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Tribunal pénal international pour le Rwanda

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**TRIAL CHAMBER III**

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

**Registrar:** Mr. Adama Dieng

**Date:** 27 January 2010

JUDICIAL OFFICE  
ICTR

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**THE PROSECUTOR**  
v.  
**DOMINIQUE NTAWUKULILYAYO**

Case No. ICTR-05-82-T

**DECISION ON THE REQUEST BY THE DEFENCE FOR CALLIXTE  
KALIMANZIRA FOR ACCESS TO CLOSED SESSION TRANSCRIPTS**

*Rule 75 (F) and (G) of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. On 6 February and 11 May 2009, this Chamber granted protective measures to Prosecution and Defence witnesses respectively.<sup>1</sup> The Prosecution case closed on 26 May 2009 and the Defence concluded its case on 17 December 2009.
2. On 13 January 2010, the Defence for Callixte Kalimanzira (“Defence”), an accused person in the case of *The Prosecutor v. Callixte Kalimanzira*, filed a motion requesting access to all closed session transcripts from the *Ntawukulilyayo* proceedings.<sup>2</sup> Mr. Kalimanzira was convicted and sentenced on 22 June 2009 and the Judgment is now the subject of an appeal before the Appeals Chamber.
3. On 14 January 2010, the Prosecution responded opposing the Defence Motion.<sup>3</sup> On 15 January 2010, the Defence for Dominique Ntawukulilyayo responded to the Defence Motion stating that it does not object to the Defence request.<sup>4</sup>
4. On 19 January 2010, the Defence replied to the Prosecution Response.<sup>5</sup>

## DISCUSSION

### *The Law on Disclosure of Confidential Materials*

5. Rule 75 of the Rules of Procedure and Evidence (“Rules”) empowers a Chamber to order appropriate measures to safeguard the privacy and security of witnesses, provided that the measures are consistent with the rights of the accused. Furthermore, Rule 79 (A)(ii) permits the Chamber to order that the proceedings be held in closed session in order to preserve any protective measures granted under Rule 75.
6. Sub-Rules 75 (F) and (G) of the Rules envisage the circumstances currently before this Chamber. First, those sub-Rules provide that protective measures continue to have effect in other proceedings.<sup>6</sup> Second, they prescribe a method by which a party from another case may apply to the Chamber, which granted the protective measures, to rescind, vary, or augment those protective measures, enabling access to the materials sought.<sup>7</sup>

<sup>1</sup> Decision on Prosecutor’s Motion for Protective Measures, 6 February 2009 and Decision on Defence Motion for Protective Measures, 11 May 2009. However, during the Defence case, a number of Defence witnesses chose to waive their protective measures.

<sup>2</sup> Requête en Transmission des Comptes Rendus d’Audience à huis Clos de l’Affaire ICTR-2005-82-T, Le Procureur c. Dominique Ntawukulilyayo, 13 January 2010 (“Defence Motion”).

<sup>3</sup> Prosecutor’s Response to Callixte Kalimanzira’s “Requête en Transmission des Comptes Rendus d’Audience à huis Clos de l’Affaire ICTR-2005-82-T, Le Procureur c. Dominique Ntawukulilyayo, 13 January 2010”, 14 January 2010 (“Prosecution Response”).

<sup>4</sup> Réponse de la Défense de Monsieur Dominique Ntawukulilyayo à la Requête de la Défense de Monsieur Kalimanzira en Transmission des Comptes Rendus d’Audience à huis Clos de l’Affaire ICTR-2005-82-T, Le Procureur c. Dominique Ntawukulilyayo, 15 January 2010.

<sup>5</sup> Réplique de la Défense de Monsieur Callixte Kalimanzira à la Réponse du Procureur à la Requête en Transmission des Comptes Rendus d’Audience à huis Clos de l’Affaire ICTR-2005-82-T, Le Procureur c. Dominique Ntawukulilyayo, 19 January 2010 (“Defence Reply”).

<sup>6</sup> Rule 75 (F).

<sup>7</sup> Rule 75 (G).



7. According to the established jurisprudence of the Tribunal, under Rule 75, the party seeking access to confidential material from another case must sufficiently identify the requested material.<sup>8</sup> Furthermore, the applicant must demonstrate “a legitimate forensic purpose for seeking access, he must show that such access would be likely to assist his case materially or that there is at least a good chance it will give that assistance.”<sup>9</sup> This standard can be met “by showing the existence of a nexus between the applicant’s case and the case from which such material is sought, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time.”<sup>10</sup>

*Preliminary Matter*

8. As noted by the Prosecution, the front page of the Defence Motion states that it is submitted in the *Kalimanzira* proceedings.<sup>11</sup> The Defence Motion should have indicated that it is brought in the *Ntawukulilyayo* case.<sup>12</sup> The Chamber notes this was an error,<sup>13</sup> and the Motion has come before the correct Trial Bench.<sup>14</sup> Nonetheless, the Chamber considers it appropriate that, for the record, the Defence file a corrigendum to the Motion, correcting the title page accordingly.

*Parties’ Submissions*

9. The Defence Motion states that several witnesses who testified in the *Kalimanzira* case returned to testify in the *Ntawukulilyayo* proceedings and many of them gave evidence on points relevant to the *Kalimanzira* case. The Defence submits that from the evidence heard in open session, it has identified relevant information, and in order to continue its work for the appeal, it is crucial that it receive all closed session transcripts from the *Ntawukulilyayo* proceedings.<sup>15</sup>

<sup>8</sup> *Niyitegeka, Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-R75, Decision on Eliézer Niyitegeka’s Appeal Concerning Access to Confidential Materials in the Muhimana and Karemera et al. Cases, 23 October 2008 (“*Niyitegeka Appeals Chamber Decision*”), para. 21, citing: *Nahimana et al.* Decision, para. 12 (“...such material must be identified or described by its general nature...”); *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Cerkez for Access to Confidential Supporting Material, 10 October 2001 (“*Hadzihasanovic Decision*”), para. 11 (a party seeking access to confidential material from another case must “identify as clearly as possible the documents of the nature of the documents to which he seeks access.”)

<sup>9</sup> *Niyitegeka Appeals Chamber Decision*, para. 21; *Hadzihasanovic Decision*, para. 11; See also *Prosecutor v. Bagosora et al.*, Case No. ICTR -98-41-T, Decision on Nzirorera Request for Access to Protected Material (TC), 19 May 2006, para. 2.

<sup>10</sup> *Niyitegeka Appeals Chamber Decision*, para. 21; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in *The Prosecutors v. Blaškić*, 16 May 2002, para. 15; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case (AC), 18 January 2006, para. 4; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Galić Case (AC), 16 February 2006, para. 3; *Bagosora et al.*, Decision on Bizimungu Defence request for Disclosure of Closed Session Testimony and Exhibits Placed under Seal (TC), 15 May 2007, paras. 7-8 (granting motion for access to specific confidential material from the Military 1 case, filed by an accused in another case. The Chamber found the cases closely related and that a “significant factual, geographical and temporal overlap exists between the cases”, para. 7).

<sup>11</sup> Prosecution Response, paras. 3-4.

<sup>12</sup> Rule 75 (G) and see supra para. 5.

<sup>13</sup> Defence Reply, para. 6.

<sup>14</sup> The Defence Motion correctly stated that it is brought before the Ntawukulilyayo Trial Bench.

<sup>15</sup> Defence Motion, paras. 3-6.

10. The Prosecution submits that the Defence has failed to establish that the material requested is likely to assist its case or has any legitimate forensic purpose. It states that the mere fact that some witnesses gave evidence in both cases is insufficient reason to grant blanket disclosure of all closed session evidence from the *Ntawukulilyayo* proceedings. Such a request would mean that even the closed session testimony of witnesses who did not testify in the *Kalimanzira* case would be disclosed.<sup>15</sup>

11. In its Reply, the Defence submits that the two cases are closely linked since Kalimanzira is mentioned in five paragraphs of the *Ntawukulilyayo* Indictment.<sup>16</sup> It further submits that the accused persons in both cases have been charged with similar events at Gisagara Market and Kabuye Hill.<sup>17</sup> The Defence also states that four witnesses testified in both cases, namely, Prosecution Witnesses AYQ, BAU, BAZ and AXV, and that there is therefore a good chance that their evidence will be relevant to the *Kalimanzira* case.<sup>18</sup>

12. In addition, the Defence submits that many witnesses came to testify in the *Ntawukulilyayo* proceedings on events at Gisagara Market and Kabuye Hill. It states that these events form the basis of the charges against Kalimanzira and that, therefore, their evidence could be relevant to its case.<sup>19</sup> In particular, it refers to Witnesses BAF, AZN, AZV, AZI, and AXV who were called by the Prosecution and Witnesses MAI, MAD, UAB, UAC, MAE, and KAB who testified on behalf of Ntawukulilyayo.

13. The Defence further asserts that it requires *Ntawukulilyayo* transcripts of Defence Witnesses UAC, UAK, and MAG because they testified that the Ibuka association,<sup>20</sup> certain witnesses from the *Kalimanzira* case, and other personalities mentioned during the *Kalimanzira* case, played a role in inciting others to falsely accuse authorities.<sup>21</sup> The Defence concludes that it requires access to all *Ntawukulilyayo* closed session transcripts in order to ascertain if they contain information on the identities or the activities of Ibuka's members.<sup>22</sup>

*Should the Materials be disclosed to the Kalimanzira Defence?*

14. The Defence Motion requests all closed session transcripts from the *Ntawukulilyayo* proceedings regardless of whether the witnesses testified in both cases, or in relation to events with which Kalimanzira is also charged. Indeed, the Defence fails to demonstrate how all closed session transcripts are likely to assist its case. Accordingly, the Chamber cannot grant the Defence request as stated in its Motion.

15. However, in its Reply, the Defence has sought to demonstrate a nexus between the two cases. In the interests of justice and expediency, the Chamber has considered the additional submissions made in the Defence Reply for the purposes of deciding whether access to any closed session materials from the *Ntawukulilyayo* proceedings should be granted.<sup>23</sup>

<sup>15</sup> Prosecution Response, paras. 6-7.

<sup>16</sup> Defence Reply, para. 9, and footnote 10. The latter refers to the Indictment of 26 May 2005. The Chamber however notes that the operative Indictment (as amended) is dated 19 May 2009. Therefore, while the Defence Reply refers to paragraphs 7, 11, 12, 18 and 20 of the Indictment as mentioning Kalimanzira, paragraph 18 is in fact now paragraph 19, and paragraph 20 of the operative Indictment does not mention Kalimanzira.

<sup>17</sup> Defence Reply, para. 10.

<sup>18</sup> Defence Reply, paras. 12-13.

<sup>19</sup> Defence Reply, para. 14.

<sup>20</sup> Ibuka is an organisation in Rwanda which assists survivors of the 1994 genocide.

<sup>21</sup> Defence Reply, para. 15.

<sup>22</sup> Defence Reply, para. 16.

<sup>23</sup> Articles 19 and 20 of the Tribunal's Statute (the Chamber's obligation to ensure a fair and expeditious trial).



16. Before addressing the merits of the additional submissions, the Chamber notes that in support of its request, the Defence has referred to certain witnesses who did not testify in closed session, namely, Prosecution Witnesses AZN and AXY and Defence Witnesses Louis Ahorukomeye (UAC) and Vianney Kabengeru (UAK).<sup>24</sup> Accordingly, the Defence already has access to their full testimonies and its request in respect of these witnesses is therefore moot.

17. The Chamber will now turn to consider the merits of the additional submissions made in the Defence Reply with respect to witnesses who testified in closed session in the *Ntawukulilyayo* proceedings.

18. The Chamber considers that the Defence Reply demonstrates a nexus between the *Kalimanzira* and *Ntawukulilyayo* cases. Indeed, the *Ntawukulilyayo* Indictment alleges that the accused persons in both cases arrived at Kabuye Hill together; brought soldiers to the Hill; subsequently met to discuss the fact that attackers had failed to kill all the refugees on the Hill; and decided to go to the site to check on the progress of the killings.<sup>25</sup> Accordingly, the Chamber considers that the evidence of the following witnesses may assist the Defence:

- (i) Prosecution Witnesses AYQ, BAU, BAZ and AXV as they testified in both cases on events in relation to which both accused persons are charged; and
- (ii) Prosecution Witnesses BAF, AZV, AZI, and Defence Witnesses MAI, MAD, Jean-Baptiste Gasana (UAB),<sup>26</sup> MAE, and KAB who all testified on events at Gisagara Market and/or Kabuye Hill.

19. With respect to Witness Simon Rumashana (MAG),<sup>27</sup> the Chamber recalls that his testimony was mainly in open session, including his evidence regarding Ibuka.<sup>28</sup> While the Witness also testified briefly in closed session in relation to Ibuka and two Prosecution witnesses, these witnesses are not among those who the Defence submits also testified in the *Kalimanzira* case.<sup>29</sup> Further, the Defence has not demonstrated how knowing the identities or activities of Ibuka members is important to its case. Accordingly, the Defence has failed to show how Witness Rumashana's closed session testimony will assist its case.

## FOR THESE REASONS

<sup>24</sup> See T. 6 and 7 May 2009 (open session) for Witness AZN's testimony, and T. 19 and 20 May 2009 (open session) for Witness AXY's testimony. Witness UAC waived protective measures prior to testifying. See T. 6 October 2009, p. 42 (open session) and in general for the Witness' open session testimony, see T. 6 and 7 October 2009 (open session). Witness UAK also waived protective measures prior to testifying. See T. 5 October 2009, p. 35 (open session) and in general for the Witness' open session testimony, see T. 5 October 2009 (open session).

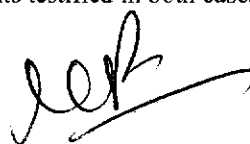
<sup>25</sup> Indictment, paras. 7, 11, 12, 19.

<sup>26</sup> Witness UAB waived protective measures prior to testifying. See T. 29 September 2009, p. 40 (open session). The only closed session extract refers to Witness BAU who is one of the Prosecution witnesses who testified in the *Kalimanzira* case. See T. 29 September 2009, pp. 69-70 (closed session).

<sup>27</sup> Witness MAG waived his protective measures prior to testifying. See T. 30 September 2009, p. 7 (open session).

<sup>28</sup> See T. 30 September 2009, pp. 22-29 (open session).

<sup>29</sup> See T. 30 September 2009, pp. 31-35 (closed session). The Prosecution witnesses referred to are not Witnesses AYQ, BAU, BAZ or AXV who the Defence submits testified in both cases.



**THE CHAMBER**

**GRANTS** the Defence Motion in part;

**ORDERS** the Registry to make available to the Defence for Callixte Kalimanzira transcripts of close session testimony of Prosecution Witnesses AYQ, BAU, BAZ, AXV, BAF, AZV, and AZI and Defence Witnesses MAI, MAD, MAE, KAB and Jean-Baptiste Gasana who testified before the *Ntawukulilyayo* Trial Chamber on 7, 11, 12, 13, 14, 21, 25, 26 May 1994, and 24, 28, 29 September 1994 and 18 November 1994;

**REMINDS** the Defence for Callixte Kalimanzira that the witness protection orders in place for the aforementioned protected witnesses in the *Ntawukulilyayo* case continue to have effect in Callixte Kalimanzira's case, as provided for by Rule 75 (F) of the Rules;

**ORDERS** the Defence to file, by close of business on 29 January 2010, a corrigendum to the Defence Motion for the purposes of correcting the title page so it is clear, for the record, that it is brought in *The Prosecutor v. Dominique Ntawukulilyayo*; and

**DENIES** the Defence Motion in all other respects.

27 January 2010

Khaida Rachid Khan  
Presiding Judge

Lee Gacuiga Muthoga  
Judge

Aydin Sefa Akay  
Judge

[Seal of the Tribunal]

