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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICR-01-68-T
20-01-2011
(2634-2631)

OR: ENG

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 20 January 2011

THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

Handwritten signature and date: 20/01/2011

**DECISION ON MOTION BY GASPARD KANYARUKIGA FOR DISCLOSURE OF
ALL MATERIAL FROM THE PROCEEDINGS OF GREGOIRE NDAHIMANA**

Office of the Prosecutor

Holo Makwaia, Senior Appeals Counsel
Althea Alexis-Windsor, Appeals Counsel
Segun Jegede, Trial Attorney
Lansana Dumbuya, Case Manager

Counsel for the Defence

Bharat B. Chadha, Lead Counsel
Wilfred Ngunjiri Nderitu, Co Counsel
Tharcisse Gatarama, Legal Assistant
Marie-Pier Barbeau, Legal Assistant

Counsel for Kanyarukiga

David Jacobs, Lead Counsel
David Paciocco, Co Counsel
Aaron Shull, Legal Assistant
Kyle Gervais, Legal Assistant

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INTRODUCTION

1. On 8 December 2010, Counsel for Gaspard Kanyarukiga filed a motion requesting that the Trial Chamber in the *Ndahimana* case order the Registrar to disclose all the material, including transcripts, pre-trial statement and exhibits both public and closed, in the ongoing case of the *Prosecution v. Ndahimana* ('Motion').¹ Kanyarukiga submits that the alleged events at the Nyange Parish Church in both cases took place at precisely the same location and time, and that it can reasonably be assumed that there is an overlap in witnesses.²

2. On 8 December 2010, the Prosecution filed a Response, stating that it does not oppose the motion, but requesting that any orders made pursuant to this Motion should be subject to the undertaking of the Defence to comply with all applicable protective measure with respect to Prosecution witnesses in the *Ndahimana* case.³

DELIBERATIONS*(i) Jurisdiction*

3. Rule 75 (G) of the Rules of Procedure and Evidence provides that:

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

- (i) to any Chamber, however constituted, remaining seised of the first proceedings; or
- (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

¹ *Prosecutor v Grégoire Ndahimana*, Case No. ICTR-01-68, Motion by Gaspard Kanyarukiga for the disclosure of all Material from the proceedings of Grégoire Ndahimana, 8 December 2010. para 1.

² Motion para. 4.

³ *Prosecutor v Grégoire Ndahimana*, Case No. ICTR-01-68, Prosecutor's response to Motion by Gaspard Kanyarukiga for the disclosure of all Material from the proceedings of Grégoire Ndahimana, 8 December 2010. paras. 2-3.

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(ii) On the Merits

4. Trial Chamber III is seised of the *Ndahimana* case, thus the present application is properly before this Chamber under Rule 75 (G)(i).⁴

5. The jurisprudence of the Tribunal follows that confidential *inter partes* material from one case may be disclosed to a party in another case, where the applicant demonstrates that the material sought “is likely to assist that applicant’s case materially, or at least that there is a good chance that it would.”⁵ This standard can be met by showing that there is a factual nexus between the two cases.⁶

6. The Chamber notes that *Gaspard Kanyarukiga* was convicted by the Trial Chamber for crimes committed at the Nyange Parish Church, the same event for which *Grégoire Ndahimana* is being tried, during the same period.⁷ The Chamber is therefore satisfied that the materials introduced in the *Ndahimana* case may be material to the preparation of Kanyarukiga’s defence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the *Kanyarukiga* Defence Motion;

ORDERS the Registry to disclose to Counsel for Kanyarukiga all the material, including transcripts, pre-trial statement and exhibits both public and closed in the ongoing *Ndahimana* trial;

⁴ *Prosecutor v. Nahimana et al.*, Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, paras. 3-6.

⁵ *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Extremely Urgent Defence Motion for the Disclosure of all Exhibits from the Seromba Trial, 26 August 2009; *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Decision on Nsengiyumva Request for Access to Protected Material (TC), dated 14 July 2006, para. 4; *Prosecutor v. Galic*, Decision on Momcilo Perisic’s Motion Seeking Access to Confidential Material in the Galic Case (AC), 16 February 2006, para. 3 (citations omitted); *Prosecutor v. Blagojevic and Jokic*, Decision on Momcilo Perisic’s Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case (AC), 18 January 2006, para. 4.; *Prosecutor v. Dragomir Milošević*, (AC), Decision on Radovan Karadžić’s motion for access to confidential confidential material in the *Dragomir Milošević* case, 19 May 2009.

⁶ *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Decision on Nsengiyumva Request for Access to Protected Material (TC), 14 July 2006, para. 4; *Prosecutor v. Bagosora*, Decision on Nzirorera Request for Access to Protected Material (TC), 19 May 2006, para. 2; *Prosecutor v. Blagojević and Jokić*, 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*, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Galić Case (AC), 16 February 2006, para. 3 (with further references).

⁷ *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Amended Indictment, 14 November 2007; Kanyarukiga Trial Judgement, 1 November 2010, *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Indictment, 18 August 2010. The Accused is charged with Genocide (Count 1), or in the alternative, Complicity in Genocide (Count 2), and Extermination (Count 3).; *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Amended Indictment, 14 November 2007

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DECLARES that *Kanyarukiga* Defence and any other party in receipt of the protected information, including the Accused, shall be bound *mutatis mutandis* by the witness protection measures ordered by the *Ndahimana* Trial Chamber;⁸

ORDERS that the *Kanyarukiga* Defence shall not, without the leave of the Chamber, through a finding that it has been demonstrated that third party disclosure is necessary for the preparation of *Kanyarukiga*'s defence:

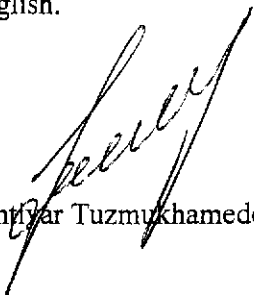
- a. disclose to any third party the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measure already in place;
- b. disclose to any third party any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement of prior testimony; or
- c. contact any witness whose identity was subject to protective measure

Arusha, 20 January 2011, done in English.



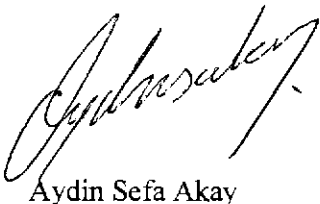
Florence Rita Arrey

Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge



Aydin Sefa Akay

Judge



⁸ *Prosecutor v Grégoire Ndahimana*, Case No. ICTR-01-68, Decision on the Prosecution's motion for protective measures for its witnesses, pursuant to *Articles 19, 20 and 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence*, 4 March 2010; *Prosecutor v Grégoire Ndahimana*, Case No. ICTR-01-68, Decision on protective measures for Defence witnesses, 30 September 2010

