

ICTR-96-14-R75
B-5-2008
(1577/A - 1572/A)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OFFICE NATIONAL
RUGANDA 1994

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Raehid Khan, presiding
Lee Gacuga Muthoga
Emile Francis Short
Registrar: Mr. Adama Dieng
Dates: 23 May 2008

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15 MAY 2008

THE PROSECUTOR

v.

ELIÉZER NIYITEGEKA

Case No. ICTR-96-14-R75

**DECISION ON MOTION FOR RECONSIDERATION OF DECISION ON
MOTION FROM ELIÉZER NIYITEGEKA FOR DISCLOSURE OF CLOSED
SESSION TESTIMONY AND EVIDENCE UNDER SEAL, OR
ALTERNATIVELY FOR CERTIFICATION TO APPEAL**

Rules 54 and 73 (B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Mr. Hassan Bubakar Jallow

Counsel for the Defence:
Mr. Nyabirungu Mwene Songa
Mr. Richard Kazadi Kabinda

The Applicant:
Mr. Eliézer Niyitegeka

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BACKGROUND

1. On 16 May 2003, Trial Chamber I convicted Eliézer Niyitegeka, former Minister of Information in the Rwandan Interim Government of 1994, of 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, noting that it was not properly seized of the matter, dismissed Niyitegeka's request that it order (i) the disclosure of the closed session testimony of Witness DD, who testified in the *Muhimana* proceedings on 17 August 2004, as well as (ii) an exhibit entered into evidence under seal during DD's testimony.⁴ The Appeals Chamber referred the matter to the President of the Tribunal for assignment to an appropriate Trial Chamber.⁵

3. On 18 July 2007, Niyitegeka filed a request for disclosure of the same materials 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, designated Trial Chamber III, comprising Judges Khalida Rachid Khan, presiding, Lee Gacuga Muthoga, and Emile Francis Short, to determine Niyitegeka's Request for Disclosure.⁸

5. On 23 January 2008, the Appeals Chamber denied Niyitegeka's Third Request for Review.⁹ In its decision, the Appeals Chamber noted that the excerpts of Witness DD's

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").

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").

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closed session testimony should not have been revealed to Niyitegeka without prior authorization, and had been disclosed in direct violation of the *Muhimana* Trial Chamber's Defence Protective Measures Decision.¹⁰

6. On 14 February 2008, this Chamber denied Niyitegeka's Request for Disclosure.¹¹

7. On 3 March 2008, Niyitegeka filed a request for reconsideration, and, in the alternative, a request that the Chamber grant certification to appeal the Disclosure Decision.¹²

DISCUSSION

Niyitegeka's Request for Reconsideration

8. Although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions.¹³ Reconsideration is available only where new material circumstances have arisen since the decision was issued,¹⁴ or where the challenged decision was erroneous in law or an abuse of the Trial Chamber's discretion.¹⁵

9. In arguing for reconsideration, Niyitegeka does not suggest any new circumstances; rather, he suggests that the Disclosure Decision was the result of legal error or amounts to an abuse of discretion. Niyitegeka acknowledges that he tendered improperly disclosed closed session materials from the *Muhimana* proceedings before the Appeals Chamber as part of his Third Request for Review without permission to do so, but argues that this was the fault of delay by the President of the Tribunal in considering his Request for Disclosure. In any event, he submits that the Chamber should not have considered the Appeals Chamber's Decision on Third Request for Review in reaching its conclusion. At the same time, Niyitegeka suggests that he was in no way bound by the

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

¹¹ *Ibid.*, paras. 9-10.

¹² *Niyitegeka*, Case No. ICTR-95-14-R75, Decision on Motion from Elizer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal (TC), 14 February 2008, para. 10 ("Disclosure Decision").

¹³ *Requete en Reconsideration de la "Decision on Motion from Elizer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal" ou, Alternativement, en Certification D'Appel de Ladite Decision*, filed 3 March 2008 ("Request for Reconsideration or Certification to Appeal").

¹⁴ See e.g., *Prosecutor v. Casimir Bizimungu, et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (E) Requested by the United States Government (TC), 26 April 2007, para. 7 (citations omitted).

¹⁵ *Prosecutor v. Burayavyiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2006, Separate Opinion of Judge Shahabuddeen, paras. 4-5; *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; *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2004 (TC), 18 July 2003, para. 25.

¹⁶ See e.g., *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.

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protective measures in the *Muhimana* proceedings, and that his use of the materials without permission was in good faith. In addition, Niyitegeka now suggests that the requested materials ought to have been disclosed by the Prosecution as exculpatory material pursuant to Rule 68, an argument he failed to raise in his original Request for Disclosure.

10. The Chamber recalls that its original rationale for denying Niyitegeka's request was his "demonstrated disregard for the existing protective measures", which, in the Chamber's view, raised "serious doubt that he would honour the same protective measures if granted access to Witness DD's closed session testimony."¹⁶

11. Sub-Rules 75 (F) and (G) make clear that protective measures issued in one case continue to have effect in other proceedings before the Tribunal unless rescinded or varied, and that third parties must obtain permission to rescind or vary such measures. Niyitegeka's suggestion that he was not bound to seek permission to use the materials pursuant to Rule 75 because, at the time he filed his Request for Disclosure, he was not party to any proceedings before the Tribunal is unconvincing. First, that Niyitegeka was aware that he needed permission in order to access the closed session materials in question is made clear by the fact that he sought that permission. Second, pursuant to the jurisprudence of the Tribunal, all third parties seeking to access closed session materials must obtain permission to do so, even when they are not party to any proceedings before the Tribunal.¹⁷ Third, Niyitegeka's Third Request for Review clearly qualifies as proceedings before the Tribunal to which the protective measures explicitly applied pursuant to Rule 75 (F). Therefore, it is disingenuous for Niyitegeka to suggest that he was not bound to seek permission to use the materials and that his use of the materials without permission was in good faith.

12. The Chamber also considers Niyitegeka's argument concerning delay to be unavailing. The plain language of Rule 75 states that protective measures apply until rescinded or varied. No amount of delay in considering a request to rescind or vary protective measures changes this, or justifies the use of closed session materials without permission.

13. As noted above, Niyitegeka's submissions regarding Rule 68 were not before the Chamber when it rendered the Disclosure Decision. In the Chamber's view, new legal

¹⁶ Disclosure Decision, para. 10.

¹⁷ See e.g., *Nyiramasuhuko et al.*, Decision on Prosecution Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of the Testimonies of Witnesses JA, QCB, TK, SJ, FAL, QY and QBQ (TC), 19 March 2007 (application by Canadian Authorities brought through the Prosecution); *Prosecutor v. Karemera et al.*, Case No. 98-44-T, Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA (TC), 22 March 2007; *Prosecutor v. Ndindiyimana et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Motion to Unseal and Disclose to the Canadian Authorities the Closed Session Transcripts of Witness ANA (TC), 23 March 2007; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55, Decision on the Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness QY (TC), 23 March 2007; *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C, Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness HF (TC), 26 March 2007.

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submissions are not new material circumstances for the purposes of reconsideration. Moreover, Niyitegeka's failure to raise this legal argument in his Request for Disclosure cannot amount to an error of law or abuse of discretion on the part of the Chamber.¹⁸

14. Therefore, the Chamber considers that Niyitegeka has failed to show any reason for it to reconsider its *Disclosure Decision*.

Niyitegeka's Application for Certification to Appeal

15. Pursuant to Rule 73 (B), leave to file an interlocutory appeal of a decision may be granted if the issue involved "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and where "an immediate resolution by the Appeals Chamber may materially advance the proceedings". Even where these criteria are met, the decision to certify is discretionary and should remain exceptional.¹⁹

16. In deciding whether to grant leave to appeal, Trial Chambers do not consider the merits of the challenged decision; the Chamber's inquiry under Rule 73 (B) involves only a consideration of whether the criteria outlined in the Rule have been satisfied.²⁰

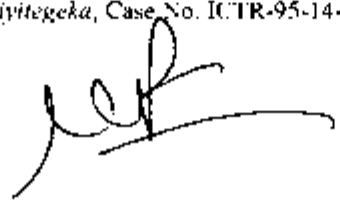
17. Niyitegeka does not address the Rule 73 (B) criteria, instead arguing that the *Disclosure Decision* was erroneous and unfairly punitive. The Chamber will not consider these arguments, as they go to the merits of the challenged decision. Under these circumstances, the Chamber considers that Niyitegeka has failed to show why he should be granted leave to appeal the *Disclosure Decision*.

18. In addition, the Chamber notes that, at present, Niyitegeka is not involved in any proceedings before the Tribunal. In the Chamber's view, therefore, an immediate resolution of the issues involved will not significantly affect the fair and expeditious conduct of, or materially advance any proceedings. Therefore, the Chamber declines Niyitegeka's request that it grant leave to appeal the *Disclosure Decision*.

¹⁸ The Chamber notes that it was comprised by the President to determine only the Request for Disclosure. It is unclear that this Chamber would be the proper Chamber to hear any claims based on Rule 68, even if they had been properly advanced by Niyitegeka.

¹⁹ See e.g., *Bizimungu et al.*, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 22 May 2007, para. 6.

²⁰ *Ibid.*, para. 7; see also, *Bizimungu et al.*, Decision on Bicumampaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 'Decision on the Motion of Bicumampaka and Mugenzi for Disclosure of Relevant Material' (TC), 4 February 2005, para. 28; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para. 4.



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Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal

13 May 2008

FOR THESE REASONS, the Chamber

DENIES the Request for Reconsideration or Certification to Appeal.

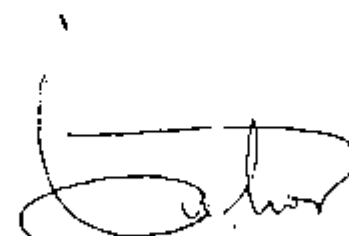
Arusha, 13 May 2008



Khalida Rachid Khan
Presiding Judge



Lee Gacuiya Muthoga
Judge



Emile Francis Shirirwa
Judge

[Seal of the Tribunal]

