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**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda
OFFICE OF THE PRESIDENT**

ICTR-96-13

20-3-2012

(2240-2226)

Before: Judge Vagn Joensen, *President*
Registrar: Adama Dieng
Date: 20 March 2012

PROSECUTOR v. KAYISHEMA et al.
Case No. ICTR-95-1

PROSECUTOR v. BAGILISHEMA
Case No. ICTR-95-1A

PROSECUTOR v. MUHIMANA
Case No. ICTR-95-1B

PROSECUTOR v. NDIMBATI
Case No. ICTR-95-1

PROSECUTOR v. SIKUBWABO
Case No. ICTR-95-1D

PROSECUTOR v. NIYITEGEKA
Case No. ICTR-96-14

PROSECUTOR v. NTAKIRUTIMANA et al.
Case No. ICTR-96-10/17

PROSECUTOR v. MUSEMA ✓
Case No. ICTR-96-13

PROSECUTOR v. MUNYAKAZI
Case No. ICTR-97-36A

PROSECUTOR v. NCHAMIHIGO
Case No. ICTR-01-63

PROSECUTOR v. NDINDABAHIZI
Case No. ICTR-01-71

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**REPLY TO THE PROSECUTOR'S RESPONSES TO JACQUES MUNGWARERE'S
FIRST AND SECOND URGENT MOTION FOR ACCESS TO MATERIAL and
NOTICE UNDER RULE 67(D)**

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Ottawa Superior Court
C/o The Honorable Louis Z. Charbonneau

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

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SIGNATURE: [Signature] DATE: 23/3/2012

ICTR-95-1-0015

I. INTRODUCTION:

1. On 17 August 2011, Jacques Mungwarere filed a motion for access to material in the Ntakirutimana et al. case.¹
2. On 1 March 2012, Mr. Mungwarere filed another motion requesting access to material identified in eleven other cases before this Tribunal² ("1 March 2012 Motion"). On 5 March 2012, Mr. Mungwarere filed yet another motion requesting access to material related to fabrication of evidence, witness tampering and recantation in six cases before this Tribunal, as well as providing notice under Rule 67(D)³ ("5 March 2012 Motion").
3. On 8 March 2012, the Office of the Prosecutor of the Tribunal ("Prosecution") responded to the 1 March 2012 Motion,⁴ and, on 14 March 2012, to the 5 March 2012 Motion,⁵ requesting that both motions be dismissed in their entirety.
4. On 14 March 2012, the President of the Tribunal, Judge Vagn Joensen, designated himself to adjudicate the motions of 17 August 2011 and of 1 and 5 March 2012 with regards to the requests in the *Kayishema et al.*, *Bagilishema*, *Muhimana*, *Ndimbati*, *Sikubwabo*, *Niyitegeka*, *Musema*, *Munyakazi*, *Ntakirutimana et al.*, *Nchamihigo*, and *Ndindabahizi* cases and ordered Counsel for Mr. Mungwarere to file his requests in relation to the *Karemera et al.*, *Nyiramasuhuko et al.*, *Bizimungu et al.*, and *Ndindiliyimana et al.* cases before the relevant Appeals Chambers.⁶

¹ *Prosecutor v. Ntakirutimana et al.*, Case Nos. ICTR-96-10/17, Mungwarere Motion for Access to Materials, 17 August 2011

² *Prosecutor v. Kayishema et al.*, *Bagilishema*, *Muhimana*, *Ndimbati*, *Sikubwabo*, *Niyitegeka*, *Musema*, *Munyakazi*, *Karemera et al.*, *Nchamihigo* and *Ndindabahizi*, Case Nos. ICTR-95-1, ICTR-95-1A, ICTR-95-1B, ICTR-95-1D, ICTR-96-14, ICTR-96-13, ICTR-97-36A, ICTR-98-44, ICTR-01-63, ICTR-01-71, Jacques Mungwarere's Urgent Motion for Access to Material, 29 February 2012.

³ *Prosecutor v. Niyitegeka*, *Ntakirutimana et al.*, *Nyiramasuhuko et al.*, *Bizimungu et al.*, *Ndindiliyimana et al.*, and *Ndindabahizi*, Case Nos. ICTR-96-14, ICTR-96-10/17, ICTR-98-42, ICTR-99-50, ICTR-00-56, ICTR-01-71, Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice Under Rule 67(D), 5 March 2012.

⁴ *Kayishema et al.* and 10 other cases, Prosecutor's Response to Jacques Mungwarere's Urgent Motion for Access to Material, 8 March 2012. ("Prosecutor's First Response")

⁵ *Niyitegeka* and 5 other cases, Prosecutor's Response to Jacques Mungwarere's Second Urgent Motion for Access to Material and Notice Under Rule 67 (D), 14 March 2012. ("Prosecutor's Second Response")

⁶ *Prosecutor v. Ntakirutimana et al.*, *Kayishema et al.*, *Bagilishema*, *Muhimana*, *Ndimbati*, *Sikubwabo*, *Niyitegeka*, *Musema*, *Munyakazi*, *Karemera et al.*, *Nchamihigo*, *Nyiramasuhuko et al.*, *Bizimungu et al.*,

5. Considering that Mr. Mungwarere's 1 and 5 March 2012 Motions have now been joined through the Designation Order of the President of the Tribunal, and that the grounds relied upon by the Prosecution in opposing these motions in both his First and Second Responses are largely similar, Mr. Mungwarere hereby replies to the Prosecution First and Second Responses.

II. PRELIMINARY MATTER

6. As a preliminary matter, Mr. Mungwarere acknowledges that, since the *Karemera et al.*, *Nyiramasuhuko et al.*, *Bizimungu et al.*, and *Ndindiliyimana et al.* cases are currently pending before the Appeals Chamber, he must therefore file his requests in relation to these cases before the relevant Appeals Chambers, which he shall do forthwith. He apologizes for any inconvenience that his incorrect filing of these requests before the President of the Tribunal may have caused.

III. SUBMISSIONS

7. In both his First and Second Responses, the Prosecution opposes the 1 and 5 March 2012 Motions on three common grounds, which Mr. Mungwarere will address in turn.

(1) First Ground

8. First, the Prosecution alleges that: "the law and jurisprudence of the Tribunal do not generally envisage cooperation between the Tribunal and an accused in another jurisdiction in an individual capacity."⁷ More specifically, the Prosecution argues that Mr. Mungwarere places undue reliance on the *Simba* Decision.⁸
9. Regarding the Prosecution argument that this Decision predates Prosecutor's Regulation No 1 of 2008 promulgated on 17 November 2008 which regulates

Ndindiliyimana et al. and *Ndindabahizi*, Case Nos. ICTR-95-1, ICTR-95-1A, ICTR-95-1B, ICTR-95-1D, ICTR-96-14, ICTR-96-13, ICTR-96-10/17, ICTR-97-36A, ICTR-98-42, ICTR-98-44, ICTR-99-50, ICTR-00-56, ICTR-01-63 and ICTR-01-71, Designation of a Judge to Consider Jacques Mungwarere's Motions for Access to Material and Notice Under Rule 67 (D), 14 March 2012. ("Designation Order")

⁷ Prosecution First Response, para. 3; Prosecution Second Response, para. 3

⁸ Prosecution First Response, para. 5; Prosecution Second Response, para. 6

requests for assistance by national authorities, with respect, it is submitted that this argument is without merit. Neither Mr. Mungwarere nor the Tribunal's Chambers are bound by internal Prosecution Regulation.

10. That the Prosecutor's Regulations do not specifically address the question of cooperation with a private individual being prosecuted before a national jurisdiction does not deprive this Tribunal of the discretion to hear such a Request in the interests of justice. It is not to the Prosecution to establish who may or may not have standing before this Tribunal, and especially not by way of internal Prosecution regulations.
11. It has not been infrequent for this Tribunal to enlarge the scope of its own rules by applying them by analogy, and this is a case in which, it is submitted, that applying the Tribunal's policy of cooperation with State organs, such as the court or the prosecutor of a foreign state, should be applied by analogy to cooperation with an individual being prosecuted and tried by those very State organs. To do otherwise would be to fly in the face of the fundamental principles of justice, in particular, the principle long upheld at this Tribunal of equality of arms before the law.

(2) Second Ground

12. Second, the Prosecution alleges that the 1 and 5 March 2012 Motions are fatally defective as they lack specificity and provide insufficient forensic justification.⁹
13. With respect, it is submitted that this argument is also misguided. According to the relevant jurisprudence, when a party to other proceedings requests access to confidential material from another case, such material must be identified or described by its general nature and a "legitimate forensic purpose" for accessing it must be demonstrated.¹⁰

⁹ Prosecution First Response, para. 3; Prosecution Second Response, para. 3

¹⁰ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karemura et al.* case (AC), 10 July 2009, para. 28; *See also Prosecutor v. Karemura et al.*, Case No. ICTR-98-44-T, Decision on Callixte Nzabonimana's Motion for Access to Exhibit DNZ-461, 23 August 2010, para. 6.

14. Mr. Mungwarere submits that by identifying the relevant paragraphs in the Indictments and Trial Judgments of the related cases, he has sufficiently described the material for which he requests access and indicated the nature of the nexus with his own case.

15. Nevertheless, for greater clarity and precision, Mr. Mungwarere herein provides extensive further details on the material sought in the 1 March 2012 Motion, and their nexus to his own case at Annex 1 of the present Reply, as requested by the Prosecution.¹¹

16. The bottom line is simply that Mr. Mungwarere needs to know the identities of the witnesses mentioned in the various paragraphs of judgements and indictments cited in our motions and annexes, and needs to have access to their unredacted statements, and unredacted confidential testimony, in order to adequately prepare his own defence. Had he been charged before this Tribunal, he would have had access to such names and statements long ago as a matter of course. Had the Prosecutor in a national jurisdiction thought such material would assist the prosecution of an individual arrested there, that Prosecutor would have had it long ago. It is contrary to the spirit of international cooperation, and the fundamental principles of justice and fairness, that an accused should be deprived of such essential material for the preparation of his own defence by virtue of the geography of his arrest.

(3) Third Ground

17. Third, the Prosecution alleges that Mr. Mungwarere "has not demonstrated that the protected witnesses subject of his motion have consented to the variation of protective measures or disclosure of their statements and testimony."¹²

18. As has been argued in our motions, it is submitted that this step is unnecessary under the rules in as much as Mr. Mungwarere does not intend to make this information public, nor reveal the identities of these witnesses, having pledged to respect all

¹¹ Prosecution First Response, para. 7

¹² Prosecution First Response, para. 3; Prosecution Second Response, para. 3

protection orders in place. Mr. Mungwarere notes, as well, that he has already been disclosed some confidential material that has originated at the ICTR and been transmitted to him by the Public Prosecution Service of Canada, and he is not aware of any variations in the protective orders having been requested or required for such disclosure to have taken place.

19. The Prosecution has furthermore argued that disclosure is made, as a general rule, "to national prosecution or judicial authorities that assume the obligation and have the institutional capacity to ensure compliance with the Tribunal's orders with respect to witness protection."¹³ Presumably, the corollary of that is that the protective measures are unenforceable on a private individual in a national jurisdiction since that individual does not fall under the jurisdiction of the Tribunal. It might be argued that the State prosecution and judicial authorities do not fall under the jurisdiction of the Tribunal either, however, it is conceded that the mechanisms of State may indeed provide some measure of "institutional capacity to ensure compliance".

20. However, it must be remembered that individual accused does fall under the jurisdiction of the State "judicial authorities" that the Prosecution envisages as having institutional capacity to ensure compliance with the protective measures. It is therefore suggested that if this Tribunal considers it to be an issue that the applicant does not fall under its jurisdiction, and thus the Tribunal cannot enforce compliance with the protective measures, that it is open to this Tribunal to order disclosure subject to an order of the Ontario Superior Court that the applicant comply with all protective measures in place regarding this material.

21. Should this Tribunal issue such a *conditional* order for disclosure, the Applicant undertakes to seek an order of the Superior Court of Ontario obliging him to comply with the protective orders in place, and will only be able to receive any such material as this Tribunal may order to be disclosed to him after such an order has been issued and transmitted to the Tribunal.

¹³ Prosecution Second Response, para. 4

(4) **Notice Under Rule 67 (D)**

22. The Prosecution alleges that Mr. Mungwarere's submissions regarding Rule 67 (D) is misplaced and without merit since the ICTR disclosure regime is predicated upon "possession" of disclosable material.¹⁴ With respect, the Prosecution argument reflects a complete misunderstanding of Mr. Mungwarere's submissions with respect to this matter. Mr. Mungwarere is in fact in possession of material which he believes may fall within the purview of Rule 67(D) of the Rules, and believes that the Public Prosecution Service of Canada likely has possession of some such material as well, and is seeking guidance of this Tribunal as to what, if anything, he should do about that situation.

IV. CONCLUSION:

23. For the aforementioned reasons, the Defence for Mr. Mungwarere prays the President of the Tribunal to reject the Prosecution objections to the disclosure sought by Mr. Mungwarere.

¹⁴ Prosecution Second Response, para. 17

**FOR ALL THE ABOVE REASONS, MAY IT PLEASE THE HONOURABLE
PRESIDENT OF THE TRIBUNAL TO:**

REJECT the Prosecution objection to disclosure

and

ORDER the disclosure of the requested Material to the Defence of Jacques Mungwarere.

20 March 2011



Me. Philippe Larochelle



Me. Marc Nerenberg

ANNEX 1

(a) *Kayishema et al.*

24. According to paragraphs 45-50 of their Indictment,¹⁵ Mr. Kayishema and Mr. Ruzindana were charged with several counts related to their alleged involvement in the massacres in the Bisesero area.

25. During trial, many witnesses testified about these events, and in particular on the attacks at Muyira Hill in May 1994, as can be seen from paragraphs 405-472 of the Trial Judgment in this case.¹⁶ Paragraph 411 of the Trial Judgment states more specifically that there is sufficient evidence before the Trial Chamber to show that attacks occurred at approximately twelve sites in the Bisesero area. According to paragraphs 564-571 of the Trial Judgment, Mr. Kayishema and Mr. Ruzindana were found guilty of participating in these events.

26. In greater particulars, paragraph 415 of the Trial Judgment refers to the testimony of witnesses PP, OO, II, JJ, NN, HH, UU, FF and KK who were present during the attacks that occurred at Muyira Hill in May 1994, identifying Mr. Kayishema and Mr. Ruzindana. Paragraphs 416-427 of the Trial Judgment further refer to the detailed descriptions of these attacks made by these witnesses. Paragraph 425 also mentions further evidence regarding these attacks and the involvement of Mr. Kayishema and Mr. Ruzindana in those, including by witnesses Z and AA.

27. Moreover, paragraphs 428-472 refer to the testimony of witnesses PP, OO, CC, W, HH, U, DD, MM, RR, II, EE, Z and KK in which they describe further attacks in Bisesero area.

¹⁵ *Kayishema et al.*, First Amended Indictment, 11 April 1997, Counts 19 to 24

¹⁶ *Kayishema et al.*, Trial Judgment, 21 Mai 1999

(b) Bagilishema

- 28. According to paragraphs 4.29-4.31 of his Indictment,¹⁷ Mr. Bagilishema was charged with several counts related to his alleged involvement in the events in Kibuye *préfecture*, particularly attacks in the Bisesero area.
- 29. During trial, witnesses testified about attacks in the Bisesero area, as can be seen from paragraphs 792-813 of the Trial Judgment in this case.¹⁸ In greater particulars, these paragraphs refer to the testimony of witnesses H, A, O, Z, AB, BE and AC relating to these attacks.
- 30. Paragraph 804 of the Trial Judgment also refers to paragraphs 405-472 of the *Kayishema et al.* Trial Judgment and paragraphs 362-497 and 649-796 of the *Musema* Trial Judgment concerning further evidence presented in these trials on the events in the Bisesero area.

(c) Muhimana

- 31. According to paragraphs 5(c), (d), 6(c), (d), 7(c), (d) of his Indictment,¹⁹ Mr. Muhimana was charged with several counts related to his alleged involvement in events at Mugonero Complex, including the attack of 16 April 1994, as well as events in the Bisesero area, including the attacks at Muyira Hill in May 1994.
- 32. During trial, many witnesses testified about these events, as can be seen from paragraphs 210-306 and 324-375 of the Trial Judgment in this case,²⁰ for which Mr. Muhimana was found guilty.

¹⁷ *Bagilishema*, Amended Indictment, 17 September 1999
¹⁸ *Bagilishema*, Trial Judgement, 7 June 2001
¹⁹ *Muhimana*, Revised Amended Indictment, 29 July 2004
²⁰ *Muhimana*, Trial Judgement, 21 May 1999

- 33. In greater particulars, paragraphs 210-225 of the Trial Judgment refer to the testimony of Prosecution witness BI and Defence witnesses TQ28, TQ7, ARI and TQ8 concerning the abduction and rape of Josiana, Mariana Gafurafura and Martha Gafurafura between 14 and 16 April 1994, who had sought refuge at Mugonero Complex, as alleged at paragraph 6 (c) of the Indictment. Based on this evidence, the Trial Chamber found, at paragraphs 223-225 of the Trial Judgment, that Muhimana, Sikubwabo and Gisambo abducted these victims from Mugonero Complex.
- 34. According to the statements of Crown witnesses, these victims are now alleged to have been raped by the Applicant during the same time period they were found to have been apparently absent from the scene in the Muhimana case.
- 35. Furthermore, paragraphs 226-260 of the Trial Judgment refer to the testimony of Prosecution witnesses BG, BI, AT, AU, BH and BJ and Defence witnesses DI, ARI, TQ28, DS and DK about the attack of 16 April 1994 at Mugonero Complex, as alleged at paragraphs 5 (c), of the Indictment. Based on this evidence, the Trial Chamber found, at paragraphs 246-260, that Mr. Muhimana participated in the attack in the presence of Clément Kayishema, Obed Ruzindana, Charles Sikubwabo, Elizaphan Ntakirutimana and Gérard Ntakirutimana, along with civilians, Interahamwes and gendarmes.
- 36. Moreover, paragraphs 261-306 of the Trial Judgment refer to the testimony of Prosecution witnesses AT, BH, BJ and AU and Defence witnesses TQ28, TQ7, ARI and AH7 concerning specific murders and rapes committed during the attack of 16 April 1994 at Mugonero Complex, as alleged at paragraphs 6 (c) and 7 (c) of the Indictment. Of particular interest is paragraphs 261-277 of the Trial Judgment, where,

based on witness AT's evidence, the Trial Chamber found that Mr. Muhimana participated, along with two soldiers, in the rape and murder of Aimos Karera's daughters at Mugonero Hospital. According to the statements of Crown witnesses, what appears to be one of these victims is now alleged to have been raped by the Applicant during the same time period.

37. Concerning the attacks in the Bisesero area, in particular the attacks at Muyira Hill in May 1994, as alleged at paragraphs 5 (d), 6 (d) and 7 (d) of the Indictment, paragraphs 324-375 of the Trial Judgment refer to the testimonies of Prosecution witnesses BI, AP, AW, W, BH, BU and Defence witnesses NM6, AH8, DK, DL, DF, DY, DD who provided a detailed description of these events, for which Mr. Muhimana was found guilty.

(d) Ndimbati and (e) Sikubwabo

38. According to paragraphs 55-60 of their Indictment, Mr. Ndimbati and Mr. Sikubwabo are also charged with several counts related to their alleged involvement in the massacres in the Bisesero area, along with Mr. Kayishema, Mr. Ruzindana and Mr. Muhimana.²¹ Mr. Ndimbati and Mr. Sikubwabo are still at large. Nevertheless the Applicant is seeking the supporting material for the charges against them.

(g) Niyitegeka

²¹ *Prosecutor v. Kayishema, Bagilishema, Sikubwabo, Ndimbati, Rutaganira, Muhimana, Ryandikayo and Ruzindana*, First Amended Indictment, 29 April 1996, Counts 20 to 25

39. According to paragraphs 6.54-6.58 of his Indictment,²² Mr. Niyitegeka was also charged with several counts related to his alleged involvement in the events in Kibuye *préfecture*, particularly the attacks in the Bisesero area.

40. During trial, many witnesses testified about these events, as can be seen from paragraphs 84-232, 235-238, 258-272, 288-312 of the Trial Judgment in this case,²³ for which Mr. Niyitegeka was found guilty.

41. In greater particulars, paragraphs 84-215, 235-238, 256-272, 288-289, 292-302 of the Trial Judgment refer to the testimony of Prosecution witnesses GGD, HR, GGY, GGM, DAF, GGH, GGR, GGV and GHA, and Defence witnesses TÈN-10, TÈN-8, TEN-16, TEN-22, TEN-9, TEN-23 concerning several attacks in the Bisesero area, including the attacks on Muyira Hill in May 1994. Of particular interest are paragraphs 208-215 and 269-272 of the Trial Judgment, where, based on GGV's evidence, the Trial Chamber found that Mr. Niyitegeka participated in an attack at Kiziba on 18 June 1994, killing a victim there who is now alleged to have been killed by the Applicant, according to the statements of Crown witnesses.

42. Also of interest is paragraph 127 of the Trial Judgment where reference is made to Exhibit D15, the *Preliminary Report Identifying the Sites of Genocide and Massacres in April - July 1994 in Rwanda*, a publication of the Ministry of Higher Education, and Scientific and Cultural Research (Commission for the Rwandan Genocide and Massacre Memorial), identifying a list of people responsible for the massacres in Kibuye *préfecture*.

²²Niyitegeka, Amended Indictment, 25 November 2002

²³Niyitegeka, Trial Judgement, 16 May 2003

43. Furthermore, paragraphs 215-232 of the Trial Judgment refer to the testimony of witnesses GGV, KJ and TEN-10 about meetings held at Kibuye prefectural office in June 1994, at which, according to the statements made by some of the Crown witnesses, the Applicant allegedly attended.

44. Moreover, paragraphs 290-291 of the Trial Judgment refer the testimony of witness GGM about an attack in Gitwe, and paragraphs 303-312 to the testimony of witness GGO about an attack at Kazirandimwe, allegations similar to those made by some of the Crown witnesses against the Applicant.

(h) Musema

45. According to paragraphs 4.4-4.11 of his Indictment,²⁴ Mr. Musema was also charged with several counts related to his alleged involvement in the events in Kibuye *préfecture*, particularly attacks in the Bisesero area.

46. During trial, many witnesses testified about these events, as can be seen from paragraphs 362-497 and 830-862 of the Trial Judgment in this case.²⁵ In greater particulars, these paragraphs refer to the testimony of witnesses BB, M, K, F, G, N, P, R, T, Z, AC, D, H, S, AB, E and J in which they describe several attacks in the Bisesero area, including the attacks at Muyira Hill in May 1994, and specific rapes and murders that occurred in the course of these attacks and to which Mr. Musema participated.

(i) Munyakazi

²⁴ *Musema*, Amended Indictment, 6 May 1999
²⁵ *Musema*, Trial Judgement, 27 January 2000

47. According to paragraphs 7.6 and 8.5 of his Indictment, Mr. Munyakazi was also charged with several counts related to his alleged involvement in the events in Kibuye *préfecture*, particularly attacks in the Bisesero area.²⁶ However, no evidence was presented at trial regarding these events. Nevertheless the Applicant is seeking the supporting material for the charges against him.

(k) Nchamihigo

48. According to paragraph 37 of his Indictment,²⁷ Mr. Nchamihigo was also accused of participating in attacks in the Bisesero area, along with Mr. Munyakazi and others.

49. During trial, as can be seen from paragraphs 234 and 319-325 of the Trial Judgment in this case,²⁸ witnesses BRF, LDB, RJN testified about these events, providing detailed descriptions.

(l) Ndindabahizi

50. According to paragraphs 3, 15-18 and 20-24 of his Indictment,²⁹ Mr. Ndindabahizi was also charged with several counts related to his alleged involvement in the events in Kibuye *préfecture*, particularly attacks in the Bisesero area.

51. During trial, witness CGV testified about these events, particularly attacks at Muyira and Gitwa, as can be seen from paragraph 122 of the Trial Judgment in this case.³⁰

²⁶ *Munyakazi*, Amended Indictment, 29 November 2002
²⁷ *Nchamihigo*, Second Revised Amended Indictment, 11 December 2006
²⁸ *Nchamihigo*, Trial Judgement, 12 November 2008
²⁹ *Ndindabahizi*, Amended Indictment, 8 July 2003
³⁰ *Ndindabahizi*, Trial Judgement, 15 July 2004



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