



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

2176/H

IN THE APPEALS CHAMBER

ICTR-96-14-R75
23 October 2008
(2176/H – 2166/H)

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

Registrar: Mr. Adama Dieng

Decision of: 23 October 2008

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DATE: *23/10/08*

ELIÉZER NIYITEGEKA

v.

THE PROSECUTOR

Case No. ICTR-96-14-R75

THE PROSECUTOR

v.

**ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA**

Case No. ICTR-98-44-R75

ICTR Appeals Chamber

Date: *23 October 2008*

Action: *P.T.*

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**Decision on Eliézer Niyitegeka's Appeal Concerning Access to Confidential
Materials in the *Muhimana* and *Karemera et al.* Cases**

Eliézer Niyitegeka
pro se

Office of the Prosecutor
Mr. Alex Obote-Odora
Mr. George W. Mugwanya
Ms. Inneke Onsea

Ms. Dior Diagne Mbaye and Mr. Félix Sow for Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mathieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

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 “Consolidated Appeal against Decisions rendered by Trial Chamber III on 14 February 2008 and 25 February 2008 respectively on Eliézer Niyitegeka’s Motions for Disclosure of Closed Session Transcripts of Witness DD in Muhimana and Witness AMM in Karemera et al.” filed on 2 July 2008 (“Consolidated Appeal”) by Eliézer Niyitegeka (“Niyitegeka”).

A. Background

2. On 14 February 2008, a bench of Trial Chamber III designated by the President of the Tribunal (“*Muhimana* Trial Chamber”)¹ denied Niyitegeka’s motion to access closed session transcripts from the *Muhimana* case² (“14 February 2008 Decision”).³ On 25 February 2008, a bench of Trial Chamber III seized of the *Karemera et al.* case (“*Karemera* Trial Chamber”) denied Niyitegeka access to closed session transcripts from the *Karemera et al.* case (“25 February 2008 Decision”).⁴

3. On 17 April 2008, Niyitegeka filed a motion for clarification before the Appeals Chamber related to, *inter alia*, the 14 February 2008 Decision and the 25 February 2008 Decision.⁵ In a decision dated 20 June 2008, the Appeals Chamber found *proprio motu* that Niyitegeka was entitled to challenge, on appeal, the Trial Chambers’ decisions denying him access to confidential transcripts from other cases.⁶

¹ *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.

² *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 [sic] lors de la déposition du témoin DD*, confidential, signed 17 July 2007 and filed 18 July 2007.

³ *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. See also *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.

⁴ *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, ruling on *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. See also *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.

⁵ *Requête aux fins d’une Clarification sur l’interprétation de “Niyitegeka’s Decision on 3rd Request for Review”*, 17 April 2008.

⁶ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008 (“Decision on Motion for Clarification”), para. 16.

4. On 2 July 2008, Niyitegeka filed the Consolidated Appeal challenging the 14 February 2008 Decision and the 25 February 2008 Decision. The Prosecution responded to the Consolidated Appeal on 11 July 2008.⁷ Niyitegeka filed an Addendum to the Consolidated Appeal on 14 July 2008, requesting the assignment of counsel to assist him with the Consolidated Appeal.⁸ On 21 July 2008, Niyitegeka filed a Reply to the Prosecution's Response to the Consolidated Appeal.⁹ On 24 July 2008, the Prosecution filed its response to the Addendum to the Consolidated Appeal.¹⁰

5. On 25 July 2008, the Appeals Chamber granted, in part, a motion from Joseph Nzirorera ("Nzirorera")¹¹ and directed the Registrar to cross-file the Consolidated Appeal in the *Karemera et al.* case.¹² This decision also ordered Édouard Karemera ("Karemera"), Mathieu Ngirumpatse ("Ngirumpatse") and Nzirorera to file their respective responses to the Consolidated Appeal, if any, within ten days of the Consolidated Appeal being cross-filed in their case and upon receipt of certain stipulated documents, and reminded Niyitegeka that any reply must be filed within four days of the filing of these responses.¹³ On 6 August 2008, Nzirorera and Ngirumpatse filed their responses.¹⁴ Niyitegeka's request for assignment of counsel and his request for extension of the time limit to file his reply to Nzirorera's Response and Ngirumpatse's Response were denied¹⁵ and he filed his reply on 26 September 2008.¹⁶ On 3 October 2008, the Appeals Chamber denied Karemera an extension of time to file his response.¹⁷

⁷ Prosecutor's Response to Niyitegeka's "Appel groupé contre les Décisions de la Chambre de première instance III du 14 février 2008 et du 25 février 2008, respectivement, sur les requêtes d'Elizier [sic] Niyitegeka aux fins de communication des procès-verbaux des audiences à huis clos des témoins DD dans Muhimana et AMM dans Karemera et al.", 11 July 2008 ("Prosecution's Response").

⁸ Addendum à l'« Appel groupé contre les Décisions de la Chambre de première instance III du 14 février 2008 et du 25 février 2008 respectivement, sur les requêtes d'Elizier Niyitegeka aux fins de communication des procès-verbaux des audiences à huis clos des témoins DD dans Muhimana et AMM dans Karemera et al. », 14 July 2008 ("Addendum to the Consolidated Appeal").

⁹ Réplique à la "Prosecutor's Response to Niyitegeka's 'Appel groupé contre les Décisions de la Chambre de première instance III du 14 février 2008 et du 25 février 2008, respectivement, sur les requêtes d'Elizier [sic] Niyitegeka aux fins de communication des procès-verbaux des audiences à huis clos des témoins DD dans Muhimana et AMM dans Karemera et al.'", 21 July 2008 ("Niyitegeka's Reply to the Prosecution's Response").

¹⁰ Prosecutor's Response to Niyitegeka's Addendum, 24 July 2008.

¹¹ Joseph Nzirorera's Motion for Re-Classification of Appeal and Suggestion for Appointment of Counsel, 11 July 2008.

¹² Decision on Joseph Nzirorera's Motion for Re-Classification and Suggestion for Appointment of Counsel, 25 July 2008 ("Decision on Nzirorera's Motion"), para. 13.

¹³ Decision on Nzirorera's Motion, para. 13.

¹⁴ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Brief on Appeal, 6 August 2008 ("Nzirorera's Response"); *Response De M. Ngirumpatse a l'appel forme par Eliezer Niyitegeka contre les decisions de la chambre de premiere instance iii lui refusant l' acces a des documents confidentiels provenant des proces Nahimana et Karemera et autres*, 6 August 2008 ("Ngirumpatse's Response").

¹⁵ Decision on Extremely Urgent Motion for Extension of Time for Filing a Reply, 3 October 2008.

¹⁶ Réplique aux réponses de Joseph Nzirorera et Mathieu Ngirumpatse à l'« Appel groupé » déposé par Eliezer Niyitegeka, le 2 juillet 2008, 26 September 2008 ("Niyitegeka's Reply to Nzirorera's Response and Ngirumpatse's Response").

¹⁷ Decision on Édouard Karemera's Motion for Extension of Time to Respond to Eliezer Niyitegeka's Appeal of 2 July 2008, 3 October 2008.

B. Submissions

6. In the Consolidated Appeal, Niyitegeka requests the Appeals Chamber to set aside the 14 February 2008 Decision and 25 February 2008 Decision.¹⁸ He further requests disclosure of the closed session transcripts and the exhibit tendered under seal during the testimony of Witness DD in the *Muhimana* case, as well as the closed session transcripts of the testimony of Witness AMM in the *Karemera et al.* case.¹⁹

7. Niyitegeka contends that the 14 February 2008 Decision and the 25 February 2008 Decision are manifestly unfair and unreasonable.²⁰ He argues that the *Muhimana* Trial Chamber and the *Karemera* Trial Chamber erred by failing to consider that none of the parties involved in the *Muhimana* case and the *Karemera et al.* case have objected to his motions.²¹ Niyitegeka contends that the *Muhimana* Trial Chamber and the *Karemera* Trial Chamber sanctioned him for an error for which he had already been penalised by the Appeals Chamber,²² and if the 14 February 2008 Decision and the 25 February 2008 Decision are not reversed, he will be penalised twice for the same error.²³

8. Niyitegeka submits that the Trial Chambers contravened the reasoning of the ICTY Appeals Chamber in the *Galić* case,²⁴ which stated that an accused is allowed to seek access to confidential material from another case where it is likely to assist his case materially, and where this standard is met, by showing a factual nexus between the two cases.²⁵ He asserts that the Trial Chambers should have followed this jurisprudence and should have ascertained whether his motions satisfied the requirements to obtain the material sought.²⁶

9. Niyitegeka argues that the error in reasoning by the *Muhimana* Trial Chamber and the *Karemera* Trial Chamber impedes “a manifestation of the truth” and deprives him of a fair hearing as well as of obtaining exculpatory evidence.²⁷ He asserts that the finding by the *Muhimana* Trial Chamber and the *Karemera* Trial Chamber that he violated protective measures is unfounded, as the Trial Chambers failed to identify any person or media to whom he allegedly disclosed the identity

¹⁸ Consolidated Appeal, para. 25.

¹⁹ Consolidated Appeal, para. 25.

²⁰ Consolidated Appeal, para. 2.

²¹ Consolidated Appeal, p. 4, First Ground of Appeal, para. 15.

²² Consolidated Appeal, p. 4, Second Ground of Appeal, para. 16. He asserts that he was sufficiently sanctioned by the Appeals Chamber when it denied his request for review on the ground that he relied on witness testimonies from other cases without prior authorisation (Consolidated Appeal, para. 16).

²³ Consolidated Appeal, para. 17.

²⁴ Niyitegeka refers to *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, “Decision on Momcilo Perisić’s Motion Seeking Access to Confidential Material in the Galić Case”, 16 February 2006, para. 3.

²⁵ Consolidated Appeal, para. 18.

²⁶ Consolidated Appeal, paras. 18, 19.

²⁷ Consolidated Appeal, p. 5, Fourth Ground of Appeal.

of the witnesses.²⁸ Niyitegeka submits that his initiative to file before the Appeals Chamber material from the *Muhimana* case and the *Karemera et al.* case was done in good faith and that he exclusively used this material for internal purposes within the Tribunal.²⁹ He asserts that his sole concern was to bring out the truth, not to endanger the lives of the witnesses concerned.³⁰ Niyitegeka claims that the Prosecution's failure to disclose these materials to him violates Rule 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules") and several decisions requiring it to do so,³¹ and is a blatant violation of his right to a fair trial which is yet to be cured.³²

10. In response, the Prosecution submits that the Consolidated Appeal is without merit and should be dismissed in its entirety.³³ It asserts that Niyitegeka fails to apply the correct standard of review and fails to demonstrate that a discernible error was committed in the 14 February 2008 Decision and the 25 February 2008 Decision.³⁴

11. The Prosecution contends that it was open to the Trial Chambers to deny Niyitegeka access to the requested materials, even if there was no objection from the Prosecution.³⁵ It argues that it lies within the discretion of a Trial Chamber to decide whether to grant access to closed session testimony irrespective of whether or not the Prosecution, or any other party, objects to the disclosure.³⁶ The Prosecution asserts that a Trial Chamber has the discretionary power to strike a balance between the rights of a party to have access to closed session testimony and the protection and integrity of confidential information.³⁷ It claims that the *Muhimana* Trial Chamber and the *Karemera* Trial Chamber correctly exercised their discretion in this regard.³⁸

12. The Prosecution submits that Niyitegeka's argument that he has already been sanctioned by the Appeals Chamber,³⁹ and that the 14 February 2008 Decision and the 25 February 2008 Decision are thus sanctioning him for the second time, is unfounded.⁴⁰

13. The Prosecution submits that the 14 February 2008 Decision and the 25 February 2008 Decision are in compliance with settled jurisprudence.⁴¹ It argues that the *Muhimana* Trial Chamber

²⁸ Consolidated Appeal, paras. 20-22.

²⁹ Consolidated Appeal, para. 23.

³⁰ Consolidated Appeal, para. 23.

³¹ Consolidated Appeal, para. 23.

³² Consolidated Appeal, para. 24.

³³ Prosecution's Response, paras. 2, 24.

³⁴ Prosecution's Response, paras. 11, 12.

³⁵ Prosecution's Response, para. 13.

³⁶ Prosecution's Response, para. 13.

³⁷ Prosecution's Response, para. 13.

³⁸ Prosecution's Response, paras. 13, 14.

³⁹ See *Elízer 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").

⁴⁰ Prosecution's Response, paras. 15, 16.

⁴¹ Prosecution's Response, paras. 17, 18.

and the *Karemera* Trial Chamber found it unnecessary to consider whether the requested materials were identified and whether a legitimate forensic purpose for access was demonstrated, in view of Niyitegeka's disregard for existing protective measures.⁴² It also argues that it is untenable for Niyitegeka to suggest that the Trial Chambers should have identified the precise order which he violated, as they based their reasoning on the Appeals Chamber's Decision on Third Request for Review.⁴³

14. In response, Nzirorera submits that the *Karemera* Trial Chamber incorrectly held that the Appeals Chamber had found that Niyitegeka had violated the *Karemera* Protective Measures Order⁴⁴ in its Decision on Third Request for Review.⁴⁵ He argues that the Appeals Chamber found that the disclosure of the closed session testimony to Niyitegeka was a breach of the *Karemera* Protective Measures Order and ordered an investigation to determine who violated this order by disclosing the material to Niyitegeka.⁴⁶

15. Nzirorera contends that Niyitegeka's possession of the closed session testimony from the *Karemera et al.* case, as well as his submission of this material to the Appeals Chamber in a confidential filing did not violate the *Karemera* Protective Measures Order.⁴⁷ He asserts that the Decision on Motion for Clarification stated that Niyitegeka was bound not to disclose confidential material and he argues that by submitting this material in a confidential filing to the Appeal Chamber, Niyitegeka made no such disclosure.⁴⁸ Nzirorera argues that there is no case law which supports a position that the mere possession of closed session testimony violated a protective measures regime.⁴⁹

16. Nzirorera further submits that the *Karemera* Trial Chamber failed to consider that the identity of Witness AMM had already been disclosed to Niyitegeka, as this witness testified for the Prosecution in his case.⁵⁰ He argues that Niyitegeka's discovery of the identity of Witness AMM did not jeopardise the security of the witness.⁵¹ Nzirorera claims that the Trial Chamber should have considered that Niyitegeka has no access to a lawyer and therefore did not know how to properly seek a remedy for the Prosecution's misconduct.⁵²

⁴² Prosecution's Response, para. 16.

⁴³ Prosecution's Response, para. 20.

⁴⁴ See *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 ("*Karemera* Protective Measures Order").

⁴⁵ Nzirorera's Response, para. 21.

⁴⁶ Nzirorera's Response, para. 22.

⁴⁷ Nzirorera's Response, para. 28.

⁴⁸ Nzirorera's Response, para. 33.

⁴⁹ Nzirorera's Response, para. 35.

⁵⁰ Nzirorera's Response, para. 40.

⁵¹ Nzirorera's Response, para. 40.

⁵² Nzirorera's Response, para. 50.

17. Nzirorera submits that the *Karemera* Trial Chamber erred when it concluded that Niyitegeka's disregard for the *Karemera* Protective Measures Order raises serious doubts about his intention to comply with this order if allowed access to the closed session testimony of Witness AMM, as Niyitegeka is already in possession of this testimony.⁵³ He argues that by denying Niyitegeka access to the closed session testimony of Witness AMM, the *Karemera* Trial Chamber effectively assured that such testimony would be excluded in the consideration of the merits of Niyitegeka's case.⁵⁴ He argues that the *Karemera* Trial Chamber ought to have considered the many available alternatives, such as ordering the Prosecution to determine whether the material in question was exculpatory, and this failure to consider the available alternatives resulted in an incorrect interpretation of the governing law.⁵⁵

18. Ngirumpatse supports Niyitegeka's appeal against the 25 February 2008 Decision.⁵⁶ He argues that the *Karemera* Trial Chamber erred in law when it rejected Niyitegeka's request for access to closed session material.⁵⁷ Ngirumpatse contends that it was inappropriate for the *Karemera* Trial Chamber to deny Niyitegeka's motion because he was in possession of closed session material from the *Karemera et al.* case, as any request in accordance with Rule 75 (G) of the Rules is tantamount to admitting that the requesting party was familiar with or has obtained confidential information.⁵⁸

19. Ngirumpatse argues that there is a nexus between the *Niyitegeka* case and the *Karemera et al.* case which warrants the disclosure of the requested transcripts to Niyitegeka.⁵⁹ He claims that the Prosecution's violation of its disclosure obligations could only be remedied by granting Niyitegeka's request for access to the confidential information.⁶⁰

C. Standard of Review

20. The protection of victims and witnesses is part of the day to day management of trial proceedings and as such the 14 February 2008 Decision and the 25 February 2008 Decision of the respective Trial Chambers are discretionary decisions, to which the Appeals Chamber must accord deference.⁶¹ Where such decisions are appealed, the issue is whether the Trial Chambers correctly

⁵³ Nzirorera's Response, para. 56.

⁵⁴ Nzirorera's Response, para. 57.

⁵⁵ Nzirorera's Response, paras. 61-69.

⁵⁶ Nzirorera's Response, para. 2.

⁵⁷ Ngirumpatse's Response, para. 3.

⁵⁸ Ngirumpatse's Response, para. 4.

⁵⁹ Ngirumpatse's Response, para. 7.

⁶⁰ Ngirumpatse's Response, para. 8.

⁶¹ See, e.g., *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("*Karemera et al.* Decision of 23 January 2008"), para. 7 referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 7 ("*Karemera et al.*

exercised their discretion and not whether the decisions were correct, in the sense that the Appeals Chamber agrees with them.⁶² Consequently, the Appeals Chamber will only reverse an impugned decision where it is demonstrated that a Trial Chamber committed a discernible error, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the impugned decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁶³

D. Discussion

21. Where protective measures have been ordered in any proceedings before the Tribunal, they continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, unless and until they are rescinded, varied or augmented.⁶⁴ The Appeals Chamber recalls that a party is entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case.⁶⁵ Where a party requests access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose for accessing it must be demonstrated.⁶⁶ Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.⁶⁷ A Chamber must be satisfied that the requesting party has established that this material is likely to assist its case materially, or that there is at least a good chance that it would.⁶⁸ Once it is determined that confidential material filed in another case may materially assist an applicant, the Chamber shall determine which protective measures shall apply to the material, as it is within the Chamber's

Decision of 5 October 2007"); *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeals against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Ndayambaje et al.* Decision of 21 August 2007").

⁶² *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

⁶³ *Karemera et al.* Decision of 23 January 2008, para. 7 referring to *Karemera et al.* Decision of 5 October 2007, para. 7; *Ndayambaje et al.* Decision of 21 August 2007, para. 10.

⁶⁴ See Rule 75(F)(i) of the Rules.

⁶⁵ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du procureur et nécessaires à la défense de l'appellant et aux fins d'assistance du greffe pour accomplir des investigations complémentaires en phase d'appel*, 8 December 2006 ("*Nahimana et al.* Decision"), para. 12.

⁶⁶ *Nahimana et al.* Decision, para. 12.

⁶⁷ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Blaškić*, 16 May 2002, para. 15.

⁶⁸ *Prosecutor v. Vidoje Blagojević and 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, 18 January 2006 ("*Blagojević and Jokić* Decision"), para. 4.

discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and integrity of confidential information.⁶⁹

22. In its 14 February 2008 Decision, the *Muhimana* Trial Chamber disapproved of Niyitegeka's violation of the *Muhimana* Defence Protective Measures Order⁷⁰ and found that Niyitegeka had sought the admission of the closed session testimony of Witness DD before the Appeals Chamber without authorisation.⁷¹ It also found that Niyitegeka made observations about Witness DD in his request for disclosure "which may tend to reveal Witness DD's identity".⁷² The *Muhimana* Trial Chamber held that where an applicant has been granted access to protected materials from another case, such access is subject to the protective measures granted in that case.⁷³ It concluded that Niyitegeka had demonstrated disregard for existing protective measures, which raised doubt as to whether he will respect the same protective measures if granted access to Witness DD's closed session testimony.⁷⁴ On that basis, the *Muhimana* Trial Chamber deemed it unnecessary to assess whether a legitimate forensic purpose existed and whether there was a sufficient nexus between Niyitegeka's case and the *Muhimana* case to warrant granting Niyitegeka access to the closed session testimony of Witness DD.⁷⁵

23. The Appeals Chamber finds that in light of the abovementioned standards, the *Muhimana* Trial Chamber was obliged to consider first whether Niyitegeka had shown the existence of a legitimate forensic purpose for access to the closed session material, *i.e.* whether the closed session testimony of Witness DD was likely to materially assist Niyitegeka's case. It is only as a second step that the *Muhimana* Trial Chamber should have exercised its discretion to strike a balance between the protection and integrity of the closed session material and Niyitegeka's right to have access to it.⁷⁶ By failing to follow this approach, the *Muhimana* Trial Chamber committed a discernible error, based on an incorrect interpretation of the governing law.

24. In its 25 February 2008 Decision, the *Karempera* Trial Chamber held that protective measures may be varied to allow the disclosure of closed session testimonies from one case to be used in another case, and that these protective measures are also applicable in that other case.⁷⁷ It

⁶⁹ *Prosecutor v. Mladen Naletilić et al.*, Case No. IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*" and "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005, p. 7; *Blagojević and Jokić* Decision, para. 7.

⁷⁰ *Prosecutor v. Mika Muhimana*, Case No. ICTR-95-IB-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004.

⁷¹ 14 February 2008 Decision, para. 9.

⁷² 14 February 2008 Decision, para. 9.

⁷³ 14 February 2008 Decision, para. 10.

⁷⁴ 14 February 2008 Decision, para. 10.

⁷⁵ 14 February 2008 Decision, para. 10.

⁷⁶ See *Blagojević and Jokić* Decision, para. 7.

⁷⁷ 25 February 2008 Decision, para. 8 (internal citation omitted).

disapproved of Niyitegeka's violation of the *Karemera* Protective Measures Order and stated that this was noted by the Appeals Chamber in its Decision of 23 January 2008.⁷⁸ The *Karemera* Trial Chamber considered that Niyitegeka's disregard for the protective measures raised doubt as to whether he will comply with such measures, if allowed access to Witness AMM's closed session testimony.⁷⁹ It did not, however, assess whether Niyitegeka had established a legitimate forensic purpose for access to the closed session testimony of Witness AMM by determining whether the requested closed session testimony was likely to materially assist Niyitegeka in his case. Consequently, the *Karemera* Trial Chamber committed a discernible error in its application of the governing law.

25. Furthermore, the *Karemera* Trial Chamber stated that it "disapprove[d] of Eliézer Niyitegeka's flagrant violation of the order granting protective measures to witnesses in the instant case, as noted by the Appeals Chamber in its Decision of 23 January 2008."⁸⁰ In this regard, the Appeals Chamber notes that in its Decision on Third Request for Review, it stated that "the disclosure of the *Muhimana and Karemera et al.* closed session material to the Applicant was a breach of orders for protective measures imposed pursuant to Rule 75 of the Rules."⁸¹ Thus, the Appeals Chamber did not find any violation of the *Karemera* Protective Measures Order, on the part of Niyitegeka. There was also no evidence before the *Karemera* Trial Chamber that Niyitegeka violated the *Karemera* Protective Measures Order and the *Karemera* Trial Chamber relied solely on the Decision on Third Request for Review to arrive at such a conclusion. Consequently, the finding that Niyitegeka violated the *Karemera* Protective Measures Order is based on an incorrect conclusion of fact.

E. Disposition

26. For the foregoing reasons, the Appeals Chamber:

GRANTS Niyitegeka's Consolidated Appeal in part; and

REMANDS the cases back to the *Muhimana* Trial Chamber and the *Karemera* Trial Chamber, and directs these Chambers to reconsider Niyitegeka's requests for closed session material in accordance with the governing law.

⁷⁸ 25 February 2008 Decision, para. 9 (internal citation omitted).

⁷⁹ 25 February 2008 Decision, para. 10.

⁸⁰ 25 February 2008 Decision, para. 9.

⁸¹ Decision on Third Request for Review, para. 10.

Done this 23rd day of October 2008,
at The Hague, The Netherlands.



Judge Fausto Pocar

Presiding

