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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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ICTR-96-03-R

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TRIAL CHAMBER II

Before: Judge Joseph Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 6 January 2010

GEORGES A.N. RUTAGANDA

v.

THE PROSECUTOR

Case No. ICTR-96-03-R

JUDICIAL RECORDS/ARCHIVES
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**PROSECUTOR'S RESPONSE TO RUTAGANDA'S EXTEREMLY URGENT
MOTION FOR ACCESS TO CONFIDENTIAL MATERIAL OF WITNESS
"CSH" IN RUKUNDO CASE (ICTR-2001-70 -T)**

The Applicant

Georges A.N. Rutaganda, *pro se*

Office of The Prosecutor

Mr Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Linda Bianchi
Mr. Ousman Jammeh
Ms. Madeleine Schwarz

697/A

A. Prosecutor's Response

(A) Overview of the Motion

1. On 29 December 2009, Georges A.N. Rutaganda, the Applicant, filed "*Rutaganda's Extremely Urgent Motion for Access to Confidential Material of Witness 'CSH' in Rukundo Case (ICTR-2001-70-T)*" (the "Motion") in which he requests the Trial Chamber to grant him access to the closed session testimony of Witness "CSH" from the *Rukundo* trial.¹

2. The Prosecutor opposes the Motion for the following reasons. First, the Applicant has brought the Motion before the wrong Chamber. The Applicant ought to have brought this Motion before the Appeals Chamber. Second, and in any event, the Applicant has failed to demonstrate that the material he has requested is likely to assist his case and thus access to closed, confidential material is not warranted.

(B) The Applicant has brought this Motion before the wrong Chamber

3. The Applicant has brought this Motion before Trial Chamber II, the Trial Chamber which by written decision dated 27 February 2009 rendered Final Judgement on the *Rukundo* case. However, the Chamber properly seized of this matter is the Appeals Chamber, since the case is currently on appeal.

4. On 19 March 2009, Rukundo notified the Appeals Chamber that he intended to appeal the Judgement and asked for an extension of time to file his Notice of Appeal until the French translation of the Judgement was available. On 24 March 2009, the Appeals Chamber granted the extension.

5. On 5 November 2009, Rukundo filed his Notice of Appeal. His Appeal Brief is due to be filed on 19 January 2010.

¹ *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Rutaganda's Extremely Urgent Motion for Access to Confidential Material of Witness CSH in *Rukundo* Case (ICTR-2001-70-T), dated 23 December 2009, filed on 29 December 2009.

6. When the Appeals Chamber becomes seized of an appeal against a Trial Judgement, it becomes the Chamber "seized of the first proceedings" within the meaning of Rule 75(G)(i) of the Rules.²

7. As a result, the Prosecutor submits that, as a party to the second proceedings, the Applicant should have filed his Motion before the Appeals Chamber, instead of filing it improperly before Trial Chamber II.

8. As opposed to directing the Applicant to file a new motion, the Prosecutor requests the Trial Chamber to transfer this Motion to the Appeals Chamber and for the Appeals Chamber to consider the following response.³

(C) *The Applicant has failed to demonstrate that the material he has requested is likely to assist his case*

9. As stated by the Appeals Chamber:

where a party 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. Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.....A Chamber must be satisfied that the requesting party has established that this material is likely to assist its case materially or that there is at least a good chance that it would.⁴

² See, e.g., *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, *Confidential Decision* on Augustin Ndirabatswe's Motion for Disclosure of Closed Session Testimony and Exhibits under Seal, 18 September 2009, para. 12; *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-A, *Decision* on Radovan Karadzic's Motion for Variance of Protective Measures, 8 October 2009, para. 6. See also *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, *Decision* on Request for Disclosure, 11 July 2007, paras. 4, 5.

³ The Prosecutor notes that, as this motion is properly made before the Appeals Chamber, it has filed this Response in accordance with the timing set out in Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006. para. 13, that is, within 10 days of receipt of the Motion.

⁴ *Georges Rutaganda v. The Prosecutor*, *Decision* on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karemura et al.* Case, 10 July 2009, para. 13; see also, *Decision* on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 10.

10. The Applicant has failed to establish that the testimony of CSH in *Rukundo* is likely to assist his case materially, taking into account the full extent of his criminal conduct in Cyahafi Sector, Nyarugenge Commune.⁵

11. In its Appeal Judgement of 26 May 2003, the *Rutaganda* Appeals Chamber confirmed the Applicant's conviction for genocide and extermination as a crime against humanity, entered an additional conviction for serious violations of Article 3 common to the Geneva Conventions and upheld his sentence of life imprisonment.⁶ The Appeals Chamber affirmed the Trial Chamber's findings that the Applicant distributed weapons and aided and abetted killings in Cyahafi sector, Nyarugenge Commune, Kigali-Town; ordered, committed, and aided and abetted crimes committed in the area of the Amgar garage, participated in the massacres at *Ecole Technique Officiel* ("ETO") and participated in the forced diversion of refugees to Nyanza and the subsequent massacres there.⁷

12. The *Rutaganda* Trial Chamber found that on 15 April 1994, the Applicant arrived in Cyahafi Sector, Nyarugenge Commune in a pick-up truck. The men who arrived with him distributed weapons that were in the back of the truck to *Interahamwe*. Immediately after the distribution of the weapons the *Interahamwe* started to shoot. Three persons were shot dead, including one individual named Viater Kalinda.⁸ The Trial Chamber made a number of other findings concerning the Applicant distributing weapons on other days.⁹ As a result of these acts, the Chamber found the Applicant individually criminally responsible for having aided and abetted in the preparation for and perpetration of killings of members of the Tutsi group and for having caused serious bodily or mental harm to members of said group.¹⁰

13. It is worth noting that the Applicant was not convicted of the actual killing of Viater Kalinda. The Applicant's conviction was based on his involvement in the

⁵ *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karemera et al.* Case, 10 July 2009, para. 28.

⁶ *Georges Rutaganda v. The Prosecutor*, Case No. ICTR -96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgment"), Disposition; *The Prosecutor v. Georges Rutaganda*, Case No. ICTR -96-3-T, Judgement, 6 December 1999, ("*Rutaganda* Trial Judgement"), Verdict.

⁷ *Rutaganda* Appeal Judgement, paras. 294-341

⁸ *Rutaganda* Trial Judgement, paras. 197, 385.

⁹ See for example, *Rutaganda* Trial Judgement, para. 385.

¹⁰ *Rutaganda* Trial Judgement, paras. 198, 199, 385.

distribution of weapons in Cyahafi sector which resulted in killings of different individuals.¹¹

14. In this Motion, the Applicant seeks access to the confidential material of Witness CSH who testified in *Rukundo* on refugees and abductions of refugees from the Kabgayi Major Seminary in Gitarama Prefecture. At no point did Witness CSH testify about events in Cyahafi sector or mention the Applicant.

15. The Applicant noted that he was informed that the testimony of CSH and the publication which was tendered as Defence Exhibit D.6 and admitted under seal, discussed the death of a certain Viater Kalinda.¹² The *Rukundo* Trial Judgement summarizes the testimony of CSH and his testimony on the death of Viater Kalinda, and mentions a book written by CSH regarding the testimonies of Kabgayi survivors (Exhibit D-6 (under seal)).¹³

16. CSH testified that Viater Kalinda, a journalist from Radio Rwanda, was one of the individuals abducted from the Seminary and killed on 24 May 1994.¹⁴ He further testified that, on 2 June 1994, when he and the other refugees were liberated from the Kabgayi Major Seminary by the RPF, they were taken to a camp in Byimana where some peasants told them about the killings they had witnessed on 24 May 1994, which was a Thursday (a market day). The peasants explained that they had heard gunshots and Viater Kalinda had tried to run away but was struck down by a machete.¹⁵ This is the extent of CSH's testimony on Viater Kalinda. It is hearsay testimony based on what he heard after the event. It did not form the basis of any conviction of Rukundo.

17. The Appeals Chamber has noted that in a situation such as the Applicant's, the "only legitimate purpose to seek disclosure would be in relation to a request for review of his judgement pursuant to Rule 120 of the Rules."¹⁶ The Appeals Chamber has

¹¹ *Rutaganda* Trial Judgement, paras. 385, 386.

¹² Motion, para. 11.

¹³ *Rukundo* Trial Judgement, paras. 455-460.

¹⁴ *Rukundo* Trial Judgement, para. 457, 497.

¹⁵ *Rukundo* Trial Judgement, para. 497.

¹⁶ *Georges Rutaganda v. The Prosecutor*, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karemera et al.* Case, 10 July 2009, paras. 21 and 22 confirming Trial Chamber's statement.

confirmed that significant factual, geographical and temporal overlap can establish a legitimate forensic purpose.¹⁷

18. The Applicant has failed to demonstrate that there is a legitimate forensic purpose, or a close nexus between his case and the case from which such material is sought.¹⁸ There is no geographical or temporal overlap between these cases. The evidence contained in CSH's testimony speaks to the circumstances of the abductions in Kabgayi in May 1994. This has no bearing on the Cyahafi arms distributions and the preparation and perpetration of killings in April 1994, including the shooting of a Tutsi named Viater Kalinda.

19. The only potential factual overlap may exist in the circumstances relating to a Tutsi victim killed during the genocide in 1994. However, even here, no legitimate forensic purpose has been established. Witness J in *Rutaganda* mentioned very briefly that Viater Kalinda was one of the Tutsi individuals shot after the distribution of weapons in Cyahafi in mid-April 1994. Witness CSH in *Rukundo* also mentioned very briefly a refugee named Viater Kalinda who was abducted from Kabgayi Minor Seminary and killed in May 1994. This does not constitute a significant factual overlap.

20. Disclosure of CSH's closed session material will not assist the Applicant's case. The Prosecutor has reviewed the testimony of CSH, including Exhibit D-6, and notes that no further information about Viater Kalinda, the journalist who was abducted and killed, is provided either in the closed session testimony or in Exhibit D-6.

21. By way of comparison, Trial Chamber III, granted disclosure of documents from the *Karempera* case to the Applicant noting that there was a significant factual, geographic and temporal overlap between the *Karempera et al.* case and the *Rutaganda* case.¹⁹ In this case, there is no *significant* factual, geographic or temporal overlap between the *Rukundo*

¹⁷ *Georges Rutaganda v. The Prosecutor*, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karempera et al.* Case, 10 July 2009, para. 21 confirming Trial Chamber's statement.

¹⁸ *Georges Rutaganda v. The Prosecutor*, Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karempera et al.* Case, 10 July 2009, para. 13; see also Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 10.

¹⁹ *Prosecutor v. Karempera et al.*, ICTR-98-44-T, Decision on Appeals Chamber remand regarding Rutaganda's Appeal Concerning Access to Confidential Materials in the *Karempera et al.* Case, 29 September 2009, para. 4.

case and the *Rutaganda* case. While there is a possibility that there is factual overlap in a victim, Viater Kalinda, the Prosecutor submits that the nexus is so far removed from offering any material assistance to the Applicant's case that it does not warrant disclosing protected and confidential information, particularly as none of the allegedly relevant material relating to Viater Kalinda is found in the closed session material.

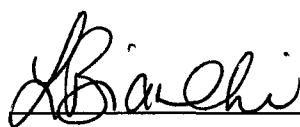
B. Relief Requested

22. There is a need to strike a balance between the protection and integrity of the closed session material and the Applicant's right to have access to it.²⁰ As the Applicant has failed to demonstrate a legitimate forensic purpose to gain access to the material, and as there is no further information concerning Viater Kalinda and his murder provided by Witness CSH beyond what is available in the open session testimony and the *Rukundo* Trial Judgement, the Applicant should not be granted access to the sought-after material.

23. The Prosecutor requests that the Applicant's Motion be dismissed.

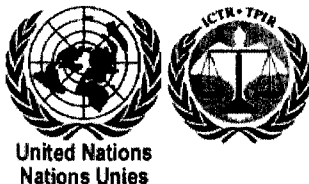
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Signed at Arusha this 6th day of January 2010



Linda Bianchi
Senior Appeals Counsel

²⁰ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Eliézer Niyitegeka's Appeal Concerning Access to Confidential Materials in the *Muhimana* and *Karemera et al* Cases, 23 October 2003, para. 23.



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No. of Pages:	7	Original Language:	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
Title of Document:	PROSECUTOR'S RESPONSE TO RUTAGANDA'S EXTREMELY URGENT MOTION FOR ACCESS TO CONFIDENTIAL MATERIAL OF WITNESS "CSH" IN RUKUNDO CASE (ICTR-2001-70-T)			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties		
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