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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, *Presiding*
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Date of filing: 4 January 2010

JUDICIAL RECORDS ARCHIVES
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Jean de Dieu KAMUHANDA
v.

THE PROSECUTOR

Case No. ICTR-99-54A-R

Prosecutor's Response to Kamuhanda's "Requête aux fins de communication de pieces à décharge et autres éléments pertinents - Article 68 du Règlement de procédure et de preuve"

Office of the Prosecutor

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A. Background

1. On 22 December 2009 Kamuhanda filed a motion for the disclosure of evidence pursuant to Rule 68.¹ This is the Prosecution's reply to that motion.
2. In its Judgement of 22 January 2004, Trial Chamber II of the Tribunal (the Trial Chamber) found Kamuhanda guilty of aiding and abetting, instigating and ordering genocide and extermination as a crime against humanity for his involvement in a massacre that took place at Gikomero Parish Compound on 12 April 1994. As a result, he was sentenced to imprisonment for the remainder of his life.² He appealed the Trial Judgment. In the course of the appeal proceedings, the Appeals Chamber granted in part Kamuhanda's motion to admit additional evidence. During the evidentiary hearing that followed on 18 May 2005, Witness GAA testified that he had lied when he testified during Kamuhanda's trial that he had been at Gikomero the day of the massacre and that he had seen Kamuhanda there.³ A further witness, GEX, testified that, contrary to her previous statement given to the Prosecution, she had not seen Kamuhanda or heard his name spoken at Gikomero.⁴
3. On 19 May 2005, the Appeals Chamber rendered an oral decision directing the Prosecutor to investigate allegations of interference with a witness, discrepancies arising from testimony given during the appeal hearing and false testimony.⁵ A Special Counsel was appointed by the Prosecutor to conduct this investigation.⁶
4. In its Judgement of 19 September 2005, the Appeals Chamber found GAA's recantation at the appeal hearing not credible, and the testimony of GEX to be

¹ *Jean de Dieu Kamuhanda, v. The Prosecutor*, Case No ICTR-99-54A-A, Requête aux fins de communication de pièces à décharge et autres éléments pertinents – Article 68 du Règlement de procédure et de preuve, dated 21 December 2009 but filed 22 December 2009 (Rule 68 Motion).

² *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No ICTR-99-54A-T, Judgement and Sentence, 22 January 2004 (Trial Judgement), paras. 651, 652, 700, 702, 750, 770.

³ Witness GAA, T. 18 May 2005, p. 3.

⁴ Witness GEX, T. 18 May 2005, p. 45.

⁵ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005, p.p.2-3.

⁶ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No ICTR-99-54A-A, Prosecutor's Clarification on Kamuhanda's Request for Special Counsel's Report, 13 August 2009 (Prosecutor's Clarification).

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unreliable.⁷ The Appeals Chamber affirmed Kamuhanda's convictions for ordering genocide and extermination as a crime against humanity. They also affirmed the sentence imposed by the Trial Chamber.⁸

5. On 7 April 2006, the Appeals Chamber dismissed a motion by Kamuhanda whereby he requested, amongst other things, to be provided with a copy of the report purported to have been prepared by the Special Counsel.⁹

6. By motion of 15 May 2009, Kamuhanda requested the assignment of a legal assistant at the expense of the Tribunal in order to assist in the preparation of a potential motion for review of the Appeal Judgement pursuant to Article 25 of the Statute and Rules 120 and 121.¹⁰ This motion was granted by the Appeals Chamber on 21 July 2009, wherein the Prosecution was also ordered to clarify whether it was provided with a report by the Special Counsel.¹¹ The Prosecution provided its clarification on 13 August 2009 whereby it stated that no such report exists.¹²

7. In the Rule 68 Motion, Kamuhanda asserts that, "A ce jour, le Procureur ne s'est pas pleinement conformé à l'obligation qui lui est faite par l'article 68A) du Règlement."¹³ He then sets out a number of pieces of evidence which he asserts are exculpatory and have not been disclosed to him. He requests the Chamber, "de constater que le Procureur a manqué à son obligation de communication sur le fondement de l'article 68 du Règlement", and to order disclosure of the documents listed thereafter.¹⁴

⁷ *Jean de Dieu Kamuhanda, v. The Prosecutor*, Case No ICTR-99-54A-A, Judgement, 19 January 2005 (Appeal Judgement), paras. 211, 226.

⁸ Appeal Judgement, paras. 364, 365.

⁹ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No ICTR-99-54A-A, Decision on Jean de Dieu Kamuhanda's Request Related to Prosecution Disclosure and Special Investigation, 7 April 2006, para. 7.

¹⁰ *Jean de Dieu Kamuhanda, v. The Prosecutor*, Case No ICTR-99-54A-A, Motion for Legal Assistance for Preliminary Proceedings Relating to the Review of the Judgement Delivered by the Appeals Chamber on 19 September 2005, 15 May 2005.

¹¹ *Jean de Dieu Kamuhanda, v. The Prosecutor*, Case No ICTR-99-54A-A, Decision on Motion for Legal Assistance, 21 July 2009.

¹² Prosecutor's Clarification, para.4.

¹³ Rule 68 Motion, para. 7.

¹⁴ Rule 68 Motion, p. 9.

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B. Respondent's Submissions

8. In order to show that the Prosecution is in breach of its disclosure obligations, an applicant must (1) identify specifically the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material is in the custody or under the control of the Prosecution.¹⁵

9. The Prosecution acknowledges that its obligation to disclose exculpatory material is ongoing,¹⁶ regardless of whether Kamuhanda can show any particular breach of Rule 68, and notes that it exercises the discharge of its mandate in good faith.

10. Kamuhanda has requested disclosure of material that can be divided into four categories. The Prosecution will deal with each of these in turn.

1. Material relating to the investigation of the Special Counsel

11. Kamuhanda has asked that the Appeals Chamber order disclosure of a complete list of persons interviewed by the Special Counsel in the course of her investigation, the date when this investigation was completed and all of the statements received in its course.¹⁷

12. First, with regard to the request for a complete list of all persons interviewed by the Special Counsel, Kamuhanda has failed to establish a *prima facie* showing of the probable exculpatory nature of such a list. The Prosecution does not consider such a list to fall within Rule 68 material to be disclosed and such a list of all persons interviewed by the Special Counsel will not be disclosed.

¹⁵ *The Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-AR73.13, Decision on Joesph Nsirorera's Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008, para. 9.

¹⁶ *Prosecutor v. Niyitegeka*, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review, Case No. ICTR-96-14-R, 28 September 2005, p. 8.

¹⁷ Rule 68 Motion, p. 9.

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13. Secondly, with regard to the date that the investigation was completed, the Prosecution re-iterates, that the investigation has not been concluded.¹⁸ Therefore no such date exists. In any event, Kamuhanda has again failed to establish a *prima facie* showing of the probable exculpatory nature of this information. The Prosecution considers the date of completion of such an investigation would not constitute exculpatory material and would not fall within material that the Prosecution is under a duty to disclose.

14. Thirdly, the Prosecution will not disclose *all* the statements received in the course of the Special Investigation. Kamuhanda has failed to show how all these documents would be exculpatory.

15. The Appeals Chamber has already determined that the report of the Special Counsel is not subject to disclosure.¹⁹ The Prosecution acknowledges that the Appeals Chamber also held that this did not excuse it from disclosing exculpatory material obtained in the course of this investigation.²⁰

16. Accordingly, on 28 May 2009, the Prosecution disclosed to Kamuhanda, *inter alia*, the transcript of the Special Counsel's interview with witness GAA.²¹

17. The Prosecution has therefore reviewed the material in its possession relating to this investigation and has determined that this is the material which is potentially exculpatory and subject to disclosure. Kamuhanda's dissatisfaction with the information disclosed thus far, or the fact that the investigation has not been concluded, does not demonstrate that there is any further exculpatory information relating to the Special Counsel's investigation. However, the Prosecution recognizes its obligation to continue

¹⁸ Prosecutor's Clarification, para 4; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, T. 30 October 2009, pp. 10, 11.

¹⁹ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No ICTR-99-54A-A, Decision on Jean de Dieu Kamuhanda's Request Related to Prosecution Disclosure and Special Investigation, 7 April 2006, para. 7.

²⁰ *Ibid.*, at footnote 20.

²¹ Memorandum (with CD) from Abdoulaye Seye, Appeals Counsel for the Office of the Prosecutor, "Disclosure to Mr. Jean de Dieu Kamuhanda of Witness Statements and Trial Transcripts from the Case *The Prosecutor v. Nshogoza*", confidential, 28 May 2009. A copy of this memorandum is filed separately as Confidential Annex I.

to review such material and will disclose any further material which is in its possession which it determines is exculpatory.

2. Material relating to the *Nshogoza* case

Exhibit P2

18. Kamuhanda requests the disclosure of Exhibit P2 from the *Nshogoza* trial which is a confidential spelling list of names and places. The list is not exculpatory on its face and Kamuhanda has failed to show how it could be exculpatory. Such a list of persons cannot constitute Rule 68 material. There is nothing exculpatory in a list of all persons called and places referred to in a different trial. This is a mere fishing expedition. The Prosecution declines to disclose this document.

Previous Statements of Nyagatare

19. No previous statements made by this witness have been found by the Prosecution.

Transcripts of GAA's interview by Special Counsel and tapes

20. Kamuhanda requests Exhibits D11 through D14 from the *Nshogoza* trial. These exhibits are excerpts of the transcriptions of the audio recording of the interview of GAA by the Special Counsel. The entire transcription of the complete interview has already been disclosed to Kamuhanda by the Prosecution.²² The material disclosed includes the excerpts requested in this Motion and referred to as Exhibits D11 through D14.²³ Audio recordings of this material are in the possession of the Prosecution and will be provided to Kamuhanda in CD format.

*Exhibits D9, D10, D22, D23, D24, D53 and D54 from the *Nshogoza* trial*

²² See Memorandum "Disclosure to Mr. Jean de Dieu Kamuhanda of Witness Statements and Trial Transcripts from the Case *The Prosecutor v. Nshogoza*", confidential, 28 May 2009, attached as Confidential Annex I.

²³ Rule 68 Motion, para, 24.

21. The Prosecution is in the process of locating and reviewing these documents to determine whether they are exculpatory and the status of their disclosure to Kamuhanda. The Prosecution requires a further short period of time to review its files with regard to the remainder of this evidence requested from the *Nshogoza* case and undertakes to, in due course, disclose any of the requested material in its possession which is exculpatory and that has not previously been disclosed.

3. Material relating to the *Rwamakuba* case

22. Kamuhanda alleges that testimony and documentation from the *Rwamakuba* trial reveals exculpatory material that ought to be disclosed under Rule 68.

23. The Prosecution has reviewed the motion submitted by Kamuhanda as well as the documentation in issue and has concluded that this material he requests does not meet the requirements for Rule 68 disclosure.

Rwamakuba Defence Witness 5/15

24. Kamuhanda has requested disclosure of the entire testimony of Defence Witness 5/15, all of which was given in closed session. Kamuhanda claims that testimony of *Rwamakuba* Defence Witness 5/15 affects the credibility of the prosecution evidence, specifically the credibility of Prosecution Witness GEK, and ought to be disclosed to him.

25. Prosecution witness GEK testified under the pseudonym GIN in the *Rwamakuba* trial and was found to be not credible by that Trial Chamber.²⁴

26. In the *Rwamakuba* Judgment, the Trial Chamber noted that “According to Defence Witness 3/22 who has known GIN since she was very young, and Defence

²⁴ *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Judgement, 20 September 2006 (Trial Judgement).

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Witness 5/15, who also has a close relationship to GIN, she has been greatly affected by her experience in 1994 and changed since then.”²⁵

27. The Prosecution has reviewed the testimony of Witness 5/15 and is of the view that in fact it does not contain any exculpatory material with regard to Kamuhanda. A review of the entirety of the testimony of 5/15 reveals that she mentions neither Kamuhanda nor GIN (despite the Trial Chamber’s reference to 5/15 regarding GIN’s credibility). For these reasons the Prosecution declines to disclose this material. In any event, in these circumstances, one witness’s opinion on the credibility of another witness would not constitute exculpatory material.

Rwamakuba Defence Witness 2/18

28. Kamuhanda also requests the disclosure of the full testimony of *Rwamakuba* Defence Witness 2/18. Witness 2/18 testified that he was one of the assailants who attacked the Gikomero Parish on 12 April 1994. During his testimony he made a list of names of some of the co-assailants in the attack on the Parish.²⁶

29. As noted above, Witness 2/18 also testified in the *Nshogoza* case and stated that he did not see Kamuhanda at the parish on the day of the massacres. He testified that he had told members of the Office of the Prosecution that Kamuhanda was not involved in the genocide during interviews.²⁷

30. The testimony given by Witness 2/18 in the *Nshogoza* file was disclosed to Kamuhanda on 28 May 2009. As a result of this witness’ testimony in *Nshogoza*, Kamuhanda now claims that 2/18’s entire testimony in the *Rwamakuba* trial is exculpatory.

31. Kamuhanda has failed to present a *prima facie* case that Witness 2/18’s testimony is exculpatory. Simply because Witness 2/18 testified in *Nshogoza* that he did not see Kamuhanda on the day of the massacres at Gikomero parish does not mean that he

²⁵ *Rwamakuba*, Trial Judgment, para. 133.

²⁶ *Rwamakuba*, T. 23 January 2006, p. 26, lines 10-26.

²⁷ *Nshogoza*, T. 23 March 2009, p. 16, lines 7-17.

provided exculpatory material in his testimony in the *Rwamakuba* trial. In fact, Witness 2/18 did not offer any information about Kamuhanda during his testimony in *Rwamakuba*. The Prosecution is therefore under no obligation to disclose this testimony.

32. Kamuhanda has also requested the disclosure of a list of co-assailants made by Defence Witness 2/18 during his testimony.²⁸ A review of the proceedings' transcripts for that day indicates that while it appears that a list of co-assailants was made by Witness 2/18, the list does not seem to have been entered as an exhibit in the proceedings.

33. Kamuhanda has therefore failed to establish that this list exists at all. In addition, he has failed to demonstrate how this list, if it exists, is exculpatory in nature. According to the transcript, the list merely names a few of the people who were with him on the day of the massacres.²⁹

34. The purpose of Rule 68 is not to facilitate the conduct of a fishing expedition.³⁰ Kamuhanda has not made a *prima facie* case for why the names of some of the attackers of the Gikomero parish massacres could in any way be exculpatory to the Appellant. He has failed to meet the standard required for Rule 68 disclosure in relation to his request for this list.

Rwamakuba Defence Witness 7/13

35. Kamuhanda requests the disclosure of an alleged statement made by *Rwamakuba* Defence Witness 7/13 wherein he indicated that Kamuhanda never played a role in the genocide in Gikomero.³¹

36. The Prosecution has searched its database and can find no such statement in its records.

²⁸ *Rwamakuba*, T. 23 January 2006, pp. 26-27.

²⁹ *Rwamakuba*, T. 23 January 2006, p. 26, lines 11-32.

³⁰ *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jerome Bicomumupaka's Urgent Motion for Disclosure of Exculpatory Material, 9 February 2009, para. 7; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-I, Decision on the Defence motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 11.

³¹ *Rwamakuba*, T. 19 January 2006, p. 18, lines 3-6.

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4. Material relating to a statement identified as K0110003

37. Kamuhanda has asked for the identity of the witness who made the statement with the number K0110003,³² as well as any other statements made by this witness in regard to the *Kamuhanda* case. The witness in question is not under a protection order and did not give testimony in *Kamuhanda* or any other case. No other statements by this witness have been found in the Prosecution's evidence collection.

38. It should be noted, however, that the Prosecution used this statement in the *Kamuhanda* trial in its cross-examination of Defence Witness PCB, referring to the person who gave the statement by name. The date of the statement was also given in court, and extracts of the statement were quoted into the record.³³ Copies of the statement appear to have been provided to Counsel for the Defence at that time, who continues to be counsel in relation to this Rule 68 Motion.³⁴ The Prosecution makes no comment on the exculpatory nature of statement K0110003. However, in light of the fact that Counsel for Kamuhanda has apparently already received this information, it has no objection to disclosing again the first two pages which show the witness' identity.

³² This K-number relates to the third and final page of this 3-page statement.

³³ *Kamuhanda*, Witness PCB, T. 6 February 2003, p.17 (closed session)

³⁴ *Kamuhanda*, Witness PCB, T. 6 February 2003, p.19 (closed session).

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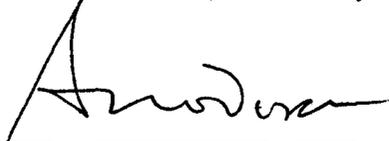
C. Relief Requested

39. The Prosecution requests:

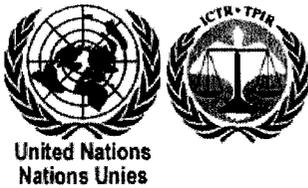
- that this motion be dismissed with respect to the material relating to the investigation of the Special Counsel, exhibits P2, D11 through 14 and Witness Nyagatare in the *Nshogoza* case and all of the requested material relating to the *Rwamakuba* case;
- with respect to the statement identified with K0110003 and the audio recordings of the cassettes numbered KT00-1679 through 1682, the Prosecution undertakes to provide the information requested by separate correspondence and that the Appeals Chamber make no order in this regard; and,
- a further short period of time to review its files with regard to the remainder of the evidence requested from the *Nshogoza* case and in due course will disclose any of the requested material in its possession which is exculpatory that has not previously been disclosed.

Word Count: 2, 983

Dated in Arusha, this 4th day of January 2010



Alex Obote-Odora
Chief, Appeals and Legal Advisory Division



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s):	
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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: