



UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1584/H

ICTR-96-14-R75

20th June 2008

{1584/H – 1578/H}

IN THE APPEALS CHAMBER

Before:

Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar:

Mr. Adama Dieng

Decision of:

20 June 2008

ICTR Appeals Chamber
Date: 20 June 2008
Action: R-June
Copied To: concerned judges
Parties, SLOS, LOS, ALOS, LSS,
Archives

2008 JUN 31 A 9:40
JUDICIAL RECORDS/ARCHIVE
RECEIVED

Eliézer NIYITEGEKA

v.

THE PROSECUTOR

Case No. ICTR-96-14-R75

DECISION ON MOTION FOR CLARIFICATION

The Applicant

Mr. Eliézer Niyitegeka, *pro se*

Office of the Prosecutor

Mr. Hassan Bubacar Jallow

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of the "*Requête aux fins d'une Clarification sur l'interprétation de 'Niyitegeka's Decision on 3rd Request for Review'*" filed on 17 April 2008 ("Motion for Clarification") by Eliézer Niyitegeka ("Applicant").

I. BACKGROUND

2. On 16 May 2003, Trial Chamber I convicted the Applicant, the former Minister of Information in the Rwandan Interim Government in 1994, of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and murder, extermination, and other inhumane acts as crimes against humanity, and sentenced him to imprisonment for the remainder of his life.¹ In its Judgement of 9 July 2004, the Appeals Chamber dismissed the Applicant's appeal against his convictions and affirmed his sentence.²

3. On 11 July 2007, the Appeals Chamber denied a request from the Applicant for disclosure of confidential material from the *Muhimana* case,³ on the ground that the Appeals Chamber was no longer seized of his case or of the *Muhimana* case and that the Applicant should direct his request to the President of the Tribunal.⁴ Pursuant to this decision, the Applicant filed a motion for access before the President of the Tribunal.⁵

4. On 22 August 2007, the Applicant filed his Third Request for Review, requesting the Appeals Chamber, *inter alia*, to admit excerpts of closed session transcripts from the *Muhimana*, *Karemera et al.*, and *Bizimungu et al.* cases⁶ as "new facts" and to grant his request for review pursuant to Article 25 of the Statute of the Tribunal ("Statute") and Rule 120 of the Rules of

¹ *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003, paras. 420, 429, 437, 447, 454, 467, 480, 502.

² *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 270.

³ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, *Requête urgente aux fins de communication du procès-verbal de la séance à huis clos et d'une pièce déposée sous scellée [sic] lors de la déposition du témoin DD dans le procès de Mika Muhimana (ICTR-95-1B-T)*, 29 June 2007.

⁴ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Disclosure, 11 July 2007, p. 3.

⁵ *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, *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*, confidential, signed 17 July 2007 and filed 18 July 2007 ("Motion for Access to Muhimana Closed Session Material").

⁶ *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T; *The Prosecutor v. Cusimir Bizimungu et al.*, Case No. ICTR-99-50-T.

Procedure and Evidence of the Tribunal ("Rules").⁷ In its decision of 23 January 2008, the Appeals Chamber noted, as a preliminary matter, that the Applicant was alleging as new facts closed session material from the *Muhimana* and *Karemera et al.* cases to which he had not been granted access.⁸ At the time, the Applicant had not requested access to the closed session transcripts from the *Karemera et al.* case and no decision had been rendered on his Motion for Access to *Muhimana* Closed Session Material.⁹ As a result, the Appeals Chamber decided not to examine the excerpts of the closed session transcripts attached to the Applicant's Third Request for Review.¹⁰ The Appeals Chamber denied the Third Request for Review in its entirety.¹¹

5. Following the Appeals Chamber's decision, the Applicant filed a motion before the Trial Chamber seized of the *Karemera et al.* case ("*Karemera et al.* Trial Chamber") to request access to the relevant closed session transcripts.¹² On 14 February 2008, the bench of Trial Chamber III designated to rule on the Motion for Access to *Muhimana* Closed Session Material denied the Applicant's request and, on 13 May 2008, it denied his request for reconsideration and his alternative request for certification to appeal.¹³ On 25 February 2008, the *Karemera et al.* Trial Chamber also denied the Motion for Access to *Karemera et al.* Closed Session Material.¹⁴ The Applicant's request for reconsideration of the latter decision was denied on 1 April 2008 together with his alternative request for certification of an appeal against it.¹⁵

6. In the present Motion for Clarification of the Decision on Third Request for Review the Applicant requests the Appeals Chamber to clarify the following six points:

⁷ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, *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*, confidential, 22 August 2007 ("Third Request for Review").

⁸ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008 ("Decision on Third Request for Review"), para. 9.

⁹ The President of the Tribunal designated a bench to rule on the Applicant's motion on 15 November 2007. *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R75, Designation of a Trial Chamber to Consider the Request for Disclosure of Closed Session Transcripts, 15 November 2007.

¹⁰ Decision on Third Request for Review, para. 9.

¹¹ Decision on Third Request for Review, para. 33.

¹² *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Requête urgente de Mr. Eliézer Niyitegeka aux fins de communication des procès-verbaux des audiences à huis-clos de la déposition du témoin AMM*, 4 February 2008 ("Motion for Access to *Karemera et al.* Closed Session Material").

¹³ *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R75, Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence under Seal, 14 February 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, 13 May 2008 ("*Niyitegeka* Decision of 13 May 2008").

¹⁴ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Décision sur la Requête urgente d'Eliézer Niyitegeka aux fins de communication des procès-verbaux des audiences à huis-clos de la déposition du témoin AMM*, 25 February 2008.

¹⁵ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Décision relative à la Requête d'Eliézer Niyitegeka en réexamen de la Décision du 25 février 2008, 1 April 2008* ("*Karemera et al.* Decision of 1 April 2008"), ruling on "*Requête en reconsidération de la 'Décision sur la requête urgente d'Eliézer Niyitegeka aux fins de communication des procès-verbaux des audiences à huis-clos de la déposition du témoin AMM' ou alternativement, en certification d'appel de ladite décision*", filed on 3 March 2008.

- (a) The fact that the Appeals Chamber supposedly found Eliézer Niyitegeka guilty of (violating witness protection orders or of) contempt of the Tribunal [...];¹⁶
- (b) The manner in which the Applicant may have rendered himself guilty of contempt of the Tribunal, for the simple act of possession and confidential use of the closed session transcripts [...], without at the same time disclosing these to the public or to the media;¹⁷
- (c) The exact moment when a third party may be bound by the witness protection measures in *Muhimana* and in *Karemera*;¹⁸
- (d) The Trial Chamber's power to interpret the Appeals Chamber's Decision in *Galid* as it thinks fit by attaching other conditions thereto;¹⁹
- (e) The procedure that the Applicant needs to follow in order to officially obtain the exculpatory evidence to which he is fully entitled, without resorting to his own means, when the Prosecutor, with impunity, fails in his duty to disclose them to him;²⁰
- (f) The profile which the Applicant needs to adopt for the Tribunal to try his case fairly, considering that the Tribunal prevents him from calling exculpatory evidence on the pretext that he obtained such evidence through his own means, whereas the Prosecutor has clearly failed in his duty to disclose the evidence to him in a timely manner.²¹

7. The Prosecution has not responded to the Motion for Clarification.

II. DISCUSSION

8. With respect to point (a), the Appeals Chamber recalls that, in its Decision on Third Request for Review, it stated that the closed session material submitted by the Applicant in support of his Third Request for Review had been "obtained in direct violation of Trial Chambers' orders".²² The Appeals Chamber was well aware that the Applicant was not a party to the proceedings in which the protective measures were ordered. However, it considered that, by obtaining and making use of closed session material to which he undoubtedly knew that he was not authorized to have access, the Applicant took part in the breach of the Trial Chambers' orders committed by those who were directly bound by them. The Applicant therefore participated in the violation of the orders for protective measures imposed by the Trial Chambers and, thereby, "seriously undermine[d] the integrity of the Tribunal's proceedings".²³

¹⁶ Motion for Clarification, paras. 16(1) and 18(a). See also para. 15.

¹⁷ Motion for Clarification, para. 18(b). See also paras. 14, 16(2).

¹⁸ Motion for Clarification, para. 18(c). See also para. 16(3).

¹⁹ Motion for Clarification, para. 18(d), referring to *Prosecutor v. Stanislav Galid*, Case No. IT-98-29-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galid Case, 16 February 2006. See also para. 16(4).

²⁰ Motion for Clarification, para. 18(e). See also para. 16(5).

²¹ Motion for Clarification, para. 18(f). See also paras. 16(6) and 16(7).

²² Decision on Third Request for Review, para. 9, citing *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004 and *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses, 10 December 2004.

²³ Decision on Third Request for Review, para. 9.

9. It is clear from the Decision on Third Request for Review, however, that the Appeals Chamber did not find the Applicant guilty of contempt pursuant to Rule 77 of the Rules. Rather, the Appeals Chamber directed the Prosecution to investigate the unauthorized disclosure of confidential material pursuant to Rule 77(C)(i) of the Rules.²⁴ The Prosecution filed its confidential report on its investigation on 29 February 2008,²⁵ and, as of today, no contempt proceedings have been initiated.

10. As to the scope of Rule 77 of the Rules raised in point (b), the Appeals Chamber notes that, while the rule does not specifically provide for holding in contempt those who are in possession of confidential material to which they were not granted access or make "confidential use" of unauthorized confidential material, it does generally provide for holding in contempt "those who knowingly and willfully interfere with [the Tribunal's] administration of justice".²⁶

11. Turning to point (c), the Appeals Chamber clarifies that, although the Applicant was not a party to the cases in which the protective measures were ordered, he was bound by the Trial Chambers' orders not to disclose confidential material from the moment it came into his possession. Similar to what the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia found in respect of closed session orders,²⁷ the Appeals Chamber considers that the orders of protective measures apply to all persons coming into possession of protected information. This is necessary, in particular, in order to comply with the Tribunal's obligation pursuant to Article 21 of the Statute to protect witnesses on whose behalf protective measures have been ordered. Such orders would be meaningless if third parties were allowed to disclose confidential information on the sole ground that the orders were not expressly directed to them.

12. The remaining points raised by the Applicant are not related to the Appeals Chamber's Decision on Third Request for Review. In raising points (d), (e), and (f), the Applicant does not seek clarification from the Appeals Chamber of its decision, but appears, in fact, to challenge the Trial Chambers' decisions denying him access to the *Muhimana* and *Karemera et al.* closed session transcripts.²⁸ The Appeals Chamber considers that a motion for clarification is not an appropriate avenue to raise such challenges.

13. The Appeals Chamber notes that both Trial Chambers denied the Applicant's requests for certification of an appeal against their decisions on the ground that the requirements for certification

²⁴ Decision on Third Request for Review, para. 10.

²⁵ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-99-50-T, Prosecutor's Confidential Report on his Investigation of the Unauthorized Disclosure of Confidential Material from the *Muhimana* and *Karemera* Cases Pursuant to Rule 77(C)(i), filed 29 February 2008, stamped 3 March 2008.

²⁶ Rule 77(A) of the Rules.

²⁷ See *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007, para. 22; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006, para. 24.

²⁸ See, in particular, Motion for Clarification, para. 4.

set out in Rule 73(B) of the Rules were not fulfilled.²⁹ However, Rule 73 of the Rules is only applicable at the time of the proceedings before Trial Chambers.³⁰ In the present case, the Trial Chambers' decisions denying access were rendered after the close of the trial and appeal proceedings in the Applicant's case.

14. Rule 75(G) of the Rules, which allows for the possibility of seeking to rescind, vary, or augment protective measures ordered at trial does not provide for an appeal as of right, nor do the Rules address the issue of whether a decision rendered by a Trial Chamber after the close of trial and appeal proceedings is subject to appeal. However, because issues related to access to confidential material by a convicted person concern the important question of balance between the right of the convicted person to access potentially exculpatory material and the need to guarantee the protection of victims and witnesses,³¹ the Appeals Chamber considers, *proprio motu*, that an applicant is entitled to challenge a decision by a Trial Chamber, pursuant to Rule 75(G) of the Rules, rendered after the close of trial and appeal proceedings before the Appeals Chamber. As with any discretionary decision, the applicant would have to demonstrate that the Trial Chamber committed a discernible error in its decision because it was based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of discretion.³²

III. DISPOSITION

15. The Applicant's Motion for Clarification is admissible only insofar as it seeks clarification of the Appeals Chamber's Decision on Third Request for Review. Having clarified points (a), (b), and (c), the Appeals Chamber declines to consider the remaining points raised by the Applicant because they amount to challenges to the Trial Chambers' decisions denying him access to closed session material from the *Muhimana* and *Karemera et al.* cases.

16. As explained above, the Applicant may appeal the Trial Chambers' decisions denying him access to confidential transcripts from other cases. Should he wish to do so, the Applicant will have to lodge his appeals within seven days of the present decision. The Prosecution would have ten days to respond, and the Applicant would have four days to reply. The Appeals Chamber also reminds

²⁹ *Karemera et al.* Decision of 1 April 2008, paras. 13-17; *Niyitegeka* Decision of 13 May 2008, paras. 15-18.

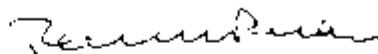
³⁰ Rule 73 is in the part of the Rules dedicated to "Proceedings before Trial Chambers" (Part six) and sets out requirements related to proceedings at trial of the requesting party.

³¹ Cf. *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Application for Leave to Appeal, 1 February 2002, p. 2.

³² E.g., *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-R73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008, para. 6.

the Prosecution of its duty to disclose exculpatory and other relevant material as provided under Rule 68 of the Rules.

Done this twentieth day of June 2008.
at The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the Tribunal]