



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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ICTR-01-71-R  
13-11-2008  
(108/A-104/A)

TRIAL CHAMBER I

**Before:** Judge Erik Møse, presiding  
Judge Khalida Rachid Khan  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 13 November 2008

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**THE PROSECUTOR**

v.

**Emmanuel NDINDABAHIZI**

*Case No. ICTR-2001-71*

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**DECISION ON NDINDABAHIZI'S MOTION FOR RECONSIDERATION OR  
CERTIFICATION TO APPEAL DECISION OF 5 MARCH 2008 ON DISCLOSURE  
OF CLOSED SESSION TESTIMONY**

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**The Prosecution**  
Dior Fall  
Abdoulaye Seye

**The Applicant**  
Emmanuel Ndindabahizi

*Emmanuel Ndindabahizi*

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Khalida Rachid Khan and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** Emmanuel Ndindabahizi's Request for Reconsideration of the Chamber's Decision of 5 March 2008 regarding the Closed-Session Testimony of Witnesses CGE, CGX, CGB, CGF et CGH, or Certification to Appeal, filed on 14 March 2008;

**HEREBY** decides the request.

**INTRODUCTION**

1. Emmanuel Ndindabahizi was convicted on 15 July 2004 of genocide as well as murder and extermination as crimes against humanity in relation to events at both Gaseke roadblock and Girwa hill. He was sentenced to imprisonment for the remainder of his life.<sup>1</sup> On 16 January 2007, the Appeals Chamber vacated Ndindabahizi's conviction for genocide and murder in relation to events at Gaseke roadblock and upheld his convictions for genocide and extermination in relation to events at Gitwa hill, as well as his sentence.<sup>2</sup>

2. On 5 March 2008, the Trial Chamber denied Ndindabahizi's motion seeking disclosure of closed session testimony and sealed exhibits of protected witnesses who testified in his trial. He had sought such disclosure following an allegedly successful compensation claim by one of these witnesses, CGE, against him before the Gashyamba-Gasharu *Gacaca* court in Rwanda in July 2007.<sup>3</sup> In denying the motion, the Chamber found that although closed session evidence of witnesses has previously been provided by the Tribunal to national authorities, the Chamber was not seized of a request by any Rwandan authority in connection with the prosecution of crimes. There was also no information that the Tribunal's witness protection orders would apply *mutatis mutandis* in such proceedings, if any, or that these witnesses had consented to the disclosure of their prior closed session testimony before the Tribunal.<sup>4</sup>

3. Ndindabahizi has requested reconsideration of the decision or certification for appeal.<sup>5</sup> He argues that access to the closed session testimonies at the Tribunal would assist him to defend himself against Witness CGE's accusation before the *gacaca* court, and that the Chamber ought to vary and lift the witness protection measures in place.<sup>6</sup> The Chamber did not take into account all arguments made in his original Motion and Reply and erred, in

<sup>1</sup> *Prosecutor v. Ndindabahizi*, Judgement and Sentence (TC), 15 July 2004.

<sup>2</sup> *Prosecutor v. Ndindabahizi*, Judgement (AC), 16 January 2007.

<sup>3</sup> *Requête de Ndindabahizi Emmanuel pour utilisation des transcriptions à huis clos des témoignages des témoins CGE, CGX, CGB, CGF et CGH ainsi que des pièces déposées sous scellés*, etc., filed on 2 October 2007.

<sup>4</sup> *Prosecutor v. Ndindabahizi*, Decision on Disclosure of Closed Session Testimony of Witnesses CGE, CGX, CGF, CGB and CGH (TC), 5 March 2008.

<sup>5</sup> *Requête de Ndindabahizi Emmanuel demandant à la Chambre de Première Instance I de reconsidérer sa Décision du 5 mars 2008 sur les témoignages sous scellés des témoins CGE, CGX, CGB, CGF et CGH, ou à défaut lui accorder la certification d'appel*, etc. (hereinafter "Motion"), filed on 19 March 2008.

<sup>6</sup> Although requesting access to the sealed testimony of five protected witnesses, most of the submissions focus on the closed session evidence of Witness CGE (e.g. Motion paras. 4, 6-7 and 10). The Chamber notes that the entire testimony of one of these witnesses, CGH, took place in open session. The only sealed evidence relevant to this witness is his identification sheet.

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particular, by requiring Witness CGE's consent as a condition for authorising disclosure. The lack of a request from Rwandan authorities is not determinative.<sup>7</sup> Denial of the request is also at variance with the Tribunal's mandate, which includes strengthening the capacity of the Rwandan judiciary and enhancing national reconciliation.<sup>8</sup> The Prosecution did not file any response.

4. On 10 July 2008, Ndindabahizi filed a motion before the Appeals Chamber, requesting the same relief as before the Trial Chamber.<sup>9</sup> The Prosecution opposed the request, on grounds that the impugned decision correctly applied the law and constituted a reasonable exercise of discretion by the Trial Chamber. Further, the request before the Appeals Chamber was premature.<sup>10</sup> Ndindabahizi filed a reply on 29 July 2008.<sup>11</sup> On 9 September 2008, the Appeals Chamber found Ndindabahizi's motion to be improperly before the Appeals Chamber, as Ndindabahizi's request for reconsideration of the decision is currently pending before the Trial Chamber, which therefore remains seized of the matter.<sup>12</sup>

## DELIBERATIONS

5. Ndindabahizi has requested reconsideration, or in the alternative, certification of the Trial Chamber's decision of 5 March 2008. It follows from case law that reconsideration is justified when there have been new circumstances since the filing of the challenged decision that affect the premise of the decision. It can also be permissible where the impugned decision was erroneous in law or an abuse of discretion.<sup>13</sup>

6. A Trial Chamber may only grant certification under Rule 73 (B) of the Rules of Procedure and Evidence if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the 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. It is settled law that Rule 73 is only applicable at the time of proceedings before Trial Chambers.<sup>14</sup> The Trial Chamber's decision which is the subject of Ndindabahizi's motion was rendered after the close of the trial and appeal proceedings in his case. However, the Appeals Chamber has held that under certain conditions an applicant

is entitled to challenge a decision by a Trial Chamber, pursuant to Rule 75 (G) of the Rules, rendered after the close of trial and appeal proceedings before the Appeals Chamber. As with

<sup>7</sup> Motion paras. 5-12.

<sup>8</sup> *Id.*, paras. 6 (goal enhanced by permitting *gacaca* courts access to witnesses' closed-session testimony before the Tribunal, thus safeguarding against inconsistent accounts before *gacaca* courts) and 7.

<sup>9</sup> *Requête rappelant celle du 14 mars 2008 intitulée: Requête de Ndindabahizi Emmanuel demandant à la Chambre de Première Instance I de reconsidérer sa Decision du 5 mars 2008 sur les témoignages sous scellés des témoins CGE, CGX, CGB, CGF et CGH, ou à défaut lui accorder la certification d'appel, etc.*, filed by Ndindabahizi on 10 July 2008, para. 8.

<sup>10</sup> Prosecutor's Response to Ndindabahizi's *Requête rappelant ...*, etc., filed on 21 July 2008, paras. 7-9.

<sup>11</sup> *Replique à la Réponse du Procureur du 21 juillet 2008 ...*, etc., filed on 29 July 2009.

<sup>12</sup> *Prosecutor v. Ndindabahizi*, Decision on Emmanuel Ndindabahizi's Application Concerning Variation of Protective Measures (AC), 9 September 2008.

<sup>13</sup> *Bagosora et al.*, Decision on Prosecutor's second motion for reconsideration of the Trial Chamber's "Decision on Prosecutor's motion for leave to vary the witness list pursuant to Rule 73 bis (E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)", 15 June 2004, para. 9; *Bagosora et al.*, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11.

<sup>14</sup> *Prosecutor v. Niyitegeka*, Decision on Motion for Clarification (AC), 20 June 2008, para. 13.

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any discretionary decision, the applicant would have to demonstrate that the Trial Chamber committed a discernible error in its decision because it was based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of discretion.<sup>15</sup>

7. The criteria for reconsideration and a challenge to a Trial Chamber Decision under Rule 75 (G) are therefore similar: namely, an incorrect interpretation of the law, an incorrect conclusion of fact, or an abuse of discretion.

8. The Trial Chamber committed no discernible factual or legal error. Instead, it correctly noted that it was not seized of any request from national authorities for access to closed session testimony.<sup>16</sup> Ndindabahizi has no ongoing proceedings before either the Trial or Appeals Chamber. The only future proceedings for which disclosure could be of relevance are review proceedings pursuant to Rule 120, which are not mentioned in his motion. Further, the Chamber lacked precise and reliable information both as to the nature of the national proceedings for which the requested material was sought, and the purpose of seeking disclosure.<sup>17</sup>

9. Regarding Ndindabahizi's allegation that the Trial Chamber erred in partially basing its decision upon a lack of witness consent, the Chamber correctly noted that the Tribunal has previously granted requests for access to closed-session testimony in relation to national prosecutions of serious violations of international humanitarian law in Rwanda. Such requests have been accompanied by guarantees from national authorities that witness protection orders will apply *mutatis mutandis* in these proceedings and where the witnesses in question have consented to disclosure.<sup>18</sup> Irrespective of whether witness consent is an indispensable prerequisite to variation of witness protection measures in all circumstances, the Chamber was clearly entitled to take into account the risks posed to witnesses.<sup>19</sup> In view of its duty to safeguard vulnerable witnesses, the Chamber properly exercised its discretion to deny disclosure of closed session evidence to pending claims before *gacaca* courts in Rwanda.

10. Consequently, the Chamber's decision was therefore not based on an incorrect interpretation of the law or an incorrect conclusion of fact. The Chamber fully weighed all

<sup>15</sup> *Id.* para. 14 (noting that issues related to access to confidential material by a convicted person concern the important question of balance between the right of the convicted person to access potentially exculpatory material and the need to guarantee the protection of victims and witnesses). Rule 75 (G) allows for the possibility of seeking to rescind, vary, or augment protective measures ordered at trial.

<sup>16</sup> Decision para. 3.

<sup>17</sup> In his Motion (in particular para. 8), Ndindabahizi refers to his Reply purportedly filed on 21 January 2008, arguing that the Chamber made a mistake by disregarding it. The Registry has confirmed that no such document was received by the Tribunal from Ndindabahizi on or around that date. The Chamber has taken note of his motion filed on 10 July 2008 before the Appeals Chamber (in particular paras. 11-20), as well as his Reply in those proceedings (e.g. paras. 11 and 14). They do not show that the decision of 5 March 2008 was incorrect.

<sup>18</sup> *Prosecutor v. Muhimana et al.*, Decision on Prosecution Motion to Unseal and Disclose Closed Session Testimony of Witnesses BL, AT, GGO and GG (TC), 4 March 2008; *Prosecutor v. Simba*, Decision on Disclosure of Closed Session Testimony of Witness YC (TC), 22 March 2007. See also *Prosecutor v. Rwamakuba*, Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness HF (TC), 26 March 2007, para. 7 ("a request for disclosure of closed session testimony to national authorities may be granted when the following conditions are met: (1) such a request is in keeping with the Tribunal's objective of investigating and prosecuting persons accused of committing serious violations of international humanitarian law in Rwanda; (2) the witness concerned has consented to the disclosure of the closed session testimony; and (3) the Chamber has ascertained that there is no risk to the privacy and security of the witness concerned" (emphasis added)).

<sup>19</sup> The Chamber is unaware of any instance in which disclosure of such testimony was granted in the absence of witness consent or in spite of the witness's objection.

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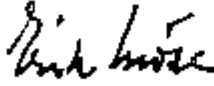
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material before it. The decision was not unfair or unreasonable so as to constitute an abuse of discretion. Ndingabahizi's request for reconsideration or certification is denied.

**FOI. THE FOREGOING REASONS, THE CHAMBER**

**DECI** ES the request.

Arusha, 13 November 2008



Erik Mose  
Presiding Judge



Khalida Rachid Khan  
Judge



Sergei Alekseevich Egorov  
Judge

