



UNITED NATIONS
NATIONS UNIES

ICTR-05-82-T
4-2-2010
(1731 - 1728)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1731
2/2/10

OR: ENG

TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date: 4 February 2010

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-T

**DECISION ON THE PROSECUTOR'S CONFIDENTIAL MOTION REQUESTING
CALLIXTE KALIMANZIRA'S "REPLIQUE DE LA DEFENSE DE MONSIEUR
CALLIXTE KALIMANZIRA A LA REPONSE DU PROCUREUR A LA REQUETE
EN TRANSMISSION DES COMPTES RENDUS D'AUDIENCE A HUIS CLOS DE
L'AFFAIRE ICTR-2005-82-T, LE PROCUREUR c. DOMINIQUE
NTAWUKULILYAYO" BE FILED CONFIDENTIALLY**

Rule 73 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 13 January 2010, the Defence for Callixte Kalimanzira ("Defence"), the accused in the case of *The Prosecutor v. Callixte Kalimanzira*, filed a motion requesting access to all closed session transcripts from the *Ntawukulilyayo* proceedings.¹ On 14 January 2010, the Prosecution filed its Response to the Defence Motion,² and on 19 January 2010, the Defence replied to the Prosecution Response.³
2. On 27 January 2010, the Chamber issued a Decision, granting the Defence Motion in part.⁴ On the same date, the Prosecution filed a confidential motion requesting that the Defence Reply be withdrawn and filed confidentially.⁵ The Defence did not respond to the Prosecution Motion.

DISCUSSION

3. The Chamber recalls that proceedings before this Tribunal must be public unless good cause is shown to the contrary. Indeed, the transparency of the proceedings is served by the public filing of documents. The only good cause for a party filing a document confidentially is if the information in the filing is confidential and exposure would risk damaging the proceedings, for instance, where the protection of a witness is at stake.⁶
4. In this case, the Prosecution requests that the Defence Reply be withdrawn by the Registrar and re-filed confidentially. The Prosecution submits that the Defence Reply reveals the pseudonyms of four protected Prosecution witnesses from the *Ntawukulilyayo* proceedings and purports to identify them with their pseudonyms from the *Kalimanzira* case. While the Prosecution concedes that this is not in direct violation of protective measures ordered in those cases, it "violates the spirit of these orders and increases the likelihood that

¹ 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. Mr. Kalimanzira was convicted and sentenced on 22 June 2009 and the Judgment is now the subject of an appeal before the Appeals Chamber. In the *Ntawukulilyayo* proceedings, protective measures were granted to Prosecution and Defence witnesses on 6 February and 11 May 2009 respectively (although many Defence witnesses chose to waive their protective measures prior to testifying).

² 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").

³ 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").

⁴ Decision on the Request by the Defence for Callixte Kalimanzira for Access to Closed Session Transcripts, 27 January 2010, as amended by the Corrigendum to the Decision on the Request by the Defence for Callixte Kalimanzira for Access to Closed Session Transcripts, 28 January 2010.

⁵ Prosecution's Confidential Motion Requesting that Callixte Kalimanzira's "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" be filed Confidentially, 27 January 2010 ("Prosecution Motion"), as amended by the Corrigendum to the Prosecution Motion filed on 28 January 2010 which corrects the title page of the said Motion.

⁶ *Prosecutor v. Setako*, Case No. ICTR-04-81-I, Decision on Defence Requests to Lift Confidentiality of Filings, 7 November 2007, para. 2; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 4; and *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-R66, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment, 3 May 2005, para. 13.

these witnesses could be identified.”⁷ The Prosecution further argues that it was inappropriate for the Defence to have attempted to independently identify the witnesses.⁸

5. The Chamber recalls that the Defence Reply did not disclose any identifying information with respect to the four witnesses who were merely referred to by their pseudonyms in the *Ntawukulilyayo* and *Kalimanzira* proceedings respectively. Since the witnesses were protected pursuant to protective measures in both cases, all evidence of identifying information would have been heard in closed session and placed under seal. Accordingly, referring to the witnesses’ pseudonyms in both cases does not reveal their identities and thus is not in breach, nor goes against the “spirit”, of the protective measures.⁹ Considering that confidential filings should be an absolute exception, and the Prosecution has not shown that the Reply contains any confidential information, the Chamber finds no basis for ordering the Defence to withdraw and re-file its Reply confidentially. Indeed, this request is totally without merit.

6. Similarly, since the Prosecution Motion contains no identifying information pertaining to protected witnesses, its confidential status should be lifted.

7. With regard to the Prosecution submission that the Defence has inappropriately sought to independently identify the four protected witnesses, the Chamber notes that the Prosecution has presented no support for this allegation. Rather, it merely refers to the Defence reference to the witnesses’ pseudonyms in both the *Kalimanzira* and *Ntawukulilyayo* cases which does not in itself demonstrate that the Defence has attempted to breach any protective measures orders or acted in bad faith. The Prosecution also misrepresents the Defence by stating that the Defence Reply admits to having sought to independently identify the witnesses.¹⁰ The Defence Reply makes no such admission and only states that, from reading the open session transcripts in the *Kalimanzira* and *Ntawukulilyayo* proceedings, the Defence has noted that four witnesses testified in both cases.¹¹

8. In view of the above, the Chamber finds the Prosecution Motion lacks merit to the extent that it has unnecessarily expended judicial time and resources. The Chamber therefore finds that the Prosecution Motion is frivolous. The Chamber also expresses its disapproval of the Prosecution’s insinuation, without any factual basis, that the Defence has attempted to identify protected witnesses.

FOR THESE REASONS

THE CHAMBER

⁷ Prosecution Motion, paras. 5-6.

⁸ Prosecution Motion, para. 7.

⁹ See for example, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-PT, Decision on Extremely Urgent and Confidential Defence Motion for Disclosure of Closed Session Testimony of Prosecution Witness AHI in Nahimana et. al., and Associated Exhibits Filed Under Seal, 15 July 2009, paras. 1-2; and *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Decision on Ngirabatware Defence Request for Disclosure of Exhibits Admitted During the Testimony of Prosecution Witness BKW in the Bikindi Case, 7 July 2009, paras. 1-2.

¹⁰ Prosecution Motion, para. 7, referring to Defence Reply, para. 12.

¹¹ Defence Reply, para. 12.

DENIES the Prosecution Motion; and

ORDERS the Registrar to lift the confidential status of the Prosecution Motion.

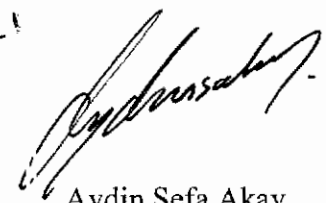
4 February 2010



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]

