

ICTR-96-14-R75
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International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR:
ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacugira Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 14 February 2008

THE PROSECUTOR
v.
ELIÉZER NIYITEGEKA
Case No. ICTR-96-14-R75

UNITED NATIONS
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**DECISION ON MOTION FROM ELIÉZER NIYITEGEKA FOR DISCLOSURE
OF CLOSED SESSION TESTIMONY AND EVIDENCE UNDER SEAL**

Rule 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Mr. Hassan Bubacar Jallow

Counsel for the Defence:
Mr. Nyabirunga Mwenze Sanga
Mr. Richard Kazadi Kabinda

The Applicant:
Mr. Eliézer Niyitegeka

BACKGROUND

1. On 16 May 2003, Trial Chamber I convicted Eliézer Niyitegeka, former Minister of Information in the Rwandan Interim Government of 1994, for genocide, conspiracy to commit genocide, direct and public incitement to genocide, and murder, extermination, and other inhumane acts as crimes against humanity, and sentenced him to imprisonment for life.¹ His conviction and sentence were upheld by the Appeals Chamber.² The Appeals Chamber dismissed two subsequent requests for review brought by Niyitegeka pursuant to Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence.³

2. On 11 July 2007, the Appeals Chamber dismissed Niyitegeka's request that it order the disclosure of the closed session testimony of Witness DD, who testified in the *Muhimana* proceedings on 17 August 2004, as well as an exhibit entered into evidence under seal during DD's testimony.⁴ The Appeals Chamber based its dismissal on Rule 75 (G), which requires an applicant "seeking to rescind, vary, or augment protective measures" ordered in proceedings to which the applicant is not party to apply (i) to any Chamber seized of the proceedings in which the protective measures were ordered ("first proceedings"); or (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the proceedings to which the applicant is party ("second proceedings"). The Appeals Chamber noted that it was not seized of the *Muhimana* case (not seized of first proceedings), and that, at the time of his application, Niyitegeka (the applicant) had no case pending before the Appeals Chamber (not seized of second proceedings). The Appeals Chamber therefore referred the matter to the President of the Tribunal for assignment to an appropriate Trial Chamber.⁵

3. On 18 July 2007, Niyitegeka filed his request for disclosure before Judge Dennis Byron, President of the Tribunal.⁶ On 22 August 2007, Niyitegeka, without waiting for a decision on his Request for Disclosure pending before the President, confidentially filed a new request for review before the Appeals Chamber and submitted excerpts of Witness DD's closed session testimony from the *Muhimana* case in support of that request.⁷

4. On 15 November 2007, President Byron, finding that no Chamber remained seized of proceedings involving either *Muhimana* or *Niyitegeka*, designated Trial

¹ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003.

² *Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004.

³ *Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Review (AC), 30 June 2006; *Niyitegeka*, Decision on Request for Review (AC), 6 March 2007. The Appeals Chamber also denied Niyitegeka's requests for reconsideration and clarification of these decisions. See *Niyitegeka*, Decision on Request for Reconsideration of the Decision on Request for Review (AC), 27 September 2006; *Niyitegeka*, Decision on Request for Clarification (AC), 17 April 2007.

⁴ *Niyitegeka*, Decision on Request for Disclosure (AC), 11 July 2007.

⁵ *Ibid.*, paras. 4-5.

⁶ Requête Urgente de Mr. Eliézer Niyitegeka (ICTR-96-14-R) aux fins de communication du procès-verbal de l'audience à huis clos et d'une pièce déposée sous scellée lors de la déposition du témoin DD, filed 18 July 2007 ("Request for Disclosure").

⁷ Requête aux fins d'une révision de l'Arrêt rendu par la Chambre d'appel le 09 juillet 2004 ou, alternativement, aux fins d'une ordonnance d'enquête sur les faux témoignages des témoins de l'Accusation, filed 22 August 2007 9 ("Third Request for Review").

Chamber III, comprising Judges Khalida Rachid Khan, presiding, Lec Gacuiga Muthoga, and Emile Francis Short, to determine the Motion.⁸ The President noted that the designated Judges comprised the Trial Chamber in the *Muhimana* case. Therefore, the President reasoned, designation of this Chamber conformed to the general purpose of Rule 75 (G).⁹

5. On 23 January 2008, the Appeals Chamber denied Niyitegeka's Third Request for Review.¹⁰ In its decision, the Appeals Chamber noted that the excerpts of Witness DD's closed session testimony should not have been revealed to Niyitegeka without prior authorization, and had been obtained in direct violation of the *Muhimana* Trial Chamber's Defence Protective Measures Decision. The Appeals Chamber directed the Prosecution, pursuant to Rule 77 (C)(i) of the Rules, to investigate the unauthorized disclosure of the closed session transcripts.¹¹

6. There has been no response to the Request for Disclosure.

DISCUSSION

7. The Chamber notes that Rule 75 deals directly with the situation before it. Rule 75 (F) and (G) deal specifically with the disclosure of materials subject to protective measures in one case for use in another case. As the Appeals Chamber noted in its Decision on Third Request for Review, the closed session transcripts of Witness DD's testimony are protected by the *Muhimana* Defence Protective Measures Decision, which ordered the non-disclosure by the parties of documents or information that could reveal the identity or location of a protected Defence witness.¹²

8. Niyitegeka also bases his Request for Disclosure on Rule 81 (B), which authorises the Trial Chamber to "order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist." The Chamber notes that Niyitegeka does not actually argue that the reasons for ordering the non-disclosure of records of closed proceedings in the *Muhimana* case – the reason being the protection of witnesses' identities – no longer exist. There is therefore no basis upon which the Chamber can be satisfied that the reasons for ordering non-disclosure of closed proceedings have changed. Rule 81 (B) is not applicable to the present circumstances.

⁸ *Niyitegeka*, Case No. ICTR-96-14-R75, Designation of a Trial Chamber to Consider the Request for Disclosure of Closed Session Transcripts (President), 15 November 2007 ("President's Order"). In reaching this decision, the President did not refer to Niyitegeka's Third Request for Review then pending before the Appeals Chamber.

⁹ *Niyitegeka*, Designation of a Trial Chamber to Consider the Request for Disclosure of Closed Session Transcripts, para. 4. The designated Trial Chamber heard the original testimony of Witness DD and granted the relevant protective measures. See *Prosecutor v. Mika Muhimana*, Case No. ICTR-95-1B-T, Decision on Defence Motion for Protective Measures for Defence Witnesses (TC), 6 July 2004 ("*Muhimana* Defence Protective Measures Decision", or "Defence Protective Measures Decision").

¹⁰ *Niyitegeka*, Decision on Third Request for Review (AC), 23 January 2008.

¹¹ *Ibid.*, paras. 9-10.

¹² *Muhimana* Defence Protective Measures Decision.



9. The Chamber strongly disapproves Niyitegeka's blatant violation of the *Muhima*, a Defence Protective Measures Decision. Not only did Niyitegeka seek to admit the closed session testimony of Witness DD before the Appeals Chamber without authorization, he also made observations about Witness DD in the Request for Disclosure, a public document, which may tend to reveal Witness DD's identity.


10. Generally, when applicants have been granted access to protected materials from another case, that access has been conditioned on the applicant following the protective measures granted in the first proceedings.¹³ In the Chamber's view, Niyitegeka's demonstrated disregard for the existing protective measures raises serious doubt that he would honour the same protective measures if granted access to Witness DD's closed session testimony. Under such circumstances, the Chamber considers it unnecessary to determine whether Niyitegeka has "a legitimate forensic purpose for seeking access to the testimony" or whether there is "a sufficient nexus" between Niyitegeka's and Muhimana's cases.¹⁴

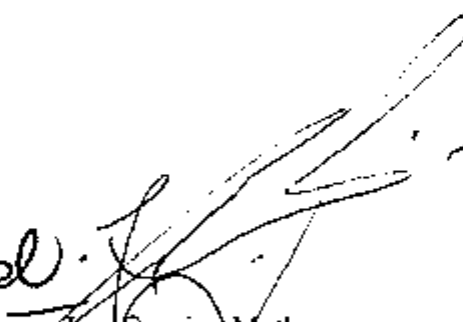
FOR THESE REASONS, the Chamber


DENIES the Motion.


ORDERS that the Request for Disclosure be re-classified as confidential by the Registrar to ensure the protection of Witness DD's identity.

Arush , 14 February 2008


Kl alida Rachid Khan
Presiding Judge


Lee Gacumba Muthoga
Judge


Emile Francis Short
Judge


[Seal of the International Criminal Tribunal for Rwanda]

¹³ See e.g., *Prosecutor v. Vidoje Blagojević & 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. 9 (e).

¹⁴ Compare *ibid.*, para. 4.