



ICTR-98-44-T
(53932-2011-53909)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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A

TRIAL CHAMBER III

Case No. ICTR-98-44-T

ENGLISH
Original: FRENCH

Before: Judge Dennis C. M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Adama Dieng

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JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

V.

ÉDOUARD KAREMERA

**MOTION BY ÉDOUARD KAREMERA
SEEKING DISCLOSURE OF RECORDINGS OF RADIO MUHABURA
PROGRAMMES FOR THE PERIOD 1 JANUARY TO 31 JULY 1994
Article 28 of the Statute, as well as Rules 66, 68 and 73 of the Rules)**

Counsel for the Accused:
Dior Diagne
Moussa Félix Sow

Prosecutor:
Don Webster
Ballah-Conteh
Takeh Sendze
Jean-Baptiste Nsanzimfura

Counsel for the Co-Accused:
Peter Robinson and Patrick Nimy Mayidika Ngimbi
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DIII10-0172 (E)

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I. INTRODUCTION

1. On 12 January 2010, the Counsel for Édouard Karemera sent a letter to Mr Don Webster, Prosecution Counsel, requesting him to disclose the following documents relating to Radio Muhabura programmes, pursuant to Rules 66 and 68 of the Rules:

- The 4 CD-ROMS referred to by Prosecution Witnesses, Alison Des Forges and Kaiser Razvi, on 25 September 2002 in the *Media* case.¹
- TH N0021473-4: handwritten summaries of radio Muhabura programmes.
- 19920702 Radio Muhabura, 2000 GMT, 2 Jul 1992; BBC SWB, 7 July 1992.
- 19920818 Radio Muhabura, BBC SWB, GerPru1997, p.198.
- 19930130 Radio Muhabura, 0030 GMT, 30 Jan 1993; BBC SWB, 2 February 1993.
- 19930211 Radio Muhabura, 1715 GMT, 11 Feb 1993; BBC SWB, 13 February 1993.
- 19930725 Radio Muhabura BBC SWB; USC.edu/1.6 min/ Art. No. 337.
- 19930903 Radio Muhabura, BBC SWB, GerPru1997, p.236, note 5.
- 19931014 Radio Muhabura, 0415 GMT, 14 October 1993, FBIS AFR; UNB.
- 19931014 Radio Muhabura, 14 October 1993, 0415 GMT; FBIS-AFR; RIKORT1997.
- 19931119 Radio Muhabura, 1815 GMT, 19 November 1993, FBIS AFR; UNB.
- 19931119 Radio Muhabura, 19 November 1993, 1815 GMT; FBIS-AFR; RIKORT1997.
- 19940129 Radio Muhabura, BBC SWB, GerPru1997/UNHCR, p.247, note 22.
- 19940222 Radio Muhabura, BBC SWB, GerPru1997, p.250, note 27.
- 19940223 Radio Muhabura, BBC SWB, GerPru1997, p.250, note 28.
- 19940223 Radio Muhabura, 23 February 1994, 1990 GMT; FBIS-AFR; RIKORT1997.
- 19940223 Radio Muhabura, 1930 GMT, 23 February 1994, FBIS AFR; UNB.
- 19940328 Radio Muhabura, BBC SWB, GerPru1997, p.252, note 30.
- 19940407 Radio Muhabura, pm "on the night"; Melvern (2004): p.161.
- 19940408 Radio Muhabura, 8 April 1994, EdoKar2007 (ICTR?).
- 19940409 Radio Muhabura, 11 April 1994, BBC SWB, AL/1968 A/4; HRW/FIDH.

¹ Following their testimonies, the Prosecutor was obliged to admit, on 25 September 2002, that he was in possession of 27.755 pages of documents and 14 rolls of microfiche given to him recently by the "US Deputy Crimes Ambassador Richard Prosper" in Arusha.

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- 19940411 Radio Muhabura, 13 April 1994, BBC SWB, AL/1970 A/5; HRW/FIDH.
- 19940413 Radio Muhabura, 13 April 1994, 1100 GMT; FBIS-AFR-94-072, AIJKup2001.
- 19940413 Radio Muhabura, 13 April 1994, 1645 GMT; FBIS-AFR-94-072, AIJKup2001.
- 19940414 Radio Muhabura, 14 April 1994, 1045 GMT, FBIS-AFR-94-073; AIJKup2001.
- 19940416 Radio Muhabura, 16 April 1994, 1815 GMT; BBC SWB, AJKup2001.
- 19940416 Radio Muhabura, 16 April 1994, 1815 GMT; FBIS-AFR-94-074, AIJKup2001.
- 19940417 Radio Muhabura, 17 April 1994, 1815 GMT; FBIS-AFR-94-075, AIJKup2001, p.31.
- 19940417 Radio Muhabura, 19 April 1994, 1900 GMT; FBIS-AFR-94-075, JARCOH, p.140.
- 19940418 Radio Muhabura, 18 April 1994, 1900 GMT; FBIS-AFR-94-076, AIJKup2001.
- 19940419 Radio Muhabura, 20 April 1994, 1815 GMT; FBIS-AFR-94-076, AIJKup2001.
- 19940421 Radio Muhabura, 21 April 1994, BBC SWB, AL/1980 A/2; HRW/FIDH.
- 19940425 Radio Muhabura, 25 April 1994, BBC SWB, AL/1980 A/3; HRW/FIDH.
- 19940430 Radio Muhabura, 1040 GMT, 30 April 1993, FBIS AFR; UNB.
- 19940430 Radio Muhabura, 30 April 1994, 1040 GMT; FBIS-AFR; RIKORT1997.
- 19940505 Radio Muhabura, BBC SWB, GerPru1997, p.313.
- 19940511 Radio Muhabura 11 May 1994; MINUAR notes; HRW/FIDH.
- 19940515 Radio Muhabura, BBC SWB, GerPru1997, p.313.
- 19940518 Radio Muhabura, 18 May 1994, FBIS AFR 94-096; HRW/FIDH.
- 19940519 Radio Muhabura, 19 May 1994, FBIS AFR 94-097; HRW/FIDH.
- 19940524 Radio Muhabura, 24 May 1994, FBIS-AFR 94-100; HRW/FIDH.
- 19940603 Radio Muhabura, BBC SWB, GerPru1997, p.314.
- 19940616 Radio Muhabura, BBC SWB, GerPru1997, p.326, note 121.
- 19940624 Radio Muhabura, FBIS-AFR-94, p.4.
- 19940625 Radio Muhabura, BBC SWB, GerPru1997, p.346, note 19.

2. In response, on 16 February 2010, the Prosecutor disclosed to Counsel for Édouard Karemera a CD containing information clearly hand-picked and not corresponding at all to what had been requested, that is close to 240 documents

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3. In fact, the said CD does not contain the key programmes from January to July 1994. Out of the 240 documents on the CD, not a single one corresponds to what was requested. It should be recalled that the Defence had asked for the programmes and not their summaries. Of these summaries, only 11 corresponded to the documents requested. The persons who made the summaries are also not stated. Whereas transcriptions of programmes generally disclosed by the Prosecutor to the Defence are signed by their authors and information is provided on the nature and quality of the original documents, audio or video tapes that have been so transcribed. Furthermore, these are summaries of radio programmes of Muhabura, as well as other stations like Radio Rwanda.

4. The Defence for Édouard Karemera has produced in Annex I of this motion, a synoptic table of documents provided by the Prosecutor on the CD. The Prosecutor chose to give only radio broadcasts of the spoken news and not in the original language which was generally Kinyarwanda. The Prosecutor is carrying on with his deliberate choice not to disclose by providing the same documents several times, under different identification numbers and in different folders. Many of the documents contained in the CD cannot be used. Where they are not partially or totally redacted, they are not identifiable. Clearly, the Prosecutor does not want the Trial Chamber to be aware of the hatred and slogans disseminated by the RPF which had huge repercussions on the "genocide". Furthermore, in a letter dated 2 February 1994, the American Ambassador, Rawson, clearly acknowledged that if the RPF wanted to cohabit, it should have required its radio station, Muhabura, to change its rhetoric against the MRND and against President Habyarimana.²

5. By refusing to make the disclosures, the Prosecutor is engaged in selective information disclosure and is thus violating the Rules of Evidence and Procedure (Rule 68).

6. It is no secret that during the period covered by the jurisdiction of the Tribunal, besides Radio Rwanda which was the official media, two other private radio stations were broadcasting conflicting information on the events in Rwanda: Radio Muhabura and Radio RTLM. There is no objective reason why the Prosecutor would be interested in the programmes of Radio Rwanda and Radio RTLM while totally ignoring those of the RPF Radio Muhabura.

7. Apart from the impressive pile of written or audio documents related to Radio Rwanda and Radio RTLM³ programmes, the Prosecutor nevertheless disclosed some carefully selected documents which, in spite of the careful selection, confirm the existence of Radio Muhabura and provide information on the contents of its programmes.

8. Several Prosecution and Defence witnesses talked about the broadcasts over Radio Muhabura. The most directly concerned of these witnesses are the former special representative of the United Nations Secretary-General in Rwanda, Mr Booh Booh, heard on 16 and 17

² Telegram of 2 February 1994, declassified on 14 April 2000.

³The Prosecution in the *Karemera et al.* case drew extensively from these documents, the Defence as well.

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February 2010, and the former director of the Rwandan News Agency, Mr Ferdinand Nahimana, heard on 21 and 22 April 2010.

Jacques Roger Booh Booh expressed himself in the following words:

“Now, as for Radio Muhabura, Radio Muhabura was a war radio station. And we need to understand that. Because the -- the language used was not always language that would be soft neither on UNAMIR nor on the other side, namely, all those who belonged to the MRND and what have you. So Radio Muhabura, at the time of the crisis, distinguished itself in the rather strong language it used at that time.

And it is not for me here to repeat all what has been said about that radio station. I can simply refer you to the transcripts of the Belgian parliamentary commission on Radio Muhabura. My concern, therefore, and my thoughts in that matter were clearly recorded by a number of Belgian authorities. And there were other witnesses as well who testified on that radio station.

So these two radio stations could have been referred to as war of -- or -- or combat radio stations. One of them being more violent and virulent in its language while the other was more tactful. In any event, those who have analysed the issues do recognise that whatever was broadcast over Radio Muhabura needed to be scrutinised carefully.

Now, let me tell you too that we had a unit at UNAMIR which listened to broadcasts from all radio stations in the region, particularly state radio stations in Rwanda at the time. I also had opportunity to read the transcripts of some of the broadcasts over those radio stations.

Now, because you are interested in this matter, I would like to encourage you to contact the services of the United Nations, p5 (to be removed?) which I believe hold all the documents, all UNAMIR documents, in their archives.”⁴

Ferdinand Nahimana, for his part, complained that the Prosecutor had made him suffer the same fate by denying him access to the said recordings of Radio Muhabura broadcasts.

9. It would be useful to recall that Radio Muhabura was a war radio station whose mission was notably⁵ to:

⁴ Court transcript of 17 February 2010, p. 4, line 19, in the case ICTR 98-44-T, *The Prosecutor v. Édouard Karemera et al.*

⁵ Exhibit P 274, p.109.

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- ☞ Carry out an information and disinformation campaign to fight the regime of President Habyarimana and his party, the MRND;
- ☞ Destabilize the administration by publishing lies, slander and sowing discord in order to create anarchy in the country;
- ☞ Fuel divisions between the Hutu of the North (the Kiga) and the Hutu of the South (the Nduga);
- ☞ Demoralize the Rwandan armed forces;
- ☞ Convince and encourage the Tutsi within the country to support the RPF and enroll in large numbers within their ranks.

10. The task was brilliantly executed by Radio Muhabura up until the victory of the RPF. As if by chance, from 17 July 1994, Radio Muhabura stopped broadcasting on its usual frequencies, since the RPF from that moment on used Radio Rwanda frequencies for its victory propaganda.

11. The political and military propaganda of the RPF broadcast over Radio Muhabura was closely linked to the activities of the clandestine brigades and other RPF infiltrators who were spread all over the country. Exhibit P 274, already mentioned, clearly demonstrates this fact.⁶ Édouard Karemera is of the view that all the digital, sound or written documents related to Radio Muhabura broadcasts are relevant to his case and intends to use them for his defence. The interests of justice and the fairness of the proceedings are predicated on his being able to use these documents.

12. Since the Prosecution has refused to disclose these documents, Édouard Karemera has brought this motion to respectfully request the Chamber, to order the Prosecutor to disclose the said digital, sound, and written documents containing Radio Muhabura broadcasts for the period of 1 January to 31 July 1994. He intends to garner some points from the said documents in order to clarify and reinforce the admissions made by Prosecution Witnesses AMM, AMN, AMO and Alison Des Forges acknowledging the resistance⁷ organized in Bisesero by military leaders whose bravery was recognized by President Pasteur Bizimungu when he decorated them with the highest national distinction on 7 April 1998.

13. That is the only solution that can further ensure the debate on this key issue that the Prosecutor is trying to avoid: “*the role of the war and the responsibility of the aggressor in the Rwandan tragedy*”⁸. Without such a debate, the Trial Chamber will not be enlightened enough to deliberate with full knowledge of the facts on the allegations leveled against the Accused in paragraphs 60, 61, 64-3 and 65 of the Indictment.

⁶ Read Chap. 5 of the book already mentioned by the Accused, tendered into evidence by the Prosecutor (Exhibit P 274).

⁷ *Ibid.*, p.136 and 137.

⁸ *Ibid.*, p. 10.

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II. THE FACTS

2.1. There is unquestionable proof of the existence of Radio Muhabura.

14. According to Emmanuel Mugonga⁹, then director of the RPF information department, Radio Muhabura was set up in March 1991. The founders gave it the same name as the newspaper "Muhabura", which at the time was published in Bujumbura and served as a mobilization organ of the RPF.¹⁰

15. Testifying in his trial, Ferdinand Nahimana, the former director of the Rwandan News Agency and a founding member of Radio RTLM, asserted without being challenged by the Prosecutor that: "[It was in reaction to the RPF propaganda through radio Muhabura, that RTLM was set up. If the RPF had not created its own radio station and started broadcasting propaganda blaming the government for the war, the RTLM no doubt will not have been created¹¹]." Further down, there is this clarification: "[The participants at the meeting¹² expressed their concern that the Inyenzi had, not only their Radio Muhabura, but had infiltrated them and their accomplices, Radio Rwanda. It was realized that all the shareholders were speaking the same language: that this Radio and Television station (RTLM) be a symbol of solidarity for the Hutu.¹³]"

16. Witness "TAP-007" interviewed by the Spanish Judge, Fernando Andreu Merelles,¹⁴ testified that: "The diplomatic and media strategy adopted was to infiltrate foreign diplomatic missions accredited to Kigali in order to filter the misinformation previously designed by the FPR/APR political strategists[...] set up a radio broadcasting station which will be used to spread the ideology of the political military movement of APR/RPF, demonizing the regime of Habyarimana and his party the MRND, to break up unity by exacerbating hatred against Hutus, hatred among the regions and between the political parties [...]. This radio station was called "Radio Muhabura" and was managed by a Tutsi extremist, Commanding Officer Shabani Ruta, later known as Major Rutayisire Wilson. As a reaction, another radio station was set up controlled by Hutu extremists "RTLM00A0" (A Thousand Hills Radio and Television which was created to counteract Radio Muhabura and to promote ethnic hatred towards the Tutsi population.¹⁵"

⁹ Statement made on 22 July 1994 to the French journalist Jean Chatain from the newspaper "L'Humanité".

¹⁰ Anicet Karege, "Les Médias rwandais toujours au service du pouvoir" [The Rwandan Media still serving Power]-Translator's rendition.

¹¹ Para. 459 in the Judgement of 3 December 2003 against F. Nahimana, in ICTR-99-52-T.

¹² Constituent General Assembly of the RTLM, SA, held on 11 July 1993 at Hôtel Amahoro.

¹³ Para. 931 of the Judgement of 3 December 2003 against F. Nahimana, in ICTR-99-52-T.

¹⁴ National Court for the Administration of Justice of the Spanish Kingdom. "ACTE". International warrant of arrest written and signed in Madrid on 6 February 2008, by Judge Fernando Andreu Merelles.

¹⁵ Witness TAP-007 interviewed by the Spanish judge is a former Rwandan Hutu soldier, dismissed from the armed forces, who for long lived in exile, in Jinja, in Uganda from where he joined the RPF, alongside his former comrades in the FAR, Kanyarengwe, Lizinde and Biseruka.

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17. After the RPF victory in July 1994, Commander Shabani Ruta, Director of Radio Muhabura, abandoned his borrowed names and took on his real identity. In the process, he was promoted Director of the Rwandan News Agency, a post he occupied for many years under his real name and title "*Major Wilson Rutayisire*".

18. The archives of the "*BBC Monitoring Service*" in Nairobi have documents showing that this service captured for the first time "*Radio Muhabura*" on the evening of 2 July 1992 on frequency 6.400 kHz. Subsequently, radio Muhabura programmes, identified by the signature tune "*the Voice that repatriates, the Voice of RPF-Inkotanyi*" were captured every day on frequency 6 275 kHz between 04H 00 and 05H 30 GMT and between 10 H 00 and 11H 35 GMT, as well as on frequency 6 285 kHz between 17H 15 and 20 H 05 GMT. Radio Muhabura programmes always started with the following announcement: "*This is Radio Muhabura. Radio Muhabura, the voice that repatriates. The voice of RPF-Inkotanyi.*"¹⁶ Broadcasts were in English, Kinyarwanda, French and Swahili.

19. Various reliable sources¹⁷, within or close to the RPF, have indicated that upon its creation, Radio Muhabura broadcast from the South of Uganda and covered the North of Rwanda but could not yet be received in some parts of the South of the country. However, Radio Muhabura quite quickly capitalized on good relations with the Tutsi president of Burundi, Pierre Buyoya, to set up a transmitter in the suburbs of Bujumbura and improve coverage of the South of Rwanda. It thus killed two birds with one stone. The reception of its broadcasts was thenceforth a lot better in the South of the country where President Habyarimana's regime was facing strong opposition, fueled by the regionalism that was now worsened by the broadcasts, to which some factions of opposition parties within the country contributed actively to implement the agreement with the RPF, following the meeting of 29 May to 3 June 1992 in Brussels.

2.2. Thanks to its ideological, ethnic and divisive propaganda, Radio Muhabura was an efficient fighting tool for the RPF

20. Many authors have denounced the RPF's divisive and false propaganda disseminated by Radio Muhabura. Amongst them, the Minister of Planning, **Augustin Ndirabatware**: "*[One of the tools used to implement the RPF programme was Radio Muhabura, an FPR radio station which started broadcasting since 1991. It preached war against the Habyarimana regime and, subsequently, against any Hutu who dared to openly criticise the incompatibility between the democracy heralded by the RPF and its war logic [...]. Radio Muhabura contributed to worsen the ethnic hatred in Rwanda. While inviting the young Tutsi to join the RPF in Uganda, it did everything possible to divide the Rwandan population in general and the Rwandan army in particular, along regional and ethnic lines*"¹⁸]"

¹⁶ BBC Summary of World Broadcasts. "Rwandan Rebel Radio heard". The Monitoring Report, 7 July 1992.

¹⁷ That was the case with Witness TAP-007 interviewed by the Spanish Judge Merelles, and the Rwandan-Swiss political analyst Nkiko Nsengimana, just to name these two.

¹⁸ A. Ndirabatware : "*Rwanda. Le faîte du mensonge et de l'injustice*" [Rwanda. Lies and Injustice at their Peak]-Translator's rendition, Published by " Sources du Nil" , p. 462.

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21. Professor **Melchior Mbonimpa** made the following statement: “[Concerning the history of the Radio Télévision Milles Collines (RTLM), I have already expressed my opinion in my book *“La Pax Americana”*. A lot of things have been said about this radio, and they always come up in the media, especially during the celebration of the anniversaries of the April 1994 tragedy. But nothing is said about the opposite radio that did exactly the same job of intoxication and propaganda: Radio Muhabura, owned by the RPF. There was competition between two clearly ethnic and clearly warlike radio stations [...] And when the world is made to believe that there was only one hate media house, RTLM, totally ignoring the existence of Radio Muhabura, then we are falling into the trap of manipulation and lies.^{19]}”

22. For his part, Father **Serge Desouter**, a Belgian missionary in Rwanda for more than 18 years, and still present in Rwanda during the events of April to July 1994, wrote: “[At some point we had the impression that journalism was a profession for those who insult. Radio Muhabura started broadcasting in 1991 and the RTLM radio at the end of 1993. The RPF mastered the art of using the media to destabilize its adversary. It is obvious that the RPF also destabilized Rwanda.^{20]}”

23. And further down, the same writer added: “[The emergence of hate media, the radio and print media, pamphlets distributed, marked the beginning of a time of violence. We often forget that it was Radio MUHABURA that was created before radio RTLM. Long before RTLM came into existence, radio MUHABURA had threatened, condemned and encouraged people to hate those it considered to be the “enemies” of Rwanda and called on young Tutsis to join the RPF in Uganda. This radio station was under the management of a Tutsi then known as Commander Shabani Ruta who later took the name Major Rutayisire Wilson. [...] The same radio station congratulated Rwamatamu Commune in the Kibuye préfecture for sending many combatants to the RPF! It called on the other communes to do same! It appears perfectly obvious to consider that the Hutu inhabitants of the communes being identified by Radio Muhabura as having provided many recruits to the rebel army at war against the Rwandan nation had eloquent proof that the Tutsi families living in the said communes were “accomplices” of the enemy RPF, deepening the hatred and pushing them to commit the massacres of April to June 1994.^{21]}”

24. In a report submitted to the ICTR in December 2002, the Rwandan-Swiss political scientist **Nkiko Nsengimana** pointed out many facts, including the following²²: “In their public declaration of 8 January 1994 relating to the delay in the establishment of the transitional institutions provided for in the Arusha Peace Accord, the civil society, represented by women’s organizations “Pro-femmes Twese Hamwe”, human rights organizations “CLADHO” and

¹⁹ http://www.abarundi.org/interviews/abarundi_291104_interview_mbonimpa.html.

²⁰ Serge Desouter. “Rwanda. Le procès du FPR. Mise au point historique” [Rwanda. The RPF Trial. Historical Analysis]-Translator’s rendition, published by “L’Harmattan”, p. 130.

²¹ Serge Desouter, Ibid. p. 166.

²² Nsengimana Nkiko, Doctorate in Political Sciences: “*Quelques éléments d’analyse politologique de l’hécatombe rwandaise de 1994. Rapport d’expertise requis pour le Tribunal Pénal International sur le Rwanda dans l’affaire : Le Procureur contre Jean de Dieu Kamuhanda, ICTR-99-54A*” [A political analysis of the 1994 Rwandan massacre. Expert Report requested by the International Criminal Tribunal for Rwanda in the case: *The prosecutor v. Jean de Dieu Kamuhanda, ICTR-99-54A*]-Translator’s rendition, Lausanne, December 2002.

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development NGOs "CCOAIIB" requested the RPF Radio Muhabura and Radio RTLM of the presidential camp to stop broadcasting ethnic speeches. The group further condemned the ongoing distribution of weapons [...] UNAMIR also had the capacity to jam the stations that were broadcasting ethnic and war-inciting propaganda [...] especially radio RTLM and radio Muhabura" (note 86, p. 36).

25. The Dutch pastor, **C.M. Overdulve**, was a missionary of the Reformed Presbyterian Church of Holland in Rwanda, between 1961 and 1971, and between 1982 and 1994. He wrote an interesting book entitled "*Rwanda, un peuple avec une histoire*"²³ [Rwanda, a People with a history]. It contains the following eloquent testimony about Radio Muhabura and its programmes: "[The RPF was thus engaged in an aggressive propaganda against the government of Habyarimana and claimed to liberate the people from dictatorship. It sowed seeds of unrest and discord among the population, thus stoking the fear of an RPF victory and dictatorship (p. 58). [...] The Rwandan catastrophe clearly revealed the problem of power and the huge influence of the media and disinformation, especially in a context where most of the listeners were illiterate, with no alternative means of verifying what they had learned. Each of the two parties in the Rwandan conflict had their own radio station]" (p. 202).

26. The last writer to be mentioned, and certainly not the least credible, is the Special Representative of the United Nations Secretary-General, Coordinator of the United Nations Assistance Mission to Rwanda. The Cameroonian diplomat, Jacques Roger Booh Booh, made many observations, including the following two: "[The RPF preferred the military option by accumulating heavy weapons and leaned more towards violence and killings rather than negotiations²⁴]" (p. 118). And a little further down, he clearly points out that, just like the RTLM, Radio Muhabura propagated hate messages in the following terms: "[I talked about RTLM hatred and wrongs. But on the opposite side, the Tutsi extremists had the RPF "Radio Muhabura" which was also not preaching national reconciliation, far from it. Their many hate messages were recorded by a captain of the Ghanaian contingent.²⁵]"

27. The Representative of the Secretary General, Jacques Roger Booh Booh, was moreover a victim of false propaganda spread by Radio Muhabura and he complained about it in his book in the following words: "[In its newscast of 7 April 1994, this extremist Tutsi radio station found the main cause of the ills that had since plagued the Rwandan people. According to an interview granted him by General Kagame in Kibungo [sic], Jacques Roger Booh Booh, the ideal scapegoat, was accused of having delayed the putting in place of the transitional institutions. He even accused me of being a close friend of Habyarimana and of other wrongs: participation in a meeting to form an illegal interim government, recognizing the CDR... This is all nonsense. This is disinformation that only the RPF is capable of.²⁶]"

²³ Overdulve C.M.: "*Rwanda, un peuple avec une histoire*" published in 2000, by "L'Harmattan".

²⁴ Jacques Roger Booh Booh: "*Le patron de Dallaire parle. Révélations sur les dérives d'un général de l'ONU au Rwanda. La faillite de Dallaire au Rwanda*" (2005), [Dallaire's boss speaks. Revelations of a UN general's wrongs in Rwanda. Dallaire's failure in Rwanda]-Translator's rendition, Published by "Duboiris", p. 118.

²⁵ *Ibid.*, p. 119.

²⁶ *Ibid.*, pp. 119 and 120.

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28. As stated earlier, the Prosecutor himself hand-picked and disclosed to the Defence documents which indeed confirm the existence of this RPF radio and provide information on the contents of its programmes. For example, below are some of the documents declassified by the American government or coming from UNAMIR:

- i. Doc 32: Radio Muhabura 17H30 GMT 24 July 1992;
- ii. Doc 1: Letter from Ambassador Rawson of 2 February 1994;
- iii. Doc 23: Radio Muhabura 19 March 1994, Arusha Accords;
- iv. Doc 22: Radio Muhabura 19H00 GMT 16 April 1994;
- v. Doc 1: Letter of 3 May 1994 from Janean Mann to Madam Render;
- vi. Doc 17: Radio Muhabura 17H30 GMT 11 June 1994;
- vii. Letter from Lt Nees to Commander KIBAT dated 7 March 1994;
- viii. MINADEF telegram of 16 April 1994;
- ix. Rumour on the assassination of General Ndindiliyimana, 22 April 1994;
- x. Radio Muhabura: The Voice of RPF 29 April 1994;
- xi. Doc 54: Strep of 9 May 1994;
- xii. JP Chrétien in the genocide Media: programmes of Radio Rwanda and those of RTLM were sorted out by Radio Muhabura;
- xiii. News from Radio Muhabura, the Voice of RPF 6 July 1994;

2.3. Radio Muhabura broadcasts were monitored by UNAMIR²⁷ and the major western embassies present in Kigali

29. The special representative of the Secretary-General, **Jacques Roger Booh Booh**, admitted and wrote: “[*I talked about RTLM hatred and wrongs. But on the opposite side, the Tutsi extremists had the RPF “Radio Muhabura” which was also not preaching national reconciliation, far from it. Their many hate messages were recorded by a captain of the Ghanaian contingent.*”²⁸” What better evidence should the Accused, Édouard Karemera, produce to convince the Prosecutor of the existence of recordings of Radio Muhabura programmes and the highly disastrous role that the programmes played in the Rwandan tragedy? Why would a United Nations official, who was present on the theatre of operations, in April July 1994, describe as he did Radio Muhabura programmes? Why does the Prosecutor not want to treat Radio Muhabura and Radio RTLM the same? Why different standards? Why continue denying the existence of the recordings whereas all evidence points to the fact that they were made and are kept by the United Nations?

30. The Late **Alison Des Forges**, a reference expert who greatly contributed to “substantiating” the Prosecution case, also openly admitted the role played by Radio Muhabura

²⁷ When he appeared as a Defence Witness for Joseph Nzirorera, on 16 February 2010, the Special Representative of the Secretary-General, Roger Booh Booh, confirmed the position already recorded in his book published by “Duboiris”.

²⁸ Jacques Roger Booh Booh: “*Le patron de Dallaire parle. Révélations sur les dérives d’un général de l’ONU au Rwanda. La faillite de Dallaire au Rwanda*” (2005), [Dallaire’s boss speaks. Revelations of a UN general’s wrongs in Rwanda. Dallaire’s failure in Rwanda]-Translator’s rendition [Published by “Duboiris”, p. 119.

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in the Rwandan tragedy.²⁹ From the many references made in her famous book "*Leave None to tell the story*", it can be concluded that UNAMIR listened to radio stations broadcasting in Rwanda during the tragic events of April to July 1994, and even long before this date. She flooded us with references of Radio Rwanda and Radio RTLM programmes in her book, while ignoring those of Radio Muhabura which, objectively, discredited her well known pro-RPF position.

31. But she was not vigilant enough. These three passages from her book which probably did not catch her attention are the exception that confirms the rule: "On May 11, Radio Muhabura, the voice of the RPF, still maintained that **"the genocide is already finished."**³⁰ [...] At the end of May, General Kagame said on Radio Muhabura 'Political party youth wingers who have been forced to join the Interahamwe to save their lives should denounce them' and come over to the RPF³¹. [...] On May 16, Radio Muhabura reported that genocide victims had been seen 'tied with their hands behind their back and thrown into the River Nyabarongo' and stated that the bodies going down the river were 'said to be decomposing and not fresh corpses.' The broadcast appeared indeed to explain away the presence of corpses in the river - surprising given that the RPF had driven away the militia and government troops - and the fact that many of the corpses were tied up, a practice usual for the RPF but rare for genocidal killers."³²

32. Rwandan services, particularly the Secretariat of the Political Bureau of the RPF and its archives department, the Rwandan News Agency and the Ministry of Information certainly have in their custody recordings of Radio Muhabura broadcasts, which recordings were made within the scope of their activities at the time of the events. A Belgian delegation composed of **Philippe Mahoux**, vice-president of the Belgian Parliamentary Commission of Inquiry on Rwanda, and **Stef Vandeginste**, researcher at the *Centre d'Etude de la Région des Grands Lacs d'Afrique* talked about this in his report presented to the Belgian Senate.³³

33. While visiting Kigali, the Belgian parliamentary delegation composed of Philippe Mahoux and Stef Vandeginste was authorized to visit, on 23 August 1997, the archives comprising recordings of broadcasts made by Radio Rwanda, RTLM and Radio Muhabura. The delegation made the following observation: "though the broadcasts were not systematically recorded, the recordings started in 1993 and the latest available ones are dated 19 June 1994, covering the crucial period of the genocide."³⁴

34. All **Western embassies** present in Kigali had services assigned to listen to and record programmes broadcast by radio stations operating in the country, and made analyses for their respective governments.

²⁹ See her deposition in the *Media* case (ICTR-99-52-T).

³⁰ HRW/FIDH: "*Leave None to Tell the story (1999)*". Published by "Karthala", p. 812.

³¹ *Idem*.

³² *Ibid.*, p. 841.

³³ Belgian Senate. Legislative document No. 1-611/9.

³⁴ *Idem*.

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35. The Prosecutor cannot be credible when he affords to exhibit recordings of Radio Rwanda and Radio RTL M programmes obtained from these different sources, but claims he is not in possession of recordings of programmes broadcast over Radio Muhabura, with the exception of communiqués and some selected extracts from the newscasts. Why the double standards for an identical situation?

36. It has already been established that early in the evening of 2 July 1992, the “**British Broadcasting Corporation Monitoring Service**” captured and recorded Radio Muhabura, for the first time, on frequency 6 400 kHz. And as evidenced by the few references revisited in paragraphs 37 to 39 below, this monitoring continued in April and May 1994, in particular.

37. We were able to find four specific references at the **BBC Monitoring Service (BBCM)**³⁵ of the **BBC World Service** of the very respectable **British Broadcasting Corporation (BBC)**, whose African offices are located in Nairobi, Kenya, as for the radio station of the RPF rebels, drawn from the book of HRW/FIH, “*Leave none to tell the story*”, under the supervision of Des Forges:

- ☞ 19940409: Radio Muhabura, BBC SWB, AL/1968 A/4, 11 April 1994;
- ☞ 19940411: Radio Muhabura, BBC SWB, AL/1970 A/5, 13 April 1994;
- ☞ 19940421: Radio Muhabura, BBC SWB, AL/1980 A/2, 21 April 1994;
- ☞ 19940425: Radio Muhabura, BBC SWB, AL/1980 A/3, 25 April 1994;

38. Hereunder are some more references taken from Gérard Prunier’s book entitled “*Rwanda: le génocide*”³⁶ [Rwanda: the genocide]:

- ☞ 19920818 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19930902 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940129 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940222 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940223 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940328 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940505 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940515 Radio Muhabura, BBC SWB, GerPru1997

³⁵ BBC Monitoring: Caversham Park, Reading RG4 8TZ, UK. Marian-Martin@mon.bbc.co.uk [September 1993 – March 2001].

³⁶ Gérard Prunier “*Rwanda: le génocide*” [Rwanda: the genocide], published by “Dagorino” in 1997.

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- ☞ 19940603 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940616 Radio Muhabura, BBC SWB, GerPru1997
- ☞ 19940625 Radio Muhabura, BBC SWB, GerPru1997.

39. **FBIS/AFR (Foreign Broadcast Information Service)** is a United States government service that collects and transcribes information recorded from radio broadcasts and the print media. The Foreign Broadcast Information Service is the American equivalent of the British Broadcasting Corporation Monitoring Service. Based in Abidjan (Abidjan IV), the African service (AFR) of FBIS provides daily updates on African events, including events in Rwanda. In the book *Leave None to Tell the Story* the following references on Radio Muhabura are mentioned:

- ☞ 19940518 FBIS AFR 94-096, 18 May 1994, Radio Muhabura;
- ☞ 19940518 FBIS AFR 94-096, 18 May 1994, Radio Muhabura;
- ☞ 19940519 FBIS AFR 94-097, 19 May 1994, Radio Muhabura;
- ☞ 19940524 FBIS AFR 94-100, 24 May 1994, Radio Muhabura.

40. Major **Rick Orth**, Military Attaché at the United States Embassy in Kigali, has published four Radio Muhabura references that are available in the library of the University of New Brunswick in Canada:

- ☞ 19931119 (Clandestine) Radio Muhabura, 19 November 1993, 1815 GMT; FBIS-AFR ABIJAN IV; RIKORT1997;
- ☞ 19931014 (Clandestine) Radio Muhabura, 14 October 1993, 0415 GMT; FBIS-AFR ABIJAN IV; RIKORT1997;
- ☞ 19940223 (Clandestine) Radio Muhabura, 23 February 1994, 1990 [sic] GMT; FBIS-AFR ABIJAN IV; RIKORT1997;
- ☞ 19940430 (Clandestine) Radio Muhabura, 30 April 1994, 1040 GMT; FBIS-AFR ABIJAN IV; RIKORT1997.

41. These references are tendered to demonstrate that Édouard Karemera's Defence is not speculating in its queries to the Prosecution about recordings of Radio Muhabura programmes. These references relate to extracts selected by authors, based on their own aims. Unfortunately, they do not address the concerns of Édouard Karemera's Defence. Moreover, they merely

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scratch the surface, given that Radio Muhabura broadcasted everyday, for several years from March 1991 until the period spanning April to July 1994, which is specifically relevant to the Defence.

42. To circumvent the difficulty, the Prosecutor disclosed to the Defence a CD containing only remnants of passages from which all materials relevant to the Defence case had been expunged. In so doing, he has no more than cleverly shirked his obligation to disclose exculpatory and incriminating material and to enable the Accused to access all the documents relevant to his case. In fact, the issue is not whether the Defence exercised diligence to access the documents with its own resources. The real issue is: "*What can the Defence do, given the nature of the documents sought and the special status of the entities in whose custody they are*"?

43. The information given in the previous paragraphs demonstrates that the Defence has left no stone unturned to find the sought material and locate the entities where they are likely to be found. These documents exist, without a doubt, and it is highly probable that the Prosecution has had access to them, as we will try to demonstrate hereunder in section 2.4.

2.4. Substantial evidence shows that the Prosecutor is in possession of recordings of Radio Muhabura and adamantly refuses to disclose them to Karemera

44. When she appeared as expert witness for the Prosecution in the trial referred to as the *Media* case (Case No. ICTR-99-52-T), **Alison Des Forges** was subjected to such a thorough examination by Ms Diana Ellis, Counsel for Ferdinand Nahimana, that she eventually revealed the existence of microfiches held by the US Department of State. She also explained that the material was the outcome of a microfilming project undertaken on behalf of the Tribunal by the US government in order to preserve the files that were in the possession of the Office of the Prosecutor as of July 1995.

45. In his testimony in the trial of Laurent Semanza, on 18 April 2001, and in the *Media* trial, on 11 March 2002, a former OTP investigator, **Kaiser Razvi**, also mentioned some 220 sound tapes recorded by the US State Department on behalf of OTP. The recorded material originated from the archives of the Secretariat of the RPF Political Bureau in Kigali, the Rwandan News Agency and the Ministry of Information in Kigali, while other tapes were obtained from individuals. In response to a question from Mr John Floyd who wondered why several recordings were inexplicably missing, Kaiser Razvi stated candidly that: "the missing tapes had been removed from the list tendered because, either the investigators had found out that they were not RTLM tapes, or they were not relevant to the case at hand, given that the according to the Prosecution case it was RTLM that instigated and fuelled the 1994 genocide in Rwanda."^{37*}

46. Coming under pressure as a result of the inadvertent revelations made by its witnesses, Alison Des Forges and Kaiser Razvi, the Prosecution finally admitted³⁸ that it had in its custody 27,755 pages of documents and 14 reels of microfiche that it had recently received from the "US

³⁷ Transcript, 12 March 2002 in the *Media* case - ICTR-99-52-T. [reference not found]

*Free translation by translator

³⁸ Transcript, 25 September 2002, *Media* trial - ICTR-99-52-T.

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*Deputy Crimes Ambassador*³⁹ in Arusha. The reels were digitized and copied on four CD-ROMs. On 16 September 2002, the Prosecutor yielded to pressure from the Defence and disclosed the “summaries” of broadcasts from Radio Muhabura, Radio RTLM and Radio Rwanda, which were in his possession.

47. Rather than allow the Defence unrestricted access to this mine of information availed to the Tribunal by the United States, the Prosecutor devised yet another scheme to shield some documents from examination by the Defence. He hired a Rwandan expert named Dr Mathias Ruzindana who, at the time, was apparently working with the Tribunal and tasked him to select from the said documents those that were not to be disclosed to the Defence. Subsequently, pursuant to Rule 66(C), the Prosecutor filed a motion requesting the Chamber to exclude the documents selected by Dr Mathias Ruzindana from inspection. The motion was granted in part.⁴⁰ The finding made by Trial Chamber I in the assessment of documents to be excluded from disclosure to or inspection by the Defence in the *Media* case evidences the existence of the said recordings. However, this decision is not binding on this Chamber, as it should make its own assessment.

48. Since it has not had any access to said documents which are in the control and custody of the Prosecutor, Édouard Karemera’s Defence cannot but emphasize their clear relevance to its case, as they bear an obvious link with the Radio Muhabura recordings which the Defence is struggling to have disclosure of. On the strength of the revelations made by Alison Des Forges and Kaiser Razvi, the Defence believes that the OTP which, it should be underscored, is a [*sic*], is in possession of about 230 hours of recordings of Radio Muhabura broadcasts

2.5. Divisive and false propaganda by Radio Muhabura is a recurrent issue at trials before the ICTR that grounds the motion for the disclosure of recordings of its broadcasts

49. In response to a question from Ms Diana Ellis, Defence witness code-named number 12 to protect his identity testified that: “*The RPF’s ideology was ethnicist, as the CRT had identified it, and broadcast anti-democratic propaganda in order to take power, inviting the population to rise against the established power and justifying thereby its war.*”⁴¹

50. In the joint trial of the *préfet* of Kibuye, Clément Kayishema, and businessman Obed Ruzindana, two Defence witnesses explained that Tutsis who had come from all over assembled at Bisesero because “*the RPF Radio Muhabura had encouraged them to seek refuge there.*”^{42*}

51. Alison Des Forges corroborates their testimonies in her account of her interviews with Tutsi survivors of the Bisesero killings: “*We fled to the hill because it was high and we could see the attackers coming. [...] Others recalled that Bisesero had been an important site for defense*

³⁹ This generous Ambassador at large was the Prosecution counsel in the *Akayesu* trial, Richard Prosper.

⁴⁰ Decision rendered on 25 October 2002 in *The Prosecutor v. Ferdinand Nahimana et al.*

⁴¹ Transcript, 25 October 2002, *Media* case - ICTR-99-52-T, p. 40.

⁴² Report by J.J. Dushimiyimana of *Hirondelle* news agency aired over BBC-Kinyarwanda on 20 May 1998 in Arusha: “*Radio Muhabura ya FPR yashishikariye abatutsi guteranira mu Bisesero*”.

*Translator’s note: free translation because the reference is available only in Kinyarwanda

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at the time of the 1959 revolution, a consideration which determined the choice of site for people in other prefectures as well. According to some witnesses, Radio Muhabura encouraged Tutsi to assemble at Bisesero."⁴³ The same accounts were given by other Tutsi survivors to **Rakiya Omar** who recounted them in *Resisting Genocide*, April-June 1994, page 17.

52. Defence Witness for Casimir Bizimungu, former ambassador of the Kingdom of Belgium to Kigali, **Johann Swinnen**, testified on 7 May 2008 and stated the following: "Radio Muhabura, the RPF radio, broadcast hate speech and made statements that were not conducive to the implementation of the Arusha peace accords. He took it up on one occasion with Kagame in Mulindi".

53. Ambassador Johann Swinnen's testimony is corroborated by his compatriot **Captain De Cuyper**, intelligence officer (S2) in Kibat 2. In a report dated 22 March 1994, the Belgian officer wrote as follow: "the political programmes of the Voice of the RPF (Radio Muhabura) have, for some time now, been broadcasting only RPF war songs and airing reports that fuel suspicion."⁴⁴

54. General **Augustin Ndindiliyimana**, testifying at his trial, castigated the divisive tactics of Radio Muhabura in its broadcast of 21 April 1994. Speaking over Radio Rwanda on 22 April 1994, he dispelled rumours peddled by the misleading RPF propaganda and misinformation aired the day before over Radio Muhabura that he and other officers from the south had been murdered by their comrades of the north.

55. In *Karemera et al.*, ICTR 98-44-T, at least 10 Defence witnesses testified about Radio Muhabura programmes, thereby unequivocally confirming that the radio had indeed existed and that its broadcasts could be received in Kibuye, including Bisesero. The witnesses include:

- ☞ **Mathias Hitiyaremye**: transcript of 15 July 2008, page 54
- ☞ **LSP**: transcript of 10 July 2008, page 19
- ☞ **UKL**: transcript of 16 July 2008, pages 25 and 26
- ☞ **ETK**: transcript of 11 November 2008, pages 31 and 32
- ☞ **RTM**: transcript of 12 November 2008, pages 48, 49 and 61
- ☞ **BWW**: transcript of 24 March 2009, page 30
- ☞ **XWZ**: transcript of 25 March 2009, pages 15 and 16
- ☞ **ECU**: transcript of March 2009, pages 54, 59 and 60
- ☞ **UOW**: transcript of 25 March 2009, pages 28 and 29

⁴³ HRW/FIDH: *Leave None to Tell the Story* (1999). Editions Karthala, p. 218.

⁴⁴ Intelligence Report by Captain De Cuyper, 22 March 1994.

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EPJ: transcript of 31 March 2009, page 70

56. Although their testimonies contradict, in every respect, the denials of Prosecution Witness GK and the allegations of Prosecution Witnesses AMM, AMN and AMO, the Prosecution failed to test their credibility on this specific point. However, the Defence would not like to delude itself by inferring that the Prosecutor agrees with its stance on this point. That is why, to avoid taking unnecessary risks, Édouard Karemera's Defence demands full access to recordings of Radio Muhabura broadcasts heard before and after the events of April to July 1994, with a view to gathering material that will be used to bolster the testimony of its witnesses.

57. In his testimony, Accused Édouard Karemera laid much emphasis on the damaging role of Radio Muhabura in exacerbating ethnic tension and chaos that contributed to the killings. He tendered long excerpts of publications⁴⁵, including an excerpt from exhibit (P.274⁴⁶), to rebut the Prosecution's theory denying the reality of covert squads and RPF infiltrators, as well as the havoc they wreaked in tandem with the divisive propaganda peddled by Radio Muhabura, to destroy Rwanda. Édouard Karemera maintains that Radio Muhabura and the covert squads of the RPF were the main vectors used by the RPF to sow the chaos which triggered the killings that gripped the country, including Bisesero.

58. Disregarding this submission and the last Defence request for access to Radio Muhabura recordings, the Prosecution merely responded with a polite, albeit embarrassed, silence. Because, on this specific point, the Accused, Édouard Karemera, was very clear in his testimony of 25, 26 and 28 May 2009.

59. In response to a question from the Prosecutor on 25 May 2009, he testified as follows: *"And then, Counsel for the Prosecution, Radio Muhabura, which broadcast in Karongi. [...] And Radio Muhabura had congratulated the bourgmestres of the communes of Gishyita and Rwamatamu, as you know, congratulating them for having sent many fighters from its ranks. If you had not refused access to the recordings of Radio Muhabura programmes to us, I would have been able to prove a long time ago to you that Bisesero was, indeed, the area where the RPF supporters in the enemy zone would regroup. By enemy zone, I mean the governmental zone."*⁴⁷

60. On 26 May 2009, he reiterated the same concern to the Chamber in the following terms: *"I don't want to accuse him for having denied me access to recordings of the Muhabura radio, but he knows that during those events you had Radio Rwanda, Radio Muhabura and RTL. All the documents that I've been given are transcripts from Radio Rwanda, Radio RTL, never from Radio Muhabura. Really, to be candid, look at me straight in the eyes. Can you tell me that there was nothing recorded from Radio Muhabura? Straight in the eye of the Bench, can you state that in your investigations you never asked yourself that question?"*⁴⁸

⁴⁵ Refers specifically to Romeo Dallaire's book, *Shake Hands with the Devil* and Abdul Ruzibiza's *"Rwanda: Histoire secrète du génocide"*.

⁴⁶ *"Drame rwandais : Les aveux accablants des chefs de la Mission d'Assistance des Nations Unies au Rwanda"* Editions Source du Nil, published in 2007 by Édouard Karemera.

⁴⁷ Transcript, 25 May 2009, p. 40.

⁴⁸ Transcript, 26 May 2009, p. 41.

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61. On 28 May 2009, Édouard Karemera indicated that: "On the 11th May 1994, Radio Muhabura, broadcast the entire day -- broadcast congratulations and songs promoting the Rwandan patriotic army's bravery and encouragements. As usual, these programmes were interspersed with information and commentaries. On that day, Radio Muhabura broadcast information according to which the RPF high command had ended the genocide of the Tutsis and that UNO forces were no longer needed to ensure humanitarian missions"-- rather, "were no longer necessary -- were necessary only to ensure humanitarian mission. In other words, they could be considered as enemy forces."⁴⁹ And, he concluded by making the following observation to the Prosecutor, who chose not to respond, probably for want of a convincing answer: "Mr. Prosecutor, this is the 11th of May. According to the RPF, the genocide is finished or, more exactly, the genocide has been stopped. And I, who came into government on 25 of May, who fought tooth and nail not to abandon the people who were on the streets, you have the courage to state what you stated, which I dare not repeat."⁵⁰

62. In the face of insistent and well grounded calls from the Defence to access recordings of Radio Muhabura programmes, the Prosecutor initially opted for a polite stance, but after the disclosure to the Defence of the famous CD containing unusable and unwanted material, he became deliberately malicious. This clearly closes the door on a discussion that should enlighten the Chamber on the role of Radio Muhabura and RPF infiltrators in the Bisesero killings. These documents are undeniably relevant to the case. Édouard Karemera's Defence believes it is entitled to access them. The Chamber's intervention is required to safeguard the fairness of the trial and the interests of justice.

III. LEGAL SUBMISSIONS

3.1. The main legal provisions applicable to the motion

63. Article 28 of the ICTR Statute provides that: "States shall cooperate with the International Criminal Tribunal for Rwanda [...]. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including [...] the taking of testimony and the production of evidence".

64. Rule 66(B) of the Rules of Procedure and Evidence is worded as follows: "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". The letter dated 27 January 2004, submitted in response to a request made by the Accused in his letter of 30 October 2003, was deemed unsatisfactory.

⁴⁹ Transcript, 28 May 2009, p. 28.

⁵⁰ Transcript, 28 May 2009, pp. 28 and 29.

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65. Rule 68 goes further and states 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 Prosecution evidence*". The Prosecutor vehemently opposed the Defence Motion filed on 17 December 2005.

66. Édouard Karemera's Defence files this motion, to seek remedy for the prejudice he has suffered as a result of the violation of the aforementioned provisions, in the hope that it will please this Trial Chamber to take appropriate action to safeguard the fairness of the trial and the interests of justice.

The Tribunal's jurisprudence regarding the disclosure of materials by the Prosecutor

67. In his Brief dated 4 December 2009, the Prosecutor appropriately recalls the need to make a distinction between his obligations under Rule 66(B) on the one hand, and under Rules 66(A) and 68(B)⁵¹ on the other hand. To buttress his argument according to which disclosure pursuant to Rules 66(A) and 68(B) differs from inspection as provided for in Rule 66(B), he quotes the following extract of this Trial Chamber's decision: "*Rule 66(B) affords the defence the right to inspect relevant documents. Upon inspection, the defence may make all copies of documents it deems relevant to its preparation. If the Prosecutor opposes the copying of specific documents, the defence may seize the Chamber for a ruling on the issue.*"⁵² Édouard Karemera's Defence takes cognizance of this felicitous suggestion by the Prosecutor and observes, with much regret, that the Prosecutor not only refused to disclose to it recordings of Radio Muhabura broadcasts, which were nevertheless identified as such, but also denied it their inspection.

68. The Prosecutor pretends to be unaware that, since 2000 Trial Chamber II ordered⁵³ the inspection and disclosure of the sound recordings, transcripts and notes relating to broadcasts made by Radio Muhabura between 1 January and 31 December 1994. In his reply quoted in the same decision, the Prosecutor merely contended that "*she [sic] is not bound to disclose material that may not be tendered during the trial.*"⁵⁴ Therefore, the Prosecutor is actually in possession of these documents but does not deem it fit to disclose them.

69. The Tribunal's settled case law actually states that "*the disclosure to the Defence of evidence which in any way tends to suggest the innocence or mitigate the guilt of the accused is one of the most onerous responsibilities of the Prosecution and shall be interpreted broadly since it is essential to a fair trial.*"⁵⁵

70. In a relatively more recent decision rendered in *Ndindiliyimana*, the Chamber further explained, with respect to disclosure under Rules 66(A) and 68, that "[A]s a rule of disclosure,

⁵¹ Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal the Decision on 27th Rule 66 Violation, para. 15.

⁵² Decision, 29 September 2003, *The Prosecutor v. Karemera et al.*, ICTR-98-44-T, para. 15.

⁵³ Decision, 1 November 2000, *The Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, ICTR-97-21.

⁵⁴ *Ibid.* p. 6, para. 21.

⁵⁵ Decision, 5 February 2008, *The Prosecutor v. Karemera et al.*, ICTR-98-44-T, para. 18.

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the provision in Rule 68 impose a categorical obligation on the Prosecution which is not subject to a balancing test. The Prosecution therefore cannot refrain from disclosing exculpatory material on the ground that the document also includes material that incriminates the Accused.”⁵⁶

71. In the same Decision of 22 September 2008, the Trial Chamber in *Ndindiliyimana et al.* found that the obligation to disclose exculpatory material is central to the fairness of a trial. It took the opportunity offered by that decision to recall the Chamber’s position in this regard: “According to the Appeals Chamber, the obligation to disclose exculpatory material under Rule 68(A) is of positive and continuing nature, notwithstanding the public or confidential character of the material. In discharging its obligation under Rule 68(A), the Prosecutor will be presumed to be acting in good faith, unless the moving party adduces “*prima facie*” evidence proving otherwise”⁵⁷

72. The requirements to be met by an accused bringing a motion based on a breach by the Prosecutor of his obligations under Rule 66(A) and Rule 68 were recalled in paragraph 13 of the Decision of 22 September 2008 in *The Prosecutor v. Ndindiliyimana et al.*, and in paragraph 5 of the Decision of 5 February 2008 in *The Prosecutor v. Karemera et al.*, ICTR-98-44-T. These requirements are three-tiered.

73. The accused who seeks to demonstrate that the Prosecutor failed to meet his disclosure obligations must⁵⁸:

- ❖ identify the material sought;
- ❖ satisfy the Chamber on a *prima facie* basis of the Prosecutor’s custody and control of the requested material;
- ❖ satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the requested material.

74. It falls to the Prosecutor, under paragraph 5 of the Decision of 5 February 2008, to determine in the first instance, which material, pursuant to Rule 68(A), could exculpate the accused, mainly on the basis of facts. After recalling the obligations of the Prosecutor and the requirements to be met by the Accused, all that needs to be done now is to verify whether the factual and legal submissions made in the instant motion meet the standard set by the Tribunal’s relevant case law.

⁵⁶ Decision, 22 September 2008, *The Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, para. 10.

⁵⁷ Decision, 22 September 2008, *The Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, para. 12.

⁵⁸ Decision, 5 February 2008, *The Prosecutor v. Karemera et al.*, ICTR-98-44-T, para. 5.

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3.3 The motion complies with the legal requirements and the Tribunal's jurisprudence on disclosure

75. The requested documents are clearly identified. They are recordings of Radio Muhabura programmes from 1 January to 31 July 1994, specifically. Radio Muhabura used to broadcast everyday⁵⁹ at the times specified in paragraph 18 of this motion. In Annex II to this motion, Édouard Karemera, gives an updated list of programmes for which recordings had already been sought in his letter of 12 January 2010. The Defence cannot give further details on the content of the programmes owing to their volume and the time that has elapsed. However, an effort has been made to give the Chamber an idea of the content by concisely stating the subject matter of some programmes⁶⁰ broadcast on specific dates, as illustrated hereunder:

- Following the killings of the Bagogwe in the *Préfectures* of Ruhengeri and Gisenyi in January 1993, on 30 January 1993, Radio Muhabura broadcast the following message in English: “The Kigali regime has now embarked on genocide, destruction and looting of people’s property. There is concrete evidence to [sic] this. Killings have systematically been perpetrated in communes (...) The Rwandan army and other security organs are merely looking on as these massacres are committed.”⁶¹
- In a programme broadcast on 19 November 1993 at 1815 GMT in French over Radio Muhabura, the RPF shifted blame as usual by claiming that the MRND opposed elections and the establishment of broad-based national transition institutions.⁶²
- On the same day, Radio Muhabura pinned the murder of MRND officials in Kirambo *sous-préfecture* on the MRND, although the RPF had actually committed the murders.
- In a programme broadcast on 23 February 1994 in English at 19:30 GMT, Radio Muhabura manipulated the audience by taking advantage of an event that occurred in Gatsata (in the outskirts of Kigali) to accuse the MRND of having attempted to eliminate RPF leaders invited to Kigali by UNAMIR.⁶³
- From 13 April 1994, Radio Muhabura aired calls to RPF supporters to assemble at Bisesero and put up resistance until the arrival of reinforcements. From 16 April 1994, it started to report and comment on the number of persons killed at roadblocks and in various parts of the FAR-controlled zone.⁶⁴

⁵⁹ The broadcast languages were English, Kinyarwanda, French and Swahili.

⁶⁰ See paras. 4, 6, 15 to 22, 44, 45, 47, 49, 50, 54, 56 and 70.

⁶¹ Radio Muhabura (English), 0030 GMT, 30 January 1993, “Kigali regime continues with massacres”, *BBC Summary of World Broadcasts*, 2 February 1993.

⁶² Radio Muhabura, 1815 GMT, 19 November 1993, FBIS AFR, ABIDJAN IV; French.

⁶³ Radio Muhabura, 1930 GMT, 23 February 1994, FBIS AFR, ABIDJAN IV; English

⁶⁴ Radio Muhabura, 16 April 1994, 1815 GMT; FBIS-AFR-94-074.

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- In the programme of 17 April 1994 broadcast at 1815 GMT in English, Radio Muhabura announced that the *préfectures* of Gitarama, Butare, Gikongoro and Kibuye had also witnessed killings as had the capital, Kigali. It was from 17 April 1994 that Radio Muhabura invariably used the term genocide to characterize the prevailing killings in Rwanda in the following terms: “*The world must not and should not forget the genocide that is being perpetrated in Rwanda today*”. This set the ball rolling. Thereafter, this RPF message was echoed by the media, in NGOs and in political speeches made by political figures.⁶⁵
- In its programmes of 20 to 21 April 1994, Radio Muhabura repeatedly announced the murder of General Augustin Ndindiliyimana and other officers from the south by their comrades from the north of the country. Its objective was to further divide the Rwandan Armed Forces. The Chief of Staff of the *Gendarmerie* made no mistake. On 22 April 1994, General Ndindiliyimana dispelled that misinformation in a lengthy intervention on Radio Rwanda.⁶⁶
- In its programme broadcast on 30 April 1994 at 10:40 GMT in French, Radio Muhabura peddled intense propaganda that was subsequently echoed by the ICTR Prosecutor on the basis of the report by the famous international fact-finding commission on human rights violations in Rwanda. It falsely accused the leadership of MRND and CDR of masterminding the genocide. According to Radio Muhabura, the political extermination plan had been uncovered long before the conclusion of the Arusha accords on 4 August 1993 by various domestic and foreign sources.⁶⁷ And in the end, it blamed the international community for failing to take the requisite measures to prevent its execution.
- In its broadcasts of 11 May 1994, Radio Muhabura repeatedly aired the statement from the RPF High Command announcing that its brave soldiers had ended the genocide, and consequently, the purpose for the deployment of 5,500 UNAMIR II troops decided on 21 April 1994 by the Security Council⁶⁸ was defeated.
- Radio Muhabura programmes continued until the RPF declared victory. To boost the morale of covert squads and other RPF supporters in FAR-controlled

⁶⁵ Subsequent references to the term “genocide” were made in the following sequence: RPF(17April 1994), Human Rights Watch (19 April 1994), New York Times (25 April 1994), Pope John Paul II (27 April 1994), U.S. Committee for Refugees (2 May 1994) and Boutros-Boutros Ghali (4 May 1994).

⁶⁶ Transcript, 27 May 2009, pp. 69 and 70, in *Karemera et al.*, ICTR-98-44-T. Also see *Ndindiliyimana et al.*, ICTR-00-56-T, Transcript, 18 June 2008, pp. 13 to 16.

⁶⁷ Radio Muhabura, 1040 GMT, 30 April 1993, FBIS AFR, ABIDJAN IV; French

⁶⁸ Radio Muhabura, 11 May 1994, UNAMIR; “On 11 May, *Radio Muhabura, the voice of the RPF, continued to announce that “the genocide was [already] over*”. Also see HRW/FIDH, *Leave None to tell the Story*, p. 816.

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areas, including Bisesero, Radio Muhabura continued is misinformation campaign, claiming that the arrival of reinforcements was imminent. It is appropriate, at this juncture, to recall the unchallenged testimony of Lieutenant Abdul Ruzibiza who accused General Paul Kagame of having formally forbidden his military commanders from going to the rescue of his supporters in the government-controlled area.⁶⁹

76. The Defence made efforts to establish a *prima facie* case that, in the course of his investigations, the Prosecutor had accessed various records and is surely in possession of recordings of some programmes, if he does not have all of them in his control. That is the purport of paragraphs 28 to 40 and 47 of the instant motion.

77. *Prima facie* evidence to satisfy the Chamber that the said recordings suggests the innocence of the accused or is potentially exculpatory was also tendered in paragraphs 14 to 27, 50 to 56 and 59 to 61 of the instant motion. The Defence draws the attention of the Chamber to the fact that this material will help to buttress its case in rebuttal of the allegations set forth in paragraphs 60, 61, 64.3 and 65 of the Indictment.

78. The Chamber may be minded to give credit to the Prosecutor for his good faith. The Defence submits that it actually has no cause to challenge a core principle such as the good faith of parties in the administration of justice. However, as the *moving party* in this proceeding, it wishes to draw attention to the impressive number of applications that this Chamber has had to decide.⁷⁰ In fact, the Prosecutor's violation of his disclosure obligations has been so often deplored in trials before this Tribunal that it becomes difficult to trust his good faith. In this regard, it suffices to refer to the position recently adopted by Trial Chamber II in *Ndindiliyimana et al.*

79. In that case, the judges were so scandalized by the conduct of the Prosecutor that they were forced to take the following severe measure: "*The Chamber issues a reprimand to the Prosecutor of the ICTR in respect of the Prosecution's lack of diligence in the disclosure of exculpatory material in this case and reminds the Prosecution of its responsibility as ministers of justice to assist the Chamber discover the truth about allegations in the Indictment and to do justice to the international community, the victims and the accused. The Prosecution must always exercise the highest standards of integrity and care in discharging its obligations.*"⁷¹

80. Accused Édouard Karemera is convinced that, in his own trial, the Prosecution did not always observe "*the highest standards of integrity and care in discharging its obligations*". For instance, he deems it necessary to cite the two cases⁷² which scandalized him most. He relies on

⁶⁹ Abdul Ruzibiza, "*Rwanda, l'histoire secrète*", Editions Panama (2005), pp. 347, 348 and 351.

⁷⁰ At the sole request of Accused Joseph Nzirorera, this Trial Chamber received more than 44 notices of appeal, including 27 on the violation of Rule 66 and 17 on the violation of Rule 68.

⁷¹ The body of the Decision of 22 September 2008 in *The Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-00-56-T.

⁷² The Prosecutor concealed the material of the judicial record of Prosecution Witness AMO and attempted to ambush him with the famous draft of the letter that *Préfet Kayishema* never sent to him.

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the arguments made in paragraphs 36, 37, 41 and 57 of this motion to state that the Prosecutor wilfully denied him access to recordings of Radio Muhabura programmes.

81. The Prosecutor does not really care much about his "*responsibility as minister of justice to assist the Chamber discover the truth about allegations in the Indictment*". Otherwise, he would not so strenuously object to the Defence proposal to litigate the impact of the war, the destructive role of RPF propaganda peddled over Radio Muhabura and the havoc wreaked by the covert squads and other infiltrators of the RPF operating throughout the country, and in the Bisesero area, in particular.

82. Having fulfilled all the requirements, Édouard Karemera's Defence respectfully prays the Chamber to:

- Grant its motion and find it well grounded;
- Order the Prosecutor to disclose or, in the alternative, allow the Defence to inspect all the recordings of Radio Muhabura broadcasts in his custody, especially those mentioned in Annex II of this motion.

Respectfully submitted
[signed]

Moussa Félix Sow
Co-counsel
Annexure I and II
