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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 19 February 2009

**THE PROSECUTOR**

v.

**Léonidas NSHOGOZA**

**Case No. ICTR-07-91-PT**

JUDICIAL RECORDS ARCHIVED  
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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OR  
CERTIFICATION TO APPEAL THE CHAMBER'S DECISION OF 22 DECEMBER  
2008 ON DISCLOSURE**

*Rules 66, 68, 73, and 77 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Paul Ng'aura  
Abdoulaye Seye  
Dennis Mabura  
Marie Ka

**For the Accused:**

Allison Turner

## INTRODUCTION

3018

1. The Defence brought multiple motions seeking disclosure of various documents under Rules 66 and 68 of the Rules of Procedure and Evidence.<sup>1</sup> On 22 December 2008, the Chamber issued a Decision ordering the disclosure of various materials, and denying the remainder of the relief sought in the motions (“the Impugned Decision”).<sup>2</sup>
2. On 29 December 2008, the Defence filed a Motion, submitting that the Chamber erred in law, and abused its discretion by not ordering disclosure of all the materials requested by the Defence. The Defence seeks certification to appeal the Impugned Decision, or in the alternative, that the Chamber reconsider its decision.<sup>3</sup> More specifically, the Defence seeks reconsideration, or certification to appeal, in respect of reviewed three aspects of the Impugned Decision, which are described by the Defence as follows: a) the decision not to order the Prosecutor to comply with his Rule 66 (A) (ii) obligations; b) the decision not to order the Prosecutor to disclose materials arising from the Loretta Lynch investigation; and c) the decision not to order disclosure of the closed session transcripts from the *Prosecutor v. Rwamakuba*<sup>4</sup> proceedings.
3. The Prosecutor objects to the Motion on the basis that neither the test for certification to appeal, nor the test for reconsideration, is met.<sup>5</sup>

## DISCUSSION

*Law on Certification to Appeal*

4. Rule 73 (B) of the Rules provides that decisions on motions brought pursuant to Rule 73 are without interlocutory appeal, unless certified by the Trial Chamber.
5. The Chamber may grant certification “if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”<sup>6</sup> However, the decision to certify is discretionary and should remain exceptional, even where the criteria for certification are met.<sup>7</sup>

<sup>1</sup> *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, “Motion for Disclosure Under Rules 66 and 68 of the ICTR R.P.E.,” filed 22 October 2008; “Defence Motion for Order to the Prosecution to Complete Rule 66 (A) (ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza,” filed 29 October 2008; “Defence Reply to Prosecutor’s Response to Defence Motion filed 29 October 2008 on Disclosure Violations and Provisional Release,” filed 10 November 2008 (“Original Motion”).

<sup>2</sup> *Nshogoza*, Decision on Defence Motions for Disclosure under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008 (“Impugned Decision”).

<sup>3</sup> *Nshogoza*, “Defence Application for Certification Decision of 22 December 2008 and Alternative Request for Review,” filed 29 December 2008. Though the Defence speaks of “review” the Chamber accepts this as a request for reconsideration.

<sup>4</sup> *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-T.

<sup>5</sup> *Nshogoza*, “Prosecutor’s Response to ‘Defence Application for Certification to Appeal Decision of 22 December 2008 and Alternatively Request for Review,’” filed 5 January 2009.

<sup>6</sup> Rule 73 (B).

<sup>7</sup> *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-95-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May 2008, para. 15; *Prosecutor v. Casimir Bizimungu et*



3017

6. The correctness of the decision is a matter for the Appeals Chamber. Trial Chambers need not consider the merits of the impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 73 (B) have been met.<sup>8</sup> However, in the process of determining whether the criteria for certification to appeal are met, the Trial Chamber can revisit the substance of the impugned decision.<sup>9</sup> Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.<sup>10</sup> Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.<sup>11</sup>

7. A Trial Chamber may grant certification to appeal a decision in its entirety, or limit the certification to one or more specific issues in the decision.<sup>12</sup>

#### *Law on Reconsideration*

8. Although reconsideration is not expressly provided for in the Statute or the Rules, the Trial Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did not exist at the time of the original decision, or where the decision was erroneous and has caused prejudice or injustice to a party.<sup>13</sup> Further, it is for the

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*al.*, Case No. ICTR-00-50-T, Decision on Jerome Bicomumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92 *bis* Admission of Faustin Nyagahima's Written Statement, 22 August 2007, para.3 (citations omitted); *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, 9 October 2007, para. 6; *Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, para. 3.

<sup>8</sup> *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on False Testimony, 23 March 2007, para. 4; *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame, 15 May 2008, para. 2; *Niyitegeka*, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal, 13 May 2008, para. 17; *Prosecutor v. Theoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4; *Bizimungu et al.*, Decision on Jerome Bicomumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92 *bis* Admission of Faustin Nyagahima's Written Statement, 22 August 2007, para. 4; *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence, 23 July 20089, para. 6 (citations omitted).

<sup>9</sup> *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4; *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para 5; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence, 23 July 20089, para 11; *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.

<sup>10</sup> *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.

<sup>11</sup> *Nindiliyimana et al.*, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, para. 7.

<sup>12</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 3.

<sup>13</sup> *Bizimungu et al.*, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7; *Karamera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of

3016

party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.<sup>14</sup>

*Should the Chamber Reconsider or Certify to Appeal the Impugned Decision?*

*I) Decision Regarding the Prosecutor's Rule 66 (A) (ii) Obligations*

9. Rule 66 (A) (ii) requires the Prosecutor to disclose to the Defence "the statements of all witnesses whom the Prosecutor intends to call to testify at trial" no later than 60 days before the scheduled trial date.

10. In its Original Motion, the Defence sought disclosure of sixteen additional witness statements under Rule 66 (A) (ii). The Prosecutor responded that thirteen of the sixteen witness statements that the Defence seeks do not exist, and that the other three documents in question had already been disclosed to the Defence.<sup>15</sup> The Chamber concluded that the Defence had not presented evidence to establish that the Prosecutor had the documents in his possession but had not disclosed them.<sup>16</sup> The Chamber notes that the Defence misrepresents the Chamber's Decision when it alleges that the Chamber made a decision "not to order the Prosecutor to fulfil its obligations under Rule 66 (A) (ii)."<sup>17</sup>

11. The Defence submits that the Chamber's reminder<sup>18</sup> to the Prosecutor "constitutes an indication that the Chamber at the very least entertained the possibility that the prosecution was withholding witness evidence."<sup>19</sup> The Defence also asserts that it produced *prima facie* evidence that the documents exist. According to the Defence, this evidence includes the affidavit from Commander Kwende that was annexed to the Prosecutor's motion for protective measures which the Defence says refers to such statements, and Kinyarwanda

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Sanctions, 8 November 2007, para. 6; *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

<sup>14</sup> See *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, 10 October 2003, para 6.

*Nshogoza*, "Prosecutor's Response to 'Defence Motion for Order to the Prosecution to Complete Rule 66 (A) (ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogoza'," filed 3 November 2008, para. 10, and Annex 1. The Prosecutor identifies the following materials as "not in the Prosecutor's possession": Witness BUC Pre-2004 to OTP, Witness BUC Pre-25 Sept 08 to OTP, Witness GAA May 2006 Statement to CID (not in possession/non-existent), Witness GAA "Several" other statements to CID pre- July 2007, Witness GAA 17 June Pro Justitia to CID, Witness GAA 25 July 2007 "Open Letter," Witness GAA Pre - 25 Sept 08 to OTP, Witness GAF Pre-25 Sept 08 to OTP, Witness SP-004 Pre-25 Sept 08 to OTP, Witness GEI, Pre-25 Sept 08 to OTP. The Prosecutor identifies the following documents as "non-existent": Witness GAA All Interview Notes, Statements to OTP in UNDF Detention, Witness GAA, 2006 (approx) Videotaped Statements to OTP in Kigali, Witness SP-003 Pre-25 Sept 08 to OTP.

<sup>16</sup> Impugned Decision, para. 59.

<sup>17</sup> Motion, para. 6.

<sup>18</sup> At paragraph 59 of the Impugned Decision, the Chamber stated that it "reminds the Prosecutor of his obligation to ensure that all statements by witnesses whom the Prosecutor intends to call to testify are disclosed to the Defence."

<sup>19</sup> Motion, para

3015

versions of the witness statements for Witnesses BUC and GAA, which imply that French and English versions exist.<sup>20</sup>

12. The Prosecutor responds that the Defence allegations are misleading and inaccurate and that all the material the Prosecutor intends to rely on at trial will have been in the Defence's possession for several months.<sup>21</sup> The Prosecutor maintains that many of the documents are non-existent or not in his possession, and that the other materials requested have been disclosed.<sup>22</sup>

i) *Reconsideration*

13. In respect of the first Defence submission on this matter, it is not unusual for the Chamber to remind the Prosecutor of his disclosure obligations, nor is it an indication that the Chamber has reached any negative conclusion in respect of the Prosecutor's conduct. Nor does the Chamber consider that its reminder to the Prosecutor amounts to an error of law or abuse of discretion warranting reconsideration of the Impugned Decision.

14. In respect of the Defence submission that Commander Kwende's affidavit provides *prima facie* evidence of the existence of additional witness statements, the Chamber notes that the affidavit which was annexed to the Prosecutor's protective measures motion does not refer to the existence of any witness statements.<sup>23</sup> Finally, the submission regarding French and English versions of documents disclosed is an issue for translation. Thus, the Chamber does not consider that there has been an error of law or abuse of discretion warranting reconsideration of this aspect of the Impugned Decision.

ii) *Certification to Appeal*

15. Since the filing of this Motion, the Chamber has ordered the Prosecutor to conduct a thorough review of the materials in his possession and certify that he has complied with his disclosure obligations, and the Prosecutor has so certified.<sup>24</sup> As the Prosecutor has certified that he has disclosed all Rule 66 and 68 materials, the Chamber is not satisfied that the issue in the Impugned Decision is one that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial. Since the Defence has failed to satisfy the first requirement under the Rule 73 (B) criteria, the Chamber need not proceed to consider whether an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.

<sup>20</sup> Motion, para. 11-13

<sup>21</sup> Response, paras. 6-9.

<sup>22</sup> *Ibid*, para 5, footnote 1.

<sup>23</sup> Commander Kwende's affidavit merely states that the witnesses testifying on behalf of the Prosecutor in these proceedings have indicated that they fear for their safety. The term "witness statement" under Rule 66 (A) (ii) has been interpreted as an account of a person's knowledge of a crime which has been recorded in the course of an investigation into that crime. It can include statements taken by entities other than the Prosecutor, which then result in the persons who gave the original statements becoming witnesses in proceedings before the Tribunal. See *Milutinović et al.*, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 14 (citing the Appeals Chamber in *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15).

<sup>24</sup> *Nshogoza*, Order for the Prosecution to Conduct a Thorough Review and Certify that it has Complied with its Disclosure Obligations, 5 February 2009.



3014

## II) Decision Regarding Disclosure of the "Loretta Lynch Report" and All Associated Materials

16. In its Original Motion, the Defence sought access to materials prepared by Special Counsel Loretta Lynch (the "Lynch Report") and all associated or related materials, including, but not limited to, witness statements arising from the investigation, which it asserts are exculpatory or potentially exculpatory and, therefore, subject to disclosure under Rule 68 (A), or alternatively, under Rule 66 (B).<sup>25</sup> The Prosecutor asserts, pursuant to Rule 70 (A) of the Rules, that the documents do not have to be disclosed.<sup>26</sup>

17. In the Impugned Decision, the Chamber found that, pursuant to Rule 70 (A), the correspondence and reports prepared by Special Counsel Lynch would be exempt from disclosure unless they were exculpatory. However, the Defence had not demonstrated that the materials were exculpatory. With respect to the request for materials pursuant to Rule 66 (B), the Chamber found that the request for "all associated materials" was not sufficiently specific to trigger any Rule 66 (B) disclosure obligation. Additionally, the Chamber was not satisfied that all witness statements arising from the *Kamuhanda* proceedings are relevant to the preparation of the Defence case.<sup>27</sup>

18. The Defence disputes the Chamber's findings. The Defence asserts that Rule 70 (A) applies only to the *Kamuhanda* defence team; that the materials are, *prima facie*, exculpatory if they are not incriminating; that the Chamber's conclusion is unreasonable; and that the materials relating to the investigation are subject to disclosure under Rule 66 (B).<sup>28</sup>

19. The Defence also makes various new arguments for seeking the materials prepared by Special Counsel Lynch, including one relating to the scope of the order for the investigations which led to the charges against the Accused.<sup>29</sup> In addition, the Defence appears to seek access to materials not previously specifically requested.<sup>30</sup> Essentially, the Defence seeks access to all the investigative materials so that it can establish that the investigation either did, or did not, yield incriminating evidence.<sup>31</sup>

<sup>25</sup> 22 October Motion, Annexure 1: in particular, the Defence requests witness statements for "SP-005, Sp-006, SP-007, SP-008, SP-009, SP-010, SP-011, SP-012, SP-13, SP-14, SP-018, and all other witness statements obtained in the context of this investigation and not yet disclosed..., taken in the context of the investigation in 2005...."; Motion, para. 16.

<sup>26</sup> Response, para. 14; Rule 70 (A) provides that reports prepared by the Prosecutor, or his assistants or representatives, in connection with the investigation or preparation of the case do not have to be disclosed.

<sup>27</sup> Impugned Decision, paras. 38-41.

<sup>28</sup> Motion, para. 22.

<sup>29</sup> *Ibid*, paras. 29-32. The Defence states, at paragraph 31 "Either the Lynch report concludes on alleged contempt by Mr. Nshogoza or it does not. If it does so conclude, then it is either incriminating, or it is exculpatory." The Defence then goes on to state, at paragraph 32, "[i]f the Loretta Lynch Report does not conclude on alleged acts of contempt by Mr. Nshogoza, then the only reasonable inference is that Mr Nshogoza was 'not under investigation,' and the Prosecution's reliance on the 19 May 2005 directive... is misplaced."

<sup>30</sup> *Ibid*, paras. 28-33. For example, the Defence now submits, at paragraph 28, that "[a]ny and all materials relating to the investigation of GAA is relevant to the preparation of the Defence case."

<sup>31</sup> *Ibid*, paras. 28-32.



3013

i) *Reconsideration*

20. Since the Defence does not assert that there are new material circumstances that warrant a reconsideration of the Impugned Decision, the Chamber can only reconsider the decision if it was erroneous in law, or an abuse of discretion, and the Accused suffered prejudice as a result.

21. First, with regard to Rule 70 (A), the Chamber considers that the language of Rule 70 (A) is clear. There is nothing in the language of the Rule to suggest that the disclosure exemption under the Rule would apply exclusively in respect of counsel from the *Kamuhanda* proceedings. It is also clear that any "reports, memoranda or other internal documents" prepared by Special Counsel Lynch in the conduct of an investigation would only be subject to disclosure if they are exculpatory.

22. Second, with respect to the exculpatory nature of the materials, the arguments presented by the Defence would require the Prosecutor to disclose absolutely all materials in his possession related to the Lynch investigation, and which are not relied upon for the prosecution of the Accused. In its Original Motion the Defence submitted that if the materials were not exculpatory, the Prosecutor would have used them in support of the Indictment and, thus, disclosed them to the Defence.<sup>32</sup>

23. The Defence now submits that the documents are exculpatory because the material allegation to be disproved by the materials prepared by Special Counsel Lynch is that the Accused was "ever in contempt of the Tribunal in respect of his contact with Witness GAA or any other witness."<sup>33</sup> Further, the Defence submits for the first time that the materials are relevant to the preparation of the Defence case because it needs to establish "a) the scope of the investigation, b) the fact that Mr. Nshogoza was either not the subject of investigation, or if he was, that the investigation yielded no evidence against him, and c) that GAA was investigated and any evidence given by any witness on his testimonies constitutes evidence that is material to the preparation of the defence."<sup>34</sup> These new submissions are not a basis for reconsideration of the Impugned Decision.

24. In respect of incriminating materials, they should have already been disclosed as part of the supporting materials for the Indictment. Further, it does not follow that any material which is not incriminating is exculpatory. The materials may be neither incriminating nor exculpatory, or they may not be relevant to the charges against the Accused.

25. Thus, the Chamber is not satisfied that there was an error of law or abuse of its discretion and that reconsideration of the Impugned Decision is warranted.

26. The Chamber notes that the Defence now requests witness statements arising from the Lynch investigation which "related to alleged contempt of the Tribunal, and the false testimony (for both GAA and GEX)."<sup>35</sup> The Chamber further notes that the Prosecutor, in his Response, submits that various witness statements are not relevant materials under Rule 66

<sup>32</sup> Original Motion, 10 November Reply; Impugned Decision, para 37.

<sup>33</sup> Motion, para. 25.

<sup>34</sup> *Ibid*, para. 29.

<sup>35</sup> *Ibid*, para. 23.



3012

(B) and that no disclosure obligation arises.<sup>36</sup> In these particular circumstances, where the Trial has commenced and is expected to be of short duration, the Chamber considers it appropriate, in the interests of justice, to consider these submissions by the parties.

27. Information may be material to the preparation of the Defence case if it is relevant to the preparation of the defence case. This is a broad concept which is not limited to material to counter the Prosecution evidence.<sup>37</sup> The materiality of the information sought can also be determined by reference to the Indictment.<sup>38</sup>

28. As the Accused has been charged with contempt of the Tribunal for allegedly procuring false testimony, the Chamber considers that witness statements arising from the investigation, and which relate to the allegations of contempt and false testimony, may be relevant to the preparation of the Defence case, and that the request is sufficiently specific. Such witness statements should be made available to the Defence for inspection pursuant to Rule 66 (B).

ii) *Certification to Appeal*

29. The Chamber notes that witness statements arising from the investigations conducted by Special Counsel Lynch have been disclosed to the Defence as required under Rule 66 (A) (ii). The Chamber has also concluded that additional witness statements may be material to the preparation of the Defence case and should be made available to the Defence pursuant to Rule 66 (B).

30. As the additional materials the Defence seeks are not subject to disclosure unless they are exculpatory, the Chamber considers that the decision is not one which would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial. The test for certification to appeal is therefore not met.

III) *Decision Regarding Disclosure of Closed Session Materials from the Rwamakuba Proceedings.*

31. The Defence sought all open and closed session transcripts from the *Rwamakuba* proceedings where witnesses mention Jean de Dieu Kamuhanda. In its Original Motion, the Defence asserted that the material is relevant and material to the preparation of the Defence case because *Rwamakuba*, like Kamuhanda, was accused of leading attacks in Gikomero.<sup>39</sup> The Defence asserts that the Impugned Decision denied the Defence access to transcripts that related to the credibility of a Prosecution witness.

<sup>36</sup> The Prosecutor refers, in particular to the statements of Witnesses SP-005, SP-006, SP-007, SP-008, SP-009, SP-011, SP-012, SP-013, SP-014.

<sup>37</sup> *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 9; *Karemera et al.*, Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Uwilingiyimana, 27 April 2006, para. 15.

<sup>38</sup> *Karemera et al.*, Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Uwilingiyimana, 27 April 2006, para. 15.

<sup>39</sup> 10 November Reply, Annex "Table 2, Rule 66 (B) Materials sections 2."



8/10



3011

32. The Chamber concluded that since the Accused has not been charged with any offence relating to a massacre, it was not satisfied that the Defence had demonstrated that the material sought was relevant to the preparation of the Defence case.

i) *Reconsideration*

33. The Defence now submits that there is evidence in the *Rwamakuba* proceedings to suggest that the case against Mr. Kamuhanda was fabricated, and that Witness GAA did not lie before the Appeals Chamber in the *Kamuhanda* proceedings, but rather lied before the Trial Chamber in that case.<sup>40</sup> According to the Defence “the entire case against Mr. Nshogoza, insofar as GAA’s evidence is concerned, necessarily involves the truth about what happened at Gikomero Parish on 12 April 1994....”<sup>41</sup> The Defence asserts that the transcripts from *Rwamakuba* support its assertion that Witness GAA was not present at Gikomero Parish on 12 April 1994.

34. The Chamber notes that, in its Original Motion, the Defence made no submissions regarding the *Rwamakuba* proceedings in connection with the credibility of Witness GAA. Nor is it apparent to the Chamber how evidence from the *Rwamakuba* proceedings, other than testimony by Witness GAA, or testimony in respect of Witness GAA, may relate to Witness GAA’s credibility.

35. The Chamber reiterates that it is not the purpose of these proceedings to re-litigate the *Kamuhanda* proceedings. The Accused has been charged with two counts of contempt of the Tribunal, and two counts of attempt to commit contempt of the Tribunal. The Chamber is not satisfied that there is an error of law or abuse of discretion that warrants reconsideration of the Impugned Decision.

ii) *Certification to Appeal*

36. As the Defence has not demonstrated the relevance of the *Rwamakuba* transcripts to the charges against the Accused, the Chamber is not satisfied that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, and for which, in the opinion of the Trial Chamber an immediate resolution by the Appeals Chamber may advance the proceedings. Thus, the test for certification to appeal is not met.

37. The Chamber stresses that it is not in a position to review all materials disclosed in order to reconcile the Parties assertions in respect of disclosure, and it expects the Parties to undertake a diligent review the materials in their possession prior to making any further submissions to the Chamber in respect of disclosure.

**FOR THESE REASONS,** the Chamber

<sup>40</sup> Motion, paras. 4-5.

<sup>41</sup> Motion, para. 5.



3010

**ORDER:** the Prosecutor to allow the Defence, pursuant to Rule 66 (B), to inspect witness statements arising from the investigation conducted by Special Counsel Lynch, which relate to alleged false testimony and contempt of the Tribunal; and,

**DENIES** the remainder of the Motion.

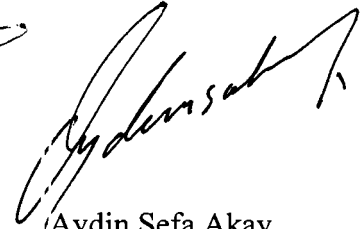
Arusha, 19 February 2009



Kh. Lida Rachid Khan  
Presiding Judge



Lee Gacuiya Muthoga  
Judge



Aydin Sefa Akay  
Judge

