the Murambi meeting was at issue in Karemera's trial.²¹²

116. Additionally, the Chamber recalls that the Defence placed Akayesu, Karemera and Niyitegeka on the witness list attached to its Pre-Defence Brief, filed on 22 February 2010. The Chamber further recalls the Defence acknowledgement, cited above, that it met and interviewed all 191 witnesses contained on its witness list; a list which included Akayesu, Karemera and Niyitegeka.²¹³ The Defence specified that each of these three witnesses were expected to testify as to Paragraph 26 of the Indictment.²¹⁴ All three were expected to testify as to "the meeting taking place at the Murambi training centre, on 18 April 1994".²¹⁵

²⁰⁹ Para. 26 of the Indictment.

²¹⁰ T. 15 December 2009 pp. 49, 50-52 (ICS) (Witness CNAА); Defence Exhibit 93 (*Prosecutor v. Karemera et al.*, Transcripts, 12 and 18 July 2007).

²¹¹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Memorandum entitled "Disclosure of Trial Transcripts under Rule 68 of the Rules of Procedure and Evidence in the Case The Prosecutor v. Callixte Nzabonimana ICTR-98-44-I, 10 February 2009.

²¹² *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008, para. 27.

²¹³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Admission of Written Witness Statements, 1 March 2011, para. 21; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Admission of Written Witness Statements, 10 May 2011.

²¹⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Pre-Defence Brief, Annex I, Defence Witness List, 22 February 2010.

²¹⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Pre-Defence Brief, Annex I, Defence Witness List, 22 February 2010. The Chamber notes that the Defence designated Akayesu, Karemera and Niyitegeka as Witnesses T76, T83 and T82 respectively.

117. Based upon the foregoing, the Chamber concludes that the Defence knew of the existence of the potentially exculpatory evidence which Akayesu, Karemera and Niyitegeka gave in *Karemera et al.*

118. Furthermore, these materials were reasonably accessible to the Defence through the exercise of due diligence. The Chamber notes that the transcript citations provided by the Defence regarding the potentially exculpatory material in the testimony of Akayesu, Karemera and Niyitegeka all refer to open session testimony. Such documents are readily available to the Defence through the website of the Tribunal or the Registry.²¹⁶ Furthermore, the Defence could have sought any relevant closed session transcripts pursuant to Rule 75.²¹⁷

119. The Defence interviewed Akayesu, Karemera and Niyitegeka and knew that they had information about the Murambi meeting. The Defence also knew that Karemera was at trial before this Tribunal and that the accusations against him included his actions at the Murambi meeting. The Chamber further notes that Akayesu testified in May 2008, Karemera testified in May 2009 and Niyitegeka testified in late-February to early-March 2010. The Chamber considers that given these circumstances, any diligent criminal defence attorney would investigate whether its potential witnesses have given similar testimony in previous trials and would have taken steps to attain transcripts of such testimony.

120. Given these circumstances, the Chamber concludes that the Defence knew of this evidence and had access to it through the exercise of due diligence. The Chamber therefore concludes that the Prosecution was relieved of the obligation under Rule 68 as the Defence was not materially prejudiced by the violation.²¹⁸

B. Ntagerura Transcripts

121. As a preliminary matter, the Chamber notes that the Prosecution mistakenly stated that Ntagerura testified in open session and clarifies that portions of Ntagerura's testimony were contained in closed session.

²¹⁶ *Brdanin*, 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, p. 3, citing *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 54.

²¹⁷ *Brdanin*, 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, p. 3.

²¹⁸ *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 38.

122. The Chamber notes that the Defence did not list Ntagerura on its witness list. Furthermore, the relevant transcripts cited by the Defence all refer to closed session transcripts. The Chamber observes that Ntagerura's testimony could potentially impact the credibility of Witness CNAAs as to Ntagerura's presence at the Murambi meeting as alleged in Paragraph 26 of the Indictment.

123. The Chamber notes that there is no indication that the Defence knew of Ntagerura's testimony or had access to this material with due diligence. The Chamber considers that the late disclosure of the above-mentioned evidence prejudiced Nzabonimana. As a result of this disclosure violation, the Defence was not able to use these transcripts during the cross-examination of Prosecution witnesses, nor was it provided the opportunity to call Ntagerura as a witness. Consequently, Nzabonimana's right pursuant to Article 2(4)(e) of the Statute was infringed.²¹⁹

124. The Chamber considers that the re-opening of the case as requested in the first Defence Motion of 12 March 2012, or drawing a reasonable inference in favour of Nzabonimana in relation to the above-mentioned allegations as set forth in the Defence Motions of 19 March 2012 and 13 April 2012, would not constitute an appropriate remedy in this instance. These remedies would only serve to delay the issuance of the Judgement and would further impede Nzabonimana's right to be tried without undue delay.²²⁰

125. Consequently, the Chamber considers it appropriate to admit the Ntagerura transcripts into evidence and assess them in conjunction with evidence already adduced, thereby addressing their value with regards to Paragraph 26 of the Indictment in the Judgement.²²¹ The Chamber deems that the admission of this material into evidence pursuant to Rule 89(C) and its consideration thereof in the Judgement, is a sufficient remedy to the disclosure violation.

²¹⁹ Article 20(4)(e) states: "...the accused shall be entitled to the following minimum guarantees, in full equality: ... To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;"

²²⁰ Article 20(4)(c); *Karemera et al.*, Décision faisant suite à l'ordonnance de la Chambre concernant la communication confidentielle du Procureur d'éléments de preuve en vertu de l'article 68(A), 15 November 2011.

²²¹ *Karemera*, Judgement (TC), paras. 815-816.

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iii. Rukundo

Whether the Defence presented a prima facie case that the material is exculpatory

126. The Defence points to the testimony of Witness BCB as having potentially exculpatory value. The Chamber observes that Witness BCB's testimony may impact the credibility of Prosecution evidence in relation to Paragraphs 19, 20 and 45 of the Indictment and is potentially exculpatory in this regard. Witness BCB's testimony could impact the credibility of Witnesses CNAY and CNAF as to Paragraphs 20 and 45 of the Indictment.²²²

127. The Chamber notes that Witnesses CNAI and CNAX testified as to Paragraph 19 of the Indictment. These witnesses testified that the meeting on 14 April 1994 at Cyayi centre occurred in the afternoon, which does not contradict the testimony of Witness BCB who stated that nothing was reported during the morning of 14 April 1994 at Cyayi.²²³

128. The Chamber considers that the Defence has made a *prima facie* case that Witness BCB's testimony in *Rukundo* contains potentially exculpatory material as to Paragraphs 20 and 45 of the Indictment.²²⁴

Whether the Prosecution violated its Rule 68 disclosure obligations

129. The Chamber must determine whether the documents were disclosed to the Defence "as soon as practicable" pursuant to Rule 68(A). The Chamber observes that the transcripts were disclosed to the Defence on 17 February 2012 on a CD-ROM.²²⁵ Given that Witness BCB testified in September 2007,²²⁶ the Chamber finds that the disclosure of the *Rukundo* transcripts was not made in a timely manner and was not "as soon as practicable". Accordingly, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68(A) as to this material.

Whether the Defence was prejudiced

130. As a preliminary assessment, the Chamber notes that there is no indication that the Defence knew of Witness BCB's testimony or had access to this material with due diligence.

²²² T. 25 November 2009 pp. 22-23 (ICS) (Witness CNAY); T. 16 November 2009 pp. 50, 52, 55 (ICS) (Witness CNAF).

²²³ T. 26 November 2009 pp. 60-61, 64-65 (Witness CNAI); T. 23 November 2009 p. 61 (Witness CNAX).

²²⁴ *Bizimungu*, Judgement (TC), para. 136; *see also, Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, paras. 12-14; *See also Kalimanzira* (AC) Judgement, para. 20.

²²⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecution Response to Defence Request Dated 14 February 2012, 17 February 2012.

²²⁶ The Chamber notes that the disclosed transcripts date from 18 September 2007 to 19 September 2007.

The Chamber considers that the late disclosure of the above-mentioned evidence prejudiced Nzabonimana. As a result of this disclosure violation, the Defence was not able to exploit these transcripts during the cross-examination of Prosecution witnesses at trial, nor was it provided the opportunity to call Witness BCB as a witness. Consequently, Nzabonimana's right pursuant to Article 2(4)(e) of the Statute was infringed.²²⁷

131. As with the Ntagerura transcripts, the Chamber finds that the appropriate remedy would be to admit the Witness BCB transcripts into evidence and assess them in conjunction with evidence already adduced, thereby addressing their value with regards to Paragraphs 20 and 45 of the Indictment in the Judgement.²²⁸ The Chamber deems that the admission of the exculpatory material into evidence pursuant to Rule 89(C) and its consideration thereof in the Judgement, is a sufficient remedy to the disclosure violation.

iv. Miscellaneous

132. Given the foregoing analysis, the Chamber concludes that there is no basis to sanction the Prosecution for violations of Rule 68 as there was no indication of bad faith on the part of the Prosecution, and given that the disclosure violations were for the most part determined to be not prejudicial and that the Chamber is admitting the relevant portions of the material into evidence.

133. Furthermore, the Chamber considers the Defence request for the appointment of an *amicus curiae* to probe the Prosecution database to have no legal basis.

134. The Chamber notes the Defence request for a temporary stay of proceedings because of its limited resources, which inhibit it from undertaking "a sufficiently detailed analysis of the material disclosed". The Chamber recalls its finding that the Defence has made a *prima facie* case that the evidentiary material provided on the CD-ROM contains potentially exculpatory material. In this regard, the Chamber notes that the Defence need only make a *prima facie* case and not a "sufficiently detailed analysis" as stated.²²⁹ Furthermore, the Chamber recalls its previous ruling that necessary and sufficient resources have been in place

²²⁷ Article 20(4)(e) states: "...the accused shall be entitled to the following minimum guarantees, in full equality: ... To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;"

²²⁸ *Karemera*, Judgement (TC), paras. 815-816.

²²⁹ *Kalimanzira*, Judgement (AC), para. 18; *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13.

for the Defence team since the disclosure of the CD-ROM on 17 February 2012.²³⁰ Therefore, the Chamber rejects the Defence request for a temporary stay of proceedings.

135. Furthermore, the Chamber notes the Defence submission with regards to the 245,000 Rwandan Francs paid by the Prosecution to potential Prosecution witnesses. The Chamber considers this to be an extraneous matter.

²³⁰ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order to the Parties Concerning Submissions on Potentially Exculpatory Material Contained on the CD-ROM Disclosed by the Prosecution on 17 February 2012, 4 April 2012.

FOR THESE REASONS, THE TRIAL CHAMBER

CONSIDERS that the Prosecution has violated its disclosure obligations pursuant to Rule 68(A) of the Rules with regard to the testimony of Bicamumpaka, Mugiraneza and Mugenzi in the *Bizimungu et al.* trial and with regard to the testimony of Akayesu, Karemera and Niyitegeka in the *Karemera et al.* trial but that the Defence was not materially prejudiced by these violations;

CONSIDERS that the Prosecution has violated its disclosure obligations pursuant to Rule 68(A) of the Rules with regard to the testimony of Ntagerura in the *Karemera et al.* trial and the testimony of Witness BCB in the *Rukundo* trial;

PARTIALLY GRANTS the Defence Motion to the extent that the Chamber has found that the Prosecution violated its disclosure obligations pursuant to Rule 68(A) of the Rules as set out above;

DECIDES to admit into evidence for assessment in the Judgement, pursuant to Rule 89(C) of the Rules, the transcripts of Ntagerura in the *Karemera et al.* trial and the transcripts of Witness BCB's testimony in the *Rukundo* trial;

DIRECTS the Registry to assign exhibit numbers to these documents;

REMINDS the Defence that any further submissions as to potentially exculpatory material contained on the CD-ROM have been waived, pursuant to the Chamber's 4 April 2012 Order; and

DENIES the Defence Motions in all other respects.

Arusha, 30 April 2012, done in English.

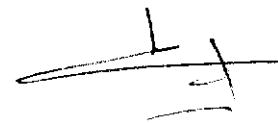


Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge

(absent at time of signature)



Mparany Rajohnson
Judge

