



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-54A-R68
04th March 2010
{83/H - 68/H}

IN THE APPEALS CHAMBER

Before:

Judge Patrick Robinson, Presiding
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron
Judge Carmel Agius

ICTR Appeals Chamber

Date: 04th March 2010

Action: R. Juma

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Registrar:

Mr. Adama Dieng

Decision of:

4 March 2010

JEAN DE DIEU KAMUHANDA

v.

THE PROSECUTOR

Case No. ICTR-99-54A-R68

DECISION ON MOTION FOR DISCLOSURE

The Applicant

Ms. Aïcha Condé
Ms. Marie Capotorto

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Linda Bianchi
Ms. Madeleine Schwarz
Mr. David Morris

<p>International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda</p> <p>CERTIFIED TRUE COPY OF THE ORIGINAL, SEEN BY ME COPIE CERTIFIÉE CONFORMÉ À L'ORIGINAL PAR MOI</p> <p>NAME / NOM: KUMELIS... A... DEANDA...</p> <p>SIGNATURE: [Signature] DATE: 04 March 2010</p>

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Motion for Disclosure of Exculpatory and Other Relevant Material – Rule 68 of the Rules of Procedure and Evidence", filed by Mr. Jean de Dieu Kamuhanda ("Kamuhanda") on 22 December 2009 ("Motion").¹

A. Procedural Background

2. On 22 January 2004, Trial Chamber II of the Tribunal ("Trial Chamber") convicted Kamuhanda for genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute of the Tribunal ("Statute") on the basis of his involvement in a massacre at Gikomero Parish Compound on 12 April 1994 and sentenced him to imprisonment for the remainder of his life.² Kamuhanda appealed against the Trial Judgement.

3. During the appeal proceedings, the Appeals Chamber granted in part a motion filed by Kamuhanda for admission of additional evidence, admitting new statements from Prosecution Witnesses GAA and GEX and ordering that these witnesses be heard.³ During the evidentiary hearing held on 18 May 2005, Witness GAA testified that he had lied when he testified at Kamuhanda's trial that he had been at the Gikomero Parish Compound and that he had seen Kamuhanda there.⁴ Witness GEX testified before the Appeals Chamber that, contrary to her earlier statement to the Prosecution,⁵ she had not seen Kamuhanda at Gikomero, nor had she heard his name spoken there.⁶

4. In an oral decision rendered at the close of the evidentiary hearing on 19 May 2005, the Appeals Chamber directed the Prosecutor, pursuant to Rules 77(C)(i) and 91(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), to investigate allegations of false testimony.⁷

¹ Originally filed in French, English translation filed on 27 January 2010.

² *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-T, Judgment and Sentence, 22 January 2003 ("Trial Judgement"), paras. 651, 652, 700, 702, 750, 770.

³ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgment, 19 September 2005 ("Appeal Judgement"), para. 442.

⁴ Appeal Judgement, para. 213.

⁵ Witness GEX provided a statement to the Prosecution prior to the trial phase, which was disclosed to the Defence. Witness GEX was not called to testify at trial. See Appeal Judgement, para. 222.

⁶ Appeal Judgement, para. 223.

⁷ See *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.

As a result, the Prosecutor appointed a Special Counsel to conduct the investigation (“Special Counsel”).⁸

5. In its Judgement of 19 September 2005, the Appeals Chamber found Witness GAA’s recantation during the evidentiary hearing of May 2005 not credible and Witness GEX’s testimony before the Appeals Chamber unreliable.⁹ While vacating Kamuhanda’s convictions for instigating and aiding and abetting genocide and extermination as a crime against humanity, the Appeals Chamber affirmed the convictions for ordering genocide and extermination as a crime against humanity, as well as the sentences imposed by the Trial Chamber.¹⁰

6. On 11 June 2007, an indictment charging Witness GAA with false testimony, contempt, and attempts to commit contempt was issued.¹¹ Witness GAA concluded a plea agreement with the Prosecution in which he acknowledged having knowingly and willfully given false testimony before the Appeals Chamber by testifying, *inter alia*, that he was not present at Gikomero Parish on 12 April 1994.¹² He also stated that his false testimony was induced by Léonidas Nshogoza (“Nshogoza”), a former investigator in Kamuhanda’s Defence team who gave him money and offered him a reward for giving false testimony.¹³ On 4 December 2007, Trial Chamber III found Witness GAA guilty of giving false testimony under solemn declaration and contempt of the Tribunal, and sentenced him to nine months of imprisonment.¹⁴

7. Subsequently, Nshogoza was indicted and prosecuted for contempt of the Tribunal and attempt to commit acts punishable as contempt of the Tribunal.¹⁵

8. On 15 May 2009, Kamuhanda filed a motion requesting the assignment of a legal assistant at the Tribunal’s expense to assist him in preparing a potential request for review of the Appeal Judgement.¹⁶ Following the filing of the Motion for Legal Assistance, the Prosecution disclosed to

⁸ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-01-54A-A, Prosecutor’s Reply by Way of Clarification in Relation to Jean de Dieu Kamuhanda’s Response to the “Prosecutor’s Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcript of the Testimony of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*”, 20 March 2006, para. 10.

⁹ Appeal Judgement, paras. 221, 226.

¹⁰ Appeal Judgement, para. 365.

¹¹ *The Prosecutor v. GAA*, Case No. ICTR-07-90-R77-I, Judgement and Sentence, 4 December 2007 (“GAA Trial Judgement”), para. 1.

¹² GAA Trial Judgement, para. 5.

¹³ GAA Trial Judgement, para. 5.

¹⁴ GAA Trial Judgement, Disposition, p. 6.

¹⁵ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-I, Indictment, 7 January 2008.

¹⁶ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Motion for Legal Assistance for Preliminary Proceedings Relating to the Review of the Judgement Delivered by the Appeals Chamber on 19 September 2005, originally filed in French on 15 May 2009, English translation filed on 22 June 2009 (“Motion for Legal Assistance”).

Kamuhanda witness statements and trial transcripts from the *Nshogoza* case,¹⁷ including Witness GAA's statements made before the Special Counsel.¹⁸

9. On 7 July 2009, Trial Chamber III convicted Nshogoza of committing contempt of the Tribunal by repeatedly meeting with and disclosing protected information of Witnesses GAA and A7/GEX, in knowing violation of, or with reckless indifference to, the protective measures ordered by the *Kamuhanda* Trial Chamber, and sentenced him to ten months of imprisonment.¹⁹

10. On 21 July 2009, the Appeals Chamber granted Kamuhanda's Motion for Legal Assistance, and further ordered the Prosecution "to clarify whether it was provided with a report containing the conclusions of the Special Counsel's investigation."²⁰ The Prosecution filed a clarification on 13 August 2009, wherein it reiterated its position stated before Trial Chamber III seized of the *Nshogoza* case that, in fact, the investigations by the Special Counsel were never concluded and therefore no such report existed.²¹

11. In the present Motion, Kamuhanda requests that the Appeals Chamber find that the Prosecution failed to discharge its obligation under Rule 68 of the Rules and order the Prosecution to disclose various items pursuant to Rule 68 of the Rules, which he submits are potentially exculpatory and relevant to his request for review.²²

12. The Prosecution responded on 4 January 2010, seeking dismissal of the Motion with respect to certain materials and undertaking to provide others.²³ In a further response filed on 14 January 2010, the Prosecution agreed to disclose various items requested by Kamuhanda.²⁴ Kamuhanda did not file a reply.

¹⁷ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T ("*Nshogoza* case").

¹⁸ See Memorandum from Abdoulaye Seye, Appeals Counsel for the Office of the Prosecutor, entitled "Disclosure to Mr. Jean de Dieu Kamuhanda of Witness Statements and Trial Transcripts from the Case *The Prosecutor v. Léonidas Nshogoza*", confidential, 28 May 2009 ("Disclosure of 28 May 2009").

¹⁹ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgement, 7 July 2009, paras. 188, 189, 233.

²⁰ See *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Decision on Motion for Legal Assistance, 21 July 2009 ("Decision on Motion for Legal Assistance"), para. 22 (directing the Registrar, after consulting with Ms. Condé and provided that the latter filed her power of attorney with the Registrar to represent Mr. Kamuhanda *pro bono*, to assign a legal assistant for three months for the purpose of assisting Kamuhanda at the preliminary stage of potential review proceedings).

²¹ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Prosecutor's Clarification on Kamuhanda's Request for Special Counsel's Report, 13 August 2009 ("Clarification"), para. 4.

²² Motion, paras. 6, 9, pp. 7, 8.

²³ Prosecutor's Response to Kamuhanda's "*Requête aux fins de communication de pièces à décharge et autres éléments pertinents – Article 68 du Règlement de procédure et de preuve*", 4 January 2010 ("Response"), para. 39.

²⁴ Prosecutor's Further Response to Kamuhanda's "*Requête aux fins de communication de pièces à décharge et autres éléments pertinents – Article 68 du Règlement de procédure et de preuve*", 14 January 2010 ("Further Response").

B. Discussion

13. Kamuhanda requests that the Appeals Chamber order the Prosecution to disclose pursuant to Rule 68 of the Rules: (1) material related to the Special Counsel's investigation conducted in his case;²⁵ (2) material from the *Nshogoza* trial;²⁶ (3) material from the *Rwamakuba* trial;²⁷ and (4) the identity of the witness whose statement "obtained on 10 August 1999" was identified as K0110003 in the Electronic Disclosure Suite ("EDS"), as well as the statement obtained the day before in the context of the *Kamuhanda* trial.²⁸

14. The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation under Rule 68 of the Rules²⁹ to, "as soon as practicable, disclose to the Defence any material, which in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". The determination of which materials are subject to disclosure under this provision is a fact-based enquiry made by the Prosecution.³⁰ Therefore, the Appeals Chamber will not intervene in the exercise of the Prosecution's discretion, unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith.³¹ To establish that the Prosecution is in breach of its disclosure obligation, the 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 requested is in the custody or under the control of the Prosecution.³²

²⁵ Motion, paras. 10-16, p. 8.

²⁶ Motion, paras. 17-27, p. 8.

²⁷ Motion, paras. 28-32, p. 8, referring to *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T ("Rwamakuba case").

²⁸ Motion, paras. 33, 34. With respect to this specific request, the Appeals Chamber refers to the original version of the Motion filed in French on 22 December 2009, p. 9. The Appeals Chamber also notes in relation to this specific request that Kamuhanda refers to a statement "obtained *a priori* on 9 August 1999" in paragraph 34 of the Motion.

²⁹ See, e.g., *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Disclosure, 7 September 2009, para. 5, citing *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, public redacted version, 27 November 2006 ("*Nahimana et al.* Decision of 27 November 2006"), para. 11.

³⁰ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008 ("*Karemera et al.* Decision"), para. 9, citing *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("*Nahimana et al.* Decision of 8 December 2006"), para. 34, referring to, *inter alia*, *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza be Expunged from the Record, 30 October 2006 ("*Nahimana et al.* Decision of 30 October 2006"), para. 6; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16.

³¹ *Nahimana et al.* Decision of 8 December 2006, para. 34; *Nahimana et al.* Decision of 30 October 2006, para. 6.

³² *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010, para. 16; *Karemera et al.*

1. Material Relating to the Investigation of Special Counsel

15. Kamuhanda requests that “in the interest of transparency and fairness” the Appeals Chamber should order the Prosecution to disclose the following material relating to the investigation conducted by the Special Counsel: (1) a comprehensive list of persons interviewed by the Special Counsel during the investigation; (2) the date when the investigation ceased; and (3) all statements obtained by the Special Counsel during her investigation.³³

16. The Prosecution responds that Kamuhanda’s request for this material should be dismissed.³⁴ The Prosecution avers that Kamuhanda has failed to show that the list of all persons interviewed is *prima facie* exculpatory and refuses to disclose this material because it does not consider it to fall within the scope of Rule 68 of the Rules.³⁵ It contends that there is no completion date to be disclosed since the Special Counsel’s investigation was never concluded and that in any event, such information would not constitute exculpatory material.³⁶ Finally, the Prosecution argues that Kamuhanda has failed to demonstrate how “all” of the statements obtained during the investigation would be exculpatory.³⁷ In this respect, the Prosecution emphasises that it has already disclosed material related to the investigation which was potentially exculpatory.³⁸

17. The Appeals Chamber is satisfied that Kamuhanda has identified the material sought with sufficient precision. The Appeals Chamber recalls its previous finding that the Prosecution is obliged to disclose any exculpatory material obtained during the course of the Special Counsel’s investigation, notwithstanding that the report itself would not have been subject to disclosure.³⁹ However, the onus remains on Kamuhanda to present a *prima facie* showing of the probable exculpatory nature of the material sought. Kamuhanda’s request for a list of names of persons interviewed, absent any further explanation, fails to meet this standard and is accordingly dismissed. The Appeals Chamber also fails to discern how the date on which the Special Counsel’s investigation ceased can be considered exculpatory information.

18. Turning to Kamuhanda’s request for “all” witness statements obtained during the investigation, the Appeals Chamber acknowledges that, contrary to the Prosecution’s apparent

Decision, para. 9, citing *Nahimana et al.* Decision of 8 December 2006, para. 34. See also *Nahimana et al.* Decision of 27 November 2006, para. 11.

³³ Motion, para. 16, p. 8.

³⁴ Response, para. 39.

³⁵ Response, para. 12.

³⁶ Response, para. 13.

³⁷ Response, para. 14.

³⁸ Response, paras. 16, 17, referring to the disclosure in May 2009 of the transcript of the Special Counsel’s interview with Witness GAA.

contention,⁴⁰ it is in practice difficult for Kamuhanda to demonstrate why all of the statements arising from the Special Counsel's investigation are of a probable exculpatory nature, given that he was not privy to the information obtained during this investigation. That said, the Appeals Chamber notes that the Prosecution submits that it has already reviewed the material in its possession from this investigation and disclosed the material which is potentially exculpatory, such as the transcript of the Special Counsel's interview with Witness GAA.⁴¹ As noted above,⁴² in the absence of evidence from Kamuhanda to the contrary, the Appeals Chamber will assume that the Prosecution's representation is made in good faith. Kamuhanda's request is accordingly dismissed.

2. Material from the Nshogoza Trial

19. Kamuhanda submits that his review of the documents from the *Nshogoza* case disclosed by the Prosecution in May 2009 reveals that certain exculpatory materials from that trial were not disclosed to him.⁴³ He moves the Appeals Chamber to order the disclosure of the following items from the *Nshogoza* case: (1) Exhibit P2 (confidential list of names and locations); (2) exhibits admitted in the course of Witness Nyarwaya's testimony (Exhibits D53 and D54); (3) a statement from Witness BUC; (4) a statement from Witness Nyagatare; and (5) material related to Witness GAA (Exhibits D9 through D14, D22 through D24, and audio tapes KT00-1679 through KT00-1682).⁴⁴

(a) Exhibit P2

20. Kamuhanda moves the Appeals Chamber to order the Prosecution to disclose Exhibit P2, which is a list of names and locations used during the *Nshogoza* trial.⁴⁵ He submits that this list is "essential" to understanding and utilising the materials obtained during the trial.⁴⁶ In particular, he argues that this list is necessary to "establish with certainty" the names of those individuals who Witness Nyarwaya claims were involved in a plot to testify against Kamuhanda.⁴⁷

³⁹ See *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, fn. 20.

⁴⁰ See Response, para. 14.

⁴¹ Response, paras. 16, 17, referring to Disclosure of 28 May 2009.

⁴² See *supra* para. 14.

⁴³ Motion, para. 17.

⁴⁴ Motion, paras. 18-27, p. 8.

⁴⁵ Motion, para. 18, citing *Nshogoza* case, T. 9 February 2009 p. 25 (French version).

⁴⁶ Motion, para. 18.

⁴⁷ Motion, para. 18.

21. The Prosecution responds that the list is not *prima facie* exculpatory and that Kamuhanda's request amounts to a "fishing expedition".⁴⁸

22. The Appeals Chamber is satisfied that Kamuhanda has identified the material sought with sufficient precision. However, the Appeals Chamber considers that Kamuhanda's generalised submission to the effect that this list is necessary to understand the materials disclosed to him is insufficient to demonstrate that this list is of a probable exculpatory nature. In any event, the Appeals Chamber notes that according to the transcript of the proceedings of 9 February 2009 in the *Nshogoza* case, Exhibit P2 was prepared by the Prosecution for the limited purposes of facilitating the work of the transcribers during the proceedings, and to enable the witnesses being examined to refer to protected witnesses by a number rather than by name.⁴⁹ Kamuhanda's request for disclosure of Exhibit P2 pursuant to Rule 68 of the Rules is therefore denied. However, the Appeals Chamber notes that this finding does not preclude Kamuhanda from moving the Chamber seized of the *Nshogoza* case to grant him access to Exhibit P2. In such a case, it will be for that Chamber to determine whether Kamuhanda demonstrates a legitimate forensic purpose for accessing the material.⁵⁰

(b) Material Related to Witness Nyarwaya's Testimony (Exhibits D53 and D54)

23. Kamuhanda requests the disclosure of a list of names of people allegedly present at meetings organised by Witness GEK with a view to bearing false accusations against Kamuhanda drawn up by Witness Nyarwaya during his testimony and admitted as Exhibit D53.⁵¹ He further requests disclosure of a prior statement from Witness Nyarwaya admitted as Exhibit D54 in which reference was made to "those people who gathered to plot against Kamuhanda and Rwamakuba".⁵²

24. The Prosecution has indicated that, although these materials already appear to be in Kamuhanda's possession, it will disclose Exhibits D53 and D54 to Kamuhanda pursuant to Rule 68 of the Rules.⁵³

⁴⁸ Response, para. 18.

⁴⁹ *Nshogoza* case, T. 9 February 2009 pp. 19, 20. Reference was made during the testimony of Witness GAF to certain witnesses by number where they appeared on the list, rather than by name or pseudonym. See *Nshogoza* case, T. 9 February 2009 pp. 20-33, 36-38, 42, 43, 46, 50, 51, 53, 59, 62, 66, 67.

⁵⁰ See *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-A, Decision on Georges A.N. Rutaganda's Motion to Access Confidential Material of Witness CSH from the *Rukundo* Case, 18 February 2010, paras. 11, 12 and references cited therein.

⁵¹ Motion, para. 19.

⁵² Motion, para. 20, citing *Nshogoza* case, T. 20 March 2009 pp. 19, 20 (French version).

⁵³ Further Response, para. 6.

(c) Witness BUC's Statement

25. Kamuhanda submits that, in an undated written statement, Witness BUC stated that she was contacted by Prosecution investigators and that it was on this occasion that she first heard of Kamuhanda going to Gikomero.⁵⁴ He adds that this witness later confirmed this statement during her testimony in the *Nshogoza* trial.⁵⁵ Kamuhanda argues that, since Witness BUC was present at the parish on the day of the massacres, her statement constitutes exculpatory material which should be disclosed to him.⁵⁶

26. The Prosecution responds that the statement which Kamuhanda "seems to be requesting" was in fact previously submitted by Kamuhanda himself in a motion for additional evidence filed in 2004.⁵⁷ It submits that it has not found any previous statements from this witness.⁵⁸

27. The Appeals Chamber notes that Witness BUC testified that she was interviewed by other persons at some point prior to the interview at which Nshogoza was allegedly present, but that she could not recall the identity of the people at this earlier interview, or the date on which it occurred.⁵⁹ The Appeals Chamber therefore considers that Kamuhanda has identified the material with sufficient precision, bearing in mind the limited detail provided by Witness BUC concerning this purported interview. The Appeals Chamber has no information before it which would enable it to conclude whether the statement which Kamuhanda seeks is the statement he proffered as additional evidence during the appeal proceedings or not.⁶⁰ In any event, the Appeals Chamber notes the Prosecution's representation that it has not found any other previous statements from Witness BUC and that Witness BUC did not confirm that this earlier interview was conducted by the Prosecution. In light of the foregoing, and in the absence of evidence from Kamuhanda to the contrary, the Appeals Chamber assumes that the Prosecution's representation is made in good faith and that the requested document has already been disclosed or is not in its custody.

⁵⁴ Motion, para. 21, citing statement identified as K0389873-K0389874.

⁵⁵ Motion, para. 21, citing *Nshogoza* case, T. 12 February 2009 pp. 32, 34 (French version).

⁵⁶ Motion, para. 21. See also *ibid.*, p. 8.

⁵⁷ Further Response, para. 5, citing *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, *Requête aux fins d'admission de moyens de preuve supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve*, confidential, 20 September 2004 ("Motion of 20 September 2004"), p. 5; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Decision on Appellant's Motion for Additional Evidence on Appeal, confidential, 12 April 2005, paras. 55, 56, 64-68.

⁵⁸ Further Response, para. 5.

⁵⁹ *Nshogoza* case, T. 12 February 2009 pp. 24-26.

⁶⁰ See Motion of 20 September 2004, p. 5.

(d) Witness Nyagatare's Statement

28. Kamuhanda submits that in the course of his testimony in the *Nshogoza* case, Witness Nyagatare testified that he first met with staff from the Office of the Prosecutor sometime between 2001 and 2002, which was when he first told them that Kamuhanda was not at Gikomero Parish on the day of the attack.⁶¹ Kamuhanda submits that since this witness was allegedly one of the assailants in the attack, his statement is clearly exculpatory and, as such, should be disclosed.⁶² The Prosecution responds that it has not found any prior statements of this witness.⁶³

29. The Appeals Chamber notes that, during the course of Witness Nyagatare's testimony in the *Nshogoza* case, the Trial Chamber asked the Prosecution to confirm whether it had searched for this statement.⁶⁴ The Prosecution replied that it had searched for this statement during both the *Rwamakuba* trial and the *Nshogoza* proceedings, but that it had not found it.⁶⁵ This explanation was accepted by the Trial Chamber.⁶⁶ In view of the foregoing, and in the absence of any evidence to the contrary, the Appeals Chamber accepts the representation of the Prosecution that Witness Nyagatare's previous statement is not in its possession.

(e) Material Related to Witness GAA

30. Kamuhanda requests disclosure of (1) the transcripts of interviews of Witness GAA by Prosecution investigators admitted as Exhibits D9, D10 (F and K), and D22; (2) the transcripts of Witness GAA's interview with the Special Counsel admitted as Exhibits D11 through D14 and the corresponding tapes with reference numbers KT00-1679 through KT00-1682; and (3) the video tape of Witness GAA's initial appearance and its transcript admitted as Exhibits D23 and D24.⁶⁷

31. The Prosecution submits that it has already disclosed to Kamuhanda the entire transcript of the complete interview of Witness GAA by the Special Counsel, which includes the excerpts of the transcripts of the audio recordings of Witness GAA's interview, referred to by Kamuhanda as Exhibits D11 through D14.⁶⁸ It moves the Appeals Chamber to dismiss Kamuhanda's request in this regard.⁶⁹ The Appeals Chamber has reviewed the trial record and accepts that the Prosecution disclosed the entire transcript of the interview to Kamuhanda in its Disclosure of 28 May 2009.

⁶¹ Motion, para. 22, citing *Nshogoza* case, T. 23 March 2009 pp. 16-18 (French version).

⁶² Motion, para. 22, p. 8.

⁶³ Response, para. 19.

⁶⁴ *Nshogoza* case, T. 23 March 2009 pp. 17-19.

⁶⁵ See *Nshogoza* case, T. 23 March 2009 pp. 17-19.

⁶⁶ *Nshogoza* case, T. 23 March 2009 p. 19.

⁶⁷ Motion, paras. 23-27, p. 8.

⁶⁸ Response, para. 20, citing Disclosure of 28 May 2009.

⁶⁹ Response, paras. 20, 39.

Nonetheless, the Prosecution submits that the audio recordings of this material (specifically, the audio tapes numbered KT00-1679 through KT00-1682) are in its possession and will be disclosed to Kamuhanda.⁷⁰ The Prosecution further submits that, although these materials appear to already be in Kamuhanda's possession, it will disclose Exhibits D9, D10, and D22, as well as Exhibits D23 and D24 pursuant to Rule 68 of the Rules.⁷¹

3. Material from the Rwamakuba Trial

32. Kamuhanda requests that the Appeals Chamber order the Prosecution to disclose the following material related to the *Rwamakuba* trial: (1) the entire closed session testimony of Witness 5/15; (2) the entire testimony of Witness 2/18, as well as a list prepared by this witness during his testimony; and (3) an earlier statement allegedly made by Witness 7/3.⁷²

(a) Witness 5/15's Closed Session Testimony

33. Kamuhanda submits that the closed session testimony of Witness 5/15 in the *Rwamakuba* case impacts on the credibility of Prosecution evidence in his own trial.⁷³ He argues that, in the *Rwamakuba* case, the Trial Chamber relied *inter alia* on the evidence of Witness 5/15 to find that Witness GEK (Witness GIN in the *Rwamakuba* trial) was not credible.⁷⁴

34. The Prosecution responds that the testimony of Witness 5/15 contains no information exculpatory to Kamuhanda and that, contrary to the Trial Chamber's finding, this witness does not mention Kamuhanda or Witness GIN/GEK.⁷⁵

35. The Appeals Chamber considers that Kamuhanda has identified with sufficient particularity the material sought with respect to Witness 5/15. The Appeals Chamber has reviewed the requested material and notes that this witness does not refer to either Kamuhanda or Witness GIN/GEK. Accordingly, the Appeals Chamber is not satisfied that this material is of a probable exculpatory nature. Kamuhanda's request for disclosure of Witness 5/15's closed session testimony in the *Rwamakuba* trial is accordingly denied. However, this finding does not preclude Kamuhanda from requesting access to the aforesaid material to the President of the Tribunal, who will designate a

⁷⁰ Response, paras. 20, 39. *See also* Further Response, para. 3.

⁷¹ *See* Further Response, para. 6.

⁷² Motion, paras. 29-32, p. 8.

⁷³ Motion, para. 29, *citing* *Rwamakuba* case, T. 26 January 2006.

⁷⁴ Motion, para. 29, *citing* *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Judgement, 20 September 2006 ("*Rwamakuba* Trial Judgement"), paras. 133, 135. The Appeals Chamber notes that in paragraph 133 of the *Rwamakuba* Trial Judgement, the Trial Chamber noted that according to "Witness 5/15, who also has a close relationship to GIN, [Witness GIN] has been greatly affected by her experience in 1994 and had changed since then." However, the Trial Chamber did not cite the evidence relied upon in support of this finding.

⁷⁵ Response, para. 27, *citing* *Rwamakuba* Trial Judgement, paras. 133, 135.

Bench to determine whether Kamuhanda has demonstrated a legitimate forensic purpose for accessing this material.⁷⁶

(b) Material Related to Witness 2/18's Testimony

36. Kamuhanda requests the disclosure of the "entire testimony" of Witness 2/18 in the *Rwamakuba* case.⁷⁷ According to Kamuhanda, Witness 2/18 testified in the *Rwamakuba* case that he himself was involved in the attack on Gikomero Parish, and gave the names of some of his alleged co-assailants.⁷⁸ He submits that, later on in his testimony, Witness 2/18 drew up a list of names of some of his alleged co-assailants in this attack.⁷⁹ It is further submitted that, in two prior statements, Witness 2/18 described the events which occurred on the day of the massacres, stating that there was no politician or intellectual among them.⁸⁰ According to Kamuhanda, during his testimony in the *Nshogoza* trial, Witness 2/18 claimed that he had not seen Kamuhanda and that he had already said so to the Prosecution while he was in detention.⁸¹ Kamuhanda therefore avers that both the testimony of Witness 2/18 in the *Rwamakuba* case and the list of those persons who attacked Gikomero Parish drawn up by this witness are exculpatory and must be disclosed to him.⁸²

37. The Prosecution responds that Kamuhanda has failed to present a *prima facie* showing that Witness 2/18's testimony is exculpatory.⁸³ It argues that the mere fact that this witness testified that he did not see Kamuhanda at the Gikomero Parish in the *Nshogoza* trial does not mean that he provided exculpatory material in his testimony in the *Rwamakuba* trial.⁸⁴ It points out that this witness did not mention Kamuhanda during his testimony in the *Rwamakuba* case.⁸⁵ Further, the Prosecution avers that Kamuhanda fails to establish the existence of the list of alleged co-assailants in the attack on Gikomero Parish, which Kamuhanda claims was prepared by Witness 2/18.⁸⁶

38. The Appeals Chamber is satisfied that Kamuhanda has identified the material sought with respect to Witness 2/18 with sufficient particularity. The Appeals Chamber has reviewed the requested testimony of Witness 2/18 from the *Rwamakuba* case and notes that this witness made no reference to Kamuhanda. The fact that the witness did testify about the attack on Gikomero Parish

⁷⁶ Cf. *supra* para. 22, fn. 48.

⁷⁷ Motion, paras. 30, 32, p. 8.

⁷⁸ Motion, para. 30, citing *Rwamakuba* case, T. 23 January 2006 p. 11 (French version).

⁷⁹ Motion, para. 30, citing *Rwamakuba* case, T. 23 January 2006 p. 31 (French version).

⁸⁰ Motion, para. 30, citing statements of 15 November 2002 (Exhibit D201) and of 8 August 2003 (Exhibit D200).

⁸¹ Motion, para. 30, citing *Nshogoza* case, T. 23 March 2009 pp. 11, 12, 16-18 (French version).

⁸² Motion, para. 30, p. 8.

⁸³ Response, para. 31.

⁸⁴ Response, para. 31.

⁸⁵ See Response, para. 31.

⁸⁶ See Response, para. 33.

and named some of the assailants is not in itself exculpatory. The Appeals Chamber is therefore not satisfied that the requested transcripts are of a probable exculpatory nature.

39. However, the Appeals Chamber is not persuaded by the Prosecution's contention that Kamuhanda has failed to establish the existence of the list of alleged co-assailants in the attack on Gikomero Parish prepared by Witness 2/18.⁸⁷ As the Prosecution itself concedes, it appears from the transcript of the open session proceedings of 23 January 2006 that Witness 2/18 prepared such a list during the course of his testimony.⁸⁸ In any event, the Appeals Chamber is not persuaded on the basis of the information before it that Kamuhanda has made a *prima facie* showing of its probable exculpatory nature.

40. Kamuhanda's request for disclosure, pursuant to Rule 68 of the Rules, of the testimony of Witness 2/18 in the *Rwamakuba* trial and the list drawn up by the witness during his testimony is accordingly denied. However, as noted above,⁸⁹ this finding does not preclude Kamuhanda from requesting access to the confidential portions of Witness 2/18's testimony in the *Rwamakuba* trial to the President of the Tribunal, who will designate a Bench to determine whether Kamuhanda has demonstrated a legitimate forensic purpose for accessing this material.

(c) Witness 7/3's Statement

41. Kamuhanda requests disclosure of "an earlier statement obtained by staff of the Tribunal" from Witness 7/3 in which, he avers, this witness stated that Kamuhanda had no role in the genocide in Gikomero.⁹⁰ The Prosecution responds that it has searched its database and did not find this statement.⁹¹

42. The Appeals Chamber notes that during the open session cross-examination of Witness 7/3 in the *Rwamakuba* case, the Prosecution asked this witness whether he knew that his name had been linked to that of Kamuhanda in proceedings before this Tribunal.⁹² Witness 7/3 replied that:

I am aware, because ICTR staff came to see me – I do not remember when, but they came and told me that I had been cited in the Kamuhanda trial. But I told these people of the ICTR that Kamuhanda never played a role in the genocide in Gikomero. I stated that we committed our crimes, but that Kamuhanda never played a role in the genocide.⁹³

However, a review of the transcript of this session reveals that Witness 7/3 did not provide any

⁸⁷ See Response, para. 33.

⁸⁸ See *Rwamakuba* case, T. 23 January 2006 p. 26.

⁸⁹ See *supra* para. 35.

⁹⁰ Motion, para. 31, citing *Rwamakuba* case, T. 19 January 2006 p. 21 (French version), p. 8.

⁹¹ Response, para. 36.

⁹² *Rwamakuba* case, T. 19 January 2006 p. 18.

⁹³ *Rwamakuba* case, T. 19 January 2006 p. 18.

further information as to the circumstances in which this alleged conversation occurred, such as the date or identity of the persons present. Accordingly, and in the absence of any evidence to the contrary from Kamuhanda, the Appeals Chamber accepts the Prosecution's representation in respect of this item.

4. Statement K0110003

43. Kamuhanda requests that the Appeals Chamber order the Prosecution to disclose the statement identified as K0110003 in the EDS and the identity of the witness who made it.⁹⁴ The Appeals Chamber notes that according to the Prosecution, statement K0110003 and the identity of the person who made it were provided to Kamuhanda during his trial but that, in any event, it will be provided to him again.⁹⁵

C. Conclusion

44. The Appeals Chamber has accepted, in the absence of evidence from Kamuhanda to the contrary, that the Prosecution has made a good faith representation that certain material is outside the scope of Rule 68 of the Rules and therefore will not be disclosed to Kamuhanda.⁹⁶ The Appeals Chamber has also accepted that the Prosecution did not find in its custody or control certain other material requested by Kamuhanda.⁹⁷ Further, the Appeals Chamber has found that Kamuhanda has failed to make a *prima facie* showing that the list of persons interviewed by the Special Counsel, the date the Special Counsel's investigation ceased, Exhibit P2 from the *Nshogoza* case, and the material relating to Witnesses 5/15 and 2/18 in the *Rwamakuba* trial are of a probable exculpatory nature.⁹⁸ Finally, the Appeals Chamber has accepted that the entire transcript of the complete interview of Witness GAA by the Special Counsel was already disclosed to Kamuhanda, which comprises the excerpts requested by Kamuhanda and admitted as Exhibits D11 through D14 in the *Nshogoza* case.⁹⁹

⁹⁴ See Motion, paras. 33, 34, p. 8.

⁹⁵ Response, para. 38; Further Response, para. 2. The Prosecution avers that this statement appears to have been provided to Kamuhanda's current defence counsel during the cross-examination of Witness PCB. See Response, para. 38, citing *Kamuhanda* case, T. 6 February 2003 pp. 17, 19.

⁹⁶ Namely, the statements arising from the Special Counsel's investigation, aside from those of Witness GAA. See *supra*, para. 18.

⁹⁷ Specifically: (1) a prior statement of Witness BUC mentioned during the testimony of this witness in the *Nshogoza* case; (2) a prior statement of Witness Nyagatare which this witness referred to in the course of his testimony in the *Nshogoza* case; and (3) a prior statement of Witness 7/3 mentioned by this witness during his testimony in the *Rwamakuba* case. See *supra*, paras. 27, 29, 42.

⁹⁸ See *supra*, paras. 17, 22, 35, 38, 39.

⁹⁹ See *supra*, para. 31. See also *supra* paragraph 27, concerning the Appeals Chamber's conclusion as to the prior statement of Witness BUC mentioned during the testimony of this witness in the *Nshogoza* case.

45. However, it remains the case that it was not until late May 2009, after Kamuhanda filed his Motion for Legal Assistance, that the Prosecution disclosed various witness statements and trial transcripts from the *Nshogoza* case, including statements made by Witness GAA before the Special Counsel.¹⁰⁰ Furthermore, the Prosecution did not undertake to disclose the exhibits relating to the testimony of Witness Nyarwaya and Witness GAA in the *Nshogoza* case until January 2010, after Kamuhanda filed the present Motion.¹⁰¹ The Appeals Chamber notes the Prosecution's submissions that the material related to the Special Counsel's investigation disclosed in May 2009 was potentially exculpatory¹⁰² and that Exhibits D9, D10, D22 through D24, as well as D53 and D54 from the *Nshogoza* case will be disclosed pursuant to Rule 68 of the Rules.¹⁰³ The Prosecution thereby recognises that the material which is the subject of these disclosures constitutes Rule 68 material. The Appeals Chamber therefore finds that the Prosecution's failure to disclose the aforementioned material in a timely manner amounts to a violation of Rule 68 of the Rules. However, as Kamuhanda makes no submissions with regard to any prejudice suffered as a result of these violations in his Motion, the Appeals Chamber does not consider this issue.

46. The Appeals Chamber expects the Prosecution to act in good faith and comply with its positive and continuous disclosure obligations. Because it can only assume that the Prosecution does so where there is no evidence to the contrary, the Appeals Chamber is seriously concerned by the Prosecution's violations of its disclosure obligations towards Kamuhanda. The Prosecution is reminded that its disclosure obligation is as important as its obligation to prosecute.¹⁰⁴

¹⁰⁰ See *supra*, para. 8.

¹⁰¹ See *supra*, paras. 24, 31.

¹⁰² Response, para. 17.

¹⁰³ Further Response, para. 6.

¹⁰⁴ See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 264; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. 95-14/2-A, Judgement, 17 December 2004, para. 242.

D. Disposition

47. For the foregoing reasons, the Appeals Chamber

REMINDS the Prosecution to immediately disclose to Kamuhanda Exhibits D9, D10, D22 through D24, D53, and D54 from the *Nshogoza* case, as well as the audio cassettes numbered KT00-1679 through KT00-1682, the statement identified as K0110003 in the EDS and the identity of its author;

FINDS that the Prosecution's failure to disclose in a timely fashion the material referred to in paragraph 45 of this Decision amounts to a violation of Rule 68 of the Rules; and

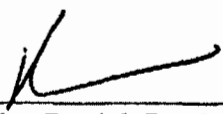
DENIES Kamuhanda's Motion in all other respects.

Done in English and French, the English version being authoritative.

Done this fourth day of March 2010,
At The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Patrick Robinson
Presiding